State Bar of Michigan

Michigan International Lawyer

International Law Section

Volume 31 No. I, Spring 2020

MIL Editorial Staff hosted by
Wayne State University Law School

Professor Gregory Fox, *Faculty Editor*
Vera Hansen, *Editor-in-Chief*
Nancy Maarraoui, *Associate Editor*

In This Issue

Comments from the Chair 1

Simple Legislative Declaration and Complex Cultural Background: Review of China's Legal Response to the COVID-19 3

By Weiwei Shen, Yiping Zhang, and Ding Zhang

Three Legal Questions Arising from the Outbreak of the Coronavirus in China 9

By Yanping Wang

Characteristics Of An Effective Compliance Program........................... 13

By Stuart H. Deming

Commentary on the United States-Mexico-Canada Agreement 18

By David Crawford, Juan Carlos Noble, Scott F. Cooper........................... 18

CFIUS Review under FIRRMA - Jurisdiction Expands, while Open Investment Policy and National Security Focus Remain 21

By Jeffrey Richardson

International Law Section Treasurer's Report.. 24

Section Membership Application.......... 25

2019-2020 International Law Section Council 26

Disclaimer: The opinions expressed herein are solely those of the authors and do not necessarily reflect those of the International Law Section or the Editors.

Comments from the Chair

Members of the International Law Section and Readers,

As you read this we are all facing unique circumstances, whether by health and welfare concerns of the COVID-19 strain of Coronavirus, or because of mandated technology-driven displacements of our normal working condition. Whatever your circumstance, I wish you productivity and to you and your families – health and well-being.

I have the honor of serving this term as the Chair of the International Law Section of the State Bar of Michigan for 2019-2020. Please join me in thanking Troy Harris of Harris Arbitration (and Professor of Law at UD Mercy Law School) for his dedicated and outstanding service to our Section as most recent past Chair. Professor Harris continues to serve the Section by gathering and organizing papers for the Michigan Bar Journal's upcoming edition focused on topics in international law. I thank Troy for his efforts.

In September, the Section held its Annual Meeting at the Ally Detroit Centre offices of Dickinson Wright where Elliott Church (Grand Rapids) became the Chair-elect, Reinhard Lemke (Troy) was elected Secretary, and Betina Schlossberg (Ann Arbor) was elected Treasurer. We all thank these talented internationally-practicing lawyers and the continuing and newly elected Council members listed in this edition.

Also at the Annual Meeting, the Section had a great program, *Understanding Trade Relationships Among the U.S., Mexico and Canada - a Proposed New Agreement.* This program was a detailed briefing of the new USMCA with fascinating insight offered by accomplished speakers. These included the Consul of Mexico (Detroit) Fernando González Saiffe, the Director of International Trade for MEDC, Alyssa Tracy, and Manager of Mexico and Director of Latin America Consulting for Clayton McKervey, Carlos Calderon. These presentations were supplemented by keen perspective and analysis from a panel of expert practitioners Cyndee Todgham Cherniak (Toronto), past Section Chair Lara Fetsco Philip (Troy), and Dickinson Wright partner Mark High (Detroit).

The Section held its November Council Meeting and an academic program at Wayne State University Law School on the topic of *Privacy Law and Immigration Practitioners*. This was a fascinating discussion of dilemmas created for U.S. practitioners caught between documentary evidence requirements for U.S. immigration

Continued on the next page

Michigan International Lawyer Submission Guidelines

The *Michigan International Lawyer,* which is published three times per year by the International Law Section of the State Bar of Michigan, is Michigan's leading international law journal. Our mission is to enhance and contribute to the public's knowledge of world law and trade by publishing articles on contemporary international law topics and issues of general interest.

The Michigan International Lawyer invites unsolicited manuscripts in all areas of international interest. An author is encouraged to submit a brief bio and a photograph for publication. An article, including footnotes, should contain between 1000 and 3000 words.

Articles can be submitted for consideration in hard copy or electronic format. Manuscripts and photographs cannot be returned unless accompanied by a $5 check or money order made payable to Wayne State University Law School for shipping and handling.

The Michigan International Lawyer will consider articles by law-school students and may publish student articles as part of a regular column. A student should submit the article either through a law-school faculty member or with a law-school faculty member's recommendation.

Submissions should be forwarded to:
Professor Fox, Faculty Editor
Michigan International Lawyer
Wayne State University Law School
471 W. Palmer
Detroit, Michigan 48202
Telephone: (313) 577-0110
E-Mail: gfox@wayne.edu

Michigan International Lawyer

Publication Deadline Dates

Summer Issue
Articles due May 15

Fall Issue
Articles due September 15

Winter Issue
Articles due January 15

The *Michigan International Lawyer* is published three times per year by the International Law Section, State Bar of Michigan, 306 Townsend Street, Lansing, Michigan 48933-2012.

Copyright 2020 International Law Section, State Bar of Michigan. © All rights Reserved.

benefits and prohibitions on disseminating these same evidentiary documents by the countries of origin. We were fortunate to have as expert speakers Delphi Technologies legal counsel for Mexico and Latin America Marie Galindo, Robert Bosch LLC legal counsel Andreas Seidel, Privacy Associates international LLC practitioners Keith Cheresko and Robert Rothman (Council member) expertly moderated by immigration law practitioner Betina Schlossberg (Treasurer).

Through the efforts of Reinhard Lemke, the Section joined together in February with the Consular Corps of Detroit to host a reception and light program on the topic of relations and trade with the United States from the perspective of our local consular corps nations and their residents. This program occurred at Automation Alley in Troy and was lots of fun with food and refreshments.

While the Mid-May tradition of hosting the legal program of West Michigan World Trade Week at the Van Andel Institute of Grand Valley State University in Grand Rapids is canceled at this time, I want to offer my thanks to Council member Paul Vandevert (Dearborn) for coordinating this great effort for the Section and to efforts of Elliott Church for making this great event an annual undertaking. Each legal program held for the business community and economic chambers of West Michigan at this event has been met with enthusiastic turnout and positive response.

We ourselves are enthusiastic about convening by Webinar on June 12 for a program on Contract Interruption-Force Majeure to be held in conjunction with the U.S. Commercial Service – Export Assistance Center and organized by Council member and U.S. Senior International Trade Specialist, Eve Lerman (Pontiac). We will provide you all information and details as the connection information and broadcast is publicized.

The Summer issue of the *Michigan Bar Journal* is a special international law focus issue with fantastic articles by our members and academic specialists. I also ask your consideration in taking a second to have a look at the International Law Section's LinkedIn, Twitter and Facebook pages created for us by Council member John Wright (Troy). Thank you, John, for your time and effort in this important endeavor.

As for this edition of the Michigan International Lawyer, due to Coronavirus restrictions we are offering it to you in electronic form. In addition to the very interesting articles by Scott Cooper of the Fragomen Law firm and by former ILS Chairman and ABA author and scholar Stuart Deming (Kalamazoo), we have two unique papers we have included in this issue, both by Chinese national authors.

The International Law Section wishes to remind all readers that neither the Section nor the State Bar of Michigan endorses the viewpoints in any particular submission, nor confirms statements of fact or historical events as presented by an author. I, personally, am pleased that Michigan International Lawyer and its editorial staff is enthused to present varying viewpoints and perspectives. I invite all those who may wish to present alternate perspectives to submit a piece of legal-article quality to continue the dialogue.

Please enjoy another wonderful issue of the Michigan International Lawyer! Thank you and appreciation goes to Wayne State University Law Professor Greg Fox and to Wayne State Law School for hosting our publication and providing the editing process. My special thanks goes to the highly capable, keen and very energetic law students Vera Hansen and Nancy Maarraoui for undertaking this endeavor to the benefit of the State Bar's International Law Section.

Stay safe and well.

Sincerely,
James Y. Rayis, Chair

Simple Legislative Declaration and Complex Cultural Background: Review of China's Legal Response to the COVID-19

By Weiwei Shen, Yiping Zhang, and Ding Zhang

The coronavirus disease 2019 (COVID-19) is an infectious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2),[1] which was first identified in 2019 in Wuhan, Hubei Province, China, and has since spread globally, resulting in the 2019–20 coronavirus pandemic. The prevention and control of COVID-19 is a test for China and the rest of the world. At the beginning of the outbreak, the Chinese local government caused a series of concealments and delays in information disclosure and did not declare a state of emergency as required by law. The government prioritized social stability over the management of crucial issues such as community spread and human-to-human transmission. Therefore, it failed to immediately take legal prevention and control measures.

Moreover, once the city of Wuhan was locked down, the social security measures were inadequate and medical and living materials were in short supply. The Red Cross Society of China was incapable of allocating and using donated materials. The health commission, provincial and municipal governments, and the Chinese Center for Disease Control and Prevention all failed to take responsibility. These adverse factors eventually led to the large-scale spread of the epidemic. The above-mentioned problems are all related to a lack of adequate laws and regulations. Insufficient legal action is caused by a highly centralized political decision-making system under which any local action requires instructions from the central government. However, the improvement of the rule of law is only a superficial problem. In essence, China needs to further promote political reforms in accordance with the needs of the information age.

I. National Legal Response: Legislative Decisions and Supreme Directives

(a) Quasi-Legal Decisions: From the Top Legislature

The intermediate host of the COVID-19 is said to be a wild animal, thus the improvement of the Wildlife Protection Law is the most prominent example of necessary legal reform. The Wildlife Protection Law was deliberated and adopted by the Standing Committee of the National People's Congress (NPC) in November 1988.[2] Since it was implemented, the law has been amended and revised four times: in August 2004, August 2009, July 2016 and October 2018. Based on the painful lessons of the SARS outbreak, which was caused by some Chinese people's consumption of wildlife in 2003, the law was amended in August 2004 to increase the level of legal protection for wildlife.

Weiwei Shen

Later, in April 2014, the Standing Committee of the NPC passed the interpretation of Art. 341 and 312 of the Criminal Law. This interpretation finds it illegal to purchase rare and endangered wildlife and its products that are known, or should be known, as particularly protected species.[3]

Due to the limited scope of criminal law to protect wildlife, many legal experts, ecologists, and animal rights activists proposed a total ban on the consumption of all kinds of wildlife and their products during the law's revision in July 2016. This proposal initially failed to be adopted because of some people's continued desire to eat wildlife, the severely divided opinions in society, and the captive breeding industry's strong opposition.[4]

After Wuhan had been locked down due to COVID-19 for one month, however, the Standing Committee of the NPC, China's top legislature, finally decided to crack down on the illegal trade and consumption of wildlife in order to protect people's lives and health.[5] It issued a decision that enacts a complete ban on the consumption of wildlife. At the critical moment in epidemic prevention and control, it is highly necessary and prominent for the Standing Committee of the NPC to pass a special decision, which takes effect immediately.

Decisions made by the Standing Committee of the NPC are usually not as comprehensive and systematic as laws because amending laws requires a formal legislative procedure and accordingly a significant amount of time. These decisions, however, are of quasi-legal nature. They serve as a guide for local policies and as a basis for the legislative process.

In this decision, Art. 1 stipulates that heavier penalties will be imposed for violations of the Wildlife Protection Law. Notably, this is in conflict with Art. 7, 8, and 9 of the Legislation Law, which states that laws on crime and punishment can only be determined by the National People's Congress. Thus, the Standing Committee of the NPC clearly exceeded its authority and violated the Legislation law. This provokes the question whether such an urgent decision was truly appropriate.[6]

Another important measure was the review of the Prevention and Control of Infectious Diseases Law by the Law

Enforcement Inspection Team of the Standing Committee of the NPC in August 2018. However, this review failed to resolve the issues of legal enforcement; thus, the law still cannot respond quickly and correctly to epidemic outbreaks. In the future, it will be imperative to closely monitor the conclusions of the Law Enforcement Inspection Team to ensure that they will not become futile.

Overall, it is notable that even if laws, law enforcement supervision and inspections are in place, some legislation in China still cannot be improved effectively within a short period of time. Another interesting observation is that the Standing Committee of the NPC did not issue a separate decision on the Prevention and Control of Infectious Diseases Law, or even suggested amending this act, when it issued its decision on the ban of wildlife consumption. This law is the key act in the control and prevention of epidemics, and despite the recent review by the Law Enforcement Inspection Team, it is not taken seriously. Thus, the legislature should be held accountable for this failure.

(b) Beyond Legal Status: Directives from the Supreme Leader

Five days after the NPC passed the ban on the consumption of wildlife, an Article by President Xi Jinping on the improvement of law-based epidemic prevention and control and the national public health emergency management system was published by the Qiushi Journal, a flagship magazine of the Communist Party of China's Central Committee. The Article emphasized the utmost importance of carrying out prevention and control measures in a law-based, scientific and orderly manner. Stressing the need to strengthen legislation on public health, the Article called for the assessment and revision of laws and regulations on infectious disease prevention and control, and wildlife protection. It also highlighted the need to accelerate the enactment of laws on biosafety.[7]

Moreover, Xi Jinping delivered two speeches to the Central High-level Committee.[8] On February 5, at the third meeting of the Central Committee for the Comprehensive Rule of Law, he emphasized that the pandemic must be prevented and controlled in accordance with the laws.

On February 14, at the twelfth meeting of the Central Committee for Deepening Overall Reform, he proposed that biosafety must be included in the national security system, and a biosafety law must be created as soon as possible, although China's top legislature had already started the first reading on a draft of the Biosafety Law last October.[9] As the General Secretary of the Communist Party of China, Xi Jinping's directives are of a quasi-legal nature and even higher than the law.

II. Local Legal Responses: Awareness of the Rule of Law and Official Ecology

(a) Wuhan, Hubei Province

China categorizes emergency responses to a public health crisis into four levels, with one being the highest, based on the scope and degree of the impact. Strikingly, provinces including Central China's Hunan, South China's Guangdong, and East China's Zhejiang scaled up the emergency response to the first level one day earlier than Central China's Hubei province, which is the source area of the epidemic. This demonstrates how the bureaucratic habits in different places determine the efficiency of response to the epidemic.

According to Chinese law, local governments can disclose information about a public health emergency only after being authorized. However, local governments may implement defensive measures immediately. Thus, Wuhan could have taken preventive and control measures as soon as possible instead of waiting until the investigation team sent by the central government announced that the virus could be transmitted between humans.

As a consequence, Wuhan had to lock down the city quickly, resulting in a large number of residents who potentially carried the virus fleeing and spreading it on a large scale. It is unprecedented in history to lock down a city of more than 10 million people. Wuhan's government took the most restrictive measures without any preparation, which is the officials' greatest failure. Wuhan decided to use full-on mitigation measures—restricting travel, keeping people inside, shutting down the whole city.[10] These extraordinary measures taken by the government without declaring a state of emergency in accordance with the Constitution clearly constituted human rights violations.

In contrast, Europe and the United States have abstained from using mandatory prohibitions for a long time in order to respect the citizens' human rights and freedoms. Especially in the United States, people do not have to fear total disorder during the pandemic, e.g. shortages of essential supplies, no opportunities to leave the house, and arbitrary arrest and punishment.

Wuhan's Mayor admitted that the local government failed to disclose information in a reasonable time frame in the early stages of the pandemic.[11] The slow-moving responses of Wuhan and the Hubei Province indicate that the social alert system has failed, and the emergency mechanism is not working.

There has been a nationwide outpouring of grief at the news that Li Wenliang, the doctor who was among a group of people who early on tried to warn of COVID-19, had died of the virus. Instead of paying attention to his warnings, local police reprimanded him for "spreading rumors online." This incident raises questions whether Hubei officials neglected their duties by ignoring these early warnings and instead harassing

a young doctor who earnestly tried to prevent the spread of a novel disease.

The National Supervisory Commission's decision to send an inspection team to Wuhan, however, was an appropriate response to people's calls for an investigation.[12] It sent a clear message that the central authorities were determined to get to the truth and hold those responsible accountable. Until the investigation results were released, Wuhan officials did not apologize and continued defending the wrong punishment against whistleblower Li. Once the investigation was completed on March 18, the final statement advised the disciplinary authorities in Wuhan to supervise the rectifications, and it urged the police to revoke the reprimand letter and hold the relevant people accountable. Consequently, the Public Security Bureau of Wuhan announced its revocation of the reprimand letter and issued an apology to Li's family.[13]

Li Wenliang's experience reflects the current government's deficiencies in information disclosure and supervision in accordance with the law. It also shows the need for a whistleblower protection act in the field of disease prevention and control. One positive example is Shanghai's Food Safety Tip-off and Reward Ordinance, which was enacted in March 2016 and focuses on rewarding and protecting food safety whistleblowers.[14] However, before realizing freedom of speech and freedom of the press in addition to the whistleblower protection system, China needs an effective public emergency policy and fast-responding local officials.

(b) Other Provinces

In the following, local ordinances and laws that ban the consumption of wildlife will be discussed.

The earliest legislative decision on the prohibition of wildlife consumption was made in Tianjin. On February 14, the Standing Committee of the Tianjin People's Congress passed a decision that prohibited the consumption of wildlife.[15] Likewise, four days later, the Standing Committee of the Fujian Provincial People's Congress passed a decision to eliminate the consumption of wildlife.[16] While these two regions were not the most affected by the pandemic, their local officials paid attention and decided to immediately act on the available prevention and control measures, which stands in stark contrast to local officials' inactivity in Hubei. However, Fujian's decision is more akin to an announcement than a law, as it does not contain a detailed legal liability clause. Tianjin's decision is more practical, providing that people who eat wildlife illegally may face fines up to ten times the value of the animals.

Only two days after the Standing Committee of the NPC enacted its ban on the consumption of wildlife, the Standing Committee of the Shenzhen People's Congress issued the "Shenzhen Special Economic Zone's Comprehensive Ban on Eating Wildlife (Draft)." This draft expands the scope of the prohibition to pets. Moreover, the draft prohibits the consumption of wildlife that was artificially bred, such as turtles, snakes, birds, and insects, as their consumption also carries a considerable risk of spreading diseases.[17] The draft's legal liability provisions refer to the decision from Tianjin but the norms are even more specific. This demonstrates the characteristics of special economic zones as windows of reform and opening up.

By March 5, the Standing Committee of the Hubei Provincial People's Congress passed a comprehensive ban on the trade and consumption of wildlife in order to safeguard people's health and safety.[18] This decision is almost identical to the decision of the Standing Committee of the NPC without any creativity, which indicates that the officials in Hubei are conservative and cautious. These officials clearly did not have the courage to push for new innovative measures.

China's traditional decision-making system is centralized, and any provincial government's decision must be reported to the central government before it can be officially promulgated. Hubei Province, located in the mid-western area of China, does not occupy a prominent status in the country's politics and economy and has little power in the central government; therefore, Hubei's officials are relatively conservative. Centrally administered municipalities (Tianjin and Shanghai) and special economic zones (Shenzhen and Xiamen), on the other hand, have the privilege of "going one step ahead;" hence these places pursue more innovation and bold attempts in legislation. This is an important reason why Tianjin and Shenzhen are able to carry out legislative innovation even before the NPC begins to amend legislation.

It is obvious that in the early stages of the pandemic Hubei's top leader, who was a financial expert, underestimated the danger of the virus. At the same time, delaying emergency measures was a choice made in favor of maintaining social stability and economic development. Wuhan chose to only shut down the city once the Lunar New Year celebrations had already started, allowing many people to leave the city in order to visit their families all over the country. This decision was made to reduce the pressure on Wuhan's Center for prevention and control, and it allowed people from Wuhan to spread the virus to all parts of the country.[19] Although Wuhan 's response was slow, the decision to eventually shut down the city delayed the arrival time of COVID-19 in other cities effectively by 2.91 days.[20]

While focusing on epidemic prevention and control, China is also preparing for the post-outbreak development policies to stabilize the economy after the epidemic is restrained. The Chinese government is considering interest rate and tax cuts to expand money supply and infrastructure investments. On March 6, President Xi Jinping re-emphasized the fight against poverty as well as measures to overcome the impact of the epidemic. Notably, 2020 is the year the Chinese Communist Party promised to the world to eradicate poverty

and build a moderately prosperous society in all respects.[21]

III. System and Content: Concerns about China's Legal Response to the Epidemic

(a) Consistency and Specificity of Legal Norms

There are three major legal sources in China that apply to the prevention and control of epidemics: the Law on the Prevention and Control of Infectious Diseases, the Regulations on Public Health Emergencies, and the National and Provincial Emergency Plans. These three legal systems are inherently chaotic and lack consistency.

For example, it is unclear at the provincial level what the basis and standard is for downgrading a level one emergency to a level two. Moreover, it is unclear why provinces have the power to decide on the appropriate emergency measures in case of an infectious disease, but they must not release any information related to such disease without permission from the central government.

Moreover, the norms of the three legal systems apply only to the actions of governments at or above the county level; therefore, no specific legal guidelines exist for the self-governing organizations of streets and villages. At the outset of the pandemic, these organizations started implementing their own prevention and control measures, e.g., by forcibly restricting personal freedom through road and village closures. These measures were only obstructed by the central government once they were widely reported by the media.

(b) Amendment of the Wildlife Protection Law

China's top legislature plans to amend the Wildlife Protection Law to crack down on those who trade or eat wildlife. Presumably, future legislation will be amended and improved in the following ways.

First, not everyone is in favor of a total ban on the consumption and trade of wild animals. Opponents criticize that an indiscriminatory ban could eventually lead to a prohibition of meat consumption altogether, for example if a farmed animal was found to be the host of an infectious disease in the future. While this concern strikes me as exaggerated, a compromise could be the establishment of a directory system in the Wildlife Protection Law that lists the animal species prohibited from hunting, breeding, transferring, and eating. However, under this system some scientific uncertainty will remain regarding the identification and judgment of what constitutes harmful wildlife.

Second, regarding the scope of wildlife protection, it is recommended to add to the fifth paragraph of Art. 10 of the current Wildlife Protection Law that:

> "The list of terrestrial and aquatic wildlife that may cause public health events shall be determined according to the risk classification and shall be subject to graded management. The specific list shall be formulated, adjusted, and published after scientific evaluation by the competent department of wildlife protection under the state council in conjunction with the administrative department of health."[22]

Furthermore, the hunting, breeding, transporting, storing, transferring, and eating of wildlife included on the list should be prohibited except by legal concession.

Third, in order to strengthen judicial supervision, the title of chapter III "Wildlife Management" should be changed into "Wildlife Management and Supervision" and an additional clause should be added at the end of the chapter, stipulating that eligible social organizations may, in accordance with the provisions of the Civil Procedure Law, bring civil public interest lawsuits against those who illegally hunt, breed, transport, store, transfer, or eat wildlife. Moreover, the procuratorate (the equivalent to the prosecutor general) should be enabled, in accordance with the provisions of the Administrative Procedure Law, to file administrative public interest lawsuits against local governments and their functional departments for regulatory negligence. These procedural changes are crucial to strengthen law enforcement supervision.

Fourth, offenders should be punished by administrative detention and fines. However, if a public health incident is caused and a crime was committed, criminal responsibility shall be investigated according to law. Specific punishment measures need further serious consideration.

Fifth, the relevant animal protection laws should also be amended in a cohesive manner. Because pet animals, such as dogs, cats, and minks, may have close contact with wildlife such as birds, mice, and bats, as well as with humans, they are very likely to become an "intermediate hosts" for infectious diseases. It is suggested to modify the Prevention and Control of Infectious Diseases Law and stipulate that eating pet animals is also prohibited by law.

Only by establishing the list system of wildlife prohibited from hunting, breeding, transferring, or eating can we create a net of legal protection to properly separate humans from wildlife and promote the harmonious coexistence between humans and nature. However, such legislative proposals are not perfect, as most of China's legislative proposals are simply a way of resolving political pressure. The NPC's ban on the consumption of wildlife is only a mechanism to calm the anger of the people. Not only is the legislation too ideal, but law enforcement will be too difficult.

IV. Comparison and Conclusion: Legal Performance in Different Cultures

(a) Two Different Ideas and Traditional Values

Comparing the prevention and control measures in China, Italy, Singapore, Japan, the United Kingdom, and the United States, we can find two completely different epidemic manage-

ment ideas as analyzed under the concepts of the French philosopher Michel Foucault, which are *discipline* and *sécurité*.[23]

A country like China relies on the concept of *discipline* to rule its people and prefers the use of rules to restrict freedom. *Discipline* means that the government must rule, educate and train its citizens in the same way that parents treat their children, and citizens must obey the government's discipline unconditionally. Governments that rely on *discipline* must have unlimited power.

The concept of *sécurité*, on the other hand, means that the government will rely on respect to maintain people's happiness and only use limited power to maximize the safety of most people. *Sécurité* means that governments more commonly use rules that guarantee people sufficient freedom, as is the case in the U.S. and most European countries. The first goal of *sécurité* is freedom. During an epidemic, *sécurité* does not consider individuals but only values the mortality curve. This attitude seems rather ruthless but very rational. Since the cost of completely preventing and controlling the epidemic is too high, the government only needs to ensure the safety of the vast majority of people, and it can still allow the individual to do anything. Thus, as long as the mortality curve is within a reasonable range, the government feels that it is not necessary to take extreme measures to control the spread of the virus, as this may incite panic among the people and lead to an economic depression. Under this rationale, the cost of death is acceptable. This approach transfers responsibility to the individual and makes it impossible for the government to abuse power. It is based on the reasonable calculation of the limited liability government, hence a government that has limited powers but also limited responsibility.

For instance, rather than through widespread testing and tracking down the contacts of every case and isolating them, as many other countries in Asia and Europe have chosen to do, the U.K. government's top scientists suggested the best way to ease the long-term consequences of the pandemic was to allow the virus to spread naturally in order to build up people's mass immunity. Britain's policy is an approach closer to that of U.S. President Donald Trump — appealing to the public for voluntary cooperation rather than ordering it — than to that of the European Union.[24]

Discipline, however, requires the government to assume infinite responsibilities; therefore, the government must have fairly high moral standards. From the perspective of utilitarianism, *discipline* means that the government needs to invest at any cost. From the perspective of the rule of law, *discipline* is prone to a wide range of abuses of power. From an economic perspective, *discipline* disrupts market security. From the perspective of Hubei and Wuhan, *discipline* sacrifices local interests and causes regional injustice.

The choice of a crisis management model based on *discipline* and *sécurité* depends on historical traditions. It is worth considering their suitability devoid of normative judgment. The meta-narrative shown in Chinese history is that *Dayu* manages the floods, and *Yugong* moves the mountains. The core of this meta-narrative is the mutual assistance of the entire group, which preserves the collective power of the entire social group by sacrificing a small number of people. This cultural spirit of mutual assistance continues to the present.

In contrast, the Western meta-narrative is the theory of natural selection, at the core of which is self-help. Under this principle, all people and actions that may be a waste of necessary resources for social survival can be discarded. Therefore, when responding to the pandemic, both Europe and the United States emphasized that the virus mainly attacks the elderly and those with underlying diseases (the weak people), and ordinary people do not need to be greatly concerned. This epidemic prevention and control principle fully embodies the western myth and religious belief that "God will only help those who help themselves."

(b) Different Legal Performances

Under the influence of the governance model and traditional thinking, China's legal response seems to be positive, but it is actually passive. In the past, the Chinese government was given excessive responsibilities. In order to fulfill all responsibilities, national legislation can only address high-level issues, which comes at the expense of specificity. Moreover, the Chinese government generally lacks the trust of the people. If the government encounters a crisis and needs to rely on collective power to resolve it, it needs to take public opinion into account. But if the legislation blindly caters to the voices of the people, it will constantly be questioned by the people. This is a vicious circle, the root of which lies in the lack of legitimacy of the ruling elite.

In contrast, European and American laws have been very meticulous and complete, and ordinary people have full trust in the elite. Therefore, the ruling elite's prevention and control methods may seem passive, but in fact they are actively guiding the people to calmly and efficiently handle the epidemic.

As the virus is extremely dangerous, the preventative measures adopted by different countries will gradually align, but the legal response will remain completely different. If China's ruling elite cannot truly communicate and cooperate fully with its people, its inadequate laws will continue to be dismantled by future crisis. As the people's faith in the laws continues to dwindle, the rule of law will lose its foundation.

About the Author

Weiwei Shen *is an Associate Professor at South China University of Technology Law School, and a Visiting Scholar at Wayne State University Law School, 2019-2020. B.A., Huazhong University of Science and Technology, 2007; L.L.M., Sun Yat-sen University Law School, 2009; S.J.D., Renmin University of China Law School, 2012.* ***Yiping Zhang*** *is an S.J.D. candidate,*

and a research assistant at the Institute of Resources and Environmental Policy, Zhongnan University of Economics and Law. B.A., Hubei Minzu University, 2014; L.L.M., South China University of Technology, 2019. ***Ding Zhang*** *is a resident in Physical Medicine & Rehabilitation, Beaumont Hospital, Taylor, Michigan, 2018-2022. M.D., Tongji Medical College, Huazhong University of Science and Technology, 2010.*

Endnotes

1 *Naming The Coronavirus Disease (COVID-19) and the Virus That Causes It,* The WHO , https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it/ (last visited Feb. 2, 2020).

2 The Wildlife Protection Law of the People's Republic of China (中华人民共和国野生动物保护法) (1988).

3 The Standing Committee of the NPC's Interpretation on Art.s 341 and 312 of the Criminal Law of the People's Republic of China, Cent. Gov. Portal (Apr. 25, 2014), http://www.gov.cn/xinwen/2014-04/25/content_2666324.htm.

4 Wang Hongju, *Notes on the 'Wildlife Protection Law of the People's Republic of China (Revised Draft)*, The Chinese NPC Network (Dec. 21, 2015), http://www.npc.gov.cn/wxzl/gongbao/2016-08/22/content_1995719.htm.

5 *Decision of the Standing Committee of the NPC on Comprehensively Banning the Trade in Illegal Wildlife, Eliminating the Bad Habits of Wild Animals, and Effectively Safeguarding People's Health and Safety*, Cent. Gov. Portal (Feb. 24, 2020), http://www.npc.gov.cn/npc/c30834/202002/c56b129850aa42acb584cf01ebb68ea4.shtml.

6 *Just One Month After the Decision of the Standing Committee of the NPC Was Issued, How Is Local Implementation in China?*, The Paper (Mar. 25, 2020), https://www.thepaper.cn/newsDetail_forward_6679585.

7 Xi Jinping, *Comprehensively Improving the Ability to Prevent, Control and Manage Epidemic According to the Law, Improving the National Public Health Emergency Management System*, Qiushi (Feb. 29, 2020), http://www.qstheory.cn/dukan/qs/2020-02/29/c_1125641632.htm.

8 In March 2018, the Central Committee of the Communist Party of China issued the Plan to Deepen the Reform of the Party and State Institutions and established two committees chaired by General Secretary Xi Jinping. One is the Central Committee for the Comprehensive Rule of Law, the other is the Central Committee for Deepening Overall Reform. *The Central Committee of the Communist Party of China issued the Deepening Party and State Institution Reform Plan*, Cent. Gov. Portal (Mar. 21, 2018), http://www.gov.cn/zhengce/2018-03/21/content_5276191.htm#1.

9 Gao Hucheng, *Explanation on Proposals for Review of the Biosafety Law (Draft)*, China People's Congress Net, Oct. 21, 2019.

10 Debora Mackenzie, *Covid-19: Why Won't the WHO Officially Declare a Coronavirus Pandemic?*, NewScientist (Feb. 26,2020), https://www.newscientist.com/Art./2235342-covid-19-why-wont-the-who-officially-declare-a-coronavirus-pandemic/.

11 Yang Zekun, *Wuhan Mayor Says He Will Resign if It Helps Control Outbreak*, china daily (Jan. 1, 2020), https://www.chinadaily.com.cn/a/202001/27/WS5e2e9f69a310128217273628.html.

12 *Whistle-blowing Doctor's Battle Must Still Be Fought*, China Daily (Feb. 8, 2020), https://www.chinadaily.com.cn/a/202002/07/WS5e3d5823a310128217275e5c.html.

13 Cui Jia, *Li Wenliang Police Summons Not Appropriate Special Investigation Says*, China Daily (Mar. 19, 2020), http://www.chinadaily.com.cn/a/202003/19/WS5e735a89a310128217280880.html.

14 Zou Juan & Yu Kai, *Shanghai Food's Whistleblower System Is to Encourage 'Deep Throat' and Reward Through Legislation*, Pengpai News, Mar. 25, 2017.

15 *Provincial People's Congress Issued the First Local Regulations to Prohibit the Consumption of Wildlife*, Tianjin Daily, Feb. 15, 2020.

16 *Fujian Says No to the Bad Habit of Eating Wild Animals, Supervision Covers the Entire Chain of Game Industry*, Fujian People's Congress Net, Feb. 18, 2020.

17 Li Shuyu, *The Shenzhen Special Economic Zone's Comprehensive Ban on Eating Wild Animals Is Open for Comments, Including Dogs, Snakes, Pheasants, Turtles, etc.*, Shenzhen Special Zone Daily, Feb. 26, 2020.

18 *Hubei: The Full Range of Eating Wild Animals Is Prohibited, the Whole Chain of Illegal Wildlife Trade Is Regulated*, Hubei Daily, Mar. 6, 2020.

19 *Announcement of The New Coronavirus Infection Pneumonia Prevention and Control Headquarters in Wuhan (No. 1)*, Xinhua Net (Jan. 23, 2020), http://www.xinhuanet.com/politics/2020-01/23/c_1125495557.htm.

20 Huaiyu Tian et al., *An Investigation of Transmission Control Measures During the First 50 Days of the COVID-19 Epidemic in China*, Science (Mar.31, 2020), https://science.sciencemag.org/content/early/2020/03/30/science.abb6105

21 Xi Jingping, *Resolutely Overcoming the Impact of the New Coronary Pneumonia Epidemic, Resolutely Winning the Decisive Battle against Poverty Alleviation*, Guangming Daily (Mar. 7, 2020), http://news.gmw.cn/2020-03/07/content_33627051.htm?s=gmwreco2.

22 Ma Huaide et al., *Nine Suggestions for Amendments to the Wildlife Protection Law*, China Law Institute, http://iolaw.cssn.cn/jyxc/202002/t20200214_5088725.shtml. (last visited Feb. 29, 2020).

23 Michel Foucault, *Security, Territory and Population: Lectures at the College De France, 1977-78*, (Arnold I., Davidson eds., 2009).

24 Owen Matthews, *Britain Drops Its Go-It-Alone Approach to Coronavirus*, Foreign Policy (Mar. 17, 2020), https://foreignpolicy.com/2020/03/17/britain-uk-coronavirus-response-johnson-drops-go-it-alone/.

Three Legal Questions Arising from the Outbreak of the Coronavirus in China

By Yanping Wang

The outbreak of the coronavirus in China and its recent global spread present business and legal problems; this article discusses three relevant legal issues.

1. The Outbreak of the Coronavirus Tests the Authority of the WHO

After the outbreak of the Severe Acute Respiratory Syndrome ("SARS") in China in 2003, the World Health Organization (WHO) issued the International Health Regulations (2005) ("IHR").[1] The purpose of the IHR is twofold: one is to "prevent, protect against, [and] control" the international spread of the disease, and the other is to "avoid unnecessary interference with international traffic and trade."[2]

Under the IHR, the member states of the WHO have 24 hours to report a potential Public Health Emergency of International Concern ("PHEIC") to the WHO. Pursuant to Annex 2 of IHR, a list of diseases on the right box of Annex 2 are notifiable only if they have a "serious public health impact," are "unusual or unexpected," and pose a "significant risk of international spread;"[3] whereas the diseases in the left box of Annex 2 (SARs, smallpox, poliomyelitis due to wild-type poliovirus and any new subtype of human influenza) are always notifiable.[4] For diseases of unknown causes or those involving other events than the ones listed in the left and the right box of Annex 2, if a country is not certain whether the WHO should be notified, it should refer to the criteria set forth in the IHR. Pursuant to Article 6, the WHO should be notified if any two of the four following questions are affirmed: (i) is the public health impact of the event serious?, (ii) is the event unusual or unexpected?, (iii) is there a significant risk of international spread?, and (iv) is there a significant risk for international travel or trade restrictions?[5]

The outbreak of the coronavirus in China is obviously a notifiable event, but the issue is whether China notified the WHO in a timely manner. Based on the date that China notified the WHO and the date when the coronavirus was declared a PHEIC by the WHO, it appears that China was not late in reporting. On December 31, 2019, China alerted the WHO of several cases of unusual pneumonia in Wuhan, China. At that time, the virus was still unknown. On January 23, 2020, the WHO stated that the outbreak did not yet constitute a public emergency of international concern and that there was no evidence of the virus spreading among humans outside of China.[6]

Yanping Wang

Finally, on January 30, 2020, the WHO declared that the outbreak of the coronavirus constituted a PHEIC.[7] This is the 6th PHEIC the WHO has declared since 2009. The previously declared PHEICs are the 2009 H1N1 (or swine flu) pandemic, the 2014 polio declaration, the 2014 outbreak of Ebola in Western Africa, the 2015-16 Zika virus epidemic, and the 2018-20 Kivu Ebola epidemic. On February 11, 2020, the WHO officially named the coronavirus 2019-nCoV.[8]

Upon declaring a PHEIC under IHR, the WHO may make temporary recommendations that include health measures to be implemented by the member state experiencing the public health emergency of international concern and by the other member states, regarding persons, baggage, cargo, containers, conveyances, goods and/or postal parcels, to prevent or reduce the international spread of the disease and avoid unnecessary interference with international traffic.[9] On January 30, 2020, when the WHO declared the PHEIC in China, it did not recommend any travel or trade restrictions. Furthermore, it required other countries to inform the WHO if they imposed travel restrictions and cautioned countries against taking actions that promote stigma or discrimination, in line with the principles of Article 3 of the IHR.[10]

As recent as February 27, 2020, the WHO issued a joint statement with the World Tourism Organization (UNWTO)[11] announcing that they are working together to assist states in ensuring that health measures be implemented in ways that minimize unnecessary interference with international traffic and trade. Travel restrictions going beyond these measures may cause unnecessary interference with international traffic, including negative repercussions on the tourism sector.[12] Under Article 43 of the IHR, state parties implementing additional health measures that significantly interfere with international traffic (refusal of entry or departure of international travelers, baggage, cargo, containers, conveyances, goods, and the like, or their delay for more than 24 hours) are obliged to send the public health rationale and justification of their actions to the WHO within 48 hours of implementation. The WHO will then review the justification and may request countries to reconsider their measures. The WHO is

required to share with other member states the information about measures and the justifications received.

Despite the provisions set forth in the IHR and statements made by the WHO, many countries almost immediately suspended the issuance of visas to Chinese nationals and imposed travel bans on China after the WTO declared the coronavirus a PHEIC on January 30, 2020. On January 31, 2020, the U.S. Department of Health and Human Services (HHS) declared the 2019-nCoV situation to be a public health emergency in the United States. HHS issued a quarantine order for specific airline passengers returning to the United States from the Hubei Province of China. The same day, President Trump issued a proclamation on the *Suspension of Entry as Immigrants and Non-immigrants of Persons Who Pose a Risk of Transmitting the 2019 Novel Coronavirus.*[13] This proclamation included a temporary suspension of foreign nationals (with some exceptions such as vessel crewmembers) who were physically present in the People's Republic of China (excluding Hong Kong and Macau) during the 14-day period preceding their entry or attempted entry into the United States, to enter into effect February 2, 2020 at 5:00 pm Eastern Standard Time.[14] On the same day, some major airlines—including Delta, United, and American—cancelled flights between China and the United States. Similar measures have been taken by other countries, including Australia, Singapore, and the Philippines. Russia, on February 18, 2020, banned Chinese nationals for an indefinite period from entering the country and closed off the long land border with China and Mongolia.[15]

With the outbreak of the coronavirus in Iran, South Korea, and Italy, other countries started closing their borders as well. For example, Turkey has officially closed its border with Iran and suspended all travelers from Iran as of February 24, 2020.

Although the determination of a PHEIC should not constitute a basis for discrimination, Russia has adopted a special monitoring system to track Chinese nationals and has requested public transit conductors in Moscow to identify Chinese passengers and inform the police of their presence. In some cases, people were even forcibly quarantined.[16] In the United States, racist assaults and ignorant attacks against Asians occurred in various places.[17]

The author recognizes that some actions are "official" government actions, such as those taken by Russia; whereas others shall not be attributed to the government, such as the racist assaults in the US. However, the official measures taken by some member states in contradiction to the WHO's cautionary advice raise concerns about the legal authority of the IHR and the authority of the WHO. Perhaps, the question is an old one: Is "international law", such as the IHR, really law that has a binding effect on its member states? Upon the actions taken by Russia, and various travel bans taken by many other countries, the WHO seems to lack any authority to sanction the violating member states, and each member state continues doing what it thinks is in the best interest of its own people.

2. Is the Coronavirus a Force Majeure Event?

2019-nCoV has already impacted the supply chain globally. Companies organized under Chinese law may refer to the doctrine of "force majeure" to seek full or partial excuse from the performance of domestic supply contracts. In the General Principle of Civil Law of the People's Republic of China[18] and the Contract Law of the People's Republic of China[19] "force majeure" means any objective circumstances which are unforeseeable, unavoidable, or insurmountable.[20] To seek the partial or full excuse from performance, the party who suffers a force majeure event has the duty to notify the other party to mitigate the losses that may be caused to the other party and shall provide evidence of the force majeure event within a reasonable time.[21]

However, for international contracts whether the Chinese party can be excused from performance will depend on the governing law, the existence of a force majeure clause in the contract, and how the force majeure clause is written.

To help Chinese suppliers prove the existence of a force majeure event, on February 2, 2020, the China Council for the Promotion of International Trade ("CCPTI") issued the first force majeure certificates to evidence that the 2019-nCoV outbreak constitutes a force majeure event for international trade purposes. To apply for the force majeure certificates, companies in China should provide (i) the announcement made by local government, (ii) the announcement made by the air carrier, train or other transportation agency regarding the cancellation of the freight etc., and (iii) the relevant contract/purchase order.[22] Since the degree of severity of the 2019-nCoV in different cities and provinces vary, not all companies meet the conditions for CCPTI to issue a certificate. Even with the certificate in hand, CCPTI made it clear that obtaining such certificate will not excuse performance automatically; the company concerned must carefully review the specific language set forth in the contract.[23]

Since both China and the United States are parties to the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), a Chinese company may be able to cite the occurrence of an "impediment" event to excuse late delivery or non-performance, if the relevant contract is governed by CISG. Art. 79 of CISG provides that a party is not liable for a failure to perform any of its obligations if: "he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences." In February 2020, many local government

authorities in China mandated the lockdown of factories, and employees from places that are not located within the same village or town where the factory is located were prohibited from entering the manufacturing facility. In some places, however, the local government selectively allows certain companies to resume the business while others are still not permitted to engage in manufacturing activities. Therefore, whether the outbreak of the coronavirus constitutes a force majeure event for a company should be studied case by case, and the Chinese party will need to carry the burden of proof that the occurrence of the coronavirus constitutes a force majeure event in light of the specific circumstances.

CISG, however, is not applicable to service contracts, as CISG only applies to the sale of goods. Between US purchasers and Chinese manufacturers, the governing law for service contracts generally is the state law of the US purchaser. Under these circumstances, whether the occurrence of the coronavirus constitutes an event of force majeure will be decided by U.S. state law.[24]

3. Will the Chinese Government Fight for Its Citizens' Data Privacy as it Fights against Coronavirus?

To curb the spread of the coronavirus, the health authorities, airlines, rail operators and property management companies in China have collected personal data from a great number of people. There is a common joke in China that every person is asked three questions on daily basis: "who are you," "where are you from," and "where are you going." People must provide their real name, identification or passport information, and their facial recognition every time they buy food, drugs, masks, or take the subway, bus, taxi, train, or airplane. With this information people can easily locate confirmed and suspected cases in real time so they can avoid being infected, however, collecting even more data has led to privacy breaches. In response to these concerns, the National Health Commission of China and the Cyberspace Administration of China (CAC)[25] issued an official *Notice on the Protection of Personal Information when Using Big Data for Joint Support and Defense* on February 4, 2020. The notice provides some guidance on the collection and use of the personal data obtained during the 2019-nCoV period:

A. Only entities authorized under the Cybersecurity Law of the PRC[26], the Laws of the People's Republic of China on Prevention and Treatment of Infectious Disease[27], and the Regulations on Responses to Public Health Emergencies[28] may collect personal information. Other entities may not collect personal information without obtaining consent from individuals;

B. The scope of the personal information must be minimized, the authorized entities can only collect personal information from diagnosed individuals, persons with symptoms, and person who have close contacts with the aforesaid people;

C. The personal information collected for the purpose of fighting 2019-nCoV shall not be used for other purposes; and

D. The entities which collect or process the personal information must adopt strict technical measures to protect the data and prevent data theft and leakage.

Any individual or entity that discovers a violation with respect to the use, collection, and disclosure of personal information may report this violation to the CAC or the Public Security Bureau (PSB). Network operators and service providers who violated the regulations may be subject to a fine, penalty, income confiscation, and the person or persons directly responsible or in charge of the entity which violated the regulations will face personal liability and may lose their operating license.[29] Should the victims suffer damages, the violators shall also be responsible for civil liabilities.[30]

Although these provisions seem protective of individuals' personal information, a number of problems continue to exist. For one, the authorized entities covered by the above referenced laws and regulations are very broad. For example, the authorized entities under the Cybersecurity Law include network operators and network service providers, cyberspace administrators, "other related departments," which are not defined, the telecommunication department, the public security department, and "other related authorities," which are not defined. Furthermore, the *Regulations on the Responses to Public Health Emergencies* permit the health administration department of the local government on the county level and above to collect information and handle health emergencies, and the *Laws of the PRC on the Prevention and Treatment of Infectious Diseases* allow any community to collect and obtain personal information in order to participate in the prevention and control of the coronavirus. This means that landlords, property management companies, and drug stores are all required to collect personal information. Individuals, on the other hand, have no right to object but must give their consent; otherwise, they may not be able to go back to their home, do their shopping, or buy their daily necessities online. The second problem is that to date almost every person, and not only those with diagnosed symptoms, is required to provide personal information such as the individual's name, age, identification number, telephone number, home address, and personal contacts. Finally, many individuals do not know how their personal information is used. For Chinese individuals, the leakage of their personal information is almost a certainty to everyone; the question is only to what extent the information has been leaked.

With Chinese people's enhanced awareness of the protection of their data privacy, will the Chinese government fight as hard to protect the personal information of its citizens as it does to fight the coronavirus? Since many authorized entities

that collect personal information are governmental entities, it remains to be seen how these laws and regulations apply to unauthorized entities collecting personal information, authorized entities' unauthorized use of the rightfully collected information, and authorized entities that exceed their authority to engage in excessive collection of personal information.

About the Author

Yanping Wang *is a senior principal of Miller Canfield Paddock and Stone, P.L.C. Her practice has been focused on cross-border transactions. The views and opinions expressed in this Article are those of the author and do not represent the official view and opinions of the firm. Further, this Article is for general information only, it is not a legal advice and shall not be relied upon as such.*

Endnotes

1 The International Health Regulations were adopted by the Health Assembly in 1969. *International Health Regulations – third Edition*, The WHO, https://www.who.int/ihr/publications/9789241580496/en/ (last visited Mar. 14, 2020

2 *Id.* at art. 2

3 Cholera, pneumonic plague, yellow fever, viral hemorrhagic fevers (Ebola, Lassa, Marburg), West Nile fever, other diseases that are of special national or regional concerns, e.g, dengue fever, Rift Valley fever, and meningococcal disease. *Id.* at Annex 2.

4 *Id.*

5 *Id.*

6 See *Statement on the Meeting of the International Health Regulations (2005)*, The WHO (Jan. 30, 2020), https://www.who.int/news-room/detail/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

7 *Id.*

8 *Rolling Updates on Coronavirus Disease (COVID-19)*, The WHO, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen (last visited Mar. 14, 2020).

9 International Health Regulations, *Supra* note 6, at art. 15 §2.

10 *Statement on the Meeting of the International Health Regulations (2005)*, *Supra* note 7.

11 The World Tourism Organization (UNWTO) is the United Nations agency responsible for the promotion of responsible, sustainable and universally accessible tourism. *See About UNWTO*, The UNWTO, https://www.unwto.org/who-we-are (last visited March, 14, 2020).

12 *A Joint Statement on Tourism and COVID-19-UNWTO and WHO Call for Responsibility and Coordination*, The WHO (Feb. 27, 2020), https://www.who.int/news-room/detail/27-02-2020-a-joint-statement-on-tourism-and-covid-19---unwto-and-who-call-for-responsibility-and-coordination.

13 *Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus*, The White House (Jan. 31, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/.

14 Dana S. Tulis, *Marine Safety Information Bulletin*, The USCG (Feb. 2, 2020), https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/MSIB/2020/MSIB-02-20_Novel_Coronavirus_2Feb2020.pdf?ver=2020-02-02-182614-690.

15 *See* Public Broadcasting Service, *Russia to Ban Entry of Chinese Nationals to Halt Coronavirus*, PBS (Feb. 18, 2020) https://www.pbs.org/newshour/health/russia-to-ban-entry-of-chinese-nationals-to-halt-coronavirus.

16 Gabrielle Tetrault-Farber, *China to Russia: End Discriminatory Coronavirus Measures Against Chinese*, REUTERS (Feb. 26, 2020), https://www.reuters.com/Art./us-china-health-moscow-letter/china-to-russia-end-discriminatory-coronavirus-measures-against-chinese-idUSKCN20K1HU.

17 Holly Yan, *What's Spreading Faster Than Coronavirus in the US? Racist Assaults and Ignorant Attacks Against Asians*, CNN (Feb. 21, 2020), https://www.cnn.com/2020/02/20/us/coronavirus-racist-attacks-against-asian-americans/index.html.

18 The General Provisions of the Civil Law of the People's Republic of China was adopted at the 5th Session of the Twelfth National People's Congress of the People's Republic of China on March 15, 2017 and came into force on October 1, 2017.

19 The Contract Law of the People's Republic of China was adopted at the Second Session of the Ninth National People's Congress on March 15, 1999 and came into force as of October 1, 1999. Contract Law of the People's Republic of China (1999).

20 *Id.* at art. 117.

21 *Id.* at art. 118.

22 Force Majeure Certificates for the Promotion of International Trade, China Council for the Promotion of International Trade (Jan. 30, 2020) http://www.ccpit.org/Contents/Channel_4256/2020/0130/1238885/content_1238885.htm

23 See Q & A of the New Corona Outbreak Certificate Issuing Organizations, China Council for the Promotion of International Trade, https://www.rzccpit.com/company/infomationdetails.html?id=6bc7609d7e74499eb2e19e186d524302; (last accessed March 14, 2020).

24 For a detailed discussion regarding how the language of the contract determine the results, please refer to "*Legal Considerations in Excusing Contractual Performance Due to Coronavirus*" written by my colleague, Richard A. Walawender. Richard A. Walawender, *Legal Considerations in Excusing Contractual Performance Due to Coronavirus*, Miller Canfield (Feb. 25, 2020) https://www.millercanfield.com/resources-Coronavirus-Contracts.html.

25 The Cyberspace Administration of China (CAC) was founded in 2014. The CAC answers to the Central Cyberspace Affairs Commission, which is headed by the Communist Party General Secretary Xi Jinping. It is also known as the Office of Central Cyberspace Affairs Commission. It is the central Internet regulator, censor, oversight, and control agency of the People's Republic of China.

26 Adopted at the 24th Session of the Standing Committee of the National People's Congress on November 7, 2016, which came into force on June 1, 2017.

27 Adopted at the Sixth Session of the Standing Committee of the Seventh National People's Congress on February 21, 1989; revised at the 11th Session of the Standing Committee of the Tenth National People's Congress on August 28, 2004; amended in accordance with the Decision of the Standing Committee of the National People's Congress on Amending in the Culture Relics Protection Law of the People's Republic of China and Other Eleven Laws as adopted at the Third Session on the Standing Committee of the Twelfth National People's Congress on June 29, 2013.

28 Regulation on the Urgent Handling of Public Health Emergencies was adopted at the 7th Executive Meeting of the State Council on May 7, 2003 and was amended and came into force on January 8, 2013.

29 Cybersecurity Law of the People's Republic of China, art. 64.

30 *Id.* at art. 75.

Characteristics Of An Effective Compliance Program

By Stuart H. Deming

Increasingly, in the United States and abroad, the focus has been on controlling corporate behavior through the use of compliance programs. In effect, corporate entities, both for-profit and non-profit, are being encouraged to self-police their behavior by instituting compliance programs.[1] To encourage the implementation of effective compliance programs, the United States and many other countries now require corporate entities to implement and actively enforce compliance programs.

Today, the effectiveness of a compliance program is a critical factor that the U.S. Department of Justice takes into account when exercising prosecutorial discretion, including charging decisions and sentencing recommendations. In the context of anti-bribery compliance programs under the Foreign Corrupt Practices Act ("FCPA"),[2] they have led to declinations and certainly lesser penalties. Under the UK Bribery Act, they may constitute an affirmative defense.[3]

A. Hallmarks of an Effective Compliance Program

In 2012, the U.S. Department of Justice and U.S. Securities and Exchange Commission issued guidance about the FCPA in a publication entitled *A Resource Guide to the U.S. Foreign Corrupt Practices Act* ("*FCPA Guide*").[4] According to the *FCPA Guide*, "hallmarks" of an effective compliance programs are as follows:[5]

1. Commitment from Senior Management and a Clearly Articulated Policy against Corruption[6]

An effective compliance program requires senior management to have "clearly articulated [entity] standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization."[7]

Stuart H. Deming

2. Code of Conduct and Compliance Policies and Procedures

Effective codes of conduct "are clear, concise, and accessible to all employees and to those conducting business on the [entity's] behalf."[8] They must be conveyed in the local language. In tailoring policies and procedures to circumstances associated with an entity and the business it conducts, a compliance program should "outline responsibilities for compliance within the [entity], detail proper internal controls, auditing practices, and documentation policies, and set forth disciplinary procedures."[9]

3. Oversight, Autonomy, and Resources

In addition to ensuring that there is "adequate staffing and resources," one or more specific senior members of man-

agement should be designated and assigned the responsibility of overseeing and implementing a compliance program.[10] The senior executive should have "adequate autonomy from management and sufficient resources to ensure that the [entity's] compliance program is implemented effectively."[11] "Adequate autonomy generally includes direct access to an organization's governing authority, such as the board of directors and committees of the board of directors."[12]

4. Risk Assessment

Depending upon the degree to which particular facts and circumstances may increase risks, compliance procedures need to be correspondingly adjusted to address the heightened risk.[13] This may mean, for example, increased due diligence, more frequent internal audits, or the implementation of a range of special measures.

5. Training and Continuing Advice

In a "manner appropriate of the targeted audience," pertinent policies and procedures need to be communicated throughout an entity whether through training or certifications or other appropriate measures.[14] Similar steps need to be taken with agents, partners and collaborating parties. Measures also must be implemented to ensure that timely advice can be provided.[15]

6. Incentives and Disciplinary Measures

An entity's compliance program must be applied throughout the entity.[16] No one should be exempted from its application. Disciplinary procedures must be clear and applied consistently and promptly.[17] Incentives for compliance should be encouraged.[18]

7. Third-Party Due Diligence and Payments

As part of its "risk-based" due diligence, the qualifications and associations of third parties must be understood as well as the business rationale for using the third party.[19] Third parties are individuals and entities that are not directly owned or controlled by an entity but may act on its behalf. They can take many forms, such as agents, consultants, or representatives, and may also include suppliers, vendors, and distributors. Compliance obligations should be disclosed and commitments obtained from the third parties.[20] Follow-up steps should ensure that the business reasons for using the third party are supported by the terms of any agreements, by the timing and manner in which payments are made, and by there being a verification of the work performed.[21] Third-party relationships should be monitored on an ongoing basis.

8. Confidential Reporting and Internal Investigation

A compliance program should include a mechanism for suspected misconduct to be reported on a confidential basis.[22] Policies should also be implemented to ensure that no one making a confidential disclosure fears retaliation.[23] Adequate resources should be provided so that allegations can be properly investigated and appropriate measures taken.

9. Continuous Improvement: Periodic Testing and Review

A compliance program must be regularly tested and reviewed to identify weaknesses, to adjust to changing circumstances and risks, and to develop ways of improving its efficiency and effectiveness.[24]

10. Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration

To avoid legal and business risks, compliance requires that due diligence be performed as part of mergers and acquisitions.[25] The acquired entity should be fully integrated with the internal controls and compliance program of the acquiring entity.[26] This would extend to all aspects of compliance, such as evaluating and monitoring third parties, training employees, and expanding audits.

B. Evaluation of Corporate Compliance Programs

In December 2017, the Department of Justice issued a policy titled "Evaluation of Corporate Compliance Programs" to further encourage entities to implement effective compliance programs. It continued the Department of Justice's efforts to emphasize the importance of self-disclosure, cooperation, and compliance programs in the resolution of enforcement actions and even the declination of prosecutions. The policy provided greater clarity as to the factors that are taken into consideration in evaluating the effectiveness of a compliance program.

In April 2019, the policy was updated. The update, which is commonly referred to as the "Updated Guidance," builds on the factors identified in the 2017 version of the policy and lays out an ever-increasing focus on the realities of what actually takes place. It identifies a number of additional questions that go to heart of whether a compliance program is truly effective in practice. The twelve areas of consideration in the Updated Guidance are designed to address three "fundamental questions" about the effectiveness of a compliance program:[27]

1. "Is the program well designed?"[28]

Part I "discusses various hallmarks of a well-designed compliance program relating to risk assessment, company policies and procedures, training and communications, confidential reporting structure and investigation process, third-party

management, and mergers and acquisitions."[29] Among the related considerations are whether the allocation of resources is based on risk; whether the risk assessment is subject to periodic review; whether training is tailored to an entity's needs; whether the reporting mechanism is anonymous and effective; and whether appropriate controls are in place for monitoring the use of third parties.[30]

2. "Is the program being implemented effectively?"[31]

"Part II details features of effective implementation of a compliance program, including commitment by senior and middle management of autonomy, resources, incentives, and disciplinary measures." [32] Among the other considerations relative to effective implementation is an assessment of conduct at the top, of a shared commitment between senior leadership and middle management, of adequate oversight, of the seniority and stature of the compliance officials, of the adequacy of resources and autonomy of compliance officials, and of the consistency of applying principles associated with compliance in terms of incentives and discipline.[33]

3. "Does the compliance program work in practice?"[34]

"Part III discusses metrics of whether a compliance is in fact operating effectively, exploring a program's capacity for continuous improvement, period testing, and review, investigation of misconduct, and analysis and remediation of underlying conduct."[35] Among the considerations is whether and to what degree the internal audit function is active; whether and to what degree there is a culture of compliance; whether and to what degree internal investigations are conducted by qualified personnel who are dispassionate in getting at the root cause and analyzing the data; and whether and to what degree does management take remedial measures.[36]

C. Third Parties

Entities can and are regularly held liable for conduct committed by others on their behalf. Indeed, in terms of violations of the FCPA, many, if not most, of the prosecutions arise out of conduct of third parties acting on behalf of an entity. Many entities recognize that serious issues can and do exist with third parties. But they struggle in effectively managing these risks.[37] In this context, implementing an effective anti-corruption due diligence process on third parties as well as continued monitoring of their activities are critical to reducing risk.

1. PACI Working Group

In 2011, the World Economic Forum's Partnering Against Corruption Initiative ("PACI") launched a working group charged with developing Good Practice Guidelines on Conducting Third Party Due Diligence.[38] PACI recognized that in all regions "stricter laws to combat bribery" were being introduced and that enforcement of the laws was on the rise.[39] The "extraterritorial reach of anti-corruption laws [meant] that organizations doing business and raising capital in multiple jurisdictions can be prosecuted for acts of bribery committed anywhere in the world."[40]

Of particular import to the working group was "the prevention of indirect corruption through third parties."[41] Entities "may indeed be held liable for acts of corruption by their third parties, i.e. their agents, consultants, suppliers, distributors, joint-venture partners, or any individuals or entity that has some form of business relationship with the company."[42] The guidelines sought to help "organizations mitigate the risk of becoming involved in corruption through third parties."[43]

Entities following best practices categorize third-party relationships into higher, medium, and lower risk. These categories are generally based on the type of business model. The higher-risk category is more likely to include third parties that are not regulated and only function as introducers of business. A third party that interacts with government officials is also considered higher risk. On the other hand, where third parties are subject to rigorous regulation, they are more apt to fall into a lower-risk category.

2. Increased Accountability for Higher Risks

A responsible senior official needs to be given clear responsibility for overseeing compliance concerns associated with the use of third parties. The absence of having someone responsible and ultimately accountable for third parties creates greater risk. The following scenarios can put an entity at greater risk:

- Having third parties supervised by contractors or other intermediaries with no employees of the entity accountable for the third party's conduct.
- Having long-standing third-party relationships under a contract that was executed before more rigorous corruption compliance controls were implemented.
- Having individuals overseeing third-party relationships that do not insist upon progress reports or other deliverables as contractually required.
- Having third parties operate in foreign markets with limited oversight and control.

In addition, the need for accountability becomes particularly important when familial, economic, or political circumstances position a third party as the only practical option in a particular locality. In such situations, third parties may have undue leverage and may be more likely to disregard an entity's compliance obligations.

3. Third-Party Risk Assessment

In assessing risk, the level of scrutiny should correspond with the level of risk. If later challenged, an entity should be able to demonstrate with confidence that "it is dealing with a *bona fide* third party. The higher the risk, the broader and deeper the third-party due diligence should be."[44]

Onboarding Third Parties: Screening and Due Diligence

For the selection of third parties, an effective screening and due diligence process is essential. Best practices dictate that a risk-based approach be applied to third-party due diligence. As part of the onboarding process, and also on an ongoing basis, third parties should be analyzed to assess their risk. Among the myriad of factors to be evaluated are the offered products and services, the customer pool, and the third-party's location and countries of operation. The scope of the screening and due diligence process should then be based on the assessment of risk.

One of the core components of an effective third-party compliance program relates to when an entity determines to work with or take on a third party—often referred to as "onboarding," It is a time when an entity is most apt to capture complete third-party information. Critical documents are assembled that may include licenses, certifications, and contracts. As part of the onboarding process, it is vitally important that assessments are made of the level of risk and degree of monitoring that will be required.

Ongoing Review

The due-diligence process for third parties does not end with onboarding. Risks must continue to be identified and appropriate due diligence conducted. Uninterrupted third-party monitoring and screening is the key to helping entities reduce risks and potential problems. In the context of international business, screening should continue against global sanctions lists as well as global regulatory, law enforcement, and watch lists. Similarly, adverse media reports should be monitored relating to politically exposed persons ("PEPs") and state-owned enterprises.[45]

Subcontracted services

In monitoring third parties, the oversight process must track whether products and services are actually provided by the third parties and whether they have been sub-contracted to a fourth party.[46] Fourth parties must always be among the considerations as part of the screening and risk-management processes.[47]

Tone at the Top

Senior management and an entity's board of directors are ultimately responsible for the risks of third-party relationships. Depending on the level of risk that the third party may present, approval by senior management should be required. Any delegation of approval authority should not be solely based on monetary thresholds. Consideration of risk should be a factor in whatever delegation of authority may be involved.

Appropriate Investment and Staffing

A sufficient investment in resources, which includes staffing, is essential to managing and monitoring third-party risk. It must not be limited to regulatory compliance. It extends to providing sufficient resources to adequately assess risks and actively manage third parties at the local level as well as from a central location.

Evaluate the Adequacy of the Third Party Process

Procedures need to be put in place to evaluate whether a compliance program is effective. On a regular basis, the program should be carefully evaluated to determine whether risks are being identified and properly mitigated. Well-defined metrics should be developed to assess the effectiveness of the compliance program. Third-party information should be retained in a central location to facilitate oversight, accountability, monitoring, and risk management.

Technology

Technology can play a vital role in managing third-party relationships. It can dramatically impact the efficiency of managing third-party information.[48] This, in turn, enhances the monitoring, the assessment of risks, and the due diligence process associated with multiple third parties. Ultimately, an entity's ability to ensure a greater degree of compliance is increased.

D. The Continuing Evolution

Especially with the global reach of the FCPA and the UK Bribery Act, the trend internationally for entities to self-police is expected to grow. As evidenced by the U.S. Sentencing Guidelines and the Updated Guidance, corporate compliance programs are not limited to issues associated with the bribery of foreign officials. They extend to countless compliance issues.[49] Indeed, as suggested by the Delaware Chancery Court in *Caremark*, the absence of an effective compliance program may now have implications in a civil context for members of boards of directors.[50]

About the Author

Stuart H. Deming *is a principal with Deming PLLC with offices in Washington, D.C. and Michigan. Prior to entering private practice, Mr. Deming served with the U.S. Department of Justice and the Securities and Exchange Commission. He is the*

author of Oxford University Press' Anti-Bribery Laws in Common Law Jurisdictions*, the American Bar Association's (ABA)* Designing An Effective Anti-Bribery Compliance Program: A Practical Guide for Business*; the co-author of the ABA's* The FCPA And UK Bribery Act: A Ready Reference for Business, *and the author of the ABA's* The Foreign Corrupt Practices Act and the New International Norms.

Endnotes

1 A complex matrix is established by the U.S. Federal Sentencing Guidelines for determining fines based upon the culpability of the offender. U.S.C.G., app. § 8A1.1 (2020). In light of the U.S. Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005), and its progeny, the U.S. Federal Sentencing Guidelines are to be treated as advisory by federal courts in the United States. Yet, even with the cessation of their mandatory status, the U.S. Federal Sentencing Guidelines, and the principles associated with their provisions, continue to play a significant role in the sentencing process, especially with respect to organizations. Relevant factors in assessing culpability include the existence of an effective compliance program.

2 Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (2020)) [hereinafter FCPA]).

3 Bribery Act, 2010, § 7 [UK Bribery Act].

4 Criminal Div., U.S. Dep't of Justice & Enf't Div., U.S. Sec. & Exch. Comm'n, A Resource Guide to The U.S. Foreign Corrupt Practices Act 12 (Jan. 16, 2015)

5 *Id.* at 57-63

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.* at 58.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.* at 58–59.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 59–60.

19 *Id.* "As part of an effective compliance program, a company should have clear and easily accessible guidelines and processes in place for gift-giving by the company's directors, officers, employees, and agents." *Id.* at 16. "Proper due diligence and controls are critical for charitable giving. In general, the adequacy of measures taken to prevent misuse of charitable donations will depend on a risk-based analysis and the specific facts at hand." *Id.* at 19.

20 *Id.* at 60–61.

21 *Id.* at 60.

22 *Id.*

23 *Id.*

24 *Id.* at 61–62.

25 *Id.*

26 *Id.*

27 Criminal Div., U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs (2019) [hereinafter Updated Guidance].

28 *Id.*

29 Press Release, U.S. Dep't of Justice, Criminal Division Announces Publication of Guidance on Evaluating Corporate Compliance Programs (Apr. 30, 2019) [hereinafter Criminal Division Announces Publication].

30 Updated Guidance, *supra* note 27, at 2-9.

31 *Id.* at 9.

32 Criminal Division Announces Publication, *supra* note 29.

33 Updated Guidance, *supra* note 27, at 9-13.

34 *Id.* at 13.

35 Criminal Division Announces Publication, *supra* note 29.

36 Updated Guidance, *supra* note 27, at 13-17.

37 The political climate in many foreign countries makes it crucial to take multiple factors into account when vetting third parties. For example, individuals or entities at odds with a political regime are sometimes subject to false charges and adverse state-owned media when they fall out of favor.

38 *Good Practice Guidelines on Conducting Third Party Due Diligence*, The World Economic Forum, at 4 (2013), http://www3.weforum.org/docs/WEF_PACI_ConductingThirdPartyDueDiligence_Guidelines_2013.pdf.

39 *Id.* at 5.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* at 4.

44 *Id.* at 7.

45 *See id.* at 11. Screening data providers may be able to furnish real-time alerts and data feeds on third parties.

46 *Id.* at 6.

47 *Id.* at 12.

48 *Id.* at 10.

49 *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

50 *See also* Stone v. Ritter, 911 A.2d 362 (Del. 2006).

Commentary on the United States-Mexico-Canada Agreement

By David Crawford, Partner, Toronto, Fragomen, Del Rey, Bernsen & Loewy LLP
Juan Carlos Noble, Partner, Mexico, Fragomen, Del Rey, Bernsen & Loewy LLP
Scott F. Cooper, Senior Counsel, Michigan, Fragomen, Del Rey, Bernsen & Loewy LLP

For periods over the last four years, many across North America feared that the North American Free Trade Agreement's (NAFTA) days may be numbered. At various points, observers became increasingly concerned that there would be a scaling back of NAFTA to such an extent that it would be unrecognizable, including the mobility provisions.

Fortunately, however, a "new NAFTA", renamed the United States-Mexico-Canada Agreement (USMCA), is on the verge of being implemented. Formally signed by the heads of the three countries in November 2018, it was ratified by the United States on January 29, 2020, and Canada on March 13, 2020. The USMCA will be the third iteration in North America. The Free Trade Agreement (FTA) of 1988 included only the United States and Canada and was made possible in part due to the close relationship between Republican President Ronald Reagan and Progressive Conservative Prime Minister Brian Mulroney. In 1994, Mexico was officially included, resulting in the NAFTA becoming the world's largest free trade zone.

While the USMCA does include modifications of varying degrees in areas such as dairy, automotive production, data sharing and environmental protection, it does not include any substantial changes to the provisions that govern the flow of workers and various business persons within the continent that are citizens of any of the three countries. The NAFTA provisions on mobility center on a number of specified occupations being able to have access to the work permit. In essence, those occupations and the related provisions remain unchanged.

Taking into account the current political climate both within the United States and in certain other western democracies, specifically the trend towards more protectionist economic policies, limited mobility rights for foreign nationals, and the implementation of tariffs, there was fear that the agreement as is stood or would stand might not be finalised. The U.S. had threatened to pull out of various bilateral and multilateral agreements and international organizations. The Trans-Pacific Partnership (TPP), the Paris Agreement on Climate Change, the Iran Nuclear Deal, UNESCO, and the UN Human Rights Council have all been affected by the swift change in direction by the current U.S. administration. If the NAFTA had experienced a similar fate, the financial impact on businesses across many sectors, in all three countries, would surely have been significant.

David Crawford   Juan Carlos Noble   Scott F. Cooper

The USMCA, like its predecessor (NAFTA), facilitates the temporary entry of citizens of any of the three countries who are involved in the trade of goods or services, or in investment activities. It removes the need for domestic labour tests, resulting in the ease of cross-border travel, to the benefit of companies of all sizes that seek to mobilize their resources anywhere within the continent for work or related business purposes.

The USMCA will continue to include four main categories: (1) business visitors, (2) intra-company transferees, (3) professionals, and (4) traders and investors. While other trade agreements to which the countries are still members, such as the General Agreement on Trades and Services (GATS), do offer provisions for business visitors and intra-company transferees, the USMCA continues in the spirit of the NAFTA in terms of its added flexibility in those areas. Additionally, the USMCA continues to include categories not within the GATS for professionals who qualify based solely on their occupation as well as a stream specifically for traders and investors.[1]

The professional stream is particularly critical to businesses. Citizens of the three member nations who qualify in any one of 63 listed occupations can obtain work authorization without the need for a labour market test by a company in the host country, or experience specifically linked to a company in their home country. Occupations included in the list are accountants, management consultants, engineers, technicians, and IT/computer system analysts.[2] The professional category has been mirrored in other bilateral and multilateral trade agreements and has proven very useful for businesses located within North America that rely on the ability to shift resources across the continent in a predictable, efficient manner.

When NAFTA renegotiations began in 2017, some hoped that updating the agreement would result in a modernization

of the various mobility provisions, specifically an expansion and/or update of the professional occupation list and other areas which had become outdated since the agreement came into force in 1994. In hindsight, that almost seems naïve. The scrapping of NAFTA, which perhaps was more likely than even the most pessimistic observers realized, would have undoubtedly resulted in massive disruption to commerce, loss of revenue for businesses, and costly inefficiencies for individuals, whilst relying only on a generic and relatively rigid agreement such as the GATS.

That the USMCA retained as much of the spirit and literal content of the NAFTA as it does is seen by many as a welcome relief. At the present time, the continuation of NAFTA is a positive development – regardless of whether each country can actually agree on what to call it within its own borders. Canada, for example, officially calls it the Canada-United States-Mexico Agreement, or "CUSMA", which is evidence of its sensitivity related to the implementation of a new deal, down to the last detail.

Individual Country Interpretations

Each country maintains the authority to interpret the provisions of NAFTA (and, in the future, the USMCA); further, country-specific policies and application procedures related to businesspersons, intracompany transferees, professionals, traders and investors will undoubtedly continue. Examples of individual country interpretations and procedures are given below:

Canada

Canada now requires intracompany transferees to be currently employed with a foreign subsidiary outside Canada, in addition to having been employed for one year within the previous three years for that entity.

The United States

The U.S. Department of Homeland Security has introduced several policy and procedural changes over the past year. One example is U.S. Customs and Border Protection (CBP) officials' refusal to renew L-1 applications at ports of entry on the U.S.-Canada border, as well as pre-flight inspection stations at international airports in Canada. CBP is taking the position that Canadian L-1s are not permitted to seek renewal or extension of their status at ports of entry, but must instead have an extension of stay petition approved by U.S. Citizenship and Immigration Services (USCIS),[3] despite longstanding regulations[4] and practice permitting Canadian citizens to apply for L-1 classification at Canadian ports of entry.

Pre-clearance inspection stations at Toronto, Ottawa and Vancouver international airports, as well as the port of entry at Blaine, Washington, have confirmed that they will not accept L-1 renewal applications. In addition, western land ports of entry and other preclearance stations have reportedly refused L-1 renewal applications but have not confirmed a policy of doing so. The new policy includes L-1 applications submitted pursuant to a company's approved L-1 blanket petition. The trend does not affect applications for initial L status made by Canadian citizens; these applications continue to be processed as normal.

Canadian citizens planning to renew their status at a port of entry or pre-clearance station should attempt to do so while they still have time remaining on their current L visa. If the port of entry refuses to adjudicate the application, the applicant may still be readmitted on the current L and be sponsored for a USCIS extension by the U.S. employer. Canadian citizens with an imminent L expiration should carefully consider whether an application at the border is prudent. If the application is refused, the foreign national could face a long wait to re-enter the United States while USCIS approval is sought.

CBP has not announced any official change in border L adjudication policy. NAFTA and its implementing regulations permit Canadian citizens to appear at border ports of entry and pre-flight clearance stations to apply for renewal of their L status.[5] The new CBP practice is in conflict with these rules.

USCIS and CBP implemented a pilot program under which Canadians making initial or renewal L-1 applications at the Blaine, Washington, port of entry have to file their applications with USCIS in advance. The program, which was originally set to expire on October 31, 2019, will remain in place through April 30, 2020.[6]

The pilot program, which is optional, applies to Canadians seeking L-1 admission based on an employer's previously approved blanket petition as well as those seeking L-1 admission based on an individual petition. Canadian nationals who choose to participate in the pilot file their L-1 petitions with USCIS's California Service Center for review and approval before seeking admission at the Blaine port of entry. If USCIS approves the case, the applicant can use the approval notice to request admission at any northern port of entry. Participants can also seek entry by bringing their filing receipt to the border, though CBP will need to contact USCIS to verify whether the case has been approved, which can result in delays.

As an alternative, Canadian citizens may continue to seek admission at nearby ports of entry without filing an application with USCIS in advance; nearby ports include Port Roberts, Sumas, Washington, and the Vancouver and Washington airport pre-clearance stations.

In December 2017, USCIS announced that the TN Economist category will no longer be available to foreign nationals working in financial analyst, market research analyst or marketing specialist occupations, as well as other occupations that are related to economics but primarily include the activity of other occupations.[7]

To be eligible for TN economist status, a foreign national's U.S. position must fall within the definition of economist in the Department of Labor's Standard Occupational Classification (SOC) definition.[8] The restrictions apply to new applications for TN status in the Economist category at ports of entry, U.S. consulates and USCIS Service Centers. They also affect extensions of stay and international travel for current employees in TN economist status.[9]

The economist subcategory is not otherwise defined in NAFTA or in the U.S. immigration regulations, but historically has been interpreted to include occupations involving economic analysis, including the positions now excluded. In recent months, however, TN economist applications had been subject to increasing scrutiny.

Applications for TN status in the Economist category must now meet the new guidelines, whether the foreign national will apply at a port of entry or U.S. consulate, or will be the beneficiary of a USCIS petition. Employers should consider immigration alternatives for those in market research analyst, marketing specialist and other roles that do not clearly meet the new guidelines. Options to consider include other TN subcategories (e.g., Mathematician, Statistician, Accountant) and other categories, such as H-1B, L-1, or O-1 category.

The restrictions also affect the ability of previously approved TN economists to re-enter the United States after travel abroad. All TN economists should expect increased scrutiny by Customs and Border Protection when entering the United States, regardless of their specific role. Also, they should be prepared to answer detailed questions about job duties and qualifications and should travel with documentation of eligibility under the new guidelines. TN economists who do not meet the new guidelines should carefully consider the risks of international travel. Border officers could use the guidelines to refuse entry to the United States, even to those with a valid USCIS approval notice. If travel cannot be avoided, immigration alternatives to the TN economist subcategory should be considered. Options include a border application for NAFTA L-1 status or another TN subcategory, a USCIS change of status, or an amendment.

Mexico

From a Mexican immigration perspective, NAFTA introduced significant changes through the introduction of the flexible Business Visitor status (additional categories include traders and investors and intra-company transferees, among others), which allowed eligible visitors to engage in a broad range of business-related activities in Mexico. Foreign nationals holding a valid passport from Canada or the United States were able to enter Mexico for business purposes using the FMN (NAFTA immigration form) and were able to stay in the country for up to 30 days per visit – without requiring a previously issued visa. The FMN was then replaced by the current FMM immigration form ("Multiple Purposes Immigration Form", for its acronym in Spanish), which is now granted to all foreign nationals of countries for whom the visa requirement is waived for visits of up to 180 days.

Under the USMCA, there are no significant changes in terms of the provisions for temporary entry into Mexico. Canadian and US citizens will continue to be able to enter Mexico for business purposes (among other categories), using the FMM immigration form granted at the port of entry, without requiring a previously issued visa. Individuals granted this status will continue to be able to stay in Mexico for up to 180 days per visit, performing a broad range of business-related activities (provided that they do not receive any remuneration from a Mexican source).

Although it is not mandatory, it is highly recommended for frequent Business Visitors to have an invitation letter issued by the Mexican entity/party that will host the visit. This letter should include general information about the business traveler (i.e. name, nationality, passport number, brief description of the activities to be engaged in the country along with the confirmation that any income or salary will be covered from abroad).

New sub-categories for "Business Visitors" are now included under the USMCA. For example, activities such as commercial transactions, public relations and advertising, tourism, tour bus operation, and translation are now specifically addressed. These categories were previously classified under General Service category.

The lack of major changes has been welcomed by business groups throughout the region, who had been concerned about possible disruptions that may have been caused by new visa restrictions and uncertainty during the renegotiation of NAFTA.

From Mexico's perspective, it is safe to say that Mexican immigration law and the legal framework governing international assignments has positively impacted the process of bringing skilled, highly qualified personnel and Business Visitors into the country. Mexico's immigration policy remains welcoming to foreign investment as part of the government's strategy to attract foreign investment and encourage economic growth.

As part of this trend, the 2012 Immigration Law in Mexico in conjunction with NAFTA and the recent USMCA will continue to facilitate the following economic drivers in Mexico:

a) Increase the number of Business Visitors to Mexico.

b) Allow companies to provide more services and play a fundamental role in the global market; and

c) Allow HR departments to retain talented personnel within their own organizations through accessible relocation to Mexico.

It should be noted that Mexico experienced minimal parliamentary opposition to the renegotiated treaty, which was pushed forward by the leftist party MORENA after taking

over the process in December 2019 from the previous administration. Given that MORENA holds a comfortable majority, it can be expected that any ad-hoc or related legislation moving forward would be aligned and shall facilitate the implementation of the provisions and new regulations imposed by the revised document.

In light of the above, it is expected that Mexico will continue to constitute a focal point in the continued expansion of the Latin America region into a global market, and that current and forthcoming international laws, along with local immigration policies, will provide a proper environment to this end.

About the Authors

David Crawford *is the Managing Partner of the Fragomen (Canada) Co. office in Toronto.*

Juan Carlos Aguilar Noble *co-founded and is a Partner in Fragomen's Mexico office.*

Scott F. Cooper *is Senior Counsel – Practice Leader of Fragomen's Troy, Michigan office.*

Endnotes

1 *Agreement between the United States of America, the United Mexican States, and Canada*, adopted Jan. 29, 2020 [USMCA].

2 USMCA, supra note 1, Chapter 16, Appendix 2.

3 *Practice Alert: L-1 Adjudications at Ports of Entry for Canadian Citizenship*, American Immigration Lawyers Association (May 14, 2019), https://aila.org/advo-media/aila-practice-pointers-and-alerts/practice-alert-filing-subsequent-l-1-petitions.

4 8 C.F.R. § 214.2(l)(17)(i) (1998).

5 *Id.*

6 *Form I-129/I-129S Pilot Program for Canadian L-1 Nonimmigrants*, U.S. Citizenship and Immigration Services (April 29, 2019), https://www.uscis.gov/working-united-states/information-employers-employees/form-i-129i-129s-pilot-program-canadian-l-1-nonimmigrants.

7 *Policy Memorandum: TN Nonimmigrant Economists Are Defined by Qualifying Business Activity*, U.S. Citizenship and Immigration Services (Nov. 20, 2017), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-1120-PM-602-0153_-TN-Economists.pdf.

8 *Occupational Employment Statistics*, U.S. Bureau of Labor Statistics, https://www.bls.gov/oes/2018/may/oes193011.htm (last visited February 10, 2020).

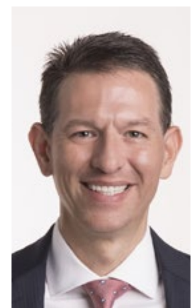
9 U.S. Citizenship and Immigration Services, *supra* note 5.

CFIUS Review under FIRRMA - Jurisdiction Expands, while Open Investment Policy and National Security Focus Remain

By Jeffrey Richardson

The US Treasury recently published final rules effective on February 13, 2020 revising the Committee on Foreign Investment in the United States (CFIUS) review requirements for foreign direct investment in the United States. The revisions implement the Foreign Investment Risk Review Modernization Act (FIRRMA) included within the voluminous John S. McCain National Defense Authorization Act for Fiscal Year 2019. Although FIRRMA imposes many jurisdictional changes to CFIUS, FIRRMA does not alter the cornerstone open foreign investment policy of the United States or the national security focus of CFIUS. This article reviews the current foreign investment policy of the United States, the role of CFIUS to focus a transaction review on national security, the arising mandatory filing requirements, and the major changes to the CFIUS review process under these final rules implementing FIRRMA.

Foreign Investment Policy of the United States



Jeffrey Richardson

First and foremost, FIRRMA broadens CFIUS jurisdiction by providing authority to review foreign direct investments that do not result in foreign control of a US business. Prior to FIRRMA, foreign control was the focus of a CFIUS jurisdiction review. Now, under FIRRMA, a secondary analysis is required to determine CFIUS jurisdiction for foreign direct investments that do not result in foreign control of a US business. CFIUS jurisdiction may arise for foreign direct investments that provide a foreign investor material access or substantive decision-making rights related to a US business with critical

technology, sensitive data, or a critical infrastructure nexus (*see* MAD Rights discussed below).

However, the longstanding policy of the US Government to welcome foreign investment remains consistent under FIRRMA despite the changes to CFIUS jurisdiction.[1] FIRRMA provides clear Congressional support of the longstanding US foreign investment policy: *It is the sense of Congress that— foreign investment provides substantial economic benefits to the United States, including the promotion of economic growth, productivity, competitiveness, and job creation, thereby enhancing national security; . . . it should continue to be the policy of the United States to enthusiastically welcome and support foreign investment, consistent with the protection of national security . . . .*[2] Again, notwithstanding the many complex jurisdictional changes resulting from FIRRMA, the fundamental open economy and open investment policy of the US Government remains unchanged.

Also under FIRRMA, the singular focus of the CFIUS review process on national security remains unchanged: *the Committee on Foreign Investment in the United States should continue to review transactions for the purpose of protecting national security and should not consider issues of national interest absent a national security nexus.*[3] CFIUS is neither tasked with nor statutorily authorized to undertake a broader review of foreign direct investment for economic and competitive concerns outside the bounds of a national security nexus.

Mandatory Filings for Foreign Investors under FIRRMA for Certain Investments

The FIRRMA final rules alter CFIUS jurisdiction by adding two additional instances where a filing with CFIUS is mandatory: (1) a transaction covered by the initial Pilot Program (defined below) and now required in the main CFIUS regulations of Part 800,[4] and (2) an investment by a foreign government resulting in the acquisition of a substantial interest in a TID US business (defined below)[5] by a foreign person in which a foreign government has a substantial interest.[6]

Foreign Investment in Specified Pilot Program Industries

First, FIRRMA provides CFIUS the ability to implement temporary pilot programs and thereby field test the utility of certain mandatory filing requirements that may enhance the CFIUS process. The initial Pilot Program became effective on October 10, 2018[7] and required the mandatory filing of a declaration for investments in a Pilot Program US Business[8] that (1) produces, designs, tests, manufactures, fabricates, or develops critical technology and (2) utilizes that critical technology in connection with a Pilot Program industry[9] as identified by NAICS code in Annex A of the initial Pilot Program.[10] The initial Pilot Program is discontinued as of February 12, 2020, but the mandatory declaration filing requirements for transactions within the scope of the initial Pilot Program are required by the primary CFIUS regulations of Part 800, which now integrate the filing requirements from the initial Pilot Program.[11]

Foreign Investment in Specified TID Businesses

Second, CFIUS now requires the filing of a declaration for a covered transaction that results in the acquisition of a substantial interest in a TID US business by a foreign person in which a foreign government has a substantial interest.[12] A TID US business includes a US business that (1) produces, designs, tests, manufactures, fabricates, or develops one or more *critical technologies*, (2) performs the specific functions with respect to covered investment *critical infrastructure* set forth in Part 800, Appendix A, or (3) maintains or collects, directly or indirectly, *sensitive personal data* of US citizens.[13] For example, TID businesses may include the following: a US business that operates a munitions plant producing a variety of military grade explosives listed on the United States Munitions List (critical technologies), a US business that manufactures pipe segments for a pipeline within the list of critical infrastructure (critical infrastructure), and a US business that operates as a credit reporting agency and maintains consumer credit reports on greater than one million individuals (sensitive personal data).

Major Changes for Foreign Investors under FIRRMA

In addition to the mandatory filing requirements, the final rules implementing FIRRMA bring other major changes to the CFIUS review of foreign direct investments:

Real Estate

First, CFIUS created a stand-alone set of real estate regulations within Part 802 that detail positive requirements for covered real estate over which CFIUS now has jurisdiction.[14] Covered real estate must be (1) located within, or will function as part of, certain airports or maritime ports, or (2) located within: (a) "close proximity" (*i.e.*, one mile from the boundary) to specific military installations, (b) the "extended range" (*i.e.*, in most cases 99 miles from the boundary) of a subset thereof, (c) certain larger geographic areas identified in connection with other military installations, or (d) any part of certain military installations that is located within 12 nautical miles seaward of the coastline of the United States. The relevant military installations and categories are identified in Part 802, Appendix A.[15]

However, importantly, as to real estate (1) there are no mandatory filing requirements for the purchase of covered real estate by a foreign person, (2) no separate additional real estate filings are required for any transaction for which a joint voluntary notice or declaration is otherwise filed with CFIUS under Part 800, and (3) CFIUS maintains the traditional policy that

the extension of a loan by a foreign person to a US business does not result in a covered real estate transaction.

From Control only to MAD Rights as Well

Second, another major shift, CFIUS transitions under FIRRMA from using control of a US business as the only criterion to find CFIUS jurisdiction over a transaction, to now further extending CFIUS jurisdiction to foreign investments that do not provide control of a US business but rather provide a foreign person the following: (1) *access* to any material non-public technical information in the possession of the TID US business, (2) *membership* or observer rights on the board of directors or equivalent governing body of the TID US business, and (3) any involvement in substantive *decision-making* of the TID US business pertaining to the use, development, acquisition, safekeeping, or release of the sensitive personal data and critical technologies, or management or operation of critical infrastructure (the foregoing (1)-(3) are MAD Rights).[16]

So, transactions providing MAD Rights to foreign investors should be carefully screened for national security risks, and those raising capital should carefully evaluate the actual need to convey MAD Rights to foreign investors and thereby trigger CFIUS jurisdiction.

Investment Funds

Third, since CFIUS jurisdiction now extends review from control of a US business to the conveyance of MAD Rights, FIRRMA provides corresponding exclusions for those impacted investment funds that incorporate certain governing characteristics designed to limit the access and control of foreign person investors, such as the following examples:

1. the fund is managed exclusively by a general partner, a managing member, or an equivalent;
2. the foreign person is not the general partner, managing member, or equivalent;
3. the fund advisory board does not have the ability to approve, disapprove, or otherwise control the investment decisions of the investment fund;
4. the foreign person does not otherwise have the ability to control the investment fund;
5. the foreign person does not have access to material non-public technical information as a result of its participation on the advisory board or committee; or
6. the investment does not afford the foreign person any MAD rights.[17]

Consequently, those involved in fund creation and management should take due care at the onset of fund creation to confirm whether the fund intends to reduce the risk of creating CFIUS jurisdiction over the foreign direct investment, and thereby, potentially eliminate the extension of MAD Rights to foreign investors from the outset within the fund governing documents.

Fees

Finally, CFIUS is authorized under FIRRMA to require filing fees that may not exceed the lesser of 1% of the value of a transaction or a maximum of $300,000. The US Treasury has not yet published any rules implementing filing fees;[18] rather, the US Treasury has confirmed that a separate proposed rule implementing the filing fee authority of CFIUS will be published at a later date.[19]

In sum, foreign investors are best served by approaching a CFIUS review with an initial focus on the US national security concerns presented by the transaction, then the impacted parties may take steps to address the complex jurisdictional questions now arising under FIRRMA.

About the Author

Jeffrey Richardson *is a Principal at Miller Canfield, Paddock and Stone, PLC. He advises multinational clients in matters that involve technology, US export controls and sanctions, international trade regulations, trans-border commercial transactions, and foreign direct investment into the United States. He can be reached at (248) 267-3366 or richardson@millercanfield.com.*

Endnotes

1 President Bush's Statement on Open Economies on May 10, 2007 and Executive Order 13456 of January 23, 2008 which provides further amendment of Executive Order 11858 of May 7, 1975. "International investment in the United States promotes economic growth, productivity, competitiveness, and job creation. It is the policy of the United States to support unequivocally such investment, consistent with the protection of the national security." Exec. Order No. 13456, 3 C.F.R. 171 (2008).

2 Foreign Investment Risk Review Modernization Act H.R. 5515, 110th Cong. §1702(B)(1)-(3) (2018).

3 *Id.*

4 31 C.F.R §801.401 Mandatory declarations under the pilot program (the citations for 31 CFR Part §801 were initially issued as part of the Pilot Program Interim Rule, *see* 83 Fed. Reg. 51322 (Oct. 11, 2018), which became incorporated within 31 C.F.R Part §800 pursuant to 85 Fed. Reg. 3112 (Jan. 17, 2020).

5 31 C.F.R §800.248 (2020).

6 31 C.F.R §800.401(b)

7 Pilot Program Interim Rule, *see* 83 Fed. Reg. at 51322.

8 31 C.F.R. §801.213 (2018).

9 31 C.F.R. §801.212

10 *See* 31 C.F.R §801 Annex A to Part 801 for the 27 Pilot Program Industries and Appendix B to Part 800, Industries

11 31 C.F.R. §801.401

12 31 C.F.R. §800.401

13 31 C.F.R. §800.248

14 31 C.F.R. § 802.211 (2020).

15 *See* Appendix A to part 802 - List of Military Installations and other US Government Sites.

16 31 C.F.R § 800.211

17 31 C.F.R § 800.307.

18 Foreign Investment Risk Review Modernization Act of 2018, H.R. 5515, 110th Cong. §1723(p)(3) (2018).

19 Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, *See* 85 Fed. Reg. 3158 (Jan. 17, 2020).

International Law Section Treasurer's Report

For the three months ending January 31, 2020

	Current Activity January 2020	Year To Date January 2020	Year To Date January 2019
Revenue:			
International Law Section Dues	525.00	12,460.00	12,250.00
International Stud/Affil Dues		35.00	35.00
Total Revenue	**525.00**	**12,495.00**	**12,285.00**
Expenses:			
ListServ	25.00	75.00	750.00
Meetings		533.82	885.63
Total Expenses	**25.00**	**608.82**	**960.63**
Net Income	500.00	11,886.18	11,324.37
Beginning Fund Balance:		25,755.46	21,711.08
Total Beginning Fund Balance:		25,755.46	21,711.08
Ending Fund Balance:		**37,641.64**	**33,035.45**

SECTION MEMBERSHIP APPLICATION FOR EXISTING BAR MEMBERS

Please check the section(s) you would like to join and submit with prepayment. The membership year is October 1 to September 30. Membership begins immediately through September 30.

	Section	No.	Cost
☐	Administrative & Regulatory Law	01	$20
☐	Agricultural Law	37	$25
☐	Agricultural Law (70+ years of age)	37	FREE
☐	Alternative Dispute Resolution	02	$40
☐	Alternative Dispute Resolution (judges)* *Section dues free for sitting judges.	02	FREE
☐	American Indian Law	31	$20
☐	Animal Law	32	$25
☐	Animal Law (Paralegals/Legal Assistants)	32	$15
☐	Antitrust, Franchising & Trade Regulation	03	$30
☐	Appellate Practice	30	$30
☐	Arts, Communications, Entertainment and Sports	04	$20
☐	Aviation Law	23	$25
☐	Business Law	05	$35
☐	Children's Law	13	$40
☐	Consumer Law	33	$15
☐	Criminal Law	07	$25
☐	Elder Law and Disability Rights	26	$40
☐	Elder Law and Disability Rights** **Section dues discounted to $20 if you are 70+ years of age.	26	$20
☐	Environmental Law	08	$35
☐	Family Law	09	$60
☐	Family Law (70+ years of age)	09	FREE
☐	Government Law	19	$35
☐	Government Law (70+ years of age)	19	FREE
☐	Health Care Law	28	$45
☐	Immigration Law	42	$35
☐	Information Technology Law	06	$25
☐	Insurance & Indemnity Law	36	$35
☐	Intellectual Property Law	11	$35
☒	International Law	12	$35
☐	Labor & Employment Law	14	$35
☐	Labor & Employment Law*** ***Section dues free if you are an emeritus member.	14	FREE
☐	Latin American Bar Activities	15	$15
☐	Law Practice Management & Legal Administrators	16	$25
☐	LGBTQA Law	40	$45
☐	Litigation	29	$25
☐	Litigation (70+ years of age)	29	$12.50
☐	Marijuana Law	39	$65
☐	Military & Veterans' Law	38	$25
☐	Negligence Law	17	$50
☐	Paralegal/Legal Assistant	25	$25
☐	Prisons & Corrections	35	$30
☐	Probate & Estate Planning *(Probate registers and probate court administrators contact section for waiver)*	18	$35
☐	Real Property Law	20	$45
☐	Real Property Law (70+ years of age)	20	FREE
☐	Religious Liberty Law	41	$35
☐	Senior Lawyers (50+ years of age)	43	$25
☐	Social Security Lawyers	34	$35
☐	Solo and Small Firm	10	$30
☐	Taxation	21	$30
☐	Workers' Compensation Law *(Directors of the Workers' Compensation Agency, Members of the Board of Magistrates, Commissioners of the Workers' Compensation Appellate Commission, and Agency Mediators contact section for waiver)*	22	$35

total: $__________
(add both columns)

All orders must be accompanied with payment.

P# ______________

Name ______________________________

Address ______________________________

____

City ______________________________

State, Zip ______________________________

Phone ______________________________

Email ______________________________

Check # __________ is enclosed, made payable to the State Bar of Michigan.

Please return to: State Bar of Michigan, Dues Department
306 Townsend St., Lansing, MI 48933-2012

Revised 08/19-0320

2019-2020 International Law Section Council

OFFICERS

Chair
James Rayis
Giarmarco Mullins & Horton, PC
101 W. Big Beaver Rd.
Troy, MI 48084
248-457-7173
jrayis@gmhlaw.com

Chair- Elect
Elliott Church
Kreis, Enderle, Hudgins & Borsos, PC
40 Pearl Street, NW
Grand Rapids, MI 49503
616-254-8412
echurch@kreisenderle.com

Secretary
Reinhard Lemke
Lemke & Associates, PLLC
6065 Annabel Lane
Troy, MI 48098
248-633-3399
reinhardlemke@sbcglobal.net

Treasurer
Betina Schlossberg
Schlossberg Legal PLLC
2020 Hogback Road, Suite 10
Ann Arbor MI 48105
734-786-2900
betina@bsblegal.com

Immediate Past Chair
Troy L. Harris
Harris Arbitration
P.O. Box 32887
Detroit, MI 48232
313-421-7727
harrisarbitration.com

COUNCIL MEMBERS

2020

Douglas Duchek
248-722-1060
dfduchek@ducheklaw.com

Robert Rothman
248-880-3942
rrothman@privassoc.com

Aida Dismondy
734-674-5922

John Wright
248-269-1000
John.Wright@tylertech.com

2021

Anne Blake-Dreher
269-686-3560
Anne.Blake-Dreher@perrigo.com

Eve Lerman
248-975-9605
Eve.Lerman@trade.gov

Neil Woelke
248-462-4637
nwoelke@kozikwoelke.com

2022

David Sloan
248-514-4041
history584@aol.com

Alexandra Stan
248-971-1729
stan@bwst-law.com

Paul Vandevert
313-737-3675
paul@ochimtradelaw.com