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TECHNOLOGY MAY-RATHON
NEW ADMINISTRATION, NEW AGENDA: THE TRAJECTORY OF THE FCC AND FTC UNDER THE TRUMP ADMINISTRATION
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Roadmap

- New President, New FCC Agenda
- Chairman Pai's Agenda
- Network Neutrality
- FCC Broadband Privacy and Data Security Order
- State Privacy Legislation
- New President, New FTC Agenda
- Acting Chair Ohlhausen's Views on Privacy
- *FTC v. AT&T Mobility, LLC*
- Telephone Consumer Protection Act (TCPA)

THE FCC

New President, New FCC Agenda

- President Trump Elevates Ajit Pai to Chairman
  - Initially nominated by President Obama for a five-year term, which began May 2012
  - President Trump announced that he would renominate Chairman Pai for a new five-year term
  - Chairman is first among equals
- Commissioner Michael O'Rielly – Republican
- Commissioner Mignon Clyburn – Democrat
- Two seats remain vacant

Chairman Pai's Agenda

- After Republicans swept the White House and Congress, then-Commissioner Pai said:
  - "We need to fire up the weed whacker and remove those rules that are holding back investment, innovation and job creation"
- Chairman Pai has also vowed to implement process reforms
  - He has made the text of draft orders that will be considered at FCC Open Meetings available prior to the vote
  - He has circulated items that will be considered at an FCC Open Meeting to other commissioner offices prior to the Chairman's office making public statements concerning such items

Chairman Pai's Agenda (cont'd)

- Rollback Net Neutrality
- Undo Broadband Privacy and Data Security Order
  - Chairman Pai was given a big assist by Congress on this one through the Congressional Review Act
- Focus on Broadband Deployment
  - Digital Empowerment Initiative (gigabit empowerment zones, Dig Once policies, reform of siting on federal land; expand FCC pole attachment authority to municipally owned poles)
  - First meeting held on April 21, 2017

Chairman Pai and the Open Internet Order

- Rollback 2015 Open Internet Order
  - Hard to do given that the rules are final and upheld on appeal
  - But the Supreme Court has upheld the right of FCC and other independent agencies to reverse their previous decisions, including statutory interpretations, as long as they articulate a rational basis
  - **Apr. 26, 2017** – Pai announces he is going to rollback the FCC's net neutrality order by re-classifying broadband services as Title I information services
  - **Apr. 27, 2017** – Draft text of the NPRM that will be voted on during the May 18, 2017, open meeting will be released

Network Neutrality Under Chairman Pai

- **January 31, 2017**: Responding to a reporter's question about net neutrality after presiding over his first FCC Open Meeting as Chairman, Chairman Pai responds:
  - "**I think the issue is pretty simple. I favor a free and open Internet and I oppose Title II**."
- **February 3, 2017**: Investigations into zero rating practices of AT&T, T-Mobile, and Verizon are closed as is investigation of Comcast's "Stream TV Service"
- **February 23, 2017**: FCC waives for five years "enhanced transparency requirements" for providers of BIAS with fewer than 250,000 subscribers. Critics contend that there are only 20 providers of BIAS with more than 250,000 subscribers, drastically reducing the scope of the requirements

2015 Open Internet Order

- Network Neutrality: 2015 Open Internet Order
  - Adopted by the FCC under the Obama Administration
  - Reclassified fixed and mobile broadband services as a telecommunications service under Title II of the Telecommunications Act
  - Reclassification was a key component of the 2015 Open Internet Order
    - In 2010, the FCC had adopted an Open Internet Order that was appealed
    - In 2014, the DC Circuit vacated **anti-blocking** and **anti-discrimination** rules of the 2010 Order. The DC Circuit found that these provisions apply to common carriers and broadband was not classified as such at the time of the 2010 Open Internet Order

2015 Open Internet Order (cont'd)

- Having the benefit of the DC Circuit's decision, FCC adopts the 2015 Open Internet Order, which reclassified fixed and mobile broadband services as telecommunications subject to Title II of the Communications Act
- Sections 201(b) and 222 of the Communications Act apply to BIAS

Restoring Internet Freedom NPRM

- Re-classify broadband service as a Title I information service
- Mobile broadband service classification revised to private mobile service standard
- Proposes that the FTC would regulate broadband ISP's privacy practices
- Seeks comment on conducting a cost-benefit analysis
  - Proposes to conduct a "regulatory analysis"
  - Costs of maintaining Title II should be estimated as those costs of *ex ante* FCC regulation relative to FTC *ex post* regulation
- Acting Chair Ohlhausen expresses support for FCC's proposed approach
- Open questions linger with respect to FTC's authority (*FTC v. AT&T Mobility LLC)*

Broadband Privacy and Data Security Order

- **October 26, 2016**: FCC adopts order imposing privacy and data security obligation on BIAS providers and other service providers subject to its jurisdiction
- Follows 2015 Open Internet Order reclassifying BIAS as Title II services, setting the legal groundwork for Privacy and Data Security Order
- Imposed affirmative privacy and data security obligations on broadband providers of internet access that exceed those applicable to edge providers

Broadband Privacy and Data Security Order (cont'd)

- **April 3, 2017**: Pres. Trump signed CRA resolution rolling back the FCC's broadband privacy and data security rules
- **Democrats Respond**:
  - Sen. Blumenthal – Managing Your Data Against Telecom Abuses Act (MY DATA)
  - Sen. Markey – Restoration of the FCC's ISP privacy and data security rules
- **States Respond** (12 so far):
  - **AK**: Considering legislation that would bar ISPs from collecting PI from customers without prior express written consent
  - **IL**: Several bills: (i) "Right to Know"; (ii) app-focused bill that would prohibit tracking of user locations without consent; and (iii) IoT-related bill aimed at devices with microphones
  - **KS**: Require consent prior to selling data to third parties

Broadband Privacy and Data Security Order (cont'd)

- **States Respond (cont'd):**
  - **MD**: House bill would require express and affirmative permission to sell or transfer personal data
  - **MA**: Require express written approval from customer for collecting, using disclosing or otherwise disseminating PI
  - **MN**: Senate passed a bill that bars ISPs from selling personal data without express written consent
  - **MT**: Considering a law barring ISPs from being awarded state Ks if collect data w/out consent
  - **NY**: Several bills: (i) online privacy act; (ii) prohibiting selling of browsing history and other PI; and (iii) require ISPs to keep all customer information confidential in absence of written consent
  - **PA**: Six bills that would address various aspects of online privacy, such as how ISPs collect and sell data, disclosure obligations, safeguards and notifications, etc.
  - **RI**: ISP disclosure obligations as to how personal data is collected and shared with third parties
  - **VT**: Require state agencies to promulgate privacy and data security rules similar to the FCC's
  - **WA**: Calls for ISPs to obtain customer consent before collecting and using PI

THE FTC

New Administration, New Federal Trade Commission

- **January 25, 2017**: Appointed Ohlhausen as Acting Chair
  - Appointed Commissioner on April 4, 2012 to a term that expires in Sept. 2018
  - Joined by Commissioner Terrell McSweeny (appointed on April 28, 2014 to a term that expires in Sept. 2017)
- Has repeatedly expressed desire that the FTC approach "intervention decisions with a philosophy of regulatory humility . . . [such that] government actors must heed the limits of their knowledge, consider the repercussions of their actions, and be mindful of the private and social costs that government actions inflict."
- Three empty posts to be filled by President Trump, with potentially a fourth in September of this year. Traditionally at least two from each party.
- Candidates:
  - Sean Reyes, current Utah AG – business and technology friendly, but more on mergers and antitrust
  - Joshua Wright, former FTC commissioner – also famous for merger views

Acting Chair Ohlhausen's Views on Privacy

- **January 2015**: FTC Releases Staff Report on IoT
  - Commissioner Ohlhausen issues a separate statement
  - **Concurs** with much of the report:
    1. Agrees that IoT-specific legislation is not needed;
    2. Supports focus on consumer-oriented devices that collect sensitive information;
    3. Pointing to consumer harm resulting from data security failures, notes bipartisan FTC support for data security legislation;
    4. Agrees with the report's findings with respect to a myriad of methods to provide notice and choice while acknowledging the limits of these practices in the IoT space; and
    5. Highlights that a use-based approach may be the best way to address consumer privacy concerns
  - **Dissents** on a few points
    1. Does not support report's recommendation for baseline privacy legislation
    2. Disputes recommendation for data minimization

Acting Chair Ohlhausen's Views on Privacy (cont'd)

- **Ohlhausen Dissent in Nomi** (April 23, 2015):
  - **Background**: Uses its own sensors and its retail clients' Wi-Fi access points to collect media access control (MAC) address broadcast by a mobile device when it searches for Wi-Fi networks. Uses the information it collects to provide analytics reports to its clients about aggregate customer traffic patterns. Provided a means to opt out exclusively on its website.
  - **Privacy Policy**: "Nomi pledges to always allow consumers to opt out of Nomi's service on its website as well as at any retailer using Nomi's technology."
    - Key points of Ohlhausen's dissent:
      1. Did not store publicly broadcast info but hashed it and stored the hash
      2. Did not collect PI and was a third party contractor; no obligation to offer opt-out

Acting Chair Ohlhausen's Views on Privacy (cont'd)

3. Offered global opt-out on its website but Nomi's retail clients did not offer consumers such ability
4. Partially inaccurate privacy policy + no evidence of harm = waste of FTC resources
5. Problematic to apply *de facto* strict liability standard to startup company that went beyond its legal obligations to protect consumers and made a mistake with no benefit to itself
6. Net effect may be that companies choose to do the bare minimum with respect to privacy that would leave consumers worse off

Acting Chair Ohlhausen's Views on Privacy (cont'd)

- **Separate Statement in the FCC's Broadband Privacy and Data Security Proceeding** (May 27, 2016):
  - **Unfairness and Deception**: FTC approach is undergirded by focusing on the sensitivity of the consumer data and promises made with respect to same; FCC approach focuses on whether the holder of the data is BIAS provider, affiliate or third party
  - **FCC vs. FTC Approach**: The FCC requires opt-in consent for many uses of non-sensitive consumer data by BIAS providers, yet would require no consent at all for certain uses of sensitive data by those providers. In contrast, FTC recommends opt-in consent for unexpected collection or use of consumers' sensitive data such as Social Security numbers, financial information, and information about children. The FTC's framework applies to any entities, including browsers and internet platforms, that access such sensitive information.

Acting Chair Ohlhausen's Views on Privacy (cont'd)

- **Opt-in vs. Opt-out**: Regulations should maximize benefits while minimizing the costs. Opt-in or opt-out defaults should match typical consumer preferences such that costs (in the form of time and decision making) should only be imposed on consumers when it really matters. For sensitive information, this means opt in; for advertising based on non-sensitive information, opt out.
- **Do No Harm**: "If a regulation imposes defaults that do not match consumer preferences, it imposes costs on consumers without improving consumer outcomes. The burdens imposed by a broad opt-in requirement may also have negative effects on innovation and growth."
- **Sensitive vs. Non-Sensitive Information**: FTC previously identified sensitive data as data about children, financial and health information, Social Security numbers, and certain geolocation data.

Acting Chair Ohlhausen's Views on Privacy (cont'd)

- **VIZIO**: (Feb. 6, 2017)

1. Manufacturers TVs that continuously track what consumers are watching and transmits that info to VIZIO through software with a default "on" setting
2. Installed software remotely on previously sold TVs
3. Viewed programming data is collected from cable or broadband service providers, set-top boxes, external streaming devices, DVD players, and over-the-air broadcasts
4. Captures up to 100 billion data points daily from more than 10 million televisions
5. Stored this data indefinitely. Other information like IP address, wired and wireless MAC addresses, Wi-Fi signal strength, nearby Wi-Fi access points and other data also collected

Acting Chair Ohlhausen's Views on Privacy (cont'd)

- **VIZIO**: (cont'd)
  - **Three Main Uses of Collected Information**:
    1. Viewing data provided to third parties for audience measurement with persistent identifiers;
    2. IP addresses provided to third parties to determine whether a consumer visited a particular website following a TV advertisement; or whether a consumer viewed a programming content after exposure to an ad for such content (aggregate data used to measure ad effectiveness); and
    3. Provided data to third parties for purposes of targeting ads to consumers on other devices based on their TV viewing data. VIZIO also facilitated appending specific demographic information to the viewing data, such as sex, age, income, marital status, household size, education level, home ownership, and household value.

Acting Chair Ohlhausen's Views on Privacy (cont'd)

- **Concurring Statement of Ohlhausen**:
  1. Evidence demonstrates that consumers do not expect TVs to track info. VIZIO was tracking and consumers may have either elected to purchase a different TV or turned relevant setting off. Thus, not disclosing tracking was material and failure to disclose was deceptive or misleading under FTC Act Section 5.
  2. VIZIO complaint is first time FTC alleged in a complaint that individualized television viewing activity falls within the definition of sensitive info and sharing such info without consent is likely to cause "substantial injury" under Section 5(n) of FTC Act.
  3. May be good policy reasons for considering such info sensitive

Acting Chair Ohlhausen's Views on Privacy (cont'd)

4. FTC cannot by statute find that a practice is unfair based primarily on public policy
5. Relevant inquiry is whether the practice causes substantial injury that is not reasonably avoidable by the consumer and is not outweighed by benefits to competition or consumers

FTC Commissioner Candidates Views on Privacy

Reyes:

- Actions as AG seem to limit government power to invade privacy
- Smaller record on private company actions
- Likely to be more closely aligned with Wright than Ohlhaussen

Wright:

- Full dissent on IoT, finding no legal authority
- Full dissent on Nomi, finding lack of benefit to consumers

FTC v. AT&T Mobility, LLC – 9th Circuit Directs Dismissal on "Common Carrier" Grounds

- FTC alleges that AT&T committed an "unfair and deceptive" act in violation of Section 5 of the FTC Act by "throttling" data for "unlimited" data users.
- AT&T moved to dismiss, citing exemption for "common carriers"
- District Court denies motion, finding that "common carrier" exception only applies to activities as a common carrier.
- 9th Circuit reverses – ruling that "common carrier" exception applies to anything a common carrier may do.
- FTC seeking en banc panel review; AT&T opposes.
- In conflict with other Circuit Courts, Supreme Court review possible.

Likely FTC Privacy Agenda 2017 - 2018

- Internet of Things – looking for standards
- Supporting Privacy Shield, subject to EU skepticism, "waiting for a call"
- Improving privacy "harm lines" – LabMD and Wyndham thresholds
- Seeking comment on COPPA regulation change to have safe harbor programs require annual vendor assessments
- In-app purchases
- Mobile device tracking by app owners
- Regulating credit monitoring providers and their claims
- Extending jurisdiction to foreign manufacturers of connected products
- Helping business with ransom attacks

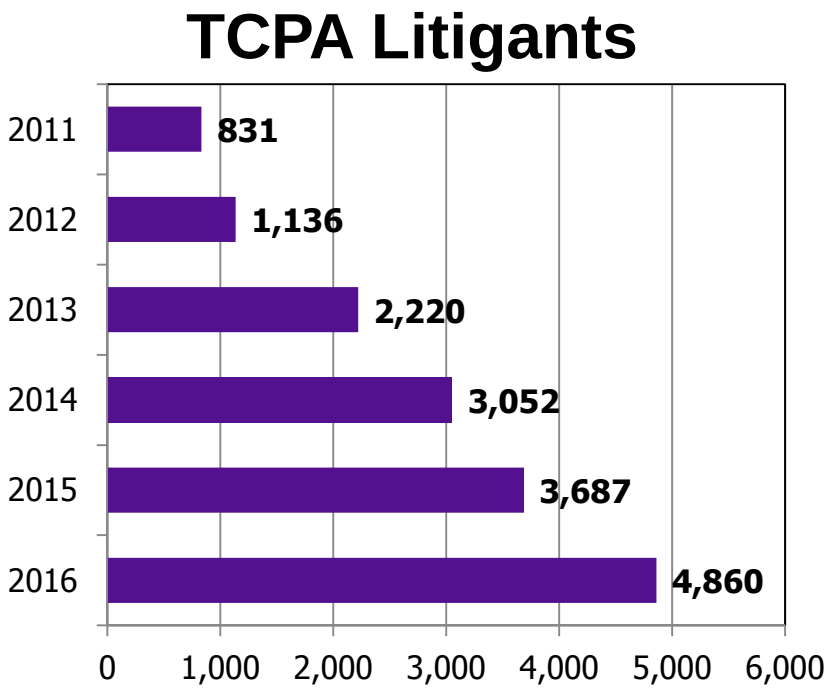
THE OVERLAP – THE TCPA

Telephone Consumer Protection Act (TCPA)

- Passed in 1991 to regulate robocalling and unsolicited faxes
- Expanded to include text messaging in 2003
- FCC has primary jurisdiction to interpret the TCPA
- FCC, FTC, and State AGs can enforce the TCPA and it includes a private right of action
- $500 per violation; trebled if willful

Automatic Telephone Dialing Systems (ATDS)

- ATDS is defined as equipment with the **capacity** to store or produce telephone numbers to be called, using a random or sequential number generator
- TCPA prohibits use of an ATDS to dial any telephone number assigned to a wireless service provider, or any service where called party is charged for the call
- Prohibited unless caller has the **prior express consent** of the called party or for emergency purposes



Source: WebRecon LLC

FCC's July 2015 Order

- FCC July 2015 Declaratory Ruling and Order
  - Broadens definition of "capacity"
  - Complicates revocation of consent for businesses
  - Liability for reassigned numbers
  - Appeal pending (*ACA International v. FCC*)
    - Oct. 19, 2016 – Oral Argument
    - Decision expected soon

ACA International v. FCC

- **Capacity:**
  - FCC Position: "Capacity" means equipment that can be modified to store or produce phone numbers to be called, using a random or sequential number generator
  - ACA International Position: Equipment must have the present capacity; any other interpretation would sweep in all programmable equipment
- **Revocation of Consent:**
  - FCC Position: Any reasonable method; calling parties cannot limit revocation
  - ACA International Position: Unworkable and interferes with general contract principles
- **Reassignment of Telephone Numbers:**
  - FCC Position: Must have consent of called party; one wrong call, then constructive notice
  - ACA International Position: No central database available and impractical; one call allowance is not enough

Commissioners Pai's/O'Rielly Dissent from the FCC's July, 2015 Order

- **Scope of the TCPA**
  - Disagree as to scope: Pai agrees that it should apply to text messages; O'Rielly does not
- **ATDS Issue:**
  - Dissented from the FCC's finding with respect to the majority's interpretation of "capacity" stating that it was "flatly inconsistent with the TCPA."
  - If equipment cannot store or produce numbers to be called using a random or sequential number generator and if it cannot dial such numbers then it does not satisfy the statutory definition of an ATDS
- **Reassigned Numbers**:
  - 37 million numbers reassigned every year and no authoritative database exists to track all disconnected or reassigned telephone numbers or to link all consumer names with their telephone numbers
  - Imposing strict liability for calls to reassigned numbers is likely unconstitutional

Commissioners Pai's/O'Rielly Dissent from the FCC's July, 2015 Order (Cont'd)

- **Revocation of Consent:**
  - Disagree as to whether revocation is permissible for non-telemarketing calls
  - Agree that the Order shifts the burden of compliance in absurd ways

Bais Yaakov of Spring Valley, et al. v. FCC

- **Procedural Background**
  - **2006**: FCC Adopts an Order requiring fax senders to include an opt-out notice on *solicited* fax advertisement
  - **2010:** A party files a Petition for Declaratory Ruling of the FCC rule requiring opt-out notices for solicited fax advertisements
  - **2012:** CGA Bureau rejects petition on procedural grounds: (i) no basis for relief; and (ii) impermissible collateral challenge of the rule. Notes that it would reject the Petition on substantive grounds too. Subsequently, same party files a Petition for Review
  - **Oct., 2014**: Commission affirms Bureau's finding and denies relief
    - Pai/O'Rielly Dissent: statute is clear in its application exclusively to *unsolicited* fax advertisements; FCC interject uncertainty in its interpretation and then relies on such uncertainty to fill-in gaps; point out procedural defects with the initial adoption of the rule.

Bais Yaakov of Spring Valley, et al. v. FCC (cont'd)

- **Opinion (2-1 Decision by DC Circuit)**
  - Relevant statutory provisions clearly distinguish between unsolicited and solicited fax advertisements
  - The Act does neither provides for nor grants the FCC with the authority to require opt-out notices on solicited fax advertisements
  - Majority highlights that both the FCC and the dissent share the position that provided Congress has not prohibited an agency to engage in an action, it may do so. Majority disagrees, instead, Congress must authorize agency action.
  - Vacates the FCC's 2006 Solicited Fax Rule

Fax Advertising Tips

- TCPA generally prohibits unsolicited fax advertisements
- FCC has adopted specific rules governing what an opt-out notice must include; failure to comply with these rules can lead to substantial liability under the TCPA
- Subject to a number of important obligations, fax advertisements may be sent to recipients that the sender has an EBR; opt-out notice is required on such faxes
- Due to DC Circuit decision, *solicited* fax advertisements may be sent with prior express invitation or permission from the recipient without a FCC-mandated opt-out notice but recipient should know how to opt-out and it should be easy
- Burden of proof that a fax advertisement was solicited and sent with prior express permission or invitation from the recipient is on the sender; recordkeeping is critical

Spokeo, Inc. v. Robins (2016)

- "Article III standing requires concrete injury even in the context of statutory violation."
- A plaintiff cannot "allege bare procedural violation, divorced from any concrete harm, and satisfy the injury in fact requirement of Article III."
- Congress "cannot erase Article III's standing requirements by statutorily granting the right to sue a plaintiff who would not otherwise have standing."
- Impact on the TCPA:
  - Still evolving but appears effective with respect to *de minimis* communications by the defendant, *e.g.*, receipt of a single or a few calls or text messages by the plaintiff
  - Winning on standing does not necessarily mean no further liability

Biography

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Ronald W. Del Sesto, Jr. is a partner in the telecommunications, media, and technology (TMT) practice group. Ron's practice concentrates on the representation of technology companies on a broad range of issues including corporate, financial, regulatory, and cybersecurity. Ron also advises financial institutions, private equity firms, and venture capital funds with respect to investments in the TMT sectors.

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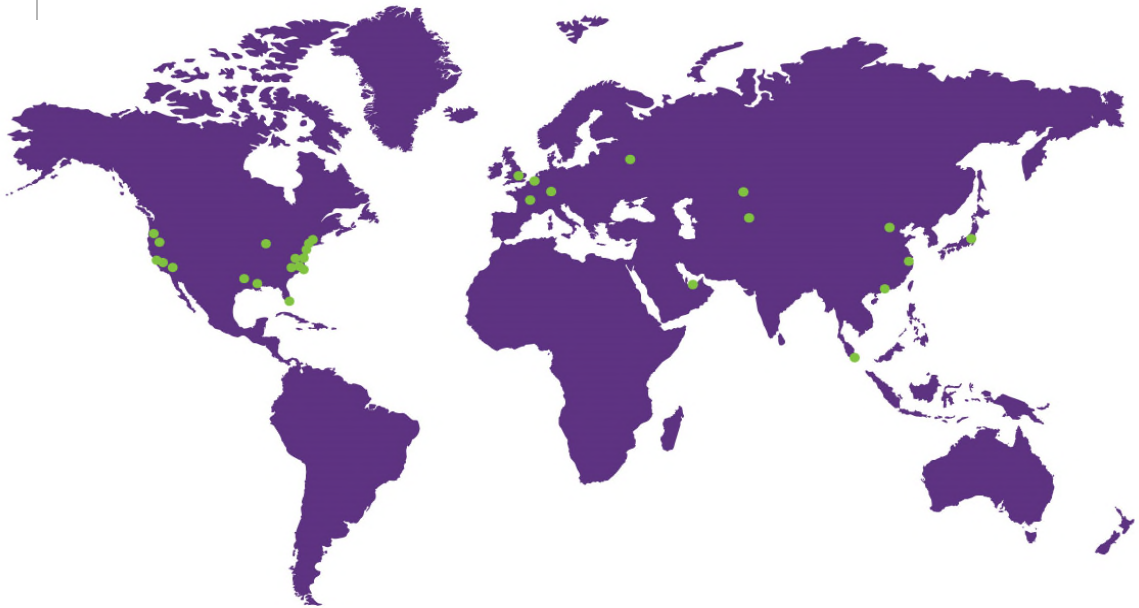

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*Our Beijing office operates as a representative office of Morgan, Lewis & Bockius LLP. In Shanghai, we operate as a branch of Morgan Lewis Consulting (Beijing) Company Limited, and an application to establish a representative office of the firm is pending before the Ministry of Justice. In Hong Kong, Morgan Lewis has filed an application to become a registered foreign law firm and is seeking approval with The Law Society of Hong Kong to associate with Luk & Partners.

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