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SEC/CORPORATE

Update: Proposed Amendments to DGCL, Including Ban on Fee-Shifting and Permitting Exclusive Forum Provisions

The Corporation Law Section of the Delaware State Bar Association has approved, in substantially the form proposed by the Delaware Corporate Council, amendments to the General Corporation Law of the State of Delaware (DGCL) that would prohibit so-called "fee-shifting" provisions in charters and bylaws, expressly permit "exclusive forum provisions" in a corporation's charter and bylaws, and make certain changes with respect to appraisal rights. The fee-shifting and exclusive forum proposals of the Delaware Corporate Council were discussed in the March 20 edition of *Corporate and Financial Weekly Digest*.

The proposed amendments would add new Sections 102(f) and 109(b) of the DGCL, which would prohibit the inclusion in any charter or bylaw (but without applying this prohibition to provisions in any other contractual agreements) of any provision that would "impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim." In addition, proposed Section 115 of the DGCL would expressly permit charter and bylaw provisions that require that "internal corporate claims" be brought exclusively in any or all of the courts of the State of Delaware. The term "internal corporate claims," as defined in the proposed amendments, includes claims (including claims in right of the corporation) based upon violations of a duty by a current or former director or officer or stockholder, in such capacity.

The proposed amendments to the DGCL also would provide an exception to the availability of appraisal rights under Section 262 of the DGCL. Specifically, under a proposed amendment to Section 262(g) of the DGCL, the Delaware Court of Chancery would be required to dismiss an appraisal proceeding with respect to any class or series of stock of a corporation listed on a national securities exchange immediately prior to the merger or consolidation of such corporation unless (1) the total shares entitled to appraisal exceeds 1 percent of the outstanding shares of the class or series entitled to appraisal, (2) the consideration provided in the merger or consolidation for such shares exceeds $1 million, or (3) the merger was a short-form merger pursuant to §253 or §267 of the DGCL. By eliminating certain *de minimis* appraisal claims, this provision would potentially assist in addressing concerns over increased appraisal activity by parties investing in target corporations for the sole or primary purpose of extracting a payment from the corporation (rather than engaging in a lengthy and costly appraisal process).

In addition, under a proposed amendment to Section 262(h) of the DGCL, the surviving corporation would have the right to pay each stockholder entitled to appraisal in advance of the entry of any judgment in the proceeding, which would stop interest from accruing, as otherwise required by Section 262(h), with respect to the amount paid.
The Corporation Law Section also approved other proposed amendments to the DGCL, including as to matters relating to calculation of consideration payable in exchange for stock or upon exercise of rights or options and ratification of defective corporate actions. It is expected that the proposed amendments to the DGCL will be presented to the Delaware General Assembly for approval.

The full text of the proposed amendments to the DGCL may be found here and here.

CFTC

CFTC and Australian Regulator Sign Memorandum of Understanding Regarding Cross-Border SDs and MSPs

The Commodity Futures Trading Commission and the Australian Prudential Regulation Authority (APRA) have entered into a memorandum of understanding regarding the supervision of CFTC-registered swap dealers and major swap participants that are located in the United States or Australia and that are also regulated by APRA as authorised deposit-taking institutions. The memorandum of understanding provides for communication and cooperation between the CFTC and APRA, including event-triggered notifications, request-based notifications, consultations regarding on-site visits and the treatment of confidential information.

The memorandum of understanding is available here.

LITIGATION

SDNY Denies Motion to Dismiss SEC Insider Trading Complaint Despite *Newman* Holding

The US District Court for the Southern District of New York recently denied two defendants' motion to dismiss a Securities and Exchange Commission complaint alleging that they committed insider trading, holding that the complaint adequately pleaded a receipt of personal benefit to the tipper as required by the US Court of Appeals for the Second Circuit's recent decision in *U.S. v. Newman*, 773 F.3d 438 (2d Cir. 2014).

The SEC alleged that, in 2009, defendants Daryl M. Payton and Benjamin Durant III received tips regarding IBM's imminent acquisition of SPSS Inc. and purchased securities relying on those tips, earning about $290,000 from the trades. According to the complaint, the tip originated from a lawyer working on the transaction who tipped a friend, Trent Martin; Martin then tipped his roommate, Thomas Conradt, who ultimately tipped the defendants. The SEC alleged that Martin had received personal benefits from Conradt in exchange for the tips, including arranging legal help for Martin when he was arrested for assault. The US Attorney for the Southern District of New York previously filed parallel criminal charges against Payton and Durant, but dropped those charges after determining they could not meet the Second Circuit's standard for personal benefits in insider trading cases as articulated in *Newman*.

The District Court held that the SEC properly pleaded that Payton and Durant committed insider trading. The District Court found that the finances of the defendants' tippee, Conradt and Conradt's tippee, Martin, were "intertwined," that they had a "*quid pro quo* relationship," and that the defendants knew of the relationship and that Martin was Conradt's source of the information. Additionally, the District Court determined that, in contrast to *Newman*, the complaint adequately pleaded that the defendants knew, or recklessly avoided discovering, that the tip originated from a breach of duty.

SEC v. Payton et. al., No. 1:14-cv-04644-JSR (S.D.N.Y. April 6, 2015).

US Sentencing Commission Revises Sentencing Guidelines for Fraud

The United States Sentencing Commission recently adopted new guidelines for sentencing in cases involving fraud and economic crimes, seeking to better account for the actual harm to victims, individual culpability and the offender's intent. The revised guidelines will be submitted to Congress on May 1 and will go into effect November 1 unless Congress disapproves of the amendments.

The new guidelines include a number of significant revisions. Among the changes, the Commission clarified that the "intended loss" caused by the offender is a subjective, rather than objective, inquiry that is measured by the harm "that the defendant sought to inflict," instead of the objectively predictable consequences. The Commission revised the enhancement system based on the number of victims of the offender's crime to provide harsher penalties on those who cause "substantial financial hardship" to more victims, whereas previously the tiered enhancement system was based on the total number of victims, regardless of hardship. In fraud on the market based cases, the guidelines now specify that the enhancement will be determined by the gain that resulted from the offense, rather than the loss.

The Commission's press release is available here.

BANKING

Federal Reserve Board Expands Small Bank Holding Company Policy Statement

On April 9, the Board of Governors of the Federal Reserve (Board) issued a final rule to expand the applicability of its Small Bank Holding Company Policy Statement and also apply it to certain savings and loan holding companies. According to the Policy Statement's provisions for bank holding companies, "the Board retains the right to exclude any savings and loan holding company, regardless of size, from the Policy Statement if the Board determines that such action is warranted for supervisory purposes." The Policy Statement facilitates the transfer of ownership of small community banks and savings associations by allowing their holding companies to operate with higher levels of debt than would normally be permitted. While holding companies that qualify for the Policy Statement are excluded from consolidated capital requirements, their depository institution subsidiaries continue to be subject to minimum capital requirements.

The final rule raises the asset threshold of the Policy Statement from $500 million to $1 billion in total consolidated assets. It also expands the application of the Policy Statement to savings and loan holding companies. All firms must still meet certain qualitative requirements, including those pertaining to nonbanking activities, off-balance sheet activities, and publicly-registered debt and equity.

The final rule implements a law passed by Congress in December 2014, and is effective 30 days after publication in the *Federal Register*.

Read more.

OCC Revises Guidance and Forms for Subordinated Debt Issued for Tier 2 Capital and Non-Capital Purposes

The Office of the Comptroller of the Currency (OCC) is revising and reorganizing its current guidance for subordinated debt issued by national banks (at appendix A of the "Subordinated Debt" booklet of the Comptroller's Licensing Manual) and replacing it with new "Guidelines for Subordinated Debt." The guidelines "are consistent with the regulatory capital rules at 12 CFR 3 and the licensing rules for national banks (at 12 CFR 5.471) and federal savings associations (at 12 CFR 163.80 and 12 CFR 163.812)." The new guidelines apply to all subordinated debt issued by national banks and federal savings associations (collectively banks), regardless of whether the subordinated debt is included in regulatory capital. The OCC also is revising the "Sample Subordinated Note" (at appendix B of the "Subordinated Debt" booklet) and replacing it with two sample notes for national banks. The first note provides sample language for a subordinated debt note included in Tier 2 capital, and the second provides sample language for a subordinated debt note that is not included in Tier 2 capital. The sample notes apply only to subordinated debt issued by a national bank because there is no pre-existing sample note for federal savings associations. The OCC is developing sample notes for federal savings associations and expects to publish the sample notes in the near future. The new guidelines and sample notes are effective for subordinated debt issued on or after April 3.

Following are highlights of new guidelines and sample notes:

- Section I of the guidelines provides general introductory information regarding the purpose of the new guidelines and the OCC's view that the new guidelines balance the broad discretion of a bank in structuring the contractual provisions of its subordinated debt with the concern that such provisions could unduly limit a bank's flexibility and authority.
- Section II of the guidelines describes the OCC's supervisory views on representations and warranties, affirmative covenants, negative covenants, events of default, contemporaneous loan agreements, and novel or extraordinary provisions.
- Section III of the guidelines describes additional requirements and OCC policies for subordinated debt included in Tier 2 capital. The OCC policies and areas of concern all relate to specific criteria for Tier 2 capital in the regulatory capital rules. The OCC anticipates that Section III may be revised as the OCC interprets applicable provisions in the regulatory capital rules.
- The OCC also is issuing two sample notes for national banks' subordinated debt: one sample note for a subordinated debt note that will not be included in Tier 2 capital, and another sample note for a subordinated debt note to be included in Tier 2 capital. The OCC is developing sample notes for federal savings associations and expects to publish the sample notes in the near future.

The sample notes include (1) required disclosures that must appear all in capital letters on the face of the note; (2) the amount and date of the note; (3) a paragraph identifying the parties to the instrument, the amount due, and the rate of interest; (4) a paragraph specifying the repayment terms; (5) a provision that describes the order and level of subordination; (6) a provision that describes the OCC's regulatory authority with respect to national banks; and (7) lines for the signature of the national bank official authorized to sign the note and the name and title of that official.

Read more.

OCC Issues New Handbook on Deposit-Related Consumer Credit

In March, the Office of the Comptroller of the Currency (OCC) issued the "Deposit-Related Credit" booklet of the *Comptroller's Handbook*. This booklet replaces and clarifies the "Deposit-Related Consumer Credit" booklet issued on February 11. The "Deposit-Related Credit" booklet references relevant supervisory guidance and includes examination procedures that OCC examiners use to assess a bank's deposit-related credit products and services. This *Comptroller's Handbook* booklet "is intended as a summary restatement of existing laws, regulations, and policies applicable to deposit-related credit products and services….[and n]othing in this booklet should be interpreted as changing existing OCC policy."

The OCC's "Deposit-Related Credit" booklet addresses:

- check credit products and services;
- overdraft protection services;
- deposit advance products; and
- risk management of third-party relationships involving these products and services.

Read more.

UK DEVELOPMENTS

FCA Finalizes Guidance on Multilateral Trading Facilities

On April 15, the Financial Conduct Authority (FCA) published its final guidance (Final Guidance) relating to the operation of multilateral trading facilities (MTFs) pursuant to the FCA's applicable market conduct rules (MAR 5). On December 1, 2014, the FCA published its initial guidance (Initial Guidance) for market consultation. The consultation period ended on January 16, 2015. Prior to its publication of the Initial Guidance, the FCA undertook a thematic review of the rulebooks of MTF operators and issued a questionnaire regarding compliance with MAR 5 to a sample of UK MTF operators.

The Final Guidance details the primary MAR 5 requirements as well as provides the FCA's good practice observations relating to the rulebooks of MTF operators. The Final Guidance includes a letter (Letter) from the FCA to the chief executive officers of all UK authorized firms operating MTFs. The Letter states that the FCA expects all MTF operators to be able to demonstrate that they have considered the FCA good practice observations when determining their approach.

The Final Guidance emphasizes the requirement under MAR 5.3.2 that a firm operating an MTF must have transparent and non-discretionary rules and procedures for orderly trading. As part of the transparency requirement, the FCA expects that an MTF operator will have a rulebook in place, which will be publicly available on the MTF operator's website.

A copy of the Final Guidance, including the FCA good practice guidelines and the Letter can be found here.

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