THOMPSON HINE

Business Law Update

Fall 2021

Business Perspectives

By Frank D. Chaiken, Practice Group Leader, Corporate Transactions & Securities

Welcome to the Fall 2021 edition of our *Business Law Update*. We continue to live in very interesting times, as the proverb says. A few years ago, policymakers were wishing for more inflation, and worrying about its opposite. Be careful what you wish for.

We now are seemingly in a shortage economy, where demand for goods and services outstrips supply, and prices are on the rise. There is a healthy debate about the causes and how long this trend will last, but no doubt it is real. From basic economics we understand that under our market-based system, firms will respond to meet this increased demand and prices will swing back toward equilibrium.

We also see this in the corporate transactions and financing work we are handling for clients, who are deploying capital, hiring staff (when they can find them), and making plans for the future. As always there are complicating factors and major trends in play that impact the development of these trends. We cover a few of these in this quarter's edition.

- **Will Henry** and **Courtney Flowers** provide a primer on the M&A sale process focusing on sellers. One of the other current megatrends is the demographic transition of businesses from the baby-boom generation to Gen X and later cohorts. This process has been underway for some time and will continue for quite a while. Estimates of the total value of enterprises to be transferred in the coming years vary, but generally are in the trillions of dollars, which will fuel a lot of M&A activity.
- **Greg Chafee** addresses the growth of ESG factors – environment, social and governance – and sustainability on business operations, in particular as these are driving increased interest in renewable energy investments. Our partner **Jurgita Ashley** wrote about

Recent News & Related Articles

- Changes to HTSUS Classifications Expected in January
- ASTM Issues New Phase I Environmental Standard
- STB Hearings Include Reciprocal Switching; STB Proposes Small Rate Case Rules
- Crowdfunding Continues Changing the "Rules" of Venture Capital
- Chemical Industry Regulatory Update
- DoD Announces (New) CMMC 2.0
- OSHA Issues COVID-19 ETS for Large Private Employers
- A 50-Year-Old Venture Capital Model Reinvented
- Employment Legislation Outlook
- SEC Proposes Enhanced Proxy Voting Disclosures

For more details on any of the topics covered in this *Business Law Update*, please contact the authors via the links at the end of each article or David R. Valz, editor-in-chief. For information on our Corporate Transactions & Securities practice, please contact Frank D. Chaiken, practice group leader.

this topic as well in our Summer 2021 edition, and also recently published an article in a prominent corporate governance blog ("ESG Governance: Board and Management Roles & Responsibilities").

- **Lindsay Karas Stencel** and **Jasmin Hurley** explore the benefits of business certification for startups and small businesses.
- And looking ahead to the post-expansion period, **Curtis Tuggle** and **Austin Alexander** review the basics of a proof of claim in bankruptcy.

As always I hope you will find this information interesting and impactful for your business, and of course let us know if there are any questions or you would like more information about any of these topics.

Frank Chaiken leads the firm's highly regarded Corporate Transactions & Securities practice and its more than 100 professionals, representing clients of all sizes across virtually every industry. If you have questions or would like to share your thoughts, please contact Frank at 513.352.6550 or by email to Frank.Chaiken@ThompsonHine.com.

Thompson Hine's ESG Collaborative

Environmental, social and governance (ESG) criteria are a set of nonfinancial standards for business operations that investors and other key stakeholders are increasingly applying as part of their evaluation to identify material risks and growth opportunities. Prioritizing these objectives has become an essential commitment for businesses and other organizations. Thompson Hine's multidisciplinary ESG team helps clients achieve success in each of these areas as we partner with them to meet their evolving ESG needs and objectives.

Earlier this fall, Thompson Hine asked in-house counsel and senior corporate executives for their thoughts and experiences related to a number of key ESG issues, including:

- The status of their companies' implementation of ESG practices and programs
- The nature of the disclosures they are providing or planning to provide
- Their short- and long-term ESG-related needs and challenges
- Delegation of ESG oversight responsibilities within the company—including the role of general counsel in ESG efforts
- How and against which metrics they are measuring their success in meeting ESG objectives
- Best practices

To read or download the survey report, please visit ThompsonHine.com/Publications/An-ESG-Snapshot. And for additional resources and information about our team's experience, see ThompsonHine.com/Services/ESG-Collaborative.

Mergers & Acquisitions

What to Expect When You're Selling: A Primer on the M&A Sale Process for First-Time Sellers

By Will Henry and Courtney Flowers

Selling your business, whether to move on to other ventures or because you are ready to retire, is simply one of the most critical events in your life. Seasoned M&A lawyers will take the time to walk you through the process, from the time you engage an attorney (most likely a team of attorneys) through the time your business is officially sold (i.e., the transaction has "closed," in M&A parlance). However, as the process unfolds it can easily seem overwhelming. With the hope of reducing the number of things that keep you awake at night, in this article we broadly describe some of the key components of the sale process.

1. **Timing.** From the moment you decide to sell your company, the process can be as quick as a few months to a year or more, depending on a number of things, including how long it takes to find a buyer, if the buyer is fast-moving or very thorough, whether your business is heavily regulated, and, as with many large transactions, the state of the economy at large. We often advise clients selling their businesses to hope for the best and push for speed, but to appreciate that patience may be necessary.
2. **Letter of Intent.** The letter of intent (an "LOI") is usually the first document your lawyers will help you negotiate, and, while only a few pages in length, it will include the major terms (purchase price, confidentiality, structure, financing, etc.) that will later show up in the purchase agreement (described below). It is a "non-binding" document—so merely signing it doesn't mean you're done!—but it sets forth the parties' expectations for the deal.
3. **Due Diligence.** After the LOI, in the "due diligence" phase, you will receive a request list from the buyer asking you to provide a range of documents asking all sorts of questions about your business—who owns it, what do your financials say, what contracts are in force, etc. Most request lists will have tens, if not hundreds, of requests, so maintaining organization in your responses will be critical. Typically, you will upload your responses to a data room—an online site where the documents can be securely read by the buyer. What's more, after you've responded, the buyer will most likely have follow-up (supplemental) requests, so the due diligence phase can be lengthy, but it is vital for the buyer's understanding of the company they are looking to buy.
4. **Purchase Agreement.** The purchase agreement will be the most critical agreement, as it quite literally is the agreement that sets forth the key terms of the purchase (and sale!). This agreement may be between 30-70 pages on average and will contain some of the following key terms:
    a. Description of what you are selling (stock? assets? other items?);
    b. Items you'll have to provide to the buyer to close ("closing deliveries"), including ancillary agreements (as noted below);
    c. Representations and warranties—these are items that involve you making statements about the company (things like, "these are the contracts of the company," "our financial statements are accurate" and "yes, I in fact own the company"). Your lawyers will spend a lot of time negotiating these on your behalf;
    d. Non-competition agreements (i.e., the buyer won't want you selling your business and using the proceeds to start a competitor); and
    e. Indemnification provisions (i.e., if your above representations aren't true, the buyer will want some money back).
5. **Schedules.** As part of the purchase agreement, you will be required to make (or, literally, "schedule") certain disclosures about your business. Each schedule corresponds to the representations you make (as noted above), for example, requiring you go through all of the

representations in the purchase agreement line by line to list out your contracts or provide financial statements. For this reason, schedule preparation, like diligence, is among the most time-consuming tasks for sellers because you are typically reviewing the diligence you provided earlier and then formally listing it out on the schedules.

6. **Ancillary Agreements.** The purchase agreement will also refer to "ancillary agreements," which are shorter, more specific agreements such as transition services agreements, assignment and assumption agreements, intellectual property assignment agreements, real estate leases or deeds, employment agreements, etc. The nature and type of these agreements vary from deal to deal, but there are virtually always a few ancillary agreements.

7. **Separate or Simultaneous Sign and Close.** In some deals, the buyer and seller sign the purchase agreement and close the same day; in others, the purchase agreement is signed on one date but the sale itself occurs on a later date. You will want to ask your lawyers which makes sense for you, as there are various factors (size of the deal and regulatory requirements among them) that can influence which structure is best.

8. **Closing.** It's almost time! In the days before closing, your lawyers will organize all of the final documents (including the purchase agreement!) and sort them for you to sign in advance of closing. Then, when the parties are about ready to close, your lawyers will share your signed documents with the buyer, and the buyer will do the same with its signature pages. Both your lawyers and the buyer's lawyers will review the documents to make sure everything is there, and if so, the parties will often have a short "closing call" (often 10 minutes or less, quite anticlimactically) to speak and agree that the closing—the sale!—has occurred. It is typically after this call when the buyer will wire the purchase price to your account (you will give them the account information just before closing).

9. **Post-Closing.** Even after the closing, while most of the work is done, you might ask your lawyers what else needs to be done, if anything. Often there are some legal loose ends to tie up, including post-closing adjustments to the purchase price and earn-out payments. Also, if you have agreed to stay on with the business as part of a transition services or consulting agreement, that period will usually start right after the closing.

Selling your business is a once-in-a-lifetime, defining event for most people, making it both stressful and, ultimately, exciting. Take comfort in knowing that your advisers (including your lawyers) will be with you every step of the way to work hand in hand with you, manage your expectations (and stress level!) and smooth the path for a beautiful ride.

Please contact Will Henry or Courtney Flowers with any questions.

Environmental, Social & Governance (ESG)

ESG Strategies Are Driving Corporate Investments in Renewable Energy

By Gregory D. Chafee

Environmental, social and governance (ESG) refers to three key factors that measure the sustainability and ethical impact of an investment. ESG has emerged as a major influence on corporate policies and practices as businesses and investors are increasingly called upon to address topics such as inclusion, workplace safety, environmental equity and access to affordable health care. The global pandemic is accelerating the impact of ESG as businesses face unique challenges and adapt to rapid change and new ways of operating and decision making.

Many large public companies are at the forefront of ESG strategies and are implementing sustainability measures. Smaller public and private companies will need to follow their lead. ESG disclosure obligations and reporting of ESG progress and policies are increasingly shaping how businesses allocate investment dollars in growing international markets. For example, businesses are now required to report the proportion of total investment that is considered sustainable under new European Union (EU) regulations. Along with expanding regulatory requirements, market forces will continue to impact ESG investment, and companies will commit more and more capital to sustainable practices. Businesses and their suppliers and customers are creating new connections, strategic alliances and partnerships to reduce their environmental impacts and advance sustainability.

Environmental issues often drive social and governance practices. Climate change is having a major effect on the ways that businesses plan, assess risk and deploy resources. Investors are asking how businesses are reducing their carbon footprint. Companies must demonstrate real progress, and there is increasing demand for investments in fossil fuels not to exceed a certain share of total spending. Businesses are responding to these influences by developing and executing ESG strategies that include four main steps: renewal, recovery, removal and reporting. Renewal means executing a transition towards sourcing more renewable energy. Recovery means addressing improvements in energy efficiency. Removal means reducing greenhouse gas emissions. Reporting means measuring and tracking sustainability performance, including internal and external performance audits. ESG rating agencies are starting to evaluate how quickly companies decarbonize their energy mix.

All this is fueling the dramatic growth of renewable energy, especially investment in solar power. In 2020 the United States saw its fifth consecutive year of renewable energy growth, reaching a record high 12% of total energy consumption according to the U.S. Energy Information Administration (EIA). Total corporate spending for solar projects, including venture capital funding and debt financing, reached $13.5 billion in the first half of 2021 compared with $4.6 billion in the same period last year. By 2030, renewable energy is forecast to produce 22% of U.S. electricity generation, surpassing both coal and nuclear power.

Market leading companies such as Walmart have seen their commitment to solar energy pay off. Walmart has become the number one commercial solar energy user according to the Solar Energy Industry Association and is now recognized as the largest onsite renewable energy user in the United States by the EPA Green Power Partnership. Apple, Amazon, Google and Target are other household names expanding the use of solar power nationally.

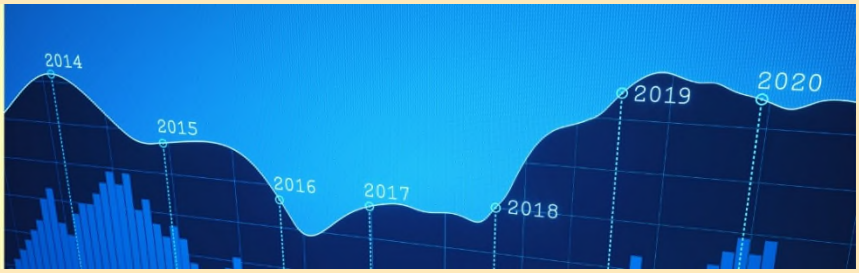
The 26% federal investment tax credit, combined with state and local programs, policies and incentives, renewable energy credits (RECs), declining installation costs, improved technologies such as battery storage, and creative financing arrangements provide strong reasons for businesses to invest in solar power as part of their ESG initiatives. Projects can be sized to meet the needs of customers and energy consumers, ranging from parking lot canopies to rooftop

systems to large ground-mounted facilities. Even small businesses have the option to match their energy usage requirements to the scale of their investment in solar resources.

For businesses investing in solar power for the first time, the process of evaluating and choosing vendors and determining the right ratio of investment to return can be challenging. Working with experienced and knowledgeable developers and contractors is an important step in effectively managing risk and maximizing results. Multiple factors influence performance, from site selection to optimizing discounts, rebates and tax incentives. Additionally, many businesses are engaging in energy performance assessments and independent audits to help evaluate opportunities for additional savings through the installation of "smart" systems and equipment and even steps as simple as substituting more efficient LED bulbs in light fixtures.

Thompson Hine works closely with lenders, investors, developers and contractors, among others, to help our clients implement effective ESG strategies, including structuring innovative solar and cleantech projects that can generate significant financial benefits while reducing and offsetting greenhouse gas emissions. We help clients select business partners and "right size" projects to maximize their economic value through creative and efficient financing arrangements and skillfully negotiated contract terms.

Please contact Greg Chafee in our Energy group to learn more about how we may be able to help your business.



Securities Quarterly Update – Fall 2021

Please visit our website for the latest edition of *Securities Quarterly Update*, our publication that provides updates and guidance on securities regulatory and compliance issues. In this edition, we look at recent announcements related to environmental, social, and governance (ESG), SEC enforcement actions, 10b5-1 plans, and Form 10-K and proxy statement considerations, among other topics.

Small Businesses & Startups

Business Certification: Good Business for Small Business

By Lindsay Karas Stencel and Jasmin Hurley

Business certification can play a crucial role for businesses that are looking to gain access to supplier diversity programs and compete for government contracts set aside for historically underrepresented groups. Yet, few owners and founders know about the process, or truly understand the value it can bring to their business.

Business certification is verification of the diverse status of the owner or owners of a business. This includes women, minorities, LGBTQ+ individuals, veterans, those with disabilities, and individuals living and operating in areas that are separated from mainstream society. Federal, state and local authorities, such as the Small Business Administration (SBA), as well as national organizations, such as the National Minority Supplier Diversity Council (NMSDC), review the eligibility of businesses in order to award certification to those that qualify. Depending on the certification, a business may retain its status for the lifetime of the business (provided it remains in compliance). Other certifications may lapse after a certain period of time, particularly those certifications with eligibility requirements tied to economic thresholds. In addition to awarding certifications, certifying authorities like the SBA and NMSDC provide support to business owners and founders in the form of education, access to grants and other sources of capital, notification of bidding opportunities, business matchmaking events, and inclusion in business listings.

While requirements may vary slightly among the certifying authorities, one key element remains the same: an eligible business must be 51% owned *and* controlled by a diverse owner or owners. This requirement may present a problem for certain businesses, particularly startups seeking funding. Adding non-diverse investors to the cap table may dilute both ownership and control of the diverse founders to the point that the business is no longer eligible to seek or maintain certification.

The traditional advice for founders contemplating certification has always been to "pick a path": certification or investment. However, the landscape is changing, giving founders more options to continue to pursue or maintain certification. There has been a notable increase over the last decade in venture capital firms not only focused on diverse founders, but also *owned* by diverse founders. Further, NMSDC provides a "Minority-Controlled Business" certification for those previously certified businesses that may no longer meet the ownership requirement.

Regardless of whether a business has been operating for a year or many years, business certification presents a worthwhile opportunity for growth. Please see our quick reference resource, "Diversity Certification: Good Business for Small Business," which outlines a number of certification authorities and programs and provides links to access more information.

Please contact Jasmin Hurley or Lindsay Karas Stencel with any questions.

Bankruptcy

Bankruptcy Proof of Claim Basics

By Curtis L. Tuggle and Austin Alexander

When a company receives notice that one of its customers has filed for bankruptcy, the initial response may be "Great, there goes the prospect of receiving payment of those outstanding invoices." While that may be the ultimate outcome, the only way that result may be locked in with certainty is if the company fails to properly assert its claim against the debtor customer in the bankruptcy proceeding. Fortunately, in many instances, filing a proof of claim in a bankruptcy is a simple and straightforward process, and may not even require the assistance of counsel.

Completing the Proof of Claim

For claims against the debtor that existed at or before the time the debtor entered bankruptcy, otherwise known as prepetition claims, creditors should use the general form that is available, with instructions, on all bankruptcy court websites. This "proof of claim" is the vehicle for a creditor to assert its claims against the debtor in the bankruptcy proceeding (the automatic stay of bankruptcy prohibits creditors from asserting claims against the debtor outside of the bankruptcy proceeding and from exercising control over any of the debtor's property). To properly complete the proof of claim, the creditor must, among other things, identify the prepetition amount owed, describe the basis of the claim, designate whether the claim is entitled to priority (such as, for example, a claim based upon goods shipped to the debtor within 20 days of the bankruptcy filing), and designate whether the claim is fully or partially secured. For claims against the company's customers, the most common form of security is a right of set off, which may exist if the company's customer is entitled to credits against the balance the customer owes the company (for example, for defective goods, deposits, outstanding warranties or repairs), in which case the company creditor must reflect those set off rights in the proof of claim in order to prevent waiving them. Finally, the creditor should attach supporting documentation, such as unpaid invoices, to the proof of claim. Of course, the creditor should consider whether any supporting documentation is confidential or contains sensitive information and, if so, consider whether that information should not be publicly filed with the proof of claim but rather made available later in the process, if necessary, after a protective order is entered to preserve confidentiality.

Deadline for Filing a Proof of Claim

The deadline to file a proof of claim varies from case to case and is set by the Federal Rules of Bankruptcy Procedure. In all cases, creditors will receive a notice of the bankruptcy which may include the deadline to file a proof of claim, also known as a bar date. In cases where a proof of claim is not required, the bar date may not be set at the time the bankruptcy notice is sent to creditors. Generally speaking, in a Chapter 7 or Chapter 13 case, a proof of claim must be filed no later than 70 days after the case is filed. In Chapter 11 cases, the bar date may depend on local practice or court order, and the amount of time provided to file a proof of claim can vary.

Filing a Proof of Claim

Even though there are some situations where the filing of a proof of claim is not required to receive distributions from the bankruptcy estate, absent unique jurisdictional considerations, it is a best practice to timely complete and file a proof of claim in every case. Not only does the proof of claim provide the creditor with the opportunity to present the specific amount, nature, basis, and priority of the claim, it also provides the debtor with accurate contact information for the creditor and allows the creditor to provide specific instructions for remitting distributions to the creditor.

Completing and filing the proof of claim form are often something that a company can do without the assistance of legal counsel, but if there is uncertainty, it is best to consult a bankruptcy attorney. Mistakes in completing the proof of claim can result in either a delay or outright denial of payment on your claim. While there is a right to amend a

proof of claim, there are limitations, and amendment should not be relied upon to address errors. In many cases, the proof of claim is filed with the bankruptcy court. However, in large cases, the debtor may have retained a claims agent to administer the proofs of claim, and the claims agent almost always maintains a separate website with information concerning the bankruptcy, including specific instructions and requirements for properly filing a proof of claim.

After the proof of claim is filed, the company should confirm that it was received by the court (or the claims agent). The company should also monitor the bankruptcy case going forward and remain vigilant so it can respond to any objection that is filed to the claim.

Objection to Proof of Claim

Finally, if a proof of claim has been filed, any party in the bankruptcy case may object to it. In almost all cases, it is advisable to hire counsel to respond to the objection. Failing to respond will likely result in the disallowance of the claim, meaning you will not receive any distribution from the bankruptcy and may waive other important rights. Typical objections include disputes over the amount of the debt and the failure of a creditor to attach adequate supporting documentation to the proof of claim. Often, an objection to a claim can be resolved by agreement without the necessity of a hearing or adjudication by the bankruptcy court. In situations where there is a substantial amount at stake or strong disagreement, a creditor may be required to present evidence, including witnesses, at a hearing and allow the bankruptcy court to resolve the claim dispute.

Conclusion

Using the standardized forms for presenting a claim in bankruptcy is one of the simplest and most cost-effective ways to protect a company's rights and maximize the chances of obtaining a recovery from customers in bankruptcy. Developing internal procedures for ensuring the timely completion and filing of proofs of claim is an essential function for any company's credit account managers. To start, the company should consider using a simple checklist, like the one that follows.

Proof of Claim Checklist

1. When is the deadline for filing claims (aka the bar date)?
2. How much is owed?
3. Is the claim entitled to priority status?
4. What documents exist that establish the debt and are they confidential?
5. Where must the claim be filed?
6. Do I need to consult with a lawyer before filing the proof of claim?

Please contact Curtis Tuggle or Austin Alexander with any questions.