THOMPSON HINE

Business Law Update

Winter 2022

Business Perspectives

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

Winter 2022 is waning and so we are getting out our winter edition of the *Business Law Update* just in time.

Just about two years into the SARS-CoV-2 pandemic there seems to be a light at the end of the tunnel. COVID-19 and the omicron wave are subsiding, for now, but their effects will be felt for a good while, if not permanently.

At our firm we are rolling out our Future of Work proposal. This likely will include many of the new ideas about working together that we have all learned to embrace—relaxed dress codes, working remotely from home, videoconferencing. In many of our office locations governments are starting to relax mandatory pandemic-related measures such as masking, quarantines, testing—welcome developments. Hopefully this opening up will continue through the year and we can begin to "unlearn" some of the necessary yet isolating habits that have become so engrained in the past two years.

Meanwhile business law continues to develop and adapt to the times. In this edition we cover:

- Modernization of states' limited liability company statutory frameworks as exemplified by the reform of the Ohio Limited Liability Company Act
- Developments in Environmental, Social and Governance (ESG) reporting by public companies
- Small business financing under the 2021 State Small Business Credit Initiative, a part of the American Rescue Plan Act
- An update on the latest revision to the U.S. merger control review thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR)

Recent News & Related Articles

- SEC Proposes Amendments to Form PF
- Employment Legislation Outlook
- Eighth Circuit Avoids Intradistrict Split and Evaluates Standing in FDCPA Case
- Chemical Industry Regulatory Update - February 2022
- FTC Announces Increases to HSR Filing Thresholds for 2022

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.

- Import regulations addressing the possible use of forced labor by exporters to the United States
- Release of directors, officers and other third parties from liability when a company is going through bankruptcy

As this goes to press the Olympics have wrapped up, the Bengals' Cinderella Super Bowl run came to a tight (and from a Cincinnati perspective, unsuccessful) finish, and world affairs continue to throw out new challenges and opportunities. We hope this finds you well and hopeful for the future. As always, please let us know of any questions, concerns, or ways we can help you achieve your goals.

All the best,

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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.

The Latest on the Ukraine/Russia Crisis

Thompson Hine's International Trade practice group is closely monitoring the trade-related developments occurring in connection with Russia's invasion of Ukraine, including the wide variety of sanctions, export bans/restrictions, foreign direct product rules and other financial measures being implemented by multiple U.S. agencies against Russia and Belarus.

Below is a list of our recent updates (newest to oldest). Please visit our SmarTrade blog regularly for current information on the evolving situation. To receive an email notification when we publish new updates, please subscribe to the blog.

- OFAC Issues Clarifying Guidance on Its Russia Sanctions and Amends Several General Licenses (March 3)
- DDTC Announces Export Prohibitions of ITAR Articles to DNR and LNR Regions of Ukraine (March 1)
- OFAC Sanctions Russian President Vladimir Putin and Additional Russian Financial Institutions (Feb. 28)
- OFAC Further Expands Sanctions Against Belarus and Russia's Financial Sectors (Feb. 28)
- United States Imposes New Russia-Related Export Restrictions (Feb. 25)
- President Biden Sanctions Nord Stream 2 AG as a Result of Russia's Invasion of Ukraine (Feb. 24)
- OFAC Implements Additional Sanctions on Russian Financial Sector and Individuals (Feb. 23)
- Webinar Recording – The Global Ripple Effect of the Ukraine/Russia Crisis: The Potential Impact of Sanctions (Feb. 23)
- President Biden Imposes Sanctions Regarding Russia's Efforts to Undermine Ukraine (Feb. 22)

General Corporate

Move Over, There's a New Act in Town: Ohio's Revised Limited Liability Company Act

By Will Henry and Cassidy M. Cleland

Ohio's existing Limited Liability Company Act, which had been in place since 1994 (with some amendments along the way), is no more. On February 11, 2022, one year to the day after Ohio State Senators Kristina Roegner and Nathan Manning introduced Senate Bill 276 to repeal the 1994 Act (Ohio Revised Code Chapter 1705) and amend and restate it, the new and improved Revised Limited Liability Company Act took effect. The Revised Act even has a new address: Ohio Revised Code Chapter 1706.

To get you ready for questions clients may ask you (or, if you are a client, questions you might ask!), below is a list of some of the key changes of which lawyers (and business owners!) working with Ohio LLCs should be aware.

Series LLCs

Probably the most novel change in the Revised Act permits the creation of "series," effectively sub-classes within the limited liability company with (1) distinct rights, powers or duties and (2) separate purposes or investment objectives. Classes of assets owned by one series may be shielded from the risk of liability of others within the same larger limited liability company. For that reason, there must be at least one member in each series (i.e., no "empty" series to avoid liability). In theory, this approach will save business owners the complexity of creating multiple limited liability companies when just one limited liability company (with multiple series) will do. Whether it will be used in a widespread fashion remains an open question, but good on Ohio for adding the option of flexibility for business owners. Notably, there are corresponding changes to indemnification providing for increased flexibility, as the Revised Act allows for distinctions among series of LLCs with its indemnification powers – meaning an individual series can separately indemnify differing parties. (Revised Act §§1706.05 (D); 1706.32; 1706.76 et. seq.).

Managers versus Members versus … Flexibility?

The Revised Act does away with the (formerly rigid) distinctions in the 1994 Act between manager-managed and member-managed limited liability companies. Instead, the default is now that members control activities and affairs, but a limited liability company may modify this default with its Articles of Organization or Operating Agreement. Managers are no longer an express option, allowing for more flexibility in governance (and titles) generally. (Revised Act §§ 1706.30 (A)-(E); 1706.31 (A)-(H)).

Statutory Agent Requirement

The Revised Act imposes a penalty (which did not exist in the 1994 Act) permitting the Secretary of State to cancel a limited liability company (i.e., render it inactive/not in good standing) 30 days after notice if there is not a proper statutory agent on file related to the limited liability company. The limited liability company can be revived upon correcting the statutory agent issue along with potential payment of nominal penalties. (Revised Act §1706.09 (A)-(L)).

Foreign Qualification Penalties

Likewise, the Revised Act provides that if the Ohio Secretary of State determines that a foreign (i.e., non-Ohio) limited liability company is doing business in Ohio without proper certification, the Revised Act allows for the imposition of a monetary penalty and/or enjoinment of the foreign limited liability company from conducting business in Ohio. It is not entirely clear what would give rise to the Secretary of State making this determination, but nonetheless penalties are now an express statutory option. (Revised Act §1706.515 (C)-(D)).

Fiduciary Duties

In the 1994 Act, the only fiduciary duties a member owed to a limited liability company and the other members were the duties of loyalty and care. The Revised Act adds liability for bad faith violations of good faith and fair dealing, which can no longer be eliminated. (Revised Act §§1706.31 (A)-(H); 1706.311 (A)-(H); 1706.08).

Creditors' Claims

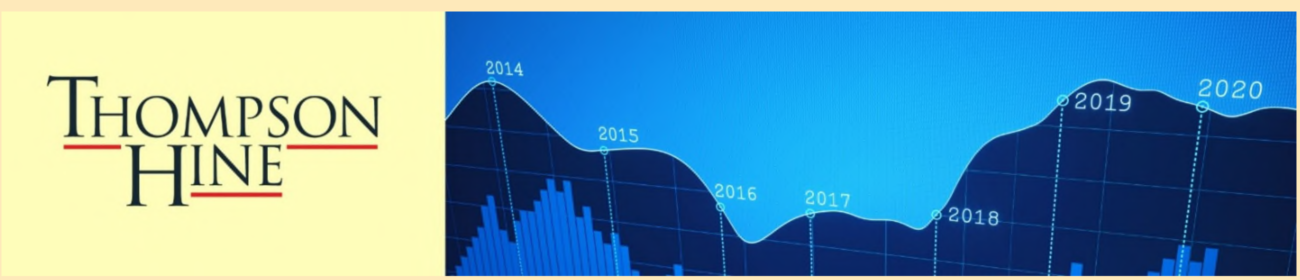
The Revised Act uniquely empowers a limited liability company to specify a deadline in its Operating Agreement to resolve "known" creditors' claims upon dissolution. The deadline must be at least 90 days (to give known creditors a reasonable period of time to chase the dissolving limited liability company). Regarding unknown claims, like the 1994 Act, the Revised Act has no time limit. (Revised Act §§1706.473; 1706.7611; §§ 1706.342 (A)-(B), (F); 1706.475 (A); 1706.7613 (A)).

Filing Forms

Happily, all your favorite/key terms in the Revised Act (such as "operating agreement," "member" and "articles of organization") remain the same as in the 1994 Act. However, all filing forms have been updated, so if you wish to form (or dissolve, or merge, etc.) an Ohio limited liability company and you do it on the "old" (pre-February 11, 2022) form, it will likely be rejected. (So make sure to update your form library accordingly!). New filing forms can be found at the Ohio Secretary of State website.

As the Revised Act went into effect on February 11, 2022, many existing LLCs may consider modifications to their existing Operating Agreements, and newly formed LLCs may wish to take stock of the above changes and, at a minimum, will need to utilize the new forms and reference Section 1706 in their limited liability company documents.

To view or download a more comprehensive list of the changes (PDF), please visit our website: Summary of Ohio and Delaware Limited Liability Company Statutes. If you have any questions, please contact Will Henry or Cassidy Cleland.



Securities Quarterly Update – Winter 2022

Please visit our website for the latest edition of *Securities Quarterly Update*, our newsletter that provides updates and guidance on securities regulatory and compliance issues. In this edition, we look at ongoing disclosure developments, including those related to environmental, social and governance (ESG) issues, that public companies should consider as they prepare their annual reports on Form 10-K.

Environmental, Social and Governance (ESG)

Class Certification in Long-Running Securities-Fraud Suit a Cautionary Tale for Public ESG Pronouncements

By David A. Wilson and Jurgita Ashley

A decision on class certification by a Southern District of New York judge in the long-running putative securities class action case against the Goldman Sachs Group, Inc. ("*Goldman*") deserves the attention of companies making ESG disclosures in their public statements and SEC filings.[1] The action is back before the trial court after the U.S. Supreme Court vacated a U.S. Court of Appeals for the Second Circuit decision and remanded the case back to the district court last June.

At issue in this decision was whether somewhat generic statements about Goldman's business practices and conflict-of-interest policies satisfied the reliance prong of the securities fraud claim for purposes of certifying a plaintiff class. Put another way, the court was evaluating whether the defendants had met their burden to rebut the presumption that the alleged misstatements had an impact on the price of Goldman's shares.

The plaintiff shareholders alleged that Goldman made false statements to fraudulently maintain an inflated share price. Those statements included some general pronouncements about clients coming first and compliance with "the letter and spirit of the laws, rules and ethical principles that govern us." The most specific statements—and those that the court deemed to have the most weight—concerned Goldman's attention to conflicts of interest. Goldman stated that as its business and its client base had expanded, it increasingly had to "address potential conflicts of interest, including situations where our services to a particular client or our own proprietary investments or other interests conflict, or are perceived to conflict, with the interest of another client." Thus, Goldman declared, "[w]e have extensive procedures and controls that are designed to identify and address conflicts of interest …"

The plaintiffs alleged that these statements were materially false in light of subsequent disclosures about Goldman's conflicted role in certain collateralized debt obligation transactions in which (among other things) Goldman had bet on certain of its products performing poorly or failing.

The court analyzed the price impact of these statements under the "inflation maintenance" theory, under which the statements are alleged to have fraudulently maintained an already inflated stock price. That approach is distinct from the "inflation introduction" theory, which is applied to alleged misstatements that fraudulently introduce inflation into a stock price. Thus, the plaintiffs alleged that Goldman made these statements, not so much to increase the price of its stock, but in order to burnish "its reputation as the preeminent Wall Street bank focused first and foremost on responsible business practices that placed their clients' needs paramount to all else."

Under Second Circuit and U.S. Supreme Court case law, the plaintiffs were entitled to rely on what is known as the *Basic* presumption of reliance—a rebuttable presumption that an investor relies on a misrepresentation so long as it is

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[1] Goldman has filed a request for interlocutory appeal of the district court's class certification with the Second Circuit (a motion Washington Legal Foundation supported with an amicus brief).

reflected in the price of the stock at the time the investor bought the stock. Defendants can rebut that presumption at the class certification stage with a showing, by a preponderance of the evidence, that the alleged misstatements in fact had no impact on the stock price. In effect, if the alleged misstatements are determined to have had any effect at all on the stock price, the defendants fail to rebut the presumption.

The District Court's opinion walked through the factors set forth by the U.S. Supreme Court for the *Basic* rebuttal in one of the interlocutory appeals of the case. The principal issue contested by the parties through the testimony of competing experts, briefing, and oral argument was whether the price impact of the alleged misstatements could be measured by the stock price decreases after those statements were revealed to be false. The defendants, of course, sought to cast the price drops as attributable to other factors, most significantly the news of enforcement activities against Goldman. They argued that the alleged misstatements were so generic and unspecific that reasonable investors would not rely on them and therefore the statements could not have influenced the stock price.

In its decision to grant class certification, the court acknowledged that general statements will have less of an effect on a stock price than more specific ones, but declared that the defendants did not rebut the *Basic* presumption, i.e., they could not show by a preponderance of the evidence that the alleged misstatements had *no* price impact whatsoever. As the court declared, "Defendants have presented no evidence purporting to demonstrate ... that if Goldman had replaced the alleged misstatements with the truth about its conflicts, its stock price would have held fast."

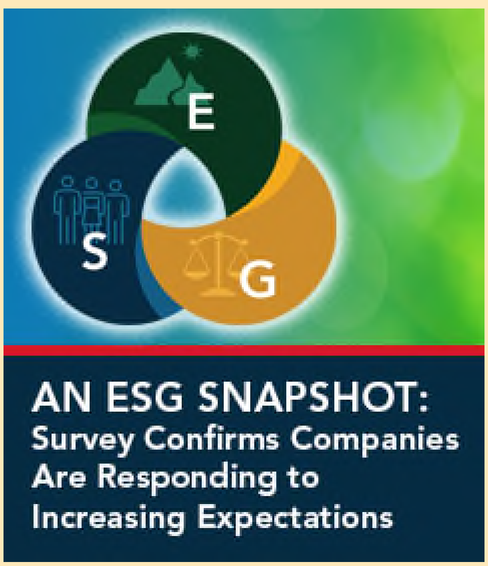
The court's analysis provides some lessons for a company's disclosures about its business practices, including those pertaining to ESG issues. First, take care in making generic statements to be certain that they are indeed generic. In *Goldman*, the court rejected the defendants' argument that no reasonable investor could have relied on the alleged misstatements because they were the kind of generic statements that all institutions in the investment business make. Even if not fraudulent, the court noted that the ubiquity of such statements is an indication that the companies view them as capable of influencing and maintaining a company's stock price. Moreover, while the general statements about Goldman's adherence to law and ethics may not have been specific enough to warrant a claim, the court reasoned that more specific statements about its attention to conflicts of interest had more of an air of specificity.

Second, subsequent disclosures of specific adverse issues may render actionable earlier statements that a company believed or intended to be simply generic platitudes. In *Goldman*, the court assessed the defendants' argument that there was a "glaring ... informational mismatch" between the alleged misstatements and the subsequent disclosures. It applied a sliding-scale test to determine whether there was a mismatch in the degree of generalness between the misrepresentation and the subsequent corrective disclosure. The court acknowledged that some of the alleged misstatements, viewed in isolation, could be too generic to be a match with the later disclosures. But the court found the statements about Goldman's approach to conflicts management were more specific than those about compliance with the law and putting clients first and were not so divergent from the later disclosures as to qualify as a "mismatch" that would overcome the *Basic* presumption of reliance in the context of an "inflation maintenance" claim.

Third, be intentional in making ESG disclosures and clear on their intended objectives. For example, when announcing ESG goals, be specific about what the company is committing to accomplish and which framework was used for goal setting. When communicating progress against previously announced ESG targets, be explicit about the baseline, time periods covered, scope of operations measured, validation process, and how progress was achieved (e.g., to what extent carbon offsets are being utilized). Be clear about the company's current status and assumptions being made and be upfront about what the disclosure is not intended to communicate (with applicable carve-outs and tailored disclaimers). If the disclosure's purpose is to address particular shareholder concerns, review applicable investor guidelines—here again, specificity of disclosure can go a long way.

The *Goldman* decision provides a cautionary tale to companies making ESG pronouncements in their public disclosures. Companies frequently make general statements that they comply with all environmental regulations, they are committed to progress on carbon neutrality, or they have rigorous policies and procedures to detect and prevent discrimination and harassment. Those kinds of general statements run the risk of becoming alleged misrepresentations in a securities lawsuit if the company later discloses toxic waste spills, increases in or lack of progress on reducing its carbon footprint, or class action lawsuits alleging widespread discrimination against women or minorities. While companies may be eager to tout their ESG chops in the current environment, they should be mindful of an irony presented by the *Goldman* court's decision: Companies need not say anything at all on these matters, but "once a company chooses to speak, the proper question ... is not what might have happened had a company remained silent, but what would have happened if it had spoken *truthfully*." What was true at the time of the initial statement is measured not by the best knowledge available at the time but by hindsight occasioned by disclosure of facts learned by senior management much later.

Please contact David Wilson or Jurgita Ashley with any questions.



An ESG Snapshot

With corporations under increasing pressure to implement environmental, social and governance (ESG) initiatives, in-house counsel and senior corporate executives will find a useful benchmark against which to measure their programs and progress in "An ESG Snapshot," a report authored by Thompson Hine's ESG Collaborative attorneys. The report summarizes the results of a recent firm survey exploring the ESG standards that investors and other key stakeholders are increasingly applying as part of their evaluation to identify material risks and growth opportunities.

View/download the report (PDF).

New Ventures

Serving Underserved Populations and Markets Proves Key to Maximizing SSBCI Capital

By Lindsay Karas Stencel

In mid-November, the U.S. Department of the Treasury (Treasury) released the state, U.S. territory, and District of Columbia (collectively, "states") application materials for how states intend to deploy the State Small Business Credit Initiative (SSBCI) Program dollars. What was evident from Treasury's capital allocation to the states and the application materials were two key items: (1) many traditional venture firms will easily run afoul of the current conflict of interest terms set forth in the November materials; and (2) Treasury is highly focused on capital deployment to underserved markets and populations. What also became clear was that states that maximize capital deployment to traditionally underserved populations and markets have additional opportunities to access capital as part of Treasury's Incentive Funding Allocation.

The Core of the SSBCI Program

The State Small Business Credit Initiative Program is a federal program instituted by Treasury that seeks to deploy up to $10 billion in small businesses and startups through a variety of funding mechanisms. The SSBCI Program has four main buckets of capital: (1) $6.5 billion Main Capital Allocation; (2) $1 billion Very Small Business Allocation; (3) $1.5 billion SEDI Allocation to socially and economically disadvantaged individuals ("SEDI-owned businesses"); and (4) $1 billion Incentive Funding Allocation. The two core tenets of the SSBCI Program are rooted in promoting equity through expanded access to capital, economic resiliency, job creation, and increased economic opportunity, and by catalyzing private investment, with an acute focus on SEDI-owned businesses seeing an uptick in capital investment. Treasury is focused on expanding opportunities to underserved communities lacking in capital and building financial ecosystems that support entrepreneurs and small businesses.

Promoting Equity

Of the $10 billion of total capital allocation under the SSBCI Program, states have been initially allocated capital under the Main Capital Allocation (which includes the state-sponsored venture capital program, in addition to other capital programs), with an opportunity to receive additional monies for investment in SEDI-owned businesses. Further, Treasury has allocated an additional $1 billion in incentive funding for jurisdictions that demonstrate robust support for SEDI-owned businesses. This effectively means that states that excel at capital deployment to SEDI-owned businesses get an additional bite at the apple from the Incentive Funding Allocation pool.

The $1.5 billion SEDI Allocation is to be allocated specifically to (1) small businesses that have faced barriers to access to capital, markets, and the networks they need to grow their businesses because of certain statuses or membership in certain groups, including membership in a group that has been subjected to racial, ethnic, or cultural biases over the course of American history; and (2) small businesses in Community Development Financial Institution (CDFI) Areas, which are generally low-income, high-poverty geographies that receive insufficient support for the needs of small businesses, including minority-owned businesses.[1]

Further, Treasury will allocate the $1 billion in additional incentive funding to the states that most effectively delivered robust support to these groups, assisting in the promotion of lending and venture capital investment for small businesses run by diverse founders or that operate in geographic areas that have traditionally lacked access to capital.[2]

Stimulating Private Investment

The SSBCI Program is designed to catalyze $10 of small business investment for every $1 of SSBCI funding, which requires states to clearly identify how the federal funds will be used under the SSBCI Program. All states, territories and tribal governments must describe in their applications for federal dollars the causes and results in new investment throughout the state, and must clearly show how the SSBCI funds are being utilized for small businesses and startups that would traditionally lack access to such capital. Overall, Treasury is seeking to show clear connectivity between the deployment of SSBCI capital and transformative impact on communities receiving such capital.

Partnering for Success

This requirement places the states in a unique position. In addition to properly deploying the Main Capital Allocation to constituents, states that maximize their deployments to SEDI-owned businesses are also eligible for at least their portion of the Incentive Funding Allocation. However, the unique opportunity for states to become action and thought leaders and top performers across the United States by thoughtfully and strategically maximizing their deployment of SSBCI Program funds to SEDI-owned businesses to capture their entire portion of SEDI-focused funding also allows them to capture 100% or more of their allocation of the Incentive Funding Allocation, with the ability to outperform other states and capture those underutilized SEDI-focused dollars as well. Further, by truly succeeding in the capital deployment of the SEDI Allocation and the Incentive Funding

Allocation buckets, states have the opportunity to deploy new areas for jobs, innovation, tax base, and population retention that previously were dramatically underserved both as to markets and the population within those markets.

In order to best accomplish this, states will need to partner with local, intimately knowledgeable partners who fundamentally understand and can work with and within the ecosystem to maximize the benefits to that state as a whole.

Maximizing deployment into SEDI-owned businesses creates a triple net positive for the states. First, by deploying capital in amounts greater than would be required to satisfy the baseline requirements of the SSBCI Program, the state can maximize generation of new capital investment and access to the SEDI Allocation. Second, by deploying capital to other credit support programs (OCSPs) with strong relationships with SEDI-owned businesses, the state will not only achieve the objectives of promoting equity and access to capital, but also will take a colossal step forward within the state to close wealth gaps. Third, by focusing deployment to OCSPs focused on investing into SEDI-owned business, the state can get access to an additional $1 billion in incentive funding for further economic development and has the ability to pull in additional incentive funding reallocations from states that it outperforms.

To comply with the terms of the SSBCI Program, the OCSPs that the states select should be able to demonstrate, at a minimum, that $1 of public investment from the SSBCI

[1] U.S. Department of the Treasury State Small Business Credit Initiative Program Fact Sheet, November 2021.
[2] Id.

Program will result in at least $1 of private funding brought by the OCSP. The state must prove causation and results in reporting on the metrics of the SSBCI Program, so working with OCSPs that have a proven track record of funding businesses, particularly SEDI-owned businesses, will be crucial to the states' plans.

Simply put, the states' successful deployment of capital under the SSBCI Program will hinge largely on their partnering with OCSPs who have knowledge of how to raise capital, how to deploy it in CDFI Areas and in SEDI-owned businesses, and who are trusted investors and partners within the investment SEDI communities. By working with OCSPs who are able to accomplish these items, the states can create a triple net positive outcome, promote equity and capital access, maximize investment into SEDI-owned businesses to further close the wealth gap, and become nationwide leaders in promoting SEDI-owned business investment, which could generate further access to capital or attraction of additional SEDI-owned businesses to that state.

Please contact Lindsay Karas Stencel with any questions.

Early Stage Founder Sentiment Report

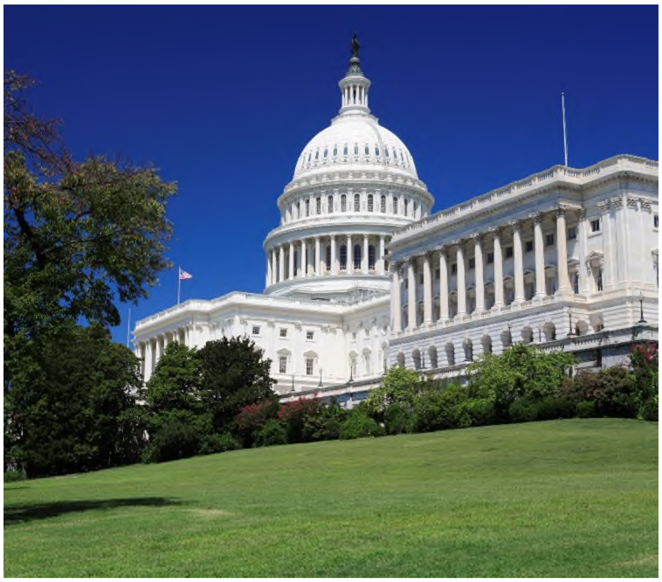
Thompson Hine teamed up with January Ventures, Oracle and Silicon Valley Bank to present the 2021 Early Stage Founder Sentiment Report. With a sample set of 450 early stage startup founders across the United States and Europe, the survey's results show that post-pandemic, early stage founders are building their companies differently from the start. The idea of big tech hubs is antiquated, and founders find strategic advantage in building distributed teams. Still, community and connection are more important than ever — particularly for underrepresented startup founders who, despite increased media attention on female and BIPOC (Black, Indigenous, People of Color) founders, still face significant obstacles.

At Thompson Hine, we are proud to promote and service diverse founders and investors. Please visit our QuickLaunch website for more information.

Antitrust

Is the Biden Administration Taking Antitrust Enforcement Back to the Future?

By Mark R. Butscha, Jr. and Joshua Shapiro



President Biden made clear in his July 2021 Executive Order on Promoting Competition in the American Economy that antitrust enforcement would be a top priority for his administration. To accomplish the enforcement objectives set out in the executive order, President Biden's appointees at the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) have indicated a willingness to shake up bedrock principles of antitrust law, including moving away from the "consumer welfare" standard, which focuses on lower prices. Whether a broader focus on nonprice effects, including effects on labor and product quality and innovation, ultimately will result in changes to substantive antitrust law (e.g., federal court precedent) will not be answered in the short term. For now, however, it suffices to say that many long-standing procedures have been jettisoned by the U.S. antitrust agencies and new policies implemented, apparently with more to come. As a result, the merger review process has become less predictable. Here is a summary of some of the most important updates from the past year.

Indefinite Suspension of Early Termination. Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), parties to mergers of a certain value (currently $101 million) must file a notification with the FTC and DOJ and observe a 30-day waiting period before closing the transaction. Parties commonly request early termination of the waiting period, and before 2021 early termination was routinely granted; indeed, in 2019 early termination was granted in about half of HSR-reportable transactions. In early February 2021, the FTC (with support from DOJ) announced that it was temporarily suspending the early termination program. The FTC claimed the "temporary suspension w[ould] be brief," but it has been—as two FTC commissioners warned at the time—"indefinite," with no sign of returning. Thus, parties should plan to wait at least the full 30-day waiting period before being able to close any HSR-reportable transaction.

Informal Interpretations Called into Question. To help navigate the complex web of regulations governing HSR reportability, the FTC has provided guidance in response to specific questions from practitioners through informal interpretations, which are collected and maintained in an online database that practitioners rely upon in advising clients. In August 2021, however, the FTC called this long-time practice into question through a blog post reiterating that the interpretations "do not carry the force of law" and expressing "concern[] that some of these informal interpretations may not reflect modern market realities or the policy position of the [FTC]." The FTC also noted that it was "reviewing the voluminous log of informal interpretations to determine the best path forward." No further pronouncements have been made, but if the FTC curtails the process or revokes more informal interpretations, it will inject further uncertainty and inefficiency into the process while also increasing the number of HSR filings.

FTC Warning Letters. It is well established that the FTC and DOJ may investigate and take other action with respect to a merger even after the HSR waiting period has expired and the deal has closed. Such occasions are rare, however, and issues with HSR-reportable deals generally are resolved during the statutory waiting period, either within the initial 30 days or as extended by the formal issuance of a request for additional information (a "Second Request"). In August 2021, the FTC announced a new wrinkle. With the stated reason that "a tidal wave of merger filings … is straining the agency's capacity to rigorously investigate deals ahead of statutory deadlines," the FTC started issuing "warning letters" stating that although the 30-day waiting period would be expiring, the agency's "investigation remains open and ongoing" and that parties choosing to close their transactions would be doing so "at their own risk." Although these warning letters do not change the fact that the FTC (as it always has) retains jurisdiction to investigate and challenge a merger at any time, they may signal a greater willingness to challenge deals post-consummation. In the meantime, dealmakers should consider whether and how to deal with the possibility of receiving a warning letter in negotiating risk-shifting provisions in merger agreements.

New Merger Guidelines. The FTC and DOJ generally evaluate proposed mergers by using an analytical framework set forth in guidelines published jointly by the agencies. The current iteration of the Horizontal Merger Guidelines was published in 2010, and new Vertical Merger Guidelines were published in 2020 (although both agencies have expressed disapproval of those). Now it appears that an overhaul of the horizontal guidelines may be coming soon. On January 18, 2022, the FTC and DOJ jointly announced that they would be considering revisions and updates to the guidelines while issuing a wide-ranging request for information and request for public comment. In remarks concerning the request, FTC Chair Lina Khan highlighted some areas that may take center stage in new guidelines, including how to assess "trends toward concentration," competition in labor markets and the effect of mergers on workers, and the evaluation of nonprice effects such as innovation. Such revisions would mark a significant change from merger analysis that has been used by the agencies for decades.

A More Litigious DOJ? On January 24, 2022, Jonathan Kanter, the newly appointed head of DOJ's Antitrust Division, suggested in public remarks that DOJ intends to focus on commencing lawsuits rather than negotiating settlements because "settlements do not move the law forward," and DOJ must "be willing to take risks and ask the courts to reconsider the application of old precedents to [modern] markets." These remarks suggest that DOJ would like to move substantive law in a different direction. It remains to be seen whether DOJ will actually bring more merger challenges and if courts will help DOJ revive "old precedents" in those cases. Regardless, DOJ clearly is staking a more aggressive position.

One thing is clear from all these developments – change is afoot, and that change may require different approaches to navigating the HSR process. Merging parties should keep these developments in mind as they assess deal risk.

With any questions, please contact Mark Butscha or Josh Shapiro.

International Trade/Supply Chain Management

What Every Company Should Know About the New Uyghur Forced Labor Prevention Act

By Francesca M.S. Guerrero, Samir D. Varma, Joyce Rodriguez and Scott E. Diamond*

The U.S. government continues to lead a global effort to require companies to be proactive and avoid forced labor in their supply chains. In particular, on December 23, 2021, President Biden signed into law the Uyghur Forced Labor Prevention Act (Act), which is part of a U.S. government effort to address the use of state-sponsored forced labor in China's Xinjiang Uyghur Autonomous Region (Xinjiang). The law sets forth a broad framework for the development of a strategy to enforce the prohibition on the importation of goods produced using forced labor from China and establishes a "rebuttal presumption" that imports of products made in whole or in part in Xinjiang are produced from forced labor. This rebuttable presumption means that any goods that contain inputs that Customs and Border Protection (CBP) traces to Xinjiang will be detained at the port of entry. It also authorizes sanctions against persons responsible for "serious human rights abuses in connection with forced labor."

The rebuttable presumption goes into effect on June 21, 2022, and is expected to impact U.S. companies with supply chain connections to China.

Background on U.S. Efforts to Address Forced Labor

Section 307 of the Tariff Act of 1930 has, since its inception, prohibited the importation into the United States of "goods, wares, articles and merchandise mined, produced or manufactured wholly or in part in any foreign country by … forced labor." Enforcement of Section 307 through Withhold Release Orders (WROs) issued by CBP has rapidly increased over the years. WROs identify goods for which there is a reasonable assumption of production using forced labor and typically cover a particular manufacturer but may cover certain goods from an entire region. From 2016 to 2022, CBP issued 36 WROs, with nearly half targeting China.

Due Diligence Guidance Expected

On January 24, 2022, the Department of Homeland Security issued, on behalf of the Forced Labor Enforcement Task Force, a request for public comments on "how best to ensure that goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part with forced labor in the People's Republic of China are not imported into the United States." Industry has until March 10, 2022, to comment on measures that may be taken to prevent the use of forced labor and "trace the origin of goods, offer greater supply chain transparency, and identify third country supply chain routes."

The Task Force will provide formal guidance on the due diligence efforts and measures U.S. companies will be expected to have in place to effectively trace and manage their supply chains to prevent the use of forced labor.

Rebuttable Presumption That Imports from Xinjiang or Designated Entities Are Produced from Forced Labor

The Act creates a rebuttable presumption that certain products are produced using forced labor and must be denied entry into the United States. Specifically, the presumption is that goods, wares, articles or merchandise that are either (i) mined, produced or manufactured in whole or in part in the Xinjiang region or (ii) produced by an entity designated by the Task Force as noted above, are produced using forced labor and are not entitled to entry at any U.S. ports.

This presumption is rebuttable and will not apply if CBP determines the importer has complied with the Task Force due diligence and CBP regulations, expected on June 21, 2022, and established by clear and convincing evidence the goods were not produced using forced labor. This evidentiary burden on companies to prove a negative, that there was no forced labor, is high.

Companies Should Take Steps to Mitigate Risk of Forced Labor

At a minimum, U.S. companies should engage in some or all of the following steps to mitigate the risk of using forced labor in their supply chain:

1. **Identify forced labor risk in your supply chain.** Resources include the Xinjiang Supply Chain Advisory or the Department of Labor's List of Goods Produced by Child Labor or Forced Labor to identify industries, parties and products at higher risk for forced labor in the region.
2. **Mitigate financial risk through contract language.** Companies should use their supplier codes of conduct and other contract agreements to prohibit their suppliers from using forced labor. Contracts may include a requirement to provide documents evidencing these efforts, information on their supply chain or certifications related to sourcing from Xinjiang or entities known to engage in forced labor.
3. **Engage in third party due diligence.** Companies should engage in risk-based due diligence on the parties in their supply chain.

Conclusion

The passage of the Act culminates congressional efforts to require U.S. companies to address growing concerns about the use of forced labor in China. It is also in line with global efforts in Canada and the European Union to increase due diligence requirements and supply chain transparency related to forced labor. Companies should act quickly to help mitigate the risk of noncompliance before the Act goes into effect on June 21, 2022.

With any questions, please contact Francesca Guerrero, Samir Varma, Joyce Rodriguez or Scott Diamond.*

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Bankruptcy

Hidden Danger: Third-Party Releases in Bankruptcy

By Curtis L. Tuggle and Alexander James Andrews

Introduction

As discussed in "Bankruptcy Proof of Claim Basics," which appeared in the fall 2021 edition of *Business Law Update*, in some situations a creditor that receives notice of a bankruptcy filing may only need to prepare and file a proof of claim in the proceeding to protect its interests. In bankruptcies filed under Chapter 11 of the Bankruptcy Code, creditors must be mindful of a significant provision that may be included in the Chapter 11 plan pursuant to which creditors release claims not only against the debtor that filed the bankruptcy, but also claims against non-debtor parties. These releases are often referred to as "non-debtor releases" or "third-party releases." Usually, third-party releases are only enforceable with creditors' affirmative consent but may occasionally be imposed on a non-consensual basis. Creditors do not often receive full recovery in bankruptcy, meaning claims against non-debtor parties may be the only opportunity for a full recovery. Creditors must be vigilant and identify and evaluate third-party releases to ensure that significant value is not lost.

Identifying third-party releases contained in a Chapter 11 plan is not as challenging as one may think. As part of the process to confirm a plan, the debtor must circulate a disclosure statement with the plan, which is like a prospectus, and must contain information adequate for creditors to evaluate the plan and its impact on their interests. Creditors are given the right to vote for approval or rejection of the plan by casting ballots. The disclosure statement and plan will also identify and explain any third-party releases and any accompanying injunction that would operate to prohibit creditors from asserting released claims against the non-debtor beneficiaries. As previously mentioned, in many instances the third-party releases are only enforceable if the creditor expressly consents to the releases, which has its own place on the ballot. Sometimes however, debtors seek approval of non-consensual third-party releases through court approval of the plan.

After identifying the third-party releases, the next step is a thoughtful analysis of the releases' breadth and scope (e.g., what claims are released and who are the beneficiaries). The creditor must determine whether its interests would be best served – in terms of maximizing recovery – by consenting to the releases or by opposing the releases. The analysis may be simple or complicated depending on the complexity of the disclosure statement and plan, the nature of the creditor's relationship with the debtor and third parties, and the number and types of claims involved. Third-party releases might be integral to the success of a plan by helping the debtor procure additional funding that would not be provided in their absence. To the extent the creditor determines, in consultation with counsel, that the plan contains non-consensual and prejudicial third-party releases, action will be required. Given the high bar debtors must overcome to confirm a plan with non-consensual third-party releases, and the recent scrutiny they have received in high-profile bankruptcy proceedings, the probability of a successful opposition is bolstered.

Purdue Pharma Case

Non-consensual third-party releases were recently set in the public eye in a rather perfect proxy for these types of releases – the highly controversial Purdue Pharma case. In the wake of the opioid addiction epidemic, Purdue Pharma, L.P., the manufacturer of OxyContin, filed for Chapter 11 bankruptcy protection.[1] The plan of reorganization incorporated non-consensual third-party releases for virtually all conceivably related entities, including the Sackler family, Purdue's multibillionaire owners. As consideration for the release, the Sacklers agreed to personally contribute $4.325 billion of new value to the plan over 10 years.[2]

This arrangement stirred public reaction as many viewed the curtailment of litigation against the Sacklers as unfair and inequitable given that the Sacklers, who derived a large part of their approximately $11 billion net worth from the sale of opioids, did not also file for bankruptcy. Several legal objections were made including that the releases are tremendously broad, both as to the types of claims released and the releasees who are protected as beneficiaries. The Purdue Pharma debtors and others that supported the Chapter 11 plan, including 95% of over 120,000 voting creditors (including 23 states and territories), viewed the Sackler's $4.325 billion contribution – which would partially go to addiction relief efforts and settlement of personal injury claims – positively and saw these releases as a necessary step to acquire funding for the reorganization.

Purdue Pharma's Chapter 11 plan was confirmed by the bankruptcy court. The confirmation order entered by the bankruptcy court was overturned by the district court on December 16, 2021[3] on grounds that the Bankruptcy Code provides no authority for non-consensual, non-debtor releases.[4] The district court's decision is now being appealed to the Second Circuit Court of Appeals on an expedited schedule.[5]

Conclusion

Third-party releases, including those that are non-consensual, are a real possibility in Chapter 11 bankruptcy proceedings and present real danger. These releases must be carefully examined, and active opposition may be necessary where there is a risk of substantial prejudice. Because of the controversial nature of non-consensual third-party releases, some expect their validity to be challenged in the U.S. Supreme Court or overturned by congressional action.[6] While a few courts have disallowed non-consensual third-party releases,[7] the majority allow their use so long as the applicable criteria are met.[8] Unless and until there is certainty, it is advisable for creditors to closely scrutinize any Chapter 11 plans and disclosure statements and consult with counsel to ensure their interests are protected.

Please contact Curtis Tuggle or Alex Andrews with any questions.

[1] Chapter 11 Petition filed September 15, 2019, in the Bankruptcy Court for the Southern District of New York. A number of related entities also filed for relief. Jointly Administered Case No. 19-23649-RDD in front of Hon. Robert D. Drain.

[2] Plan confirmed by an order of Judge Drain on September 17, 2021.

[3] *In re Purdue Pharma, L.P.*, 2021 U.S. Dist. LEXIS 242236 (S.D.N.Y. 2021) (McMahon, J.).

[4] *Id.*

[5] "Purdue's Appeal On Ch. 11 Releases Fast-Tracked By 2nd Circ.," Vince Sullivan, Law 360, January 28, 2022

[6] "Congressional Committees Propose Changes to Bankruptcy Code Prohibiting Non-consensual Releases of Third Parties and Limiting Other Important Bankruptcy Tools," Gibson Dunn, August 2, 2021

[7] Id.

[8] 11 U.S.C. § 105 (a). Section 524 (g) of the code is the only explicit authority for these types of releases but is limited to asbestos cases. The Second Circuit allows third-party releases where the object third party contributes substantial value to the plan and unique circumstances exist such that make it necessary for the feasibility of the plan. *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005). The Sixth Circuit may approve a third-party release where the following seven factors are present. *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002).