Business Law Update

Summer 2018

Business Perspectives

Thoughts on Negotiations

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

There is a lot of folklore surrounding the process of negotiating a transaction, settlement or other agreement:

"A good deal has nine lives: it dies eight times before it finally lives."

"It's easy to close the deal if you are willing to give away all your profit."

"Sometimes the best deal is the one you don't do."

"We're almost done—time for the 'final gouge'!"

A key to success in negotiations, as in any activity, is first to define "success," the business objectives to be achieved.

As a seller of a business, this may entail first and foremost the desired purchase price. Other objectives may include structuring the payout for optimal tax treatment, preserving the seller's business "legacy" and reputation, and providing continuity for employees and other business partners.

As a buyer, price and valuation also are key elements to be negotiated. The parties base their initial discussions on these important topics on the fundamental financial facts of the business. The process of fact gathering entailed in any business acquisition process then comes into play, introducing new data points that will affect the buyer's view of the initial valuation. These include quality of earnings, contingent liabilities, customer and vendor relationships, condition of assets, intellectual property, human resources, and so on.

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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.

Successful people like to win. This includes the owner, who is selling the results of her hard work over many years of winning day by day in growing the business. On the other hand, successful buyers are used to achieving pricing and other terms that support the profitability model and other objectives for their proposed acquisition of the business. Both sides are advised by lawyers who have spent their careers winning arguments in and out of court. It can be tempting to treat transaction negotiations as a zero-sum game played to win, and human emotions play an enormous part in this dynamic.

By definition, an agreement must work for both sides. Keeping emotions in check is essential to getting to that win-win position. It takes good judgment based on experience to distinguish between critical deal points for which to "fall on one's sword," and those that can be conceded without compromising a core business objective of the transaction.

There are distinct, well-recognized negotiation styles and tactics that come in to play. Two major schools are "principles-based" and "position-based" negotiations.

In the former, parties establish certain guideposts or principles for the negotiations, and refer back to these as the negotiations proceed in seeking to resolve the deal details. The agreement on these guideposts often is set forth in the initial letter of intent or understanding between parties. While not binding the parties to go forward with the transaction, this essentially sets the rules of the game that the parties agree to follow.

The positional style also has a long tradition. Everyone is familiar with the iterative process of offer and counteroffer in price negotiations. If successful, this often results in a figure somewhere in the middle between the parties' starting positions. There is research showing that the starting points in such negotiations have a huge cognitive impact on the participants' perceptions and the outcome—the so-called "anchoring" effect.

Problems often arise in deals when people are coming at the discussions from these two different directions. Someone with a positional approach often will not respond well to a reasoned argument based on the first principles of the deal. They often may not even acknowledge that such principles exist. Negotiators need to remain flexible and find appropriate responses in such cases to address their counterpart's concerns and seek a mutually agreed solution.

Information flow and exchange also can present challenges in the course of the proceedings, particularly where there are multiple players on one or both sides of the transaction. For example, there may be multiple owners with different objectives on the sellers' side. Often the owner may try to negotiate transaction benefits and protections for key employees and managers, who may or may not have their own lawyers or professionals representing them, and who certainly have their own needs and goals. Clear lines of communication are critically important and the parties should build them into their planning process from the very outset of the project.

Negotiation dynamics arise in a variety of different contexts for business lawyers, not only M&A. Looking for the mutual win scenarios, being "solution oriented," listening carefully, and understanding the motivations of the respective counterparties go a long way toward helping the parties to a "successful" outcome.

Frank Chaiken leads the firm's highly regarded Corporate Transactions & Securities practice, which comprises more than 100 professionals who represent 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 Frank.Chaiken@ThompsonHine.com.

General Corporate

What the Heck Is a B Corp?

By David J. Willbrand and Dann Bruno

The terms "B corp" and "benefit corporation" get thrown around more and more these days as (1) consumers increasingly demand socially conscious products and services, (2) employees increasingly want to work at employers that promote a social mission, and (3) regulators and politicians increasingly worry that today's large corporations have the power to cause social harm (for example, think of the European Union implementing its new General Data Protection Regulation and Congress summoning Facebook to testify regarding the Cambridge Analytics data breach). Which begs the question, what the heck is a B corp? Is B corp certification similar to an organic food/women-owned business/fair trade certification, or is a B corp a unique legal entity different than a traditional corporation or limited liability company (LLC)?

The answer is … both. B Lab is a nonprofit organization "dedicated to using the power of business as a force for good" that provides B Corp certification to for-profit companies that "meet rigorous standards of social and environmental performance, accountability, and transparency." On the other hand, as of May 2018, 35 states (including Delaware) have adopted statutes recognizing benefit corporations as unique legal entities with provisions that require corporations to follow a broader fiduciary model. The discussion below will first focus on the B Corp certification and then turn to state statutes (primarily Delaware's) that have enacted some form of benefit corporation legislation.

B Lab and the B Corp Certification

The nonprofit B Lab was founded in July 2006 and granted its first B Corp certification in June 2007. The B Corp certification is granted to certify the company as a good public citizen with a purpose of creating value for stakeholders beyond just stockholders (e.g., customers, employees, suppliers, the environment). Over 2,400 companies in more than 50 countries, including notable companies such as Ben & Jerry's, Patagonia and Kickstarter, have obtained B Corp certification.

To become certified, first a company must complete the B Impact Assessment (which measures social and environmental impact) and earn a score of at least 80 out of 200 points. Next, the company must meet the B Lab's legal requirements, which require amending the company's existing governing documents or adopting benefit corporation status, depending on the company's state of incorporation and existing governance structure. Upon receiving board and shareholder approval, the amended charter must be filed with the secretary of state within one year. Finally, the company must sign the B Corp Declaration of Interdependence and the B Corp Agreement and pay annual fees between $500 and $50,000, depending on annual sales of the company.

B Lab purports that the benefits of meeting its legal requirements are to (1) give legal protection to directors and officers to consider the interests of all stakeholders, not just shareholders, when making decisions, (2) create additional rights for shareholders to hold directors and officers accountable to consider these interests, and (3) limit those expanded rights to shareholders exclusively. To that end, B Lab drafted the Model Benefit Corporation Law (MBCL) and lobbied state legislatures to adopt it.

History and Current Status of Benefit Corporations

Maryland adopted the first benefit corporation statute in April 2010. On August 1, 2013, Delaware adopted a new subchapter XV (Public Benefit Corporation Statute) of the Delaware General Corporation Law. As of May 2018, 35 states have adopted benefit corporation legislation and numerous states have legislation currently pending (e.g., Ohio's H.B. 545). On February 1, 2017, Laureate Education became the first benefit corporation to go public and on April 25, 2017, Danone North America, a $6 billion business and wholly owned subsidiary of French multinational Danone, announced it had become the largest benefit corporation. Additionally, on April 19, 2018, the Executive Committee of the Delaware State Bar Association approved proposed amendments to the Delaware Limited Liability Company Act to provide for the formation of statutory public benefit LLCs.

Legal Implications of Public Benefit Corporations

To discuss the legal implications of benefit corporations, it is necessary to first understand the current state of the law for traditional corporations. Since the 1919 Michigan Supreme Court case of *Dodge v. Ford Motor Co*., the idea that a corporation's purpose is to maximize value for its owners, the stockholders, has been a foundational principle of corporate law.

Recent Delaware Supreme Court cases have confirmed this "stockholder primacy" doctrine and required directors, as statutory managers of the corporation, to act to promote shareholder value (see *eBay Domestic Holdings, Inc. v. Newmark*). Similarly, the Delaware Supreme Court has held that directors have a fiduciary duty to common stockholders over creditors or stockholders with preferences (*In Re Trados Incorporated Shareholder Litigation*). However, in *Unocal v. Mesa Petroleum,* the Delaware Supreme Court recognized "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)" may be considered when a corporate director faces a hostile takeover.

Under traditional corporate law (and presumably in benefit corporations), the basic duties directors have to stockholders are the duties of care and loyalty. The duty of care requires directors to act on an informed basis while the duty of loyalty requires directors to act in good faith and in the best interests of stockholders.

Delaware courts use three standards of review when reviewing the actions of the board of a traditional corporation (and presumably a benefit corporation): (1) the business judgement rule, (2) the entire fairness standard, and (3) intermediate scrutiny. Fortunately for directors, courts generally defer to the board absent unusual circumstances, such as a conflict of interest, bad faith or gross inattention. Thus, the business judgment rule gives directors a large amount of discretion in deciding how to create stockholder value, including potentially considering stakeholder interests. Delaware courts will apply the strictest entire fairness standard when the directors (or controlling stockholder) have an economic interest that materially conflicts with the interests of the minority stockholders. Finally, courts apply an intermediate standard of review when a board takes defensive actions or undergoes a change in control.

In response to concerns from investors and entrepreneurs about the stockholder primacy model, some states adopted "constituency statutes," which allow, but do not require, directors to consider the interests of non-shareholder stakeholders. Benefit corporation statutes go even farther, requiring a corporation to adopt a specific public benefit purpose and requiring directors to consider non-stockholder interests.

Under Delaware's Public Benefit Corporation (PBC) statute, a "public benefit corporation" is defined as "a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation."

Additionally, each Delaware PBC must choose one or more specific public benefits. Such public benefit is defined as "a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than the financial interests of the stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature."

Benefit Corporation Mechanics and Practice Points

The Delaware Division of Corporations has provided instructions and a template to file a certificate of incorporation for a PBC. When choosing a specific purpose, a corporation should choose a purpose that is sufficiently specific to satisfy the statute but sufficiently general so as to limit the need for charter amendments.

PBCs must provide notice to the public of their PBC organizational status. While the statute no longer requires PBCs to include the designation in the corporation's name, unregistered private placements of stock of PBCs must include notice that the corporation is a PBC (unless the corporation's name provides such notice) and stock certificates of PBCs must indicate that the corporation is a PBC.

The board of directors of a PBC is responsible for managing the business and affairs of the PBC by balancing (1) stockholder interests, (2) stakeholder interests, and (3) the specific interest(s) listed in its certificate of incorporation. Although Delaware's PBC statute expressly provides that the business judgment rule applies to all disinterested balancing decisions, PBCs should consider adopting a charter provision protecting directors from liability for balancing decisions and should expressly address stakeholder concerns in board processes so as to preserve business judgment rule protections.

In Delaware, PBCs must provide stockholders a biennial report that includes (1) the objectives the board has established to promote the best interests of stakeholders and the public benefit(s) outlined in the certificate of incorporation, (2) the standards the board has adopted to measure the corporation's progress in promoting those interests and benefits, (3) objective factual information based on the standards the board has chosen regarding the corporation's success in meeting those objectives, and (4) an assessment of the corporation's success in meeting the objectives and in promoting those interests and the public benefit(s) the corporation seeks to achieve. Delaware's PBC statute is more lenient than the MBCL insofar as that Delaware statute (1) does not require the report be made public, (2) only requires a biennial report as opposed to annual, and (3) does not require that the report use a "third-party standard." However, if a Delaware PBC chooses, it may include provisions in its governing documents (charter or bylaws) that require it to meet the more stringent MBCL standards.

Summary and Approvals

To become a PBC, a traditional Delaware corporation must draft an amendment to its certificate of incorporation that states that the corporation is a PBC in its heading and identifies one or more specific public benefits to be promoted by the corporation. The board of directors must approve the amendment and recommend it be submitted to the stockholders for approval (look to charter and bylaws to determine the vote required). Delaware's PBC statute requires a two-thirds affirmative vote of the outstanding shares of the corporation (the charter and bylaws should be reviewed to determine whether any additional vote is required).

If the corporation is not publicly traded, stockholders who did not vote for an amendment are entitled to an appraisal by the Delaware Court of Chancery of the fair market value of the stockholder's share of stock, and the corporation must provide all stockholders with notice of their right to an appraisal. After the board and stockholders approve the amendment, it must be prepared and filed with the Delaware secretary of state. Delaware requires that a stock certificate issued by a PBC clearly note that the corporation is a PBC. Finally, if the PBC has adopted a new name, it should make necessary changes such as updating bank accounts, business cards and registrations.

Please contact David J. Willbrand or Dann Bruno with any questions.

Board of Directors

Fiduciary Liability of the Board of Directors under ERISA

By Brian J. Lamb

Fiduciary litigation under the Employee Retirement Income Security Act of 1974 (ERISA) is on the rise. In 2017 alone, ERISA class action settlements reached almost $1 billion, with individual cases settling in the tens of millions of dollars each. Plaintiffs' lawyers are turning their sights on boards of directors by naming board members as individual defendants and attempting to impose personal liability under ERISA's fiduciary duty provisions. Plaintiffs likely view this tactic as providing additional leverage in settlement discussions or as providing an additional potential source of insurance recovery.

The Role of the Board under ERISA

The board of directors may appear to be a step removed from fiduciary liability under ERISA, but the reality is different. There are many circumstances in which board members can be ERISA fiduciaries. Unfortunately, those circumstances are not readily susceptible to simple and comprehensive bright-line rules. Members of the board of directors know that they owe fiduciary duties under state law to their corporation and/or its shareholders, but do they know whether, and under what circumstances, they may owe fiduciary duties under federal law to the participants and beneficiaries of their company's employee benefit plans?

According the Department of Labor (DOL), there are no special rules for determining when directors are fiduciaries. Like anyone else, board members will be fiduciaries when they meet ERISA's definition of a fiduciary, which provides for two types of fiduciaries: named or functional.

Determining whether a board, committee or individual director is a "named fiduciary" is relatively straightforward: review the relevant documents to ascertain the identity of the named fiduciary(ies). However, one must be sure to check not only the plan documents, but also any potentially related trust agreements, committee charters or other governance-related documents that might bear on the question. Courts will likely deny a motion to dismiss if there are ambiguous or conflicting references to named fiduciaries in any potentially relevant documents.

As for the second type of fiduciary, courts have struggled, with little success, to create bright-line rules or presumptions regarding when directors are functional fiduciaries under ERISA. There are essentially two ways that board members can become functional fiduciaries. First, one becomes a functional fiduciary by performing administrative functions of the plan. Hopefully most boards are sufficiently removed from performing administrative functions of benefit plans to make this a non-issue. Second, one is a functional fiduciary to the extent one is responsible for the selection and retention of other plan fiduciaries. This is particularly relevant, as the board of directors typically serves as the ultimate source of appointment power within a corporation.

Three Ways a Director Can Become an ERISA Fiduciary

1. Being named as a fiduciary in the plan documents

Named Fiduciary. This is the most direct way for board members to become fiduciaries. Also, board committee charters (perhaps prepared by corporate, not ERISA, lawyers) may allocate certain plan-related responsibilities to a committee, inadvertently increasing the chances of the committee and its members being treated as fiduciaries. Some plaintiffs argue that when "the Company" is the named fiduciary of a plan, then the board members are also fiduciaries by virtue of their ultimate legal responsibility to oversee the management and governance of the corporation.

2. Performing administrative functions of the plan

Functional Fiduciary. A board is not a fiduciary to the extent it is performing "settlor" functions, such as:

- Designating a company stock fund as a 401(k) investment option
- Funding a defined benefit or a defined contribution plan
- Terminating a plan

However, a board may be a fiduciary to the extent it is performing or influencing certain administrative functions, such as:

- Influencing day-to-day discretionary investment decisions of the plan
- Making (mis)representations to plan participants about the plan
- Selecting (or approving the selection of) plan vendors and setting their fees
- Determining/approving which expenses to pay from plan assets

3. Appointing, removing and/or monitoring other plan fiduciaries

Named or Functional Fiduciary. The DOL's long-held position, endorsed by the courts (particularly since *Enron*), is that members of the board are fiduciaries to the extent they are "responsible for the selection and retention of plan fiduciaries." This responsibility could result either from being a named fiduciary or from the simple functional reality that the board is usually the ultimate governance authority within a corporation. One effect of this principle is that a plan sponsor's board is *virtually always* a fiduciary, even if only for the limited purpose of appointing and monitoring other fiduciaries. Some plaintiffs argue that the board should be the guarantor of the full performance of the fiduciaries it appoints, but most courts hold that the duty to monitor the performance of an appointed fiduciary does not give rise to overarching responsibility for all of the appointed fiduciary's decisions; rather, the board faces liability only to the extent it fails to periodically monitor the appointed fiduciary's performance.

Best Practices Concerning the Board of Directors

- Recognize that the board and individual members are always fiduciaries, at least to the extent they have the ability to appoint other plan fiduciaries. Moreover, if the full board, a board committee or an individual director is named as a fiduciary in the plan documents, they are fiduciaries and must act accordingly.
- Ensure that plan documents and/or delegation documents are precise in their allocation of responsibility for plan administration and the management and investment of plan assets. Assign that authority to specific officers or employees of the company or a committee comprised of officers and other employees and not to directors or board committees. Most boards should not be involved in the role of Plan Administrator.
- Establish a fiduciary charter or guide that clearly specifies the allocation of all responsibilities and functions regarding the plan. This will enable board members to understand their enumerated duties, if any, and to understand who and what they may need to monitor.
- The board retains oversight responsibility [generally referred to as a duty to monitor] for fiduciaries of the plan, therefore it should require periodic reports and require appointed fiduciaries to notify the board of extraordinary events affecting the plan in appropriate circumstances. This demonstrates that the board is fulfilling its fiduciary duty to monitor appointed fiduciaries. DOL guidance provides: "At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and circumstances relevant to the choice of procedure."

- ERISA's fiduciary standards, to the extent they apply to a director, are considerably less forgiving, and provide directors with significantly less latitude, than the usual formulations of a director's duty of care and duty of loyalty under state law. Corporate directors may need to be educated that "the business judgment rule," director exculpatory provisions and director liability shields that protect them as directors under state law do not protect them from ERISA fiduciary claims.
- Know when to recognize potential conflicts of interest. Board members who serve as ERISA fiduciaries wear two different hats and have different duties of loyalty to different constituents: the corporation's stockholders (as director) and the plan's participants and beneficiaries (as plan fiduciary). The Supreme Court has recognized the "potential for conflict" in these roles, and so should the board. Sorting out the potential conflicts can be nuanced; the threshold issue is recognizing the potential conflicts so they can be addressed.
- Determine if proper insurance coverage is in place. Many D&O policies have an exclusion for fiduciary liability under ERISA, so consider the need for fiduciary riders or separate fiduciary policies. Plans that hold employer securities face particular challenges in obtaining proper insurance coverage.

Please contact Brian Lamb with any questions.

Employee Benefits Roundtable Series: Compliance Update

Tuesday, July 17
Dayton

A complimentary program presented by Thompson Hine LLP and the Chelko Consulting Group

Please join us for an interactive discussion on the latest compliance issues including:

- Mental Health Parity Act/ABA/non-essential benefits
- EEOC regulations
- PCORI fees
- IRS 226-J letters
- HIPAA audits

We'll also open the floor for topics you want to discuss. We hope to see you there.

8:30 – 10 a.m.
Breakfast, program & networking

See more information at ThompsonHine.com/Events.

There is no cost to attend, but registration is required. Please register online by July 12.

International

Beneficial Ownership Registration Requirements in the EU, Hong Kong and Indonesia

By Paul Allaer and Benjamin Becker*

Many U.S. privately held companies are surprised to learn that in most other countries in the world, even a privately held business (such as a GmbH in Germany, a private limited Company in UK and an S.A.R.L. in France) must make certain information publicly available, including the identities of the company's (primary) shareholders and the names of its directors and officers.

Now there is a further trend, namely the requirement to disclose the "beneficial ownership" of the company. Important markets for U.S. privately held companies have launched such a requirement, including the European Union, Hong Kong and Indonesia.

Requirements within the EU

The European Union has adopted Directive 2015/849 "on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing," under which the collection of accurate and up-to-date information on beneficial owners is intended to help track criminals who might otherwise hide their identities behind a corporate structure.

Definition of Beneficial Ownership

"Beneficial Ownership" in the context of the EU Directive means any natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity.

Direct ownership is indicated by a shareholding of 25 percent plus one share or an ownership interest of more than 25 percent in a legal entity held by a natural person.

Indirect ownership is indicated by a shareholding of 25 percent plus one share or an ownership interest of more than 25 percent in a legal entity by a corporate entity that is under the control of a natural person(s) or by multiple corporate entities that are under the control of the same natural person(s).

Required Information and Accessibility

The directive does not precisely state which information legal entities have to disclose. However, the EU member states have to ensure adequate, accurate and current information on the beneficial ownership, including the details of the beneficial interest held, of legal entities incorporated within their territories.

The information must be accessible to (i) the relevant government agencies; (ii) credit and financial institutions as well as insurance companies within the framework of customer due diligence in accordance with the directive; and (iii) any person or organization that can demonstrate a legitimate interest.

Implementation of the EU Directive

EU directives are not directly applicable in the EU member states. A directive is only binding as to the result to be achieved, but leaves the member states the choice of form and methods, and the directive must be implemented into national law by each member state in order to become applicable.

For this reason the requirements for disclosing beneficial ownership can vary in the different member states, in particular the percentage of shareholding or ownership interest which constitutes direct or indirect ownership or control, which member states may specify as lower than 25 percent.

Germany, the leading economy in Europe, implemented the directive through the *Geldwäschegesetz* (Money Laundering Act), which entered into effect in 2017. Legal entities in Germany have to register for each beneficial owner: first and last name, date of birth, residential address and type and extent of the beneficial interest.

The German law does not deviate from the directive's percentage rate of 25 percent, which serves as the threshold indicating direct or indirect ownership or control.

Every person or organization that can demonstrate a legitimate interest is entitled to look into the transparency register. Currently the term "legitimate interest" is interpreted to mean that the person or organization that wants to look into the transparency register needs to have an interest which supports the fight against money laundering or terrorist financing. Therefore, information contained in the transparency register is not available to the entire public at large. Other EU member states, like UK and France, have made the information available to all.

A fine amounting up to € 100,000 is specified in the event of failure to comply with the legal requirements.

Requirements in Hong Kong

Effective March 1, 2018, every legal entity registered in Hong Kong must keep and maintain a Significant Controllers Register (SCR).

A significant controller is similar in concept to a beneficial owner. A person has significant control over a company if one or more of the following five conditions are met:

- The person holds, directly or indirectly, more than 25 percent of the shares in a company or, if the company does not have share capital, the person holds, directly or indirectly, a right to share in more than 25 percent of the capital or profits of the company;
- The person holds, directly or indirectly, more than 25 percent of the voting rights of the company;
- The person holds, directly or indirectly, the right to appoint or remove a majority of the board of directors of the company;
- The person has the right to exercise, or actually exercises, significant influence or control over the company; and
- The person has the right to exercise, or actually exercises, significant influence or control over the activities of a trust or a firm that is not a legal person, but whose trustees or members satisfy any of the first four conditions (in their capacity as such) in relation to the company.

In the event of non-compliance, a fine of up to HK$ 25,000 is specified.

Requirements in Indonesia

Indonesia's government recently issued Regulation No. 13 of 2018 on the "Implementation of the Principle of Knowing Beneficial Owners of Corporations in Relation to the Prevention and Eradication of Money Laundering and Terrorism Financing Crimes."

"Beneficial Owner" is defined as an individual who has the authority to appoint and dismiss the board of directors, board of commissioners, managers, supervisory board or executive board of corporations; control the corporation; and/or is entitled to or receives a direct or indirect benefit from the corporation or the real owner of the corporation's fund. Therefore one or more individuals must be named as beneficial owners of a corporation. The deadline to provide the relevant information is March 5, 2019.

The following criteria are used to determine who the beneficial owners of a corporation are. Beneficial owners:

- own more than 25 percent of the shares or voting rights;
- obtain more than 25 percent of the annual profits or net income;
- are authorized to appoint, replace or dismiss members of the organs mentioned in the definition;
- have the power or authority to influence or control the corporation without further authorization from another party;
- receive a benefit from the corporation, the real owner of the corporation's fund or shares.

Legal entities must appoint a person who is in charge of providing the relevant information to the authorized agency, including first and last name, date of birth, residential address and nationality.

Under the regulation, authorized governmental agencies are entitled to check the information provided about beneficial ownership. The regulation allows authorized agencies to share the information about beneficial ownership with domestic and international institutions in order to prevent money laundering and terrorism financing. Third parties also can request the information.

Conclusions

U.S. privately held companies should check whether their subsidiaries registered in foreign countries have to disclose beneficial owner or significant controller information and, if so, the precise requirements, as they vary from country to country.

With any questions, please contact Paul Allaer.

**Benjamin Becker served as a legal intern earlier this year in Thompson Hine's Columbus office. He is not admitted to practice and his work was supervised by principals of the firm.*

SmarTrade for Government Contractors

Thursday, July 26

As part of its "America First" agenda, the Trump administration has sought to revise how the United States conducts its international trade relationships. The resulting changes in the regulatory landscape have had a profound impact on how multinational and government contracting organizations conduct business both domestically and internationally.

Please join us for a complimentary, informative and interactive workshop focusing on risks and opportunities in the regulation of global trade. The workshop format provides a unique opportunity to discuss industry best practices and common compliance pitfalls with experts in the field and your peers. Our panel will examine President Trump's trade initiatives and their impact, including how companies are responding from a global sourcing and procurement perspective. Our topics will include:

- New Trade Developments Affecting Government Contractors
- Supply Chain Issues (e.g., Tariffs on Imports)
- Impact of Defense Authorization Act on International Trade

Registration – Noon - 12:30 p.m.
Lunch provided

Program – 12:30 - 2:30 p.m.

Location
Wildfire McLean
2001 International Drive
(in Tysons Galleria)
McLean, Virginia

RSVP by July 20 to Stacy Weiner, Stacy.Weiner@ThompsonHine.com or 202.263.4184

Continuing Legal Education: 2.0 hours has been requested for Virginia.

Antitrust

Employers Beware: “No-Poaching” and Wage-Fixing Agreements May Invite Civil – and Criminal – Prosecution

By Jennifer L. Maffett-Nickelman

Background

The Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (together, the agencies) jointly enforce the various U.S. antitrust laws. In addition to competition among sellers in an open marketplace, federal antitrust laws also apply to competition among companies to hire employees. As the agencies stated in guidance issued in October 2016, “competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment. An agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities.”

Agreements between companies competing for employees to not solicit or hire the other’s employees (“no poaching” agreements) or about what employee salary or other compensation terms to provide employees (wage-fixing agreements) are per se illegal under the antitrust laws if they are not reasonably necessary to any separate, legitimate business collaboration between the employers. Both agencies have the enforcement authority to bring civil cases to enforce antitrust law, but only the DOJ has the authority to criminally prosecute. While this has been established law, the guidance provided a warning regarding future enforcement practice, particularly directed toward these per se illegal no-poaching and wage-fixing agreements.

Enforcement Policy

In the not too distant past, anti-competitive agreements between employers went relatively unchallenged, and any enforcement consisted only of civil actions. However, in the last few years the DOJ became aware of an unexpected amount of anti-competitive activity in the employee marketplace and brought civil enforcement actions against multiple Fortune 500 companies. Then in October 2016, the agencies issued guidance directed to HR professionals advising of the agencies’ revamped enforcement policy of no-poaching and wage-fixing agreements among employers: they now intended to proceed with criminal enforcement actions, a power the DOJ has always possessed but had rarely exercised. The threat of criminal penalties is substantial – corporations face criminal penalties up to $100 million for a violation of the Sherman Antitrust Act, and individuals face fines up to $1 million plus up to 10 years in prison. This policy change evidenced the DOJ’s intent to treat naked no-poaching and wage-fixing agreements the same as other per se illegal agreements, like price-fixing and market share allocation agreements. The agencies stated that the guidance was “intended to alert human resource professionals and others involved in hiring and compensation decisions to potential violations of antitrust laws.”

In April 2018, the DOJ settled a civil action involving a no-poach agreement and expressly stated that this case was brought civilly, and not criminally, because the company had terminated its no-poaching agreement prior to the issuance of the 2016 guidance. The settlement contains certain provisions that the DOJ noted were specifically intended to terminate the no-poaching agreements and prevent future violations by both companies involved. These provisions included seven-year injunctions prohibiting any such anti-competitive activity, a requirement that each company affirmatively notify its employees, recruiters and the rail industry of the settlement, and an agreement that lowers the DOJ's burden of proof in any action to enforce the settlement.

In the competitive impact statement filed with the settlement as well as in its April 2018 policy update, the DOJ reiterated its intent to pursue criminal enforcement of these types of no-poaching and wage-fixing agreements that were entered into or continued after the issuance of the October 2016 guidance: "Market participants are on notice: the Division intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information on additional violations to identify and end anticompetitive no-poach agreements that harm employees and the economy."

Putting companies, and specifically HR managers, on notice of the DOJ's intent to pursue not only civil enforcement but criminal prosecution of antitrust law violations does not signal any change in the law or the DOJ's interpretation of the law. However, this policy change has raised the stakes for corporations engaged in, or considering the risks of engaging in, anti-competitive activity. While defending civil enforcement action and paying fines can be expensive, the prospect of criminal penalties, including jail time for individual employees, can be an even greater "what keeps you up at night" fear, which the DOJ is certainly hoping will deter companies from contemplating or engaging in this anti-competitive activity.

What This Means for Companies and Employers

Employers, executives and human resource professionals should be aware of the potential for both civil enforcement and criminal prosecution. Based on the DOJ's statements, continuing violations will *likely* be prosecuted criminally. Employers should not only be sure their employees are aware of the illegality of these naked no-poaching and wage-fixing agreements and the potential civil and criminal penalties of engaging in such activity, but may also want to take action by conducting internal investigations and/or implementing compliance programs as a means to facilitate fair and ethical business practices and help protect the company (and its employees) from liability.

This also underscores the importance of conducting thorough due diligence on antitrust issues in the context of a purchase or merger transaction. These types of anti-competitive agreements can be formal written agreements but are often informal understandings that may violate antitrust law.

These recent actions and guidance by the DOJ have emphasized its commitment to protect employees because, as stated in its spring update, "workers, like consumers, are entitled to the benefits of a competitive market. Robbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment."

Please contact Jennifer Maffett-Nickelman with any questions.