Business Law Update

Spring 2022

Business Perspectives

History Lessons

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

Since our last edition we have witnessed scenes of war in Europe that we thought were consigned to the dustbin of history following World War II. These events have made such a strong impression, most likely because they are occurring relatively close to home. This is not to diminish the many other military conflicts in recent years, including those still ongoing. The human cost of war is terrible whenever and wherever it occurs. In any case, I could not send in a column with the word "Perspectives" in the title without acknowledging the terrible events currently ongoing in Ukraine, and sending our hopes to our colleagues there, and in the region, for a prompt resolution and return to peace.

In the fall 2020 issue of the *Business Law Update* I talked about the lawyer's role as risk manager when working with clients to document their transactions. One of my favorite law professors used to refer to this as playing the "what if" game with a client when discussing the clauses to be included in a contract. The client was to think of as many instances of "what if such and such occurs," to be addressed in the terms of the agreement. We as lawyers bring the perspective of multiple deals and clients to the game, which are reflected in the various clauses in our standard forms of agreements.

It is fascinating how often this game fails to capture the risks that actually materialize. In recent years contracts were modified to include "pandemic risk." With the COVID-19 pandemic now (hopefully) receding, its residual effects, such as inflation and global supply chain disruptions, and the war in Ukraine, now move to the front and center. It just goes to show you, it's always something (with apologies to Gilda Radner).

Recent News & Related Articles

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- New York Enacts Employee Privacy Law
- SEC Marks Important Milestone with a Decade of EXAMS
- Employment Legislation Outlook
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- Mobility Matters Quarterly
- Startup Building Blocks: Allocating Equity
- Securities Quarterly Update – Spring 2022
- Chemical Industry Regulatory Update – April 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.

Apart from careful contract drafting, insurance is a fundamental building block of any corporate risk management program. For example, among the many risks to consider are corporate directors' and officers' potential liability to shareholders and third parties, which may be mitigated with "D&O insurance." In this issue we cover amendments to Delaware corporate law allowing corporations to use captive insurance companies for this purpose. In addition, we include articles outlining recent M&A trends, summarizing new employee benefits plan compliance obligations and highlighting important considerations for government contractors related to the Buy American Act.

Speaking of history, 2022 will see the 50th anniversary of the Watergate break-in, that led to the constitutional crisis of the mid-1970s and resignation of President Nixon. We are taking this occasion to convene a symposium at the University Club of Chicago on June 9, featuring two of the major figures in those events: John Dean, the White House Counsel at the time, and Jill Wine-Banks, one of the three Assistant Watergate Special Prosecutors involved in the prosecution. There is a link below in the newsletter with more information about this event for those who may be interested.

As always, please keep in touch, and let us know of topics you would like to see covered in future editions of the *Business Law Update*.

Stay safe,

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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.

Watergate 50 Years On: Has the Legal Profession Forgotten Its Lessons?

Thursday, June 9, 4 p.m.
University Club - Cathedral Hall, 76 East Monroe Street, Chicago

Fifty years after the Watergate scandal broke, we will revisit the chain of events leading up to President Nixon's resignation in 1974. We are very pleased to welcome two of the key players: then-White House Counsel **John Dean** and **Jill Wine-Banks**, an Assistant Watergate Special Prosecutor. The discussion will be led by Thompson Hine partner **Jim Robenalt**.

If you are interested in attending, please contact Katie Egan at Katie.Egan@ThompsonHine.com.

Mergers & Acquisitions

Trending in the (Right?) Direction: Recent M&A Trends and Refinements of Deal-making Processes

By Will Henry and Kelsey Smith

Since early 2020, the pandemic and numerous associated world events brought unprecedented uncertainty to the near-term and long-term trajectory of mergers and acquisitions (M&A) activity, with many clients and professionals left wondering on a weekly (if not daily) basis what new global event could seemingly upend the M&A market next. Yet, despite these extraordinary times—it calls to mind the old phrase/curse, "may you live in interesting times"—M&A activity showed both impressive resilience and remarkable growth in 2021. Thus, while many clients and professionals indeed still wonder about global events, such fears are tinged with optimism that the M&A trend will continue throughout 2022 and beyond.

Global M&A transactions in 2021 shattered expectations and, according to PriceWaterhouseCoopers (PwC), the number of transactions increased 24% year over year from 2020. 2020 was a year marked by unpredictable but ultimately relatively stagnant deal-making—within it a dramatic slowdown mid-year (in connection with initial lockdowns) countered by an active fourth quarter, such that the year ended up somewhat of a wash. Despite a lingering but constant fear of what the COVID-19 pandemic could bring next, 2021 brought an unleashed desire to increase M&A activity across multiple sectors, with more than $5 trillion in global volume taking place. Multiple sources, including PwC and Deloitte, attribute the success seen in 2021 to the technology and media sectors. Other sectors, including pharma and medical and the industrials and chemicals sectors have seen a strong rebound (or, in some cases, countercyclicality) since the beginning of the pandemic. For example, the industrials and chemicals sector recorded $708.4 billion in deal value, almost doubling the 2020 total. This global increase in M&A activity was also seen and felt in the United States during 2021. Pitchbook reported that private equity firms in the United States, in the first half of 2021 alone, closed more than 3,700 deals with a combined value of $450 billion.

Despite the global success the M&A market experienced in 2021, questions remain as to whether the rebound and resurgence will continue. The first quarter of 2022 has already brought Russia's invasion of Ukraine, ongoing supply chain disruptions, striking inflation and increases (both actual and planned) in interest rates, in part to counter inflation. Below are a few areas in which we have observed trends and changes in the deal-making process.

Company Restructuring and Introspection

The COVID-19 pandemic and its associated labor and supply chain challenges forced company executives to rethink and, in some cases, revamp how they operate their companies and what steps can be taken to optimize performance and spur growth. These steps included, as an initial volley, changing the composition of their working capital (increased emphasis on long-term, durable assets), reorganizing company structure (eliminating redundant or inoperative subsidiaries), reducing costs (reductions in force or trends towards automation), lessening or eliminating demands for leasing and owning commercial real estate, and evaluating their recruiting and hiring policies (hybrid model, anyone?). According to Deloitte's *2022 Future of M&A Trends Survey*, many companies are hoping to make these types of transformational changes during a M&A transaction, realizing that in an acquisition there are further synergies to be attained if, for instance, much of the target company's workforce does not require a long-term office. Further, companies poised to continue growing inorganically via a cogent M&A strategy are more likely to cast a wider net of potential targets, realizing that geography matters meaningfully less today than it did even two years ago.

M&A Digitalization

Along with social distancing, the pandemic brought the increased need for better technology and a way to connect the M&A world digitally. M&A professionals were forced to quickly pivot and learn how to use technology to assist with the deal-making process. M&A professionals now have access to a plethora of technology tools to streamline transactions and connect professionals anywhere in the world – data analytics software to assist with due diligence, artificial intelligence to review contracts, DocuSign to execute documents, Webex and Zoom to hold virtual meetings, and cloud computing to retain 24/7 access to important documents. Remarkably, certain M&A processes were sped up as in-person management meetings, onsite diligence and other "hands-on" elements, individuals found, could simply be done via videoconference. This trend is here to stay and represents a clear acceleration of technology's value in the M&A space.

Outside the Box Deal-making and Divestitures

To remain competitive in the fast-paced M&A market, executives have had to consider creative routes to build capital for their companies and remain committed to their companies' strengths. One such way has been, ironically, to consider "carve-out" sales—selling outdated, unprofitable or otherwise culturally distinct (i.e., uninteresting) segments of the company's business to another buyer that will put those assets to good (or better) use. Doing so also has the (often intended) benefit of improving the selling company's cash position, which in turn frees it up to put that cash to work on other acquisitions or alternatively increase its investment in its existing divisions. Deloitte reported in its *2022 Future of M&A Trends Survey* that 57% of executives surveyed have engaged in a divestiture in the past 12 months and at least 32% are currently considering a divestiture. Deloitte also noted that many companies are exploring other creative pathways to assist with growth and long-term success, including strategic alliances, partnerships, joint ventures, and special purpose acquisition companies.

The future of M&A is, if not always bright (to the cheery-eyed deal-makers out there), resilient. Even with the pandemic, clients and professionals alike realized that opportunities abound, both in the nature of the deals themselves as well as the very ways in which they were done. As such, it's easy enough to both predict more of the same—i.e., continued reliance on technology—in the coming years as well as to fully expect that M&A will find new ways to remain, in a word, interesting.

With any questions, please contact Will Henry or Kelsey Smith.

Securities Quarterly Update – Spring 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 discuss the potential effects of Russia's invasion of Ukraine on public companies, including the disclosures that may be required of them under the U.S. securities laws.

Employee Benefits

Preparing for Compliance with the Consolidated Appropriations Act

By Julia Ann Love, Kim Wilcoxon, Beth A. Mandel and Avery Hutson Ozimek

The last several years have been a roller-coaster ride for employers that offer medical plans to their employees. In addition to dealing with COVID-19, employers have had to deal with what is arguably the most significant increase in group health plan compliance obligations since the implementation of the Affordable Care Act.

Unfortunately, employers cannot satisfy these obligations alone. Most of the new obligations require employers to rely on their insurance companies or third-party administrators, who are also struggling to understand and implement compliance solutions while waiting on guidance.

This article provides a brief overview of certain key obligations imposed by the Consolidated Appropriations Act, 2021 (CAA) and regulations requiring transparency (the "Transparency Rule"), including new group health plan price transparency and reporting requirements, protection of patients from surprise billing, and implementation of new mental health parity requirements. Additional information about these requirements is being provided in our six-part webinar series: *Deciphering the New Group Health Plan Requirements Under the CAA*. Please see the box to the right or visit **ThompsonHine.com/Events** to register for the upcoming sessions or access recordings of past sessions.

Surprise Billing Protections

Effective for plan years beginning on or after January 1, 2022, employers that offer medical plans are required to take certain steps to protect covered persons ("participants") from surprise medical billing, *i.e.*, billing for costs incurred when an out-of-network provider is unexpectedly involved in a participant's care. Under the new surprise billing rules:

- Medical plans must limit the amount that participants are required to pay for out-of-network emergency care, certain services provided by out-of-network providers at in-network facilities, and air ambulance services.

Webinar Series: Deciphering the New Group Health Plan Requirements Under the CAA

Session 1: CAA Overview

On March 23, Kim Wilcoxon and Avery Ozimek provided a summary of CAA requirements, discussed issues to consider when negotiating CAA-related contract amendments with service providers, and reviewed SPD updates that should be made to reflect CAA-related plan changes. **View the webinar recording (YouTube).**

Session 2: MHPAEA Compliance

On April 27, Beth Mandel was joined by Nicole Bitter of Willis Towers Watson to discuss group health plan mental health parity compliance and the CAA's new reporting requirements. **View the webinar recording (YouTube).**

Session 3: Transparency, Part 1 – Wednesday, May 25, noon to 1 p.m. ET

Julia Ann Love and Mark Kroboth, along with Lisa Miklich of Chelko Consulting, will examine new plan transparency requirements, including machine-readable files, price comparison tools, ID card disclosures, advanced EOBs, provider directories, and broker/consultant fee disclosures. **Register online.**

Session 4: Transparency, Part 2 – Wednesday, June 22, noon to 1 p.m. ET

In our fourth session, Julia Ann Love and Mark Kroboth will be joined by Austin Chelko of Chelko Consulting Group to continue their examination of new plan transparency requirements. **Register online.**

Session 5: Surprise Billing – Wednesday, July 27, noon to 1 p.m. ET

Laura Ryan and Tenechia Lockhart will be joined by representatives from Aon to discuss the new no surprise billing requirements, including how the requirements are impacting plan costs and the latest legal challenges related to certain aspects of the new requirements. **Register online.**

Session 6: Lessons Learned and Q&A – Wednesday, August 24, noon to 1 p.m. ET

In our sixth and final webinar, our Employee Benefits team will wrap up the series with a summary of lessons learned and answer your lingering CAA questions. **Register online.**

- Any amounts that participants must pay for these out-of-network services must count towards the in-network deductible and out-of-pocket maximum.
- The out-of-network providers of these services are prevented from balance billing the participants for such services.
- Medical plans must follow a specific process for determining the amount to be paid to an out-of-network provider for such services, and the plan may be required to submit to binding arbitration if the out-of-network provider believes the plan's payment is insufficient.
- Medical plans must post a surprise billing notice on a public website of the plan.

The surprise billing requirements apply to employer-provided major medical plans, including plans that are considered grandfathered under the Affordable Care Act. However, the requirements do not apply to plans covering only retirees.

Sessions 5 and 6 of our webinar series will address these requirements and cover lessons learned during the first part of 2022.

Transparency and Reporting

The CAA and Transparency Rule impose a complex web of reporting and information sharing requirements, including but not limited to the following:

- By July 1, 2022, employer-provided medical plans must make two machine-readable files available to the public: one containing in-network provider rate data and another containing historical information about payments to out-of-network providers. Thereafter, those files must be updated monthly and reflect the date of the most recent update. (The Transparency Rule also originally required a third machine-readable file addressing prescription drug pricing, but enforcement of that requirement has been delayed pending further rulemaking.)
- Employer-provided medical plans must report on certain prescription drug information annually. The first reports – for the 2020 and 2021 calendar years – are due December 27, 2022. Thereafter, reports will be due each

June 1 of the year following the reporting year (e.g., the 2022 calendar year report is due June 1, 2023).
- Beginning January 1, 2023, employer-provided medical plans must make certain price comparison tools, including an online database, available to participants. For the first year, the tool must cover 500 specific items and services identified by the Department of Labor (DOL), the Department of Health and Human Services and the Department of the Treasury. Beginning January 1, 2024, the tool must address all remaining items and services covered under the plan.

Sessions 3, 4, and 6 of our webinar series will address the above requirements and other new transparency and reporting obligations.

Mental Health Parity

While the requirements of the Mental Health Parity and Addiction Equity Act (MHPAEA) are not new, the CAA imposed a new obligation to document compliance relating to non-qualitative treatment limitations (NQTLs) (e.g., preauthorization requirements, step therapy protocols, prescription drug formulary design, etc.).

Employer-provided medical plans that are subject to MHPAEA must perform and document comparative analyses of all NQTLs applied to mental health and substance use disorder services under the plan, and plans must be ready to quickly provide that analysis to the DOL upon request. Compliance with this written analysis requirement is proving to be difficult, as employers rarely have the information and expertise needed to prepare this documentation themselves. However, MHPAEA enforcement continues to fall at or near the top of the DOL's enforcement priority list.

Sessions 2 and 6 of our webinar series will address MHPAEA compliance and cover lessons learned during the past year and a half.

Immediate Concerns

Employers should be working with their health insurance companies (for fully-insured plan options) or third-party administrators (for self-funded plan options) to ensure that their medical plans will be compliant with all of these new obligations. Employers should also be working to update plan documentation and communications.

Session 1 of our webinar series provided an overview of considerations to address when contracting with insurers/administrators and when updating plan documentation.

Please contact Julia Ann Love, Kim Wilcoxon, Beth Mandel or Avery Ozimek with any questions.

Insurance

Delaware Amends General Corporation Law to Authorize Captive Insurance Agreements

By Robert Ansehl

The Delaware Legislature recently amended §145 of the Delaware General Corporation Law (DGCL) to allow captive insurers to issue directors and officers insurance coverage, including both Side-A (individual protection to directors and officers) and Side-B (corporate protection) insurance. The amendment clarified a legal ambiguity under the existing DGCL – previously, captives were not permitted to provide indemnity to their affiliated insureds for breach of fiduciary duty claims brought derivatively.

Amended DGCL §145 now allows public and private companies (whether formed in Delaware or elsewhere) to establish new captives or expand current captive insurance coverage to better manage insurable risks, including protection for their officers and directors. The amendment confirms that a captive can issue directors and officers protection, including coverage for derivative claims, judgements, settlements, government investigations and attendant penalties and fines. However, captives still may not provide coverage for liabilities attributable to personal profiteering or financial advantages, or knowing criminal, fraudulent or similar activities that violate the law. That prohibition is not different than limits on the traditional insurance market. The amended law requires that the shareholder(s) approve the coverage at the captive level and that the board of directors has management oversight duty.

Captives, generally, are directly or indirectly owned by the insured(s) or an affiliate and are subject to state insurance laws and sometimes federal law requirements. They provide insurance coverage much in the same manner as the traditional commercial insurance markets. However, captive coverage can be tailored to better address a company's needs, including coverage limits, claims administration, investments and premiums. Generally, payments to captives have the same tax treatment as payments to unaffiliated third-party insurance carriers. As a result, captive insurers have been an effective means to enhance business owners' economics while prudently distributing and managing insurance risks. Captives can be especially helpful as an alternative when insurance premiums are on the rise or in times of volatile coverage limits in the traditional commercial markets, and may be a particularly good fit for life sciences, cannabis and digital asset companies, SPACs and other hard to insure companies. However, the same advantages that inure to most all other companies and captives have been advantageous to industries as diverse as trucking to manufacturing and services, as well as entertainment and hospitality.

A link to the amended law is provided here: DGCL §145.

Thompson Hine's Insurance group has insightful and practical experience and can assist clients with establishing captives and with other insurance matters. Please reach out to Bob Ansehl for assistance or more information.

Government Contracts

Final Rule Amends Federal Acquisition Regulation Part 25 Content Threshold Under Buy American Act: Important Considerations for Companies Providing Products to the Federal Government

By Francis E. (Chip) Purcell, Jr., Jessica V. Haire, Tom Mason, Ryan S. Spiegel, Joseph R. Berger and Mona Adabi

Contractors supplying end products and construction material in support of a federal contract subject to the Buy American Act (BAA or Act) will be required to comply with an increased domestic content threshold beginning this fall. On March 7, 2022, the Department of Defense, General Services Administration and National Aeronautics and Space Administration issued a final rule amending Part 25 of the Federal Acquisition Regulation (FAR), which implements the BAA. The final rule implements aspects of the Biden administration's executive order of January 25, 2021 (EO 14005), which focused on increasing the federal government's purchase of domestic products and developing the supplier base in the United States. The new final rule, effective on October 25, 2022, also provides for relaxation of the increased domestic content threshold upon an agency determination that compliance with the increased threshold is not feasible or that there are no end products or construction materials that meet the new domestic content threshold, or that such products are of unreasonable cost.

The final rule follows a proposed rule issued in 2021 that sought to implement elements of Executive Order 14005, "Ensuring the Future Is Made in All of America with All of America's Workers," which aimed to increase the federal government's use of domestic products. The final rule amends FAR Part 25 to implement (i) a near-term increase to the domestic content threshold following a short grace period during which contractors can prepare for future increases and a schedule for such increases; (ii) a fallback threshold that would allow for products meeting a specific lower domestic content threshold to qualify as domestic products under certain circumstances; and (iii) a framework for application of an enhanced evaluation factor (price preference) for a domestic product that is considered a critical item or made up of a critical component. Each element of the final rule is discussed in detail below.

Increase to Domestic Content Threshold

The final rule gradually increases the domestic content threshold of the Act over a period of several years. The rule increases the threshold from 55% to 60% initially, then to 65% in calendar year 2024, and then to 75% in 2029. The rule provides that the initial increase to 60% will occur in October 2022 to allow industry time to plan for the new threshold, a change from the proposed rule. The rule states that a supplier that is awarded a contract with a period of performance spanning the schedule of content increases will not be entitled to maintain the applicable threshold at the beginning of contract performance, and instead will be required to comply with each increased threshold for the items in the year of delivery.

The final rule states that in response to comments received following issuance of the proposed rule, the FAR Council has included provisions at FAR 25.101(d) and 25.201(c) that provide for a senior procurement executive to allow the application of an alternate domestic content test in defining "domestic end product" or "domestic construction material" where the requirement to comply with the increased thresholds would not be feasible. The rule requires the senior procurement executive to consult with the Made in

America Office (MIAO) prior to application of any alternate domestic content test, and it states that the MIAO will work with agencies to develop an appropriate process for consultation.

Fallback Threshold

The final rule provides that until one year after the increase of the domestic content threshold to 75%, an agency may use the current 55% domestic content threshold in instances where the agency has determined that there are no end products or construction materials that meet the new domestic content threshold, or such products are of unreasonable cost. The rule states that the fallback threshold requires offerors to indicate which of their foreign end products exceed 55% domestic content, and that the fallback threshold only applies to construction material that does not consist wholly or predominantly of iron or steel or a combination of both and that are not COTS items, as well as to end products that do not consist wholly or predominantly of iron or steel or a combination of both and that are not COTS items. The fallback threshold would cease to apply one year after the domestic content threshold increases to 75%, in order to "send a clear signal to the Federal marketplace that the Federal Government is fully committed to suppliers who increase their reliance on domestic supply chains."

Enhanced Price Preferences for Critical Products and Critical Components

The final rule establishes a framework through which higher price preferences will be applied to end products and construction material that are determined to be critical or made up of critical components. The rule states that a subsequent rulemaking issuance will establish the definitive list at FAR 25.105 of critical items and critical components in the FAR as well as their associated enhanced price preferences that OMB deems to be "critical" to U.S. supply chains or made up of "critical components," which will be based upon the supply chain reviews that federal agencies conducted pursuant to President Biden's Executive Order of February 24, 2021 (EO 14017). The final rule notes that while reporting remains a government priority, the reporting requirement will be deferred to the rulemaking that establishes the definitive list at FAR 25.105.

Contractor Considerations under New Rule

Contractors that supply products or construction materials in support of a government contract that is subject to the BAA should understand the implications of the final rule as well as the status of issues identified in the January 2021 executive order on procurement of domestic products.

First, the increased domestic content thresholds established by the final rule may require some companies to alter their sourcing and manufacturing practices to continue benefiting from domestic preferences under the Act. While the final rule delays implementation of the initial increase in the domestic content threshold from 55% to 60%, the final rule maintains the proposed rule's timetable for implementation of the remaining threshold increases through 2029. The increase from the current threshold of 55% to the ultimate threshold of 75% is significant, and while contractors have time to adjust their sources of supply and manufacturing processes, any delay in a contractor's efforts to prepare for the threshold increases will pose significant compliance risks.

Second, although the final rule allows for use of an alternate domestic content test by which a senior agency procurement executive determines that compliance with the applicable threshold would not be feasible, the specifics of this process remain unclear. In particular, the final rule does not address the standard that the procurement executive should use in determining whether compliance with the applicable threshold is feasible or not. Further, use of an alternate content test requires consultation and approval by the MIAO, which is a yet-to-be determined process.

Third, despite the January 2021 executive order directing the FAR Council to examine the current exemption for commercial information technology under the BAA, the final rule is silent on the exemption or its future. The commercial information technology exemption remains a significant relaxation of the BAA's requirements, and any effort by the FAR Council to rescind it will have a significant impact upon companies that supply IT products to the federal government.

Fourth, as mentioned above, the domestic content thresholds set forth in the final rule will not apply to end products or construction materials that consist wholly or predominantly of iron or steel (or a combination of both). Such items will continue to be classified as domestic for purposes of the Act only if the cost of foreign iron and steel constitutes less than 5% of the cost of all components used in an end product or construction material. The fallback threshold also described above would not apply to such items either.

The final rule's implementation of increased domestic content thresholds for products subject to the Buy American Act reflects the current administration's emphasis on procurement of domestic products and strengthening of domestic manufacturing and sourcing capabilities. Although the Act applies only to a portion of contracts issued by federal agencies, it remains a significant compliance obligation for many contractors that sell products to government customers. The final rule does provide a grace period in which contractors subject to the Act's requirements can prepare for the initial threshold increase, and the final increase will not be implemented until 2029; however, given the level of increases to the domestic content threshold required by the final rule, contractors should begin the process of addressing compliance with those increases immediately.

With any questions, please contact Chip Purcell, Jessica Haire, Tom Mason, Ryan Spiegel, Joe Berger or Mona Adabi.