

SEC/CORPORATE

Delaware Supreme Court Upholds Fee-Shifting Bylaw

On May 8, in [*ATP Tour v. Deutscher Tennis Bund*](#), the Delaware Supreme Court held that a board-adopted bylaw shifting attorneys' fees and costs in intra-corporate litigation to unsuccessful plaintiffs is facially valid. Due to the deterrent effect of "loser pays" provisions, the decision could have a significant impact on the dynamics of stockholder litigation.

Under Delaware law, corporate bylaws are presumed to be valid, and the Court stated that a bylaw allocating risk among parties to intra-corporate litigation is permissible under the Delaware General Corporation Law (DGCL). The Court noted that there is no requirement that a fee-shifting provision be included in the charter and that there is no principle of common law that prohibits directors from adopting such a bylaw. While Delaware follows the American Rule, under which each party to litigation generally pays its own legal costs, the Court stated that it is settled law that parties to litigation may agree to modify that rule by contract. Because bylaws are contracts under Delaware Supreme Court precedent, a fee-shifting provision would fall within the contractual exception.

Since the opinion responded to certified questions of law from the US District Court for the District of Delaware, the Court was not addressing a specific fact pattern. Accordingly, the Court cautioned that a facially valid bylaw will not be enforced if it is adopted or used for inequitable purposes: "inequitable action does not become permissible simply because it is legally possible." Notably, the Court went on to state: "[t]he intent to deter litigation, however, is not invariably an improper purpose."

ATP Tour arose in connection with a dispute involving a Delaware non-stock, membership corporation, but it has broader implications since most provisions of the DGCL, including those concerning bylaws, apply to both traditional and non-stock corporations. The opinion extensively cites Delaware case law involving traditional corporations.

A public company considering a fee-shifting bylaw should factor in the potential reaction of its stockholders, stockholder rights advocates and proxy advisory services. Additionally, adopting such a bylaw in response to actual or threatened litigation, rather than on a "clear day," could negatively affect its enforceability.

BROKER DEALER

FINRA Proposes Changes to FINRA Rules 7410 and 2121

The Financial Industry Regulatory Authority, Inc. is proposing to amend FINRA Rule 7410 to permit members which, under FINRA Rule 7410, are not considered to be "reporting members" (i.e., because, among other things, such members route order information to a single "reporting member") to route any order information to two "reporting members" without being deemed to be a "reporting member." Such permission is conditioned on a member routing orders to each of the two "reporting members" on a pre-determined schedule approved by FINRA for a time period not to exceed one year.

Separately, as part of FINRA's initiative to develop a new consolidated rulebook, FINRA is proposing changes to FINRA Rule 2121 to adopt current NASD Rule 2440 and Interpretive Material 2440-1 and 2440-2 as FINRA Rule 2121, which generally provide that members buying or selling securities for their own accounts shall buy or sell at a price that is fair, and members buying or selling securities as agents for customer accounts shall charge commissions that are fair, without any substantive changes thereto.

More information on the proposed rule change to FINRA Rule 7410 is available [here](#).

More information on the proposed rule change to FINRA Rule 2121 is available [here](#).

CFTC

CFTC Staff Announces Streamlined No-Action Relief Process for Certain CPOs

On May 12, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight announced a streamlined process that will allow a commodity pool operator (CPO) that has delegated investment management authority (Delegating CPO) to another person registered as a CPO (Designated CPO) to request no-action relief from CPO registration. To qualify for the streamlined approach, the Delegating CPO must submit a form no-action letter adopted by the CFTC pursuant to which the Delegating CPO represents that it will: (i) delegate all of its investment management authority to the Designated CPO; (ii) refrain from participating in the solicitation of participants for or managing any property of the commodity pool; (iii) not be subject to a statutory disqualification; (iv) be able to identify a business purpose (other than avoiding registration requirements) that explains why the Designated CPO is a separate entity; (v) ensure that the Designated CPO maintains books and records related to the commodity pool in accordance with CFTC regulations; (vi) control, be controlled by or be under common control with the Designated CPO; and (vii) enter into an agreement to be jointly and severally liable with the Designated CPO or be subject to liability as a board member of the commodity pool.

The announcement and form of the streamlined no-action request letter are available [here](#).

LITIGATION

Fourth Circuit Declines to Extend *Janus* to Criminal Cases

A three-judge panel of the US Court of Appeals for the Fourth Circuit recently affirmed the dismissal of a lawyer's *habeas* petition, finding that *Janus Capital Group Inc. v. First Derivative Traders*, a US Supreme Court case that exempts investment advisers from securities fraud liability for funds' false statements, did not apply to criminal cases. The appellant Thomas Prousalis Jr. pled guilty to three counts of securities fraud arising from his representation of Busybox.com (Company) for its initial public offering. In preparing the Company's registration materials, Prousalis failed to provide all necessary details concerning his compensation. After the Company's underwriter pulled out of the deal, thereby resulting in a \$2.5 million shortfall, Prousalis devised a scheme to "recycle" proceeds to purchase shares and compensate him and Company officers. After several unsuccessful appeals, Prousalis filed a *habeas* petition in the Eastern District of Virginia. The US District Court for the Eastern District of Virginia denied his petition, and the Fourth Circuit affirmed. Although Prousalis argued that the *Janus* definition of the "maker" of a false statement for securities fraud purposes meant that his conduct was no longer criminal, the Fourth Circuit found the Supreme Court's decision inapplicable. Noting that both the facts and reasoning in *Janus* were limited to the private right of action for securities fraud, the Fourth Circuit declined to apply it in the criminal context, citing "considerations of judicial restraint and legislative primacy."

Prousalis v. Moore, No. 13-6814 (4th Cir. 2014).

For more information, contact:

SEC/CORPORATE

Claudia H. Allen +1.312.902.5432 claudia.allen@kattenlaw.com

FINANCIAL SERVICES

Janet M. Angstadt +1.312.902.5494 janet.angstadt@kattenlaw.com
Henry Bregstein +1.212.940.6615 henry.bregstein@kattenlaw.com
Wendy E. Cohen +1.212.940.3846 wendy.cohen@kattenlaw.com
Guy C. Dempsey Jr. +1.212.940.8593 guy.dempsey@kattenlaw.com
Kevin M. Foley +1.312.902.5372 kevin.foley@kattenlaw.com
Jack P. Governale +1.212.940.8525 jack.governale@kattenlaw.com
Arthur W. Hahn +1.312.902.5241 arthur.hahn@kattenlaw.com
Carolyn H. Jackson +44.20.7776.7625 carolyn.jackson@kattenlaw.co.uk
Kathleen H. Moriarty +1.212.940.6304 kathleen.moriarty@kattenlaw.com
Ross Pazzol +1.312.902.5554 ross.pazzol@kattenlaw.com
Kenneth M. Rosenzweig +1.312.902.5381 kenneth.rosenzweig@kattenlaw.com
Fred M. Santo +1.212.940.8720 fred.santo@kattenlaw.com
Christopher T. Shannon +1.312.902.5322 chris.shannon@kattenlaw.com
Peter J. Shea +1.212.940.6447 peter.shea@kattenlaw.com
James Van De Graaff +1.312.902.5227 james.vandegraaff@kattenlaw.com
Robert Weiss +1.212.940.8584 robert.weiss@kattenlaw.com
Gregory E. Xethalis +1.212.940.8587 gregory.xethalis@kattenlaw.com
Lance A. Zinman +1.312.902.5212 lance.zinman@kattenlaw.com
Krassimira Zourkova +1.312.902.5334 krassimira.zourkova@kattenlaw.com

LITIGATION

Michael S. Gordon +1.212.940.6666 michael.gordon@kattenlaw.com
Tenley Mochizuki +1.212.940.8568 tenley.mochizuki@kattenlaw.com

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