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China Practice Newsletter

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We invite you to read our China Practice Newsletter, in which our authors discuss pertinent Sino-American topics. We also welcome you to discuss your thoughts on this issue with our authors listed within the document.

霍兰德奈特律师事务所是一家位于美国的全球性法律事务所，我们致力于向客户提供高质量的法律服务。我们向在美国及拉丁美洲进行商业活动或投资的中国投资人及公司提供他们所需的各类法律协助。我们也向跨国公司、金融机构、贸易机构、投资人及其他客户提供他们于其与中国相关活动中所需的咨询和协助。我们在 30 个办公室的 1600 多名对各领域有经验的律师及专业人员能够协助客户处理他们在经营或投资过程中所遇到的各种机会及挑战。

我们向中国客户及从事与中国有关活动的跨国客户提供法律协助的领域包括国际商业、企业并购、科技法律、石油及能源、医疗法律、房地产、环保法律、私募基金、创投基金、金融法律服务、税务、知识产权、私人财富管理法律服务、信息隐私及网络安全、劳动及雇佣法律、员工持股计划、法令遵循及政府法规、及争议解决。

我们邀请您阅读刊载我们各作者就与中美有关的各议题所作论述的 China Practice 期刊。我们也欢迎您向本期刊的各作者提供您对各相关议题的看法。

Preference Claims, Clawbacks in Bankruptcy Can Disrupt a Construction Project

Several Defenses May Reduce or Eliminate Other Project Participants' Liability in Regards to a Trustee's Preference Demands

By **James P. Chivilo**, **Richard A. Bixter Jr.** and **Gregory R. Meeder**

HIGHLIGHTS:

- A bankruptcy filing by a single construction project participant can cause a chain reaction in which payments aren't met, leading to financial distress, impacts to project payment systems and completion schedules, and/or bankruptcy for other participants.
- In addition, the bankruptcy trustee administering the case has the ability to claw back or demand the return of all payments made by the debtor to third parties in a 90-day period prior to the date the debtor's bankruptcy case began. These are often referred to as "preference demands."
- The good news is that there are several defenses that may reduce or completely eliminate liability in connection with preference demands.

Because of the injunction that begins as soon as a debtor files for Chapters 7, 11 or 13 bankruptcy – called the automatic stay – creditors and collection agencies are prevented from seeking payment from the debtor. Therefore, a bankruptcy filing by a single construction project participant can cause a chain reaction, leading to financial distress, impacts to project payment systems and completion schedules, and/or bankruptcy for other participants.

In addition, the bankrupt company (debtor) or a court-appointed trustee (trustee) has the ability to demand the return or "claw back" of all payments made by the debtor to third parties in a 90-day period prior to the date that the debtor's bankruptcy case began. These are often referred to as "preference demands."

Other project participants not involved in the bankruptcy can be understandably upset when they learn about this aspect of bankruptcy law. The bankruptcy filing of a construction project participant will likely lead to payment stoppages and project disruptions, and on top of that, a trustee can seek to claw back partial payments received by other contractors, subcontractors or suppliers from the debtor. These demands often take the form of the letter from the debtor's or trustee's attorney (sometimes years after the bankruptcy was filed) and can be followed by a lawsuit filed in the bankruptcy court if the payment demand is not resolved in the debtor's bankruptcy case.

The good news is that non-bankrupt project participants have several defenses that may reduce or completely eliminate liability in connection with preference demands. Many of these defenses are available to all payment recipients, and there are particular defenses that specifically apply to project participants given the contractual relationships among these parties. Below is a discussion of strategies on how project participants are able to address preference demands that are often overlooked in these disputes.

PREFERENCE CLAIMS

Preference claims have become a regular occurrence as bankruptcy trustees hunt for funds available to pay creditors. The general rule is that a trustee may seek the return of funds paid by the debtor to third parties in the 90 days prior to the bankruptcy filing. This preference period is extended to one year if the payments were made to an "insider" such as a family member of the debtor's owners or certain business affiliates. See 11 U.S.C. § 547.

The policy behind this bankruptcy law is that a debtor should not be permitted to "prefer" one creditor over its other creditors, and any amounts paid out immediately prior to bankruptcy should be brought back into the bankruptcy estate for a more even distribution among the debtor's entire list of creditors.

The Bankruptcy Code recognizes that, in many cases, payments within the 90-day preference window were not preferential in nature. However, there are various defenses that one can raise to a preference demand. Most common among these are the ordinary course of business defense (payments were made according to ordinary business terms and the historical practice of the parties), and the new value defense (e.g., after receiving the preference payment, the non-debtor provided new goods or services to the debtor, offsetting the preference payment). However, these common defenses can be subjective in nature, and they rarely convince the trustee to fully drop its preference demand.

The good news is that there are additional defenses available to non-debtor project participants that, in certain circumstances, may result in an objective defense that no liability exists in connection with a preference demand. For example, the non-debtor participant may be the holder of a statutory lien right in association with its contractual project obligation to provide labor, materials or services as it relates to the debtor contractor, as well as the non-debtor's right to receive payment.

In this instance, the non-debtor may fall under the umbrella of a statutory lienholder, and will be recognized by the bankruptcy court as a secured creditor that is entitled to the full value of amounts due under the applicable construction contract and the amounts due to be paid prior to the bankruptcy filing or amounts, which were in fact paid during the 90-day preference period.

In such a situation, the bankruptcy trustee's attempt to claw back the alleged preference payments is improper and inconsistent with mechanic lien law and bankruptcy law principles, for the reasons set forth further below.[1]

Under the Bankruptcy Code, a trustee can recover preferential transfers made from the debtor's estate if the transfer was 1) made to a creditor, 2) for a debt owed by the debtor, 3) made while the debtor was insolvent, 4) within 90 days prior to the debtor's filing of its bankruptcy and 5) enabled the creditor to receive more than it would have received in the Chapter 7 liquidation of the debtor. Most notable is the fifth element and its applicability to mechanic lien holders. It is well-settled law that, in a Chapter 7 liquidation case, if a creditor is fully secured, it should receive the full value of its claim. *See Golfview Developmental Ctr., Inc. v. All-Tech Decorating Co.*, 309 B.R. 758, 768 (Bankr. N.D. Ill. 2004).

SECURED STATUS AS A DEFENSE TO A PREFERENCE CLAIM

Construction-based creditors are typically secured creditors entitled to full payment under the applicable construction contract as a result of statutory mechanic's lien rights. Bankruptcy courts will incorporate non-bankruptcy property and lien law, and a properly perfected mechanic's lien will be recognized as valid under the Bankruptcy Code. Bankruptcy law is clear that the holder of a mechanic lien is a secured creditor within the meaning of the Bankruptcy Code.[2] Illinois law identifies four requirements to acquire a mechanic's lien:

1) a valid contract, 2) the contract is with the owner or knowingly permitted by the owner, 3) the claimant furnished services and 4) the claimant performed the services under the contract.[3]

As such, a fully secured creditor with a mechanic's lien will be entitled to full payment from its collateral prior to payment to any unsecured creditors. Under this circumstance, any pre-bankruptcy payment to a fully secured creditor cannot be a preference payment. Accordingly, the creditor will have a very strong argument that there is zero preference liability in connection with the pre-bankruptcy payments from the Debtor.

ALLEGED PREFERENCE PAYMENTS CONSISTED OF FUNDS "EARMARKED" FOR TRANSFER DOWN THE CONSTRUCTION PROJECT CHAIN

Even if the non-debtor participant does not hold a mechanic's lien and is not otherwise a secured creditor, there are other defenses that may apply in response to the preference demand given the unique relationship among construction project participants.

For example, there is the rarely employed "earmarking doctrine" in response to a preference demand. The earmarking doctrine applies in situations where: 1) an agreement exists between the debtor and a non-debtor (often the creditor that received the preference demand) for repayment of an antecedent debt, 2) the performance was made on that agreement as a result of which the creditor receives payment, 3) the debtor lacked control over the funds used for payment to the creditor and 4) the payment does not deplete the funds available to the debtor for its bankruptcy case.[4]

An earmarking scenario often arises given the nature of the construction project payment context. For example, the debtor may be an intermediary in the construction project chain, and the funds transferred to the creditor may have ultimately came from the project owner or somewhere else upstream, with a contractual obligation for the debtor to transfer the funds downstream to the contractors, subcontractors and/or suppliers. In such situations, there is a strong defense that the earmarking doctrine applies, as these funds were earmarked for payment to downstream contractors, and were never the debtor's property to begin with and never under the debtor's ultimate control.[5]

Moreover, payment and receipt of these funds do not deplete the debtor's estate, because 1) an argument can be made that these funds were never truly assets of the debtor, and 2) to the extent the non-debtor recipient has a mechanic's lien or other lien rights, the non-debtor was entitled to full payment of the amount due.[6]

THE CONTRACT FUND PAYMENTS BELONG TO THE CREDITOR BY VIRTUE OF LIEN LAW TRUST FUND PROVISIONS

Under Illinois law, an owner who requires the execution and delivery of a waiver of mechanic's lien by any person who furnishes services in exchange for payment, shall hold in trust the sums due to the person who furnished the services.[7]

An established principal of bankruptcy is that debtors and creditors enter with the property rights they held prior to the bankruptcy filing. In the above scenario, a debtor holding funds in trust for the creditor in exchange for a lien waiver does not have full equitable title to the trust fund, and thus these funds cannot comprise property of the bankruptcy estate available to be distributed to other creditors.[8]

In the preference context, when lien waivers are exchanged for payment prior to the bankruptcy filing, there is a presumption under Illinois law that those funds are subject to the trust provisions of mechanic's lien law. Given that these funds could never be available to a trustee to pay a debtor's creditors, there is no credible argument that the release of the funds held in trust was a preference payment that provided the non-debtor with a better result than it would have received in a Chapter 7 liquidation (i.e. the benefit of receiving funds to which it was not entitled to payment of under a contract agreement upstream due to payment obligations with its downstream contractors). Accordingly, where the "trust fund" defense may be applied, it will be a strong defense to a preference demand.

CONCLUSION

The bankruptcy filing by a construction project partner can be a disruptive event, particularly where the bankrupt company or a court-appointed trustee seeks to claw back the funds through a preference demand. Upon receipt of a preference demand letter seeking return of all payments, a non-debtor must respond to preserve its rights, and when and where applicable utilize the particular rights and defenses that are specific to construction project participants.

Notes

[1] See 11 U.S.C. § 546(b)(1).

[2] *Golfview Developmental Ctr., Inc*., 309 B.R. at 769; see also *In re FBI Wind Down, Inc*., 581 B.R. 387, 405 (Bankr. D. Del. 2018) (to the extent that a claimant even holds an inchoate mechanic's lien, it is a secured creditor).

[3] *Id.* at 768.

[4] *In re Network 90 degrees, Inc*., 126 B.R. 990, 994 (Bankr. N.D. Ill. 1991) ("The foundation of the earmarking doctrine lies … in the debtor's control (or lack of control) over the assets which were transferred.")

[5] *In re Network 90 degrees, Inc*. establishes that the earmarking doctrine does not necessarily require the payment to come from a new creditor. Id. Thus, it is sufficient when owners or other downstream contractors issue payments directly to the targeted creditor of the preference demand.

[6] See *Golfview Developmental Ctr., Inc*., 309 B.R. at 776 (noting that a fully secured creditor receiving payment would not negatively affect other creditors of the debtor's estate).

[7] See 770 ILCS 60/21.02.

[8] See *In re Raymond Professional Gr., Inc*., 408 B.R. 711 (Bankr. N.D. Ill. 2009) amended in part by *In re Raymond Professional Gr., Inc*., 410 B.R. 813 (Bankr. N.D. Ill. 2009) (holding that, pursuant to 770 ILCS 60/21.02, funds held in trust whose payment depended upon subcontractors issuing lien waivers to the owner and contractor (debtor) upon their request belonged to the subcontractor and were not the property of the debtor's bankruptcy estate).

对优先清偿的主张 -- 破产中的追回可能会扰乱建设项目

若干抗辩可以减少或消除其他项目参与者对有关受托人对优先清偿的主张的责任

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重点摘要

- 单个建设项目参与方的破产申请可能会导致连锁反应，导致款项未付、导致财务困境、影响项目付款系统和完工进度、和/或导致其他参与方破产。
- 此外，管理案件的破产受托人有能力追回或收回债务人在债务人破产案件开始前 90 天内支付给第三方的所有款项。这些通常被称为"对优先清偿的主张"。
- 幸运的是，有几种抗辩可能会减少或完全消除对优先清偿的主张的相关责任。

由于债务人申请第 7 章、第 11 章或第 13 章破产时立即开始 ---所谓自动中止---债权人和收款机构无法向债务人寻求付款。因此，单个建设项目参与方申请破产可能会引起连锁反应，导致财务困境、影响项目付款系统和完工进度、和/或导致其他参与方破产。

此外，破产公司（债务人）或法院指定的受托人（受托人）有能力要求退还或"收回"债务人在债务人破产案件开始前 90 天内向第三方支付的所有款项。这些通常被称为"对优先清偿的主张" 。

当其他没有破产的项目参与者了解破产法的这一方面时，他们可能会感到不安，这是可以理解的。工程项目参与方的破产申请可能会导致付款停止和项目中断，除此之外，受托人还可以寻求追回其他承包商、分包商或供应商从债务人处收到的部分付款。这些要求通常透过债务人或受托人的律师发函的方式作出（有时是在破产申请几年后才发生）。如果付款要求没能在债务人的破产案件中得到解决的话，也可以随后向破产法院提起诉讼。

幸运的是，没有破产的项目参与者有几种抗辩理由可以减少或完全消除对优先清偿的主张的相关责任。其中许多抗辩适用于所有付款收受方。鉴于有些当事人之间存在某些合同关系，有一些特别的抗辩特别适用于该等项目参与者。以下是关于项目参与者如何解决在这些争议中经常被忽视的那些对优先清偿主张的处理策略的讨论。

对优先清偿的主张

随着破产受托人寻找可用于支付债权人的资金，对优先清偿的主张已成为经常发生的事情。一般规则是，受托人可要求债务人在破产申请前 90 天内向第三方支付的资金的返还。如果向如债务人的所有人的家庭成员或某些企业的关联方等"内部人士"付款的话，则此期间将被延长至一年。见《美国法典》第 11 章第 547 节。

这项破产法背后的政策是不应允许债务人对某一个债权人给予优于其他债权人的优先待遇，破产前支付的任何款项都应重新回到破产财产，以便在债务人的整个债权人中进行更均匀的分配。

《破产法》承认，在许多情况下，在 90 天优先窗口内的付款在本质上并不优先。然而，人们可以就对优先清偿的主张提出各种各样的抗辩。其中最常见的是正常业务抗辩（付款是根据正常业务条款和当事人的过往惯例进行的）和新的价值抗辩（例如，在收到优先付款后，非债务人向债务人提供了与优先付款相互抵消的新的货物或服务。然而，这些常见的抗辩在本质上可能是主观的，它们很少能说服受托人完全放弃其对优先清偿的主张。

幸运的是，非债务人项目参与者有一些额外的抗辩，在某些情况下可能导致客观抗辩，即不存在与优先清偿主张的责任。例如，非债务人参与人可能是与其提供与债务人承包商相关的劳动力、材料或服务、以及非债务人获得付款的权利的合同项目义务相关的法定留置权的持有人。

在这种情况下，非债务人可能获得作为法定留置权持有人的保护，并将被破产法院确认为有担保债权人，有权享有适用的工程合同项下到期应付款项的全部价值，以及破产申请前到期且实际在 90 天优先期内支付的金额。

在这种情况下，破产受托人试图追回所称的优先付款是不适当的，并且不符合工匠留置权法律和破产法原则，原因如下。[1]

根据《破产法》，受托人可以从债务人的财产中收回优先的财产移转，如果该移转是：1）转让给债权人，2）为债务人所欠债务所作，3）债务人在资不抵债时所作，4）在债务人提出破产申请前 90 天内所作，且 5）使债权人能够收到超过其在第 7 章债务人清算中本应收到的金额。最值得注意的是第 5 个要素及其对工匠留置权持有人的适用性。在第 7 章清算案件中，如果债权人有充分担保，则其应获得其债权的全部价值，这一点在法律上已经是很明确了。见 *Golfview Developmental Ctr., Inc.* 诉 *All-Tech Decorating Co.* , 309 BR 758, 768 (Bankr. ND Ill. 2004)。

以担保地位作为对优先清偿的主张的抗辩

工程的债权人通常是有担保债权人，基于如工匠法定留置权，有权根据适用的工程合同获得全额付款。破产法院将采纳适用非破产财产法和留置权法，根据破产法，适当完善作成的工匠留置权将被视为有效。破产法明确规定，工匠留置权的持有人是《破产法》所指的有担保债权人。[2] 伊利诺伊州法律确定了获得工匠留置权的四项要求：1）存在有效合同，2）该合同已与所有人签订或在合同所有人知情同意的情况下签订，3）主张工匠留置权的人提供了服务，4）主张工匠留置权的人根据合同履行了服务。[3]

因此，具有工匠留置权的完全有担保债权人将有权在向任何无担保债权人付款之前从其担保物中获得全额付款。在这种情况下，对完全有担保债权人的任何破产前付款都不能是优先付款。因此，债权人将有一个非常有力的论点，即对债务人的破产前付款没有任何优先清偿的责任。

所谓的优先付款系由“指定”用于移转至建设项目链下游的资金所构成

即使非债务人参与人不具工匠留置权，并且在其他方面也不是有担保债权人，鉴于建设项目参与人之间的独特关系，也有其他抗辩理由可作为对对优先清偿主张的回应。

例如，在回复对优先清偿的主张时，可以适用很少采用的“指定用途原则”作为抗辩。指定用途原则在符合以下情况时适用：1）债务人与非债务人（通常是收到对优先清偿权主张的债权人）之间存在偿还先前债务的协议，2）根据该协议履行债务，债权人因此收到付款，3）债务人对用于向债权人付款的资金缺乏控制，4）付款不会耗尽债务人在其破产案中可用的资金。[4]

鉴于建设项目付款情况的性质，经常出现指定用途的情况。例如，债务人可能是建设项目链中的中间人，转移给债权人的资金可能最终来自项目业主或上游其他地方，而债务人有合同义务将资金转移给下游的承包商、分包商和/或供应商。在这种情况下，有一个强有力的抗辩理由是主张指定用途原则适用，因为这些资金被指定用于向下游承包商付款，而且从一开始就不是债务人的财产，也从不在债务人的最终控制之下。[5]

此外，这些资金的支付和接收不会耗尽债务人的财产，因为 1）可以提出一个论点，即这些资金从来都不是债务人的真正资产，且 2）如果非债务人收款人拥有工匠留置权或其他留置权，则非债务人有权获得到期金额的全额支付 。[6]

根据留置权法信托基金的规定，合同资金的支付归属于债权人

根据伊利诺伊州法律，业主要求提供服务的任何人签署并交付工匠留置权豁免书以换取付款，应被视为作为受托人持有应支付给提供服务的人的款项。[7]

破产的一个既定原则是，债务人和债权人在申请破产前持有财产权。在上述情况下，以受托人地位为债权人持有其豁免留置权而获得的资金的债务人对该资金没有完全的衡平法所有权，因此这些资金不能构成可分配给其他债权人的破产财产的财产。[8]

在优先清偿的情况下，当在破产申请之前以豁免留置权换取付款时，根据伊利诺伊州法律，有一种推定，即这些资金受工匠留置权法信托条款的约束。鉴于受托人永远无法以这些资金来支付债务人的债权人，因此没有可信的证据表明支付该信托资金是一种优先付款，而使非债务人获得了比第 7 章清算更好的结果（即，由于与下游承包商的付款义务，获得其根据上游合同协议下无权获得的资金的收益）。因此，在可能适用“信托基金”抗辩的情况下，这将是对对优先清偿主张的有力抗辩。

结论

工程项目合作伙伴的破产申请可能是一个扰乱性事件，特别是当破产公司或法院指定的受托人试图通过对优先清偿主张要求追回资金时。在收到要求返还所有款项的对优先清偿的主张的信函时，非债务人必须作出回应以保留其权利，以及在合适的时间及地点运用适用于施工项目参与者的特定权利和抗辩。

附注

[1] 见《美国法典》第 11 卷第 546（b）（1）条。

[2] *Golfview Development Ctr., Inc*.,309 B.R. , 第 769 页；*另见 re FBI Wind Down, Inc.*, 581 B.R.387, 405（Bankr.D.Del.2018）（如果提出主张的人甚至持有不完善的工匠留置权，则为有担保债权人）。

[3] *同上*，第 768 页。

[4] *In re Network 90 degrees, Inc*. 126 B.R. 990, 994（Boor.N.D.I. 1991）（“专款原则”的基础在于……债务人对被转移资产的控制（或缺乏控制）。”

[5] *In re Network 90 degrees, Inc*. 中，规定指定用途原则不一定要求付款来自新的债权人*同上*。因此，当业主或其他下游承包商直接向收到对优先清偿主张的债权人付款时，这就足够了。

[6] 见 *Golfview Development Ctr., Inc.*, 309 B.R.，第 776 页（注意到接受付款的完全有担保债权人不会对债务人财产的其他债权人产生负面影响）。

[7] 见 770 ILCS 60/21.02。

[8] 见 *In re Raymond Professional Gr., Inc*., 408 B.R.711（Bankr.N.D.Ill.2009）， 由 *In re Raymond Professional Gr., Inc.*, 410 B.R.813（Bankr.N.D.Ill.2009）部分修订（认为，根据 770 ILCS 60/21.02，信托基金的付款是因为分包商根据业主和承包商（债务人）的要求向他们发出留置权豁免书，该资金应归属于分包商不属于债务人破产财产）。

SEC Approves Nasdaq's Plan to Improve Diversity on Company Boards

By **Ira N. Rosner** and **Shawn M. Turner**

HIGHLIGHTS:

- The U.S. Securities and Exchange Commission (SEC) has approved Nasdaq Stock Market LLC's proposed rule changes related to board diversity and disclosure. A Nasdaq-listed issuer, subject to some exceptions discussed below, will now be required to include two "Diverse" members on its board or explain why it does not meet this standard.

- The phase-in period for public disclosure of board-level diversity statistics will begin within one year of the SEC's approval of the rule. The SEC will require all companies to have one diverse director, or explain why not, within two years of the SEC's approval of the rule.

- A Nasdaq-listed Issuer will be required to disclose certain information related to its board members' diversity. By requiring expanded disclosures regarding board composition, the new rule change should lead to comparable diversity metrics across issuers.

The U.S. Securities and Exchange Commission (SEC) approved Nasdaq Stock Market LLC's proposed rule changes related to board diversity and disclosure on Aug. 6, 2021.[1]

A Nasdaq-listed issuer, subject to some exceptions discussed below, will now be required to include two "Diverse" members on its board or explain why it does not meet this standard. For purposes of this rule, "Diversity" is defined as an individual who self-identifies in one or more of the following categories: 1) Female,[2] 2) Underrepresented Minority[3] or 3) LGBTQ+.[4]

The phase-in period for public disclosure of board-level diversity statistics will begin within one year of the SEC's approval of the rule. The SEC will require all companies to have one diverse director, or explain why not, within two years of the SEC's approval of the rule. Depending on the listing tier of the company, companies will need two diverse directors within four years (for Nasdaq Global Select Market and Nasdaq Global Market) or five years (for Nasdaq Capital Market) of the SEC approval of the rules related to board diversity and disclosure.

OVERVIEW OF THE RULE

The newly approved Nasdaq rules will generally require Nasdaq-listed issuers to have at least two diverse members on their boards of directors or explain why they do not. In addition, the new rules will mandate specific disclosures regarding the diversity of board composition. Nasdaq noted that nearly 85 percent of the substantive comment letters it had received supported the new rules for reasons including:

- **Enhances Corporate Governance**. Commenters felt that board diversity enhances corporate governance and board decision-making.

- **Business-Driven Approach**. Commenters commended Nasdaq's pragmatic, disclosure-based approach to improving board diversity without undue burden, coercion or mandates.

- **Advances Board Diversity**. Commenters believe that Nasdaq's new rule will help meaningfully improve board diversity related to race, ethnicity, sexual orientation and gender identity.

- **Facilitates Transparency**. By standardizing board diversity disclosures that are material to investors, commenters felt that the new rule will reduce data collection costs and improve data quality, availability and comparability.

- **Reflects Core Values**. Commenters believe that Nasdaq's new rule reflects the commenters' and/or their clients' core values.

- **Enhances Corporate Performance**. Commenters believe that board diversity is linked to enhanced corporate performance, innovation and/or long-term sustainable returns.

- **Facilitates Decision-Making**. Investors seek board diversity statistics that are widespread, consistent and/or transparent so they can integrate diversity into their decision-making.

- **Promotes Investor Confidence**. Commenters felt that the new rule will enhance investor confidence and/or improve capital market efficiency.

Notwithstanding, the SEC was not unanimous in approving the new rules, with Commissioner Hester M. Peirce issuing a statement in opposition to the adoption of the new rules, primarily based on the view that the Securities Exchange Act of 1934, as amended, does not empower the SEC to exercise authority over board composition, nor do the rules enhance investor protection or market integrity.

BOARD COMPOSITION REQUIREMENTS

The SEC approved Nasdaq's adoption of Rule 5605(f), which will apply to all Nasdaq-listed companies, with different requirements for foreign issuers,[5] smaller reporting companies[6] or companies with a "Smaller Board."[7] This rule would require each Nasdaq-listed company to have, or explain why it does not have, at least one self-identified female director and at least one LGBTQ+ or underrepresented minority director. Emeritus directors, retired directors and members of an advisory board are excluded from the count of diverse directors. For companies newly listed on the Nasdaq Global Select Market or the Nasdaq Global Market, the company must have or explain why it does not have at least one diverse director by the later of one year from date of listing (Listing Date) or the date the company files its proxy statement or its information statement (or, if the company does not file a proxy, in its Form 10-K or 20-F) for the company's annual meeting of shareholders subsequent to the company's listing (Proxy Date) and have or explain why it does not have at least two diverse directors by the later of two years from the Listing Date or Proxy Date.

For companies newly listed on the Nasdaq Capital Market, the company must have or explain why it does not have at least two diverse directors by the later of two years from the Listing Date or Proxy Date.

Foreign Issuers. For companies classified as Foreign Issuers, the definition of diverse varies slightly. Foreign Issuers must have a director that self-identifies as female, LGBTQ+ or as an underrepresented individual based on "national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the country of the company's principal executive offices (as reported on the company's Form F-1, 10-K, 20-F or 40-F)." Foreign Issuers must have or explain why it does not have at least one self-identified female director and at least one director meeting the above definition of diverse.

Smaller Board Companies. For companies with a smaller board, proposed Rule 5605(f)(2)(D) would require at least one diverse board member, or an explanation of why the company does not have one diverse member.

For newly listed smaller board companies, the company must have or explain why it does not have at least one diverse directors by the later of two years from Listing Date or Proxy Date.

Smaller Reporting Companies. A smaller reporting company can satisfy Rule 5605(f) with at least one self-identified female director and at least one self-identified female, LGBTQ+ or underrepresented minority director. Allowing smaller reporting companies to meet the diversity requirement with two female directors is intended to give more flexibility.

Nasdaq's Listing Qualification Department will notify companies that fail to adhere to the diversity requirement, and non-compliant companies must cure the deficiency by the later of the next annual shareholder meeting or 180 days from the event that caused the deficiency. If the deficiency is not cured, then the Listings Qualification Department will issue a Staff Delisting Determination Letter. A company can cure the deficiency by electing the sufficient amount of diverse directors or by adequately disclosing the deficiency.

RECRUITING ASSISTANCE

Under the "Board Recruiting Service Proposal," eligible companies[8] will be able to take advantage of one year of complimentary access for two users to a board recruiting service, which would provide access to a network of board-ready diverse candidates for companies to identify and evaluate. Nasdaq has established partnerships with Equilar, Athena Alliance and the Boardlist to provide companies with board recruiting services.[9]

DISCLOSURE REQUIREMENTS

Pursuant to proposed Rule 5606(a) (the Reporting Rule), each Nasdaq-listed company will be required to disclose board-level diversity data annually using a format referred to as the "Board Diversity Matrix." The matrix must include the total number of directors, the breakdown of gender identity and LGBTQ+ status of the board, and the race and ethnicity of the board, as well as information on any directors who did not disclose demographic information.

Foreign Issuers. A company that qualifies as a foreign issuer can elect to provide information in an alternative Board Diversity Matrix format. For a foreign issuer, the company may report the total number of directors on its board, and additionally, 1) its country of principal executive offices; 2) whether it is a Foreign Private Issuer; 3) whether disclosure is prohibited under its home country law; 4) the number of directors based on gender identity (female, male or non-binary) and the number of directors who did not disclose gender; 5) the number of directors who self-identify as Underrepresented Individuals in its home country jurisdiction; 6) the number of directors who self-identify as LGBTQ+; and 7) the number of directors who did not disclose the demographic background under item 5 or 6 above.

Failure to adhere to the requirements of the Reporting Rule will result in Nasdaq notifying the company that it is not in compliance and giving the Nasdaq-listed issuer 45 calendar days to submit a plan to regain compliance. Nasdaq will review the plan and may provide the issuer with up to 180 days to regain compliance. A failure to regain compliance in the applicable periods may result in a Staff Delisting Determination.

PHASE-IN

A company must be in compliance with the Reporting Rule by the later of: 1) one calendar year from SEC approval of the Rule or 2) the date the company files its proxy statement or its information statement for its annual meeting of shareholders (or, if the company does not file a proxy or information statement, the date it files its Form 10-K or 20-F) during the 2021 calendar year.

For companies already listed on the Nasdaq Global Select Market, the Nasdaq Global Market, and the Nasdaq Capital Market (including smaller board companies), the company must have, or explain why it does not have, at least one diverse director by the later of two years from the date of SEC approval (Aug. 7, 2023) or the date the company files its proxy statement or its information statement for its annual meeting of shareholders during the calendar year two years after SEC approval (2023).

Companies already listed on the Nasdaq Global Select Market or the Nasdaq Global Market must add a second diverse director by the later of four calendar years from SEC approval of the rule (Aug. 6, 2025) or the date the company files its proxy statement or its information statement for its annual meeting of shareholders during the calendar year four years after SEC approval.

Companies already listed on the Nasdaq Capital Market must add a second diverse director by the later of five calendar years from SEC approval of the rule (Aug. 6, 2026) or the date the company files its proxy statement or its information statement for its annual meeting of shareholders during the calendar year five years after SEC approval.

Companies that list after SEC approval of these rules will not need to comply with the earlier date, but will instead follow the timing requirements in Rule 5605(f)(5).

SUMMARY

Although the newly adopted rules relating to diversity do not necessarily require a Nasdaq-listed issuer to improve the diversity of its board, the rules likely will lead to greater pressure, consistent with existing market dynamics, on public companies to increase board diversity. The SEC issued a statement that calls these rules a "starting point for initiatives related to diversity, not the finish line."[10]

Holland & Knight would be pleased to answer questions regarding the new SEC rules 5605 and 5606 as well as help you evaluate any effects that the SEC's approval of Nasdaq's rules may have on an ongoing basis for your company. Please do not hesitate to contact the authors if they can be of assistance in any matter or with ongoing compliance.

Notes

[1] See Securities Exchange Act Release No. 34-92590 (Aug. 6, 2021) (order approving SR-NASDAQ-2020-081 and SR-NASDAQ-2020-082) (Order). The full text of the Nasdaq diversity proposal and board diversity services proposal is available on the SEC's website.

[2] Rule 5605(f)(1) defines "Female" as "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth."

[3] Rule 5605(f)(1) defines "Underrepresented Minority" as "an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities."

[4] Rule 5605(f)(1) defines "LGBTQ+" as "an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender or as a member of the queer community."

[5] Rule 5605(f)(1) defines a "Foreign Issuer" as "(a) a Foreign Private Issuer (as defined in Rule 5005(a)(19)); or (b) a company that (i) is considered a "foreign issuer" under Rule 3b-4(b) under the Act, 17 CFR 240.3b-4(b), and (ii) has its principal executive offices located outside of the United States."

[6] As defined in Rule 12b-2 of the Act.

[7] Defined in the Order as five or fewer members.

[8] The Board Recruiting Service Proposal generally defines an "Eligible Company" as a Nasdaq-listed company that represents to the SEC that it does not have: 1) at least one director who self-identifies as Female and 2) at least one director who self-identifies as an Underrepresented Minority or LGBTQ+. A Foreign Issuer would be an Eligible Company if it represents to the SEC that it does not have: 1) at least one director who self-identifies as Female and 2) at least one director who self identifies as one or more of the following: Female, an Underrepresented Individual, or LGBTQ+. A Smaller Reporting Company would be an Eligible Company if it represents to the SEC that it does not have: 1) at least one director who self-identifies as Female and 2) at least one director who self-identifies as one or more of the following: Female, an Underrepresented Minority or LGBTQ+.

[9] See Nasdaq's Board Diversity Rule FAQs.

[10] Statement on Nasdaq's Diversity Proposals – A Positive First Step for Investors.

美国证券交易委员会批准纳斯达克改善公司董事会多元化的计划

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重点摘要

- 美国证券交易委员会（SEC）已批准纳斯达克股票市场有限责任公司关于董事会多元化和披露的拟议规则变更。在纳斯达克上市的发行人，除下文讨论的一些例外情况外，现在将被要求在其董事会中包括两名“多元化”成员，或解释其不符合这一标准的原因。
- 公开披露董事会层面多元化统计数据的逐步导入阶段将在 SEC 批准该规则后的一年内开始。SEC 将要求所有公司在 SEC 批准该规则的两年内任命一名多元化董事或解释无法符合的原因。
- 纳斯达克上市发行人将被要求披露与其董事会成员多元化相关的某些信息。通过要求扩大有关董事会组成的披露，新改变的规则应可导致各发行人达到相对的多元化指标。

美国证券交易委员会（SEC）于 2021 年 8 月 6 日批准了纳斯达克股票市场有限责任公司关于董事会多元化和披露的拟议规则变更。[1]

在纳斯达克上市的发行人，除下文讨论的一些例外情况外，现在将被要求在其董事会中包括两名“多元化”成员，或解释其未能符合这一标准的原因。在本规则中，“多元化”被定义为自我认同为以下一个或多个类别人士的个人：1）女性，[2] 2）未被充分代表的少数群体[3]或 3）LGBTQ+。[4]

公开披露董事会层面多元化统计数据的逐步导入阶段将在 SEC 批准该规则后的一年内开始。SEC 将要求所有公司在 SEC 批准该规则的两年内任命一名多元化董事，或解释其无法做到的原因。根据公司的上市层级，公司需要在 SEC 批准董事会多元化和披露相关规则的四年内（对于纳斯达克全球精选市场和纳斯达克全球市场）或五年内（对于纳斯达克资本市场）任命两名多元化董事。

规则概述

新通过的纳斯达克规则通常要求纳斯达克上市的发行人在其董事会中至少有两名多元化的成员，或者解释为什么他们没有做到。此外，新规则将要求对董事会组成的多元化进行具体披露。纳斯达克指出，近 85%的实质性评论信函支持新规则，原因包括：

- **强化了公司治理**。评论者认为，董事会多元化增强了公司治理和董事会决策。
- **是业务驱动的做法**。评论人士赞扬了纳斯达克务实及以披露基础的做法，而在没有过度负担、胁迫或授权的情况下改善了董事会的多元化。

- **促进董事会多元化**。评论人士认为，纳斯达克的新规则将有助于有意义地改善董事会在种族、民族、性取向和性别认同方面的多元化。

- **促进透明度**。评论人士认为，通过标准化对投资者至关重要的董事会多元化披露，新规则将降低数据收集成本，并提高数据质量、可用性和可比性。

- **反映核心价值观**。评论人士认为，纳斯达克的新规则反映了评论人士和/或其客户的核心价值观。

- **提高公司绩效**。评论人士认为，董事会多元化与提高公司绩效、创新和/或长期可持续回报有关。

- **促进决策作成**。投资者寻求广泛、一致和/或透明的董事会多元化统计数据，以便将多元化纳入决策。

- **增进投资者信心**。评论人士认为，新规则将增强投资者信心和/或提高资本市场效率。

尽管如此，美国证券交易委员会在批准新规则方面并未达成一致意见，皮尔斯委员（Hester M. Peirce）发表声明反对通过新规则，主要是基于以下观点，即经修订的《1934 年证券交易法》并未授权美国证券交易委员会对董事会组成行使权力，这些规则也没有加强投资者保护或市场诚信。

董事会组成要求

SEC 批准纳斯达克通过个的第 5605（f）条规则，该规则将适用于所有纳斯达克上市公司，对外国发行人[5]、较小的报告公司[6]或具有“较小规模董事会”的公司[7]有不同的要求。该规则将要求每家纳斯达克上市公司拥有或解释其为什么没有至少一名自我认定为女性的董事和至少一名 LGBTQ+或未被充分代表的少数群体董事。名誉董事、退休董事和咨询委员会成员不包括在多元化董事的计算之中。

对于在纳斯达克全球精选市场（Nasdaq Global Select Market）或纳斯达克全球市场(Nasdaq Global Market)中新上市的公司，公司必须在上市日期（上市日期）或公司为在公司上市后的年度公司股东会所提交委托声明书或信息声明（或如果公司未提交委托声明，则在 10-K 或 20-F 表格中）之日（委托日期）起一年内（以较晚者为准），拥有至少一名多元化董事，或解释为何没有达到，并在上市日期或委托日期后两年内（以较晚者为准）拥有至少两名多元化董事，或解释为何没有达到。

对于新在纳斯达克资本市场（Nasdaq Capital Market）上市的公司，公司必须在上市日期或委托日期后两年内（以较晚者为准）拥有至少两名多元化董事，或解释为何没有达到。

外国发行人。对于被归类为外国发行人的公司，多元化的定义略有不同。外国发行人必须有一名自我认定为为女性、LGBTQ+或基于 “公司主要执行办公室所在国的民族、种族、族裔、原著民、文化、宗教或语言身份（如公司表格 F-1、10-K、20-F 或 40-F 所述）”的未被充分代表的个人的董事。“外国发行人必须拥有或解释为什么没有至少一名自我认定为女性的董事和至少一名符合上述多元化定义的董事。

较小规模董事会的公司。对于董事会规模较小的公司，拟议的规则 5605(f)(2)(D)要求至少有一名多元化董事会成员，或解释公司没有一名多元化董事会成员的原因。

对于新上市的较小规模董事会的公司，公司必须在上市日期或委托日期后两年内拥有至少一名多元化董事或解释为什么没有做到。

较小的报告公司。较小的报告公司可以以至少有一名自我认定为女性的董事和至少一名自我认定为女性、LGBTQ+或未被充分代表的少数群体董事来满足 5605（f）规则的要求。允许较小的报告公司满足两名女性董事的多元化要求旨在提供更大的灵活性。

纳斯达克的上市资格部门将通知未遵守多元化要求的公司，不符合要求的公司必须在下一次年度股东大会或导致不符合事件发生后 180 天内（以较晚者为准）改正不符合情形。如果不符合情形未被该正，则上市资格部门将发布行政退市决定书。公司可以通过选举足够数量的多元化董事或充分披露来改正不符合的情形。

聘任协助

根据《董事会聘任服务提案》，符合条件的公司[8]将能够利用两名用户免费使用董事会聘任服务一年的机会，该服务将为公司提供一个已符合规定的多元化董事人选的网络，供公司识别和评估。纳斯达克已与 Equilar、Athena Alliance 和 Boardlist 建立了合作关系，为公司提供提供董事会聘任服务。[9]

披露要求

根据拟议的 5606（a）规则（报告规则），每个纳斯达克上市公司将被要求使用称为“董事会多元化格式”的表格每年披露董事会层面的多元化数据。格式必须包括董事总人数、董事会性别认同和 LGBTQ+地位的细分、董事会的种族和族裔，以及未披露人口统计信息的任何董事的信息。

外国发行人。符合外国发行人资格的公司可以选择以董事会多元化格式表格的替代方式来提供信息。对于外国发行人，公司可以报告其董事会的董事总数，此外，1）其主要执行机构所在国；2） 是否为外国私有发行人；3）母国法律是否禁止披露信息；4） 基于性别身份（女性、男性或非二分法）的董事人数以及未披露性别的董事人数；5） 在母国司法管辖区内自称未被充分代表的个人的董事人数；6） 自我认定为 LGBTQ+的董事人数；7）未披露上述第 5 项或第 6 项下的人口背景的董事人数。

未能遵守报告规则的要求将导致纳斯达克通知该公司其不符合规定，并给予纳斯达克上市发行人 45 个日历日的时间提交重新符合规定的计划。纳斯达克将审查该计划，并可能向发行人提供最多 180 天的时间来恢复合规性。如果未能在适用期限内恢复合规性，可能会导致行政退市决定书的作成。

逐步导入

公司必须在以下日期之前遵守该报告规则：1）SEC 批准该规则后的一个日历年或 2）公司在 2021 日历年期间为其年度股东大会提交其委托声明或信息声明的日期（或者，如果公司未提交委托声明或信息声明，则为其提交 10-K 或 20-F 表格的日期）。

对于已经在纳斯达克全球精选市场、纳斯达克全球市场和纳斯达克资本市场上市的公司（包括较小规模董事会的公司），公司必须在 SEC 批准之日起两年内（即 2023 年 8 月 7 日）或公司在 SEC 批准两年（即 2023 年）后的日历年中为其年度股东大会提交其委托声明或信息声明的日期（以较晚者为准）时至少拥有一名多元化董事，或解释为什么没有做到。

已在纳斯达克全球精选市场或纳斯达克全球市场上市的公司必须在 SEC 批准该规则后四个日历年内（即 2025 年 8 月 6 日）或公司在 SEC 批准四年后的日历年中为其年度股东大会提交其委托声明或信息声明的日期（以较晚的为准）时增加第二位多元化董事或公司在。

已在纳斯达克资本市场上市的公司必须在 SEC 批准该规则后五个日历年（即 2026 年 8 月 6 日）或公司在 SEC 批准五年后的日历年中提交其委托声明或股东年会信息声明之日期时增加第二名多元化董事。

在 SEC 批准这些规则后上市的公司将不需要遵守较早的日期，而是将遵循规则 5605(f)(5)中的时间要求。

总结

尽管新通过的有关多元化的规则不一定要求纳斯达克上市的发行人改善其董事会的多元化，但这些规则可能会给上市公司增加董事会多元化带来更大的压力，这与现有的市场动态相一致。SEC 发表声明称，这些规则为“与多元化相关的倡议的起点，而不是终点。”[10]

Holland & Knight 将很乐意回答有关美国证券交易委员会新规则 5605 和 5606 的问题，并帮助您评估美国证券交易委员会批准纳斯达克规则对贵公司可能产生的任何影响。如果作者在任何事项上或在合规方面能够提供帮助，请随时与他们联系。

附注

[1] 参见《证券交易法》第 34-92590 号公告（2021 年 8 月 6 日）（批准 SR-NASDAQ-2020-081 和 SR-NASDAQ-2020-082 的命令）（命令）。纳斯达克多元化提案和董事会多元化服务提案的全文可在 SEC 网站上查阅。

[2] 第 5605(f)(1)条规则将“女性”定义为“不考虑个人出生时的指定性别而自我认定其性别为女性的个人”

[3] 第 5605(f)(1)条规则将“未被充分代表的少数群体”定义为“自我认定为以下一种或多种人的个人：黑人或非裔美国人、西班牙裔或拉丁裔、亚裔、美洲原住民或阿拉斯加原住民、夏威夷原住民或太平洋岛民，或两种或两种以上种族或人种。”

[4] 第 5605(f)(1)条规则将“LGBTQ+”定义为“自我认定为以下任何一种身份的个人：女同性恋、男同性恋、双性恋、变性人或同性恋群体的成员。”

[5] 第 5605(f)(1)条规则将“外国发行人”定义为“（a）外国私有发行人（定义见第 5005(a)(19)条）；或（b）根据法案第 3b-4（b）条、17 CFR 240.3b-4（b）条规则被视为“外国发行人”的公司，以及（ii）其主要执行办事处位于美国境外。”

[6] 如法案第 12b-2 条所定义。

[7] 按命令中被定义为五名或五名以下成员。

[8] 董事会聘任服务建议书通常将“合格公司”定义为纳斯达克上市公司，该公司向 SEC 表示其不具备以下条件：1）至少有一名董事自称为女性，以及 2）至少有一名董事自我认定为未被充分代表的少数群体或 LGBTQ+。如果外国发行人向 SEC 表示其没有：1）至少有一名董事自我认定为女性，2）至少有一名董事自我认定为一名或多名以下人员：女性、未被充分代表的少数个人或 LGBTQ+。如果规模较小的报告公司向 SEC 表示其没有以下人员，则该公司将是合格公司：1）至少一名自我认定为女性的董事，2）至少一名自我认定为以下一名或多名的董事：女性、未被充分代表的少数群体或 LGBTQ+。

[9] 参见纳斯达克董事会多元化规则常见问题解答。

[10] 关于纳斯达克多元化方案的声明——对投资者来说是正面的第一步。

Recent Delaware Decision Highlights Heightened Board Oversight Requirements in *Caremark* Cases

By **Martin L. Seidel**, **Ira N. Rosner**, **Marie E. Larsen** and **Sophie Kletzien**

HIGHLIGHTS:

- The Delaware Court of Chancery on Sept. 7, 2021, allowed a derivative stockholder lawsuit to proceed against The Boeing Company (Boeing), alleging that Boeing's board of directors breached their fiduciary duties by failing to implement proper oversight and monitoring procedures over "mission critical" airplane safety risks.

- The *In re The Boeing Company Derivative Litigation* case is the latest in a string of decisions in which failure of oversight claims against corporate directors (commonly termed *Caremark* claims) have survived a motion to dismiss.

- As a result, boards and board committees should review the oversight duties identified in their charters and the regular internal reporting mechanisms to align them to the risks inherent in the business of their companies.

The Delaware Court of Chancery on Sept. 7, 2021, allowed a derivative stockholder lawsuit to proceed against The Boeing Company (Boeing), alleging that Boeing's board of directors breached their fiduciary duties by failing to implement proper oversight and monitoring procedures over "mission critical" airplane safety risks. In *In re The Boeing Company Derivative Litigation* (hereinafter, *In re Boeing*),[1] Vice Chancellor Morgan T. Zurn denied a motion to dismiss seeking dismissal of stockholder claims against the members of Boeing's management and board of directors in connection with two fatal crashes of the model 737 MAX airplane. The two crashes – one in 2018 and the other in 2019 – caused severe reputational harm to the company, resulting in the grounding of the 737 MAX, cancellation of billions of dollars in aircraft orders and billions of dollars in lost revenue, as well as significant litigation and non-litigation costs. In the 103-page decision, the court found that the plaintiffs had sufficiently alleged that the directors had failed to establish an airplane safety reporting system and, by "turning a blind eye to a red flag," opened themselves up to a "substantial likelihood of liability for Boeing's losses."

The *In re Boeing* case is the latest in a string of decisions in which failure of oversight claims against corporate directors (commonly termed "Caremark" claims after *In re Caremark International Inc. Derivative Litigation;* hereinafter *Caremark*[2]) have survived a motion to dismiss. While *Caremark* claims have been described as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment," these cases highlight the risk that traditional oversight mechanisms, not tailored to specific risks, as well as undue reliance on management reporting on an *ad hoc* basis, may not be sufficient to obtain early dismissal of Caremark claims. As a result, boards and board committees should review the oversight duties identified in their charters and the regular internal reporting mechanisms to align them to the risks inherent in the business of their companies.

KEY TAKEAWAYS

1. Risk categories that are essential and mission critical to a company's business require additional oversight (e.g., airplane safety is mission critical to an aircraft manufacturer's business and requires specific risk monitoring).

2. Boards must set up systems to ensure board oversight of mission critical risks. Broad and nonspecific language putting an audit committee or other board committee in charge of overseeing general risk, without more, may not insulate a board from liability. Boards should review their constitutional documents, regular management reports and meeting agendas to ensure that their stated oversight responsibilities are explicitly tailored to the company's inherent business risks. The board or appropriate committee should also periodically review emerging risks for potential inclusion in the process.

3. Boards should tailor regularly scheduled reporting to substantively monitor and address these risks. An internal monitoring system should also be put in place for whistleblowers and employees to report concerns that reach the board or board committees. Courts may not credit such systems if they are curated by senior management, or worse, the information does not regularly reach the board or relevant board committees.

4. Corporations must be mindful that company-prepared records obtained by stockholders under Delaware General Corporate Law (DGCL) Section 220 Demands may be used against them in derivative lawsuits at the pleading stage, and that internal crisis-management, investor relations and public relations documents should be prepared and reviewed with the expectation that they will be disclosed to regulators or derivative plaintiffs.

5. Finally, when a crisis occurs, the board and its advisers must be proactive – not passive. They should respond quickly and rigorously and should not sit back and wait for management to handle the issue. The key is a record of board oversight. A record of asking questions and digging into a problem will go a long way to assist the defense of a subsequent *Caremark* claim.

DELAWARE COURT OF CHANCERY DECISION

Under *In re Caremark International*, directors need only make a "good faith effort to put into place a reasonable board-level system of monitoring and reporting" in order to satisfy their duty of loyalty. In *Marchand v. Barnhill* (hereinafter *Marchand*),[3] the court noted that *Caremark* claims are "possibly the most difficult theory in corporation law upon which a plaintiff may hope to win a judgment." The court in *Marchand*, however, distinguished the plaintiffs' claims stemming from deadly, listeria-tainted ice cream from the traditional financial harms alleged in *In re Caremark International*, such as general financial wrongdoing and accounting fraud. It determined certain categories of alleged wrongdoing, such as those involving food safety, to be "essential and mission critical" to the company's business, and oversight must therefore be "more rigorously exercised." Ultimately, the *Marchand* court concluded that the board had failed to make a good faith effort to put into place on oversight and monitoring system.

In re Boeing builds off the *Marchand* decision, finding that, like food safety in *Marchand*, airplane safety is essential and mission critical to Boeing's business. Accordingly, the court found that airplane safety must be specifically provided for in oversight protocols; broad language common to many audit committee charters relating to monitoring risk generally was insufficient. Although Boeing's audit committee was charged with general "risk oversight," the court noted that aircraft safety was not listed in the charter and the audit committee did not regularly receive briefings or reports on aircraft safety, Federal Aviation Administration regulatory

complaints or employee concerns regarding safety. Instead, the court concluded that the audit committee was primarily geared toward monitoring Boeing's financial risk; the yearly report reviewed by the audit committee on the company's risk management process did not address airplane safety risks, including the issues ultimately responsible for the two 737 MAX crashes, or any other manufacturing defect issues, focusing instead on the impact of manufacturing issues on aircraft delivery. The court also noted that Boeing lacked an internal reporting system, which "compounded" the existing deficiencies of board-level safety monitoring that could alert the board or audit committee to issues as they arose, and relied instead on management to curate any complaints. The result was that missional critical safety issues were not reported to the board.

In addition to prospective risk oversight failures, the court turned its analysis to the Boeing board's response and investigation into the causes of the two crashes. "[T]he Board treated the [first] crash as an 'anomaly,' a public relations problem, and a litigation risk, rather than investigating the safety of the aircraft and the adequacy of the flight certification process." The board's declination to test reported information calling the 737 MAX's safety into question did not indicate a mere "failed attempt" to address a red flag, and it "was aware or should have been aware that its response to the [crash] fell short." In addition, the court found the board delayed any review and relied passively on management until a second plane crashed. In making this determination, the court relied upon records produced in accordance with a stockholder demand under Del. Code Ann. tit. 8, § 220, which allows stockholders to inspect a corporation's books and records. This highlights the importance of corporate mindfulness when creating documents that may paint the company as deflecting or minimizing the issues, as Section 220 records are often wielded by stockholders pursuing derivative litigation claims. The *In re Boeing* decision serves as a warning to corporate boards nationwide to take organized and deliberate steps to structure company risk oversight processes or risk litigating costly derivative suits.

CONCLUSION

The key lesson from the *In re Boeing* decision is that boards should work with management and the board's advisers to identify critical potential risks inherent in the company's business model before they manifest. The board must then ensure that those risks are delegated to a proper board committee and flagged in its charter. Boards should also document that the board or a relevant committee regularly considers and received reports related to those issues, and when a problem occurs, ensure a robust crisis response that treats the matter as more than a public relations issue, and does not abdicate responsibility to management. Moreover, the risk oversight imperatives of *In re Boeing* (and its antecedents) amplify guidance and commentary by the U.S. Securities and Exchange Commission regarding the responsibilities of boards of directors to monitor (and ensure adequate disclosure) of material risk, just one more reason for corporate boards to take risk seriously.

Notes

[1] 2021 WL 4059934 (Del. Ch. Sept. 7, 2021)
[2] 698 A.2d 959 (Del. Ch. 1996)
[3] 212 A.3d 805 (Del. 2019)

特拉华州最近的判决强调了 *Caremark* 案中关于加强董事会监督义务的要求

原文作者：**Martin L. Seidel** 、**Ira N. Rosner** 、**Marie E. Larsen** 及 **Sophie Kletzien**

重点摘要

- 特拉华州衡平法院于 2021 年 9 月 7 日允许对波音公司（Boeing）提起衍生性股东诉讼，指控波音公司董事会未能对“对业务至关重要”的飞机安全风险进行适当的监督和监控程序，违反了其信托责任。
- *波音公司衍生诉讼案*是一系列判决中的最新一个，在这些判决中，针对公司董事未履行监督职责的请求（通常称为 *Caremark* 请求）都没被驳回动议所挡下。
- 因此，董事会和董事会委员会应审查其章程和定期内部报告机制中确定的监督职责，以使其能与公司业务固有的风险匹配。

特拉华州衡平法院于 2021 年 9 月 7 日允许对波音公司（Boeing）提起衍生性股东诉讼，指控波音公司董事会未能对“对业务至关重要”的飞机安全风险实施适当的监督和监控程序，违反了其信托责任。在*波音公司衍生诉讼*中（以下简称*波音案*），[1] 副主任法官摩根祖恩拒绝了一项驳回动议，该动议旨在驳回针对波音公司管理层和董事会成员提出的与 737 MAX 型飞机两次致命坠机事件有关的股东请求。这两起坠机事件——一起发生在 2018 年，另一起发生在 2019 年——对该公司造成了严重的声誉损害，导致 737 MAX 停飞、数十亿美元的飞机订单被取消、数十亿美元的收入损失、以及巨额的诉讼和非诉讼费用。在长达 103 页的判决中，法院认定原告充分指控董事会未能建立飞机安全报告系统，并“对危险信号视而不见”，从而使自己“对波音公司的损失承担责任的可能性很大”

*波音案*是一系列判决中最新的一个，在这些判决中，针对公司董事的监督失败请求（在 *In re-Caremark International Inc.衍生诉讼案*后，通常被称为“Caremark”请求；以下简称 *Caremark 请求*[2]）没有被驳回动议所挡下。虽然 *Caremark 请求*被描述为“可能是公司法中原告希望赢得判决的最困难理论”，但这些案例突出了特别针对特定风险所设置的传统监督机制以及过度依赖临时管理报告，可能不足以取得在诉讼初期驳回 Caremark 请求的风险。因此，董事会和董事会委员会应审查其章程和定期内部报告机制中确定的监督职责，以使其能与公司业务固有的风险匹配。

知识要点

1. 对公司业务至关重要的风险类别需要额外监督（例如，飞机安全对飞机制造商的业务至关重要，需要特定的风险监控）。

2. 董事会必须建立制度，确保董事会对公司业务至关重要的风险进行监督。仅仅规定审计委员会或其他董事会委员会负责监管一般风险的宽泛而非具体的规定可能不会使董事会免于承担责任。董事会应审查其章程文件、定期管理报告和会议议程，以确保其规定的监督责任明确针对公司固有的业务风险。董事会或适当的委员会还应定期审查新出现的风险，以便将其纳入流程。

3. 董事会应调整定期报告，以实质性地监控和应对这些风险。还应建立内部监控系统，让举报人和员工向董事会或董事会委员会报告所关注的问题。如果这些系统由高级管理层策划，或者更糟糕的是，信息没有定期送达董事会或相关董事会委员会，则法院可能不会认可这些系统。

4. 公司必须注意，股东根据《特拉华州一般公司法》（DGCL）第 220 节要求获得的公司准备的记录可能会在衍生诉讼的请求提出阶段中用来针对公司，因此应在预期该等文件将被向监管机构及衍生性诉讼原告揭露的情况下准备及审查内部危机管理、投资者关系和公共关系文件。

5. 最后，当危机发生时，董事会及其顾问必须积极主动，而不是被动。他们应该迅速而严格地作出反应，而不应该坐等管理层来处理这个问题。关键是董事会监督的记录。询问问题和深入研究问题的记录将大大有助于为随后的 *Caremark* 请求进行辩护。

特拉华衡平法院判决

根据 *In-re Caremark International* 案的判决，董事只需“真诚地努力建立合理的董事会层级监控和报告系统”，即可符合其忠实义务。在 *Marchand 诉 Barnhill* 一案（以下简称 *Marchand 案*），[3] 法院指出，Caremark 请求“可能是公司法中原告可能希望赢得判决的最困难的理论”。然而，*Marchand* 案的法院将原告对来自受致命的李斯特菌污染的冰淇淋的请求与来自 *In re Caremark International* 案中所主张的的传统财务危害（如一般财务不当行为和会计欺诈）的请求作出区别。它确定了某些类别的涉嫌不法行为，如涉及食品安全的行为，对公司业务而言是“主要和至关重要的”，因此必须“更加严格地实施监督”。最终，*Marchand* 案的法院的结论是，董事会未能作出真诚的努力以落实监督和监测制度。

而*波音案*承续法院在 *Marchand* 案的决定，法院认为与 *Marchand* 案的食品安全一样，飞机安全对波音公司的业务至关重要。因此，法院认为，必须在监督议定书中具体规定飞机安全；与监控风险相关的许多审计委员会章程通用的宽泛语言通常是不够的。尽管波音公司的审计委员会负责一般的“风险监督”，但法院指出，飞机安全并未列入公司章程文件，审计委员会也没有定期收到关于飞机安全、联邦航空管理局监管投诉或员工安全问题的简报或报告。相反地，法院认为审计委员会主要是为了监控波音公司的财务风险；审计委员会审查的关于公司风险管理流程的年度报告并未涉及飞机安全风险，包括两次 737 MAX 坠毁事件的最终责任问题，或任何其他制造缺陷问题，而是侧重于制造问题对飞机交付的影响。法院还指出，波音公司缺乏一个内部报告系统，该系统“加剧”了董事会层面安全监控的现有缺陷，可以在出现问题时提醒董事会或审计委员会，并依靠管理层来处理任何投诉。结果是，没有向董事会报告至关重要的安全问题。

除了潜在的风险监管失败外，法院还将分析转向波音董事会对两起坠机事件原因的回应和调查。“董事会将[第一次]坠机视为一种‘异常现象’、一个公共关系问题和一种诉讼风险，而不是调查飞机的安全性和飞行认证程序的充分性。”董事会拒绝对质疑 737 MAX 的安全性的报告信息进行测试不只意味着这仅是一次对处理危险信号的“失败尝试”，且其“意识到或应该意识到其对[坠机]的反应不够”。此外，法院发现，董事会推迟了任何审查且被动地依赖管理层，直到第二架飞机坠毁。在作出这一裁定时，法院依据的是根据股东依据特拉华州法律第 8 章第 220 款所制作的记录，该法律允许股东检查公司的账簿和记录。这突显出公司应注意公司制作这些文件的行为可能被用来将公司描述为公司在将问题转移或最小化的情况的重要性，因为第 220 款记录通常被寻求

衍生诉讼请求的股东所使用。波音公司的这一决定向全国的公司董事会发出了警告，要求他们采取有组织的、深思熟虑的措施，构建公司风险监管流程，或面对昂贵的衍生品诉讼风险。

结论

*波音案*判决的关键教训是，董事会应与管理层和董事会顾问协作，在公司商业模式中固有的关键潜在风险显现之前，发现这些风险。然后，董事会必须确保将这些风险委托给适当的董事会委员会，并在其章程中注明。董事会还应记录董事会或相关委员会定期审议并收到与这些问题相关的报告，当出现问题时，确保采取强有力的危机应对措施，将该问题视为不仅仅是公共关系问题，并且不会将责任推卸给管理层。此外，*波音案*（及先前的案子）的风险监管要求扩大了美国证券交易委员会关于董事会监控（并确保充分披露）重大风险责任的指导和评论，这只是公司董事会认真对待风险的又一个理由。

附注

[1] 2021 WL 4059934（Del. Ch. 2021 年 9 月 7 日）

[2] 698 A.2d 959（Del. Ch. 1996）

[3] 212 A.3d 805（Del. 2019）

Offshore Lenders Targeted by IRS Audit Campaign

By **Alan Winston Granwell**, **Katie Erin Gerber**, **Abbey Benjamin Garber** and **William M. Sharp**

HIGHLIGHTS:

- Offshore lenders have become the latest target of an Internal Revenue Service (IRS) audit campaign because of concern that foreign lenders are not properly reporting or paying U.S. tax on certain types of "inbound" lending transactions.
- The IRS wants to audit more returns in this area because, absent an IRS review of the underlying facts and circumstances, the agency is unable to ascertain whether the return has been properly prepared and filed.
- This IRS campaign, announced on June 10, 2021, without much fanfare, is reflective of the agency's interest in activities of "inbound" taxpayers, particularly those engaging in offshore lending to U.S.-based borrowers.
- As a result, U.S. taxpayers and advisors in this area should take heed.

Since 2017, the Internal Revenue Service (IRS) Large Business and International Division (LB&I) has shifted its audit efforts to issue-based examinations, premised on strategically identified and prioritized areas of compliance risks to address taxpayer compliance. LB&I's goal has been to improve return selection, identify issues with significant compliance risks and make the best use of its limited resources.

On June 10, 2021, the IRS announced a new campaign that focuses on the U.S. activities of financial service entities.[1] The campaign addresses the issue of whether foreign investors participating in "inbound" lending transactions were engaged in a U.S. trade or business and generated income effectively connected with a U.S.-situs lending trade or business. The description of the IRS campaign notes that under the U.S. Internal Revenue Code, foreign investors who only trade stocks and securities for their own account are not treated as being engaged in a U.S. trade or business under a safe harbor.[2] However, that safe harbor is unavailable to dealers in stocks or securities, to entities engaged in a lending business or to foreign investors in partnerships engaged in such activities.

To ascertain whether there has been correct reporting, the IRS must audit the applicable taxpayer and review the underlying facts and circumstances, since a mere review of the face of the return does not provide information sufficient for the IRS to make a determination as to whether a taxpayer is or is not engaged in a U.S. trade or business.

A recent article[3] reports that IRS LB&I initiated the campaign focused on foreign investors' lending income because the IRS has reason to believe that there may be noncompliance in this area by certain foreign investors. The article further reports that the campaign is in its early stage, that the IRS currently is in the process of reviewing returns to ascertain which returns the IRS will select to audit and that the first set of selected returns will be sent for audit this fall. More generally, the IRS wants to focus more on "inbound" taxpayers (i.e., non-U.S. persons making U.S. investments) as opposed to "outbound" taxpayers (i.e., U.S. persons making offshore investments).

OFFSHORE LENDING, IN GENERAL

The U.S. tax consequences of offshore lending can be extremely beneficial. On one hand, if properly structured, a non-U.S. lender who is not otherwise engaged in a U.S. trade or business in connection with a U.S. loan and qualifies for the "portfolio interest" provisions and/or is entitled to a reduced or zero rate of withholding tax of interest under a bilateral income tax treaty, 1) can avoid the 30 percent U.S. withholding tax imposed on gross U.S. source interest payments made to a foreign lender and 2) may avoid U.S. tax on gain from the disposition of the loan instrument. On the other hand, if the offshore lender were found to be engaged in a U.S. trade or business, a series of potentially detrimental tax consequences could result.[4] So, the stakes are quite high.

Whether foreign lenders making loans to U.S. persons are engaged in a U.S. trade or business is not a new issue for the IRS.[5] Under the IRS LB&I campaign, the IRS likely will scrutinize offshore lending transactions involving: 1) origination of loans in the United States, either directly by a foreign investor or indirectly by an agent of the foreign investor; 2) "season and sell" transactions, whereby, for example, in a two parallel fund structure, one fund originates the loan and the second fund purchases the loan from the other fund after a stated period of time; 3) offshore lending through treaty-protected fund structures; and 4) other structures involving direct or indirect activities by a foreign lender (or through fund structures partnerships).

TAKEAWAYS

In structuring new loan transactions with U.S. borrowers, offshore lenders need to be aware of the increased audit exposure resulting from the new campaign.

With respect to past transactions, a review of past loan acquisition policies and structures may be advisable to ascertain whether any remedial actions can or should be taken.

Further, with respect to past transactions, in cases where a foreign lender has not filed a U.S. tax return, the IRS can audit the taxpayer's return whenever it decides to do so – the otherwise applicable three-year statute of limitations does not begin to run until a tax return is filed; thus, the IRS has what is referred to as an "open statute."[6]

Moreover, depending on the structure utilized, there may be multiple return filing requirements; e.g., such as the income tax return of a U.S. entity, a withholding tax return (IRC § 1446) and the tax return of a non-U.S. entity. Each of these returns is discrete from the other returns; for example, the filing of a U.S. Return of Partnership Income (Form 1065) is separate from the filing of the Annual Return for Partnership Withholding Tax (Form 8804), and both of these are separate from the return of a non-U.S. person (1040-NR, individual, or Form 1120, corporate).[7]

A non-U.S. taxpayer who would like to remediate non-compliance, depending on the circumstances, may not be able to claim deductions in computing its effectively connected income.[8] Whether an IRS voluntary disclosure procedure can mitigate detrimental tax consequences is not clear.

For more information or questions regarding the IRS audit campaign of offshore lenders, contact the authors.

*Holland & Knight Associate **Chad M. Vanderhoef** contributed to this alert.*

Notes

[1] See "Financial Services Entities Engaged in a U.S. Trade or Business Campaign," Internal Revenue Service, (last visited Aug. 23, 2021).

[2] Internal Revenue Code (IRC) § 864(b)(2).

[3] IRS Sees Noncompliance in Foreign 'Financial Service Entities,' Bloomberg Daily Tax Report, Michael Rapoport, Aug. 10, 2021.

[4] These include one or more of the following: 1) income effectively connected with a U.S. trade or business is taxable; 2) in addition, if the offshore lender is a foreign corporation there is the potential imposition of a branch profits tax on the U.S. branch earnings and profits for the year that are not reinvested in branch assets absent bilateral income tax treaty protection to reduce or eliminate this exposure; 3) the requirement to file a U.S. federal income tax return – if a true and accurate tax return is not filed timely, generally within 18 months of the due date, allowable deductions and credits generally cannot be claimed, and, if no return is filed, the statute of limitations remains open. See, e.g., Inverworld, Ltd., Appellant, v. Commissioner of Internal Revenue, Appellee, 979 F.2d 868 (D.C. Cir. 1992); 4) withholding obligations on the effectively connected income of a foreign partnership if the lending entity is a partnership; and 5) state and local tax, depending on the state.

[5] In a Chief Counsel Attorney Memorandum, the IRS found that a foreign corporation whose U.S. agent originated loans on behalf of the foreign corporation was engaged in a U.S. trade or business. AM 2009-010 (Sept. 22, 2009). In Chief Counsel Advice 201501013 (CCA) (Jan. 2, 2015), the IRS considered whether a U.S. fund manager that extended loans and acted as a stock underwriter through its U.S. office and, acted on behalf of a foreign fund as an independent agent caused the foreign fund and its foreign feeder to be engaged in a U.S. trade or business, and not to qualify for the Section 864(b) safe harbor.

[6] IRC § 6501(c)(3).

[7] See "Assessment and Collection of U.S. Taxes from Non-U.S. Taxpayers," 38 Tax Notes International 1171, Jeffrey L. Rubinger and Andrew H. Weinstein, (June 27, 2005). This article, written by a former and current colleague at Holland & Knight, explores the complicated area of multiple filing requirements and how the statute of limitations applies in these situations.

[8] U.S. Department of the Treasury Regulation § 1.882-4.

美国国税局针对海外贷款人的审计活动

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重点摘要

- 出于对外国贷款人未能正确报告或支付某些类型“往美国方向”的贷款交易的美国税的顾虑， 海外贷款人已成为美国国税局（IRS）审计活动的最新目标。
- 美国国税局希望在这一领域审计更多的纳报申报税表，因为在没有美国国税局对基本事实和情况进行审查的情况下，美国国税局无法确定纳税申报表是否已被正确编制和提交。
- 美国国税局于 2021 年 6 月 10 日宣布了这项活动，但没有大张旗鼓，这反映了美国国税局对“往美国方向”的纳税人活动的兴趣，特别是那些向美国借款人提供离岸贷款的纳税人。
- 因此，该领域的美国纳税人和顾问们应予以注意。

自 2017 年以来，美国国税局（IRS）大型企业和国际部（LB&I）已将其审计工作转移到基于问题的检查，前提是从战略上确定并优先考虑合规风险领域，以解决纳税人合规问题。LB&I 的目标是改进纳税申报表的挑选、发现存在重大合规风险的问题、并充分利用有限的资源。

2021 年 6 月 10 日，美国国税局宣布了一项新的活动，重点关注金融服务实体在美国的活动。[1] 该活动处理了外国投资者参与“往美国方向”的问题贷款交易是否从事了在国贸易或业务并产生与美国所在地贷款贸易或业务有效关联的收入。《美国国税局活动说明》指出，根据《美国国税法典》，仅为自己账户交易股票和证券的外国投资者不被视为在安全港下从事美国交易或业务。[2] 但是，股票或证券交易商、或从事贷款业务的实体或从事此类活动的合伙企业中的外国投资者无法获得安全港的保护。

为了确定是否有正确的报告，美国国税局必须审计适用的纳税人，并审查基本事实和情况，因为仅仅审查纳税申报表的表面并不能提供足够的信息，以使美国国税局能够确定纳税人是否从事美国贸易或业务。

最近的一篇文章 [3] 报道说，美国国税局 LB&I 发起了以外国投资者贷款收入为重点的活动，因为美国国税局有理由相信某些外国投资者可能在这方面不遵守规定。文章还报告说，该活动尚处于早期阶段，美国国税局目前正在审查纳税申报表，以确定美国国税局将挑选哪些纳税申报表进行审计，并将在今年秋季发送第一批选定的纳税申报表进行审计。一般而言，美国国税局希望更多关注“往美国方向”的纳税人（即在美国投资的非美国人），而不是“由美国往外”的纳税人（即在海外投资的美国人）。

离岸贷款概述

离岸贷款的美国税收后果可能极为有利。一方面，如果结构合理，非美国贷款人不参与与美国贷款相关的美国贸易或业务，且符合“组合利息”规定和/或有权根据双边所得税条约享受扣减或零利率的利息预扣税，1）可以避

免对向外国贷款人支付的美国来源利息总额征收 30%的美国预扣税，2）可以避免对处置贷款工具的收益征收美国预扣税。另一方面，如果发现离岸贷款人从事美国贸易或业务，可能会产生一系列潜在的有害税收后果。[4]因此，风险相当高。

向美国人提供贷款的外国贷款人是否从事美国贸易或业务对 IRS 来说不是一个新问题。[5]根据 IRS LB&I 活动，IRS 可能会审查涉及以下内容的离岸贷款交易：1）由外国投资者直接或由该外国投资者的代理人间接在美国发放贷款；2）“季节和销售”交易，例如，在两个平行的基金结构中，一个基金发放贷款，第二个基金在规定的一段时间后从另一个基金购买贷款；3） 通过受条约保护的基金结构进行离岸贷款；4）涉及外国贷款人（或通过基金结构和合伙企业）直接或间接活动的其他结构。

知识要点

在规划与美国借款人的新的贷款交易时，海外贷款人需要意识到新活动导致的审计风险增加。

对于过去的交易，可能建议审查过去的贷款获取政策和结构，以确定是否可以或应该采取任何补救措施。

此外，对于过去的交易，如果外国贷款人未提交美国纳税申报表，美国国税局可以随时审计纳税人的纳税申报表——在提交纳税申报表之前，其他适用的三年期限法规不会开始生效；因此，美国国税局拥有所谓的“开口法规”。[6]

此外，根据所使用的结构，可能有多种申报要求；例如，美国实体的所得税申报表、预扣税申报表（IRC 1446）和非美国实体的纳税申报表。这些收益中的每一个都与其他收益是区别的；例如，美国合伙企业收入申报表（表格 1065）的申报与合伙企业预扣税年度申报表（表格 8804）的申报是分开的，这两种申报都与非美国人的申报表（1040-NR，个人，或 1120 表，公司）分开。[7]

根据具体情况，希望补救不符合规定的非美国纳税人可能无法在计算其有效关联收入时要求扣除。[8]美国国税局自愿披露程序是否可以减轻不利的税务后果尚不清楚。

有关海外贷款人 IRS 审计活动的更多信息或问题，请联系作者。

Holland & Knight 的律师 ***Chad M. Vanderhoef*** *协助完成此一文章。*

附注

[1] 参见“参与美国贸易或商业活动的金融服务实体”，国税局（上次访问时间为 2021 年 8 月 23 日）。

[2]《国内税收法典》（IRC）第 864(b)(2)条。

[3]《彭博每日税务报告》，Michael Rapoport，2021 年 8 月 10 日，IRS 发现外国“金融服务实体”存在违规行为。

[4]包括以下一项或多项：1）与美国贸易或业务有效关联的收入应纳税；2） 此外，如果境外贷款人是一家外国公司，则有可能对美国分支机构当年的收入和利润征收分支机构利得税，这些收入和利润未在没有双边所得税条约保护的情况下再投资于分支机构资产，以减少或消除这种风险；3） 提交美国联邦所得税申报表的要求——如果未及时提交真实准确的纳税申报表，通常在到期日后 18 个月内，通常无法申请允许的扣除额和抵免额，并且，如果未提交申报表，诉讼时效仍然有效。

例如，见 Inverworld，Ltd.，上诉人诉国税局委员，*Appellee*，979 F.2d 868（哥伦比亚特区巡回法庭，1992 年）；4） 如果贷款实体是合伙企业，则对外国合伙企业的有效关联收入预扣债务；5）州和地方税，具体取决于州。

[5] 在首席顾问律师备忘录中，美国国税局发现一家外国公司从事美国贸易或业务，其美国代理人代表该外国公司发放贷款。2009-010 上午（2009 年 9 月 22 日）。在首席法律顾问意见 201501013（CCA）（2015 年 1 月 2 日）中，IRS 考虑了通过其美国办事处提供贷款并担任股票承销商的美国基金经理，以及作为独立代理人代表外国基金的美国基金经理是否导致外国基金及其外国子公司从事美国贸易或业务，不符合第 864（b）节“安全港”的要求。

[6] IRC§6501(C)(3)。

[7] 见“非美国纳税人的美国税收评估和征收”，38 国际税务票据 1171，Jeffrey L.Rubinger 和 Andrew H.Weinstein（2005 年 6 月 27 日）。本文由 Holland & Knight 的一位前任和现任同事撰写，探讨了多重备案要求的复杂领域，以及在这些情况下如何适用诉讼时效。

[8] 美国财政部条例§1.882-4。

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Ira N. Rosner has more than three decades of experience helping entrepreneurs and corporate management teams create, fund, manage, grow and capitalize on their businesses. He has worked with a wide variety of companies, ranging from startup ventures to Fortune 100 enterprises, in a wide array of industries, including construction, healthcare, real estate (including REITs), pharmaceuticals, aerospace and aviation, agriculture, energy, manufacturing, high tech, life sciences, retail, business outsourcing, telecommunications and insurance. In addition, he is highly experienced in both public and private equity and debt securities offerings, as well as the sale and acquisition of public and privately held companies.

Martin L. Seidel has more than 30 years of experience in securities and corporate litigation and arbitration, with an emphasis on corporate control contests, transaction-related securities and shareholder litigations, multiparty class actions and derivative litigations. He regularly advises on litigation matters related to mergers and acquisitions (M&A), proxy fights and shareholder activism, securities laws, corporate accounting and disclosure, and corporate governance. In addition, he has tried cases before state and federal courts throughout the United States as well as arbitral tribunals around the globe.

William M. Sharp has more than 35 years of experience representing clients in a wide variety of international tax planning and tax controversy cases. He provides international and domestic tax advice to numerous U.S.-based and foreign-based clients, including publicly traded and closely held entities. His tax practice also focuses on globally oriented high-net-worth clients, including many U.S. and foreign-based family offices. He has served as lead counsel with respect to U.S. Tax Court proceedings, Internal Revenue Service (IRS) appeals and examination cases. He also has served as lead counsel or co-counsel to more than 1,500 IRS voluntary disclosure cases.

Shawn M. Turner has a particular emphasis on mergers and acquisitions, corporate finance and general business transactions. He primarily represents public and private companies in corporate and securities matters, bank regulatory issues and corporate governance matters. Additionally, he provides clients with general counseling as well as advising on acquisition and investment strategies, anti-takeover defenses, executive compensation and corporate governance, and U.S. Securities and Exchange Commission (SEC) compliance matters

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