Katten
Katten Muchin Rosenman LLP

CORPORATE & FINANCIAL
WEEKLY DIGEST

May 29, 2015 Volume X, Issue 21

SEC/CORPORATE

Form BE-10 Filing Deadline Extended

As reported in last week's edition of *Corporate & Financial Weekly Digest* and our client advisory, each US person who had a "foreign affiliate" at any time during its 2014 fiscal year is required to file a Form BE-10 report.

The deadline for filing Form BE-10 has been automatically extended for all new filers to June 30. More information about the Form BE-10 report is available here.

Delaware Supreme Court Holds That Plaintiffs Must Specifically Plead Non-Exculpated Claims Against Disinterested Directors in Transaction Under Entire Fairness Review to Survive Motion to Dismiss

In *In re Cornerstone Therapeutics Inc. Stockholder Litigation/Leal v. Meeks*, the Delaware Supreme Court reversed decisions of the Delaware Chancery Court denying director-defendants' motions to dismiss breach of fiduciary duty claims brought in connection with two transactions involving controlling stockholders. In reversing the Delaware Chancery Court's decisions, the Delaware Supreme Court held that a plaintiff seeking only monetary damages must plead non-exculpated claims against a director who is protected by an exculpatory charter provision to survive a motion to dismiss, regardless of the underlying standard of review for the board's conduct. The cases were remanded for the Delaware Chancery Court to determine whether the plaintiffs sufficiently pled facts suggesting that the independent directors committed a non-exculpated breach of their fiduciary duties.

In each case, the plaintiffs challenged an acquisition of a public company by its controlling stockholder. Each transaction was negotiated by a special committee of disinterested directors and subsequently approved by a majority of the minority stockholders. However, neither corporation's board complied with the procedural safe harbor set forth in *Kahn v. M&F Worldwide Corporation* (as summarized in the *Corporate & Financial Weekly Digest* edition of March 21, 2014), which would have invoked the business judgment rule and shifted the burden of proof to the plaintiff, and so the transactions were evaluated under the heightened scrutiny of the entire fairness standard. The charter documents of each target company contained exculpatory provisions that eliminated directors' personal liability for monetary damages absent bad faith or a breach of the duty of loyalty. The plaintiffs generally alleged breaches of fiduciary duties by the disinterested directors for approving a transaction that was not entirely fair, but failed to specifically allege that any of the disinterested directors breached any non-exculpated duty. In both instances, the Delaware Chancery Court declined to determine whether an exculpation provision could exculpate directors at the pleading stage, reasoning that the court would need to review a fully developed factual record before making such a determination.

The Delaware Supreme Court explained that the presumption that each director is independent, acting in good faith and furthering the corporation's best interests is a core principle of Delaware corporate law. By automatically inferring that disinterested directors who approve interested transactions are disloyal, the Delaware Chancery Court decision would have violated this principle. In addition, in reaching its holding, the Delaware Supreme Court was careful to avoid disincentivizing independent directors from serving as special committee members or otherwise dissuading them from making any other decisions that could benefit interested stockholders out of fear that their role in negotiating on behalf of minority stockholders would subject them to remain as defendants until the end of any resulting litigation. The Delaware Supreme Court noted that, in fact, it was exactly this concern that directors might be discouraged from making value-maximizing business decisions out of fear of facing personal liability that led to the adoption of Section 102(b)(7) of the Delaware General Corporation Law that permits corporations to adopt exculpatory provisions.

Click here to read the opinion.

PRIVATE INVESTMENT FUNDS

See "Form BE-10 Filing Deadline Extended" in the SEC/Corporate section.

LITIGATION

Former Olympic Games Sponsor Settles With SEC for $25 Million Over FCPA Violations

On May 20, BHP Billiton Ltd. and BHP Billiton Plc (BHPB), a global resources company that sponsored the 2008 Beijing Summer Olympic Games, settled Securities and Exchange Commission charges of Foreign Corrupt Practices Act (FCPA) violations. The SEC found that BHPB violated the FCPA by failing to devise and maintain internal controls over a global hospitality program that used BHPB's Olympics sponsorship as a platform to entertain government officials.

BHPB is one of the world's leading commodities producers with operations in 25 countries. In 2005, BHPB agreed to be an official sponsor of the 2008 Beijing Olympics by paying a fee and providing raw materials for Olympic medals. As a sponsor, BHPB had, among other things, priority access to tickets, hospitality suites and accommodations. BHPB decided to use its sponsorship as a business development tool and created an Olympics hospitality program with the stated goals of "reinforc[ing] and develop[ing] relationships with key stakeholders" in China and other regions where BHPB had existing, or sought to have, operations. To that end, BHPB invited approximately 176 government officials and employees of state-owned enterprises, along with spouses, to attend the Olympics, including officials from countries in Africa and Asia with long histories of corruption. BHPB's invitations included luxury hotel accommodations, meals, event tickets and other excursions, valuing up to $16,000.

Aware that the hospitality program presented a risk of violating anti-corruption laws and BHPB's internal policies, BHPB devised special procedures for all invitations to the Olympics. Each such invitation required the BHPB employee to submit an application that included answers to specific questions regarding the invitee's business relationship with the company, including whether the invitee could influence any actual or potential contracts, licenses or agreements with third parties.

The SEC found that BHPB's compliance procedures for the Olympics hospitality program were inadequate to thwart anti-bribery risks, and principally found BHPB's implementation of the review process to be problematic. Specifically, the applications were not subject to an independent legal or compliance review, and BHPB did not train employees on how to complete the questionnaires. Although BHPB employees understood that the applications would be reviewed by an ethics panel, to the extent any review occurred, it was not substantive. Further, members of the ethics panel viewed their role as "purely advisory," and believed the business managers should bear sole responsibility for balancing business goals against the limitations of the anti-bribery laws. Further, although the application asked whether business was "expected to develop" with the invitee, employees were not instructed to update the applications if the relationship changed. To illustrate the inadequacy of BHPB's internal controls, the SEC cited four examples of improper invitations to government officials who were directly involved in, or in a position to influence, pending business matters. (Notably, in three instances, the invited official either cancelled, or the invitation was withdrawn shortly before the Olympics.)

The SEC acknowledged that BHPB provided significant, voluntary cooperation by undertaking an extensive internal investigation and sharing the results with the SEC. In addition, BHPB instituted numerous remedial actions as a result of that investigation. Nevertheless, the SEC found that BHPB's actions violated Section 13(b)(2)(A) and Section 13(b)(2)(B) of the Securities Exchange Act of 1934 and, without admitting or denying the charges, BHPB agreed to a monetary penalty of $25 million. BHPB also agreed to cease and desist from future violations and to make a follow-up written report to the SEC on the sufficiency of the company's anti-corruption compliance program.

In re BHPB Billiton Ltd. and BHP Billiton PLC, SEC No. 3-16546 (May 20, 2015)

Second Circuit Dismisses Suit Over FBI's Wiretapping of Marital Conversations in Securities Fraud Investigation

Federal Bureau of Investigation (FBI) wiretapping played an important role in the wide-ranging insider trading investigation and subsequent trials of Galleon Group LLC principals and traders. During his criminal prosecution, former Galleon trader, Craig Drimal, unsuccessfully moved to suppress evidence obtained via an authorized wiretap of his cell phone because of a failure to minimize interception of calls with his wife. His wife, Arlene Villamia Drimal, is now pursuing civil claims against FBI agents for wiretapping her personal telephone conversations with her husband, but her claims have thus far been unsuccessful. On May, 15, the US Court of Appeals for the Second Circuit dismissed Ms. Drimal's complaint without prejudice to repleading, finding that her conclusory pleading failed to state a claim under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which requires the government to "minimize the interception of communications not otherwise subject to interception." The Second Circuit also found fault with the lower court's assessment of the agents' qualified immunity defense.

In connection with a federal criminal investigation, the US District Court for the Southern District of New York authorized a wiretap of Mr. Drimal's cell phone, but stressed that monitoring must "immediately terminate when it is determined that the conversation is unrelated [to criminal matters]." FBI agents also were instructed to "discontinue monitoring if you discover that you are intercepting a personal communication solely between husband and wife." Despite these instructions, agents allegedly monitored approximately 180 private marital calls between the Drimals that were unrelated to the investigation. Although the district court denied Mr. Drimal's suppression motion in his criminal matter, it identified 18 calls that were "potentially violative" and observed that the agents' failure to minimize monitoring of private calls was "inexcusable and disturbing." Ms. Drimal brought her separate civil lawsuit following the conclusion of her husband's criminal case with his entry of a guilty plea and subsequent sentencing.

At the district court level, the FBI agents unsuccessfully moved to dismiss Ms. Drimal's complaint for failure to state a claim and on qualified immunity grounds. The Second Circuit reversed that decision, holding that Ms. Drimal's complaint was insufficient because it merely stated, in a conclusory fashion, that the interception of marital calls violated Title III, without reference to a duty to minimize. The Second Circuit noted that Title III does not prohibit outright the monitoring of privileged calls. With respect to the agents' qualified immunity defense, the court of appeals held that the district court should have evaluated each agent's minimization efforts under an "objective reasonableness" standard based on the particular circumstances, rather than as a group. The Second Circuit vacated the lower court decision and directed dismissal of the complaint with leave to replead, stating that amending the complaint would not be futile.

Drimal v. Makol, Nos. 13-2963 and 13-2965 (2d Cir. 2015)

UK DEVELOPMENTS

UK PRA Consults on Application of Resolution Stays to Third-Country Agreements

On May 26, the UK Prudential Regulation Authority (PRA) published a consultation paper to require PRA-supervised firms covered by the EU Bank Resolution and Recovery Directive (BRRD) to include in their contractual agreements governed by third-country law an agreement by the relevant counterparty to subject itself to the general and temporary stay provisions of the BRRD as implemented under UK law. In particular, the BRRD provides for a general stay of a counterparty's right to exercise any termination, suspension, modification, netting or set-off rights, or to obtain possession, exercise control or enforce any security over any property of a firm solely as a result of the exercise of a crisis prevention or crisis management measure taken pursuant to the BRRD, provided the firm continues to perform its obligations under the relevant contract.

The BRRD also provides for national resolution authorities to impose one or more of the following temporary stays until midnight in the relevant member state on the business day following the date of entry into resolution: (1) the suspension of any payment or delivery obligation by the firm subject to resolution; (2) the prohibition of a secured creditor to enforce its security interest; and (3) the suspension of a counterparty's termination rights. The PRA's proposal forms part of wider cross-border recognition efforts undertaken by the Financial Stability Board to ensure the effective recognition of resolution actions across borders.

The consultation paper can be found here.

EU DEVELOPMENTS

ESMA Calls for EMIR Modifications to UCITS Directive

On May 22, the European Securities and Markets Authority (ESMA) published an opinion to the EU institutions (including the Commission, Parliament and Council) calling for a modification of the Directive for Undertakings for the Collective Investment of Transferable Securities (UCITS Directive) to take into account the clearing obligations for both exchange-traded and over-the-counter (OTC) financial derivatives arising under the European Market Infrastructure Regulation (EMIR).

ESMA has determined that the UCITS Directive should no longer distinguish between OTC and exchange-traded financial derivatives, but rather make a distinction between cleared (both OTC and exchange-traded) and non-cleared financial derivatives. Therefore, ESMA recommends that the counterparty risk limits imposed by the UCITS Directive for OTC derivatives should be amended to apply to exchange-traded derivatives as well.

ESMA maintains that for non-cleared derivatives, the current counterparty risk limits (5 percent/10 percent) should continue to apply. For cleared derivatives, however, separate counterparty exposure limits should be put in place for exposure to central counterparties (CCPs) and to their clearing members.

The opinion further states that the counterparty risk limits should be calibrated to the different types of segregation arrangements, i.e., gross or net omnibus versus individual segregation. ESMA also recommends that counterparty risk limits applied to CCPs should be lower for non-EU CCPs that have not been recognized by ESMA than for EU CCPs or those non-EU CCPs that have been recognized by ESMA.

ESMA provides general indication regarding what it believes the appropriate counterparty risk limits should be. Therefore, more analysis will need to be done before a final decision on ESMA's recommendation can be made, which probably will not be until the end of the year, or potentially later.

A copy of the opinion can be found here.

For more information, contact:

SEC/CORPORATE		
Mark J. Reyes	+1.312.902.5612	mark.reyes@kattenlaw.com
Mark D. Wood	+1.312.902.5493	mark.wood@kattenlaw.com
Paul R. Fenstermaker	+1.312.902.5317	paul.fenstermaker@kattenlaw.com
Martin Q. Ruhaak	+1.312.902.5676	martin.ruhaak@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
Kimberly L. Broder	+1.212.940.6342	kimberly.broder@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
Christian B. Hennion	+1.312.902.5521	christian.hennion@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
Lance A. Zinman	+1.312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@kattenlaw.com
LITIGATION		
Emily Stern	+1.212.940.8515	emily.stern@kattenlaw.com
Margaret J. McQuade	+1.212.940.6664	margaret.mcquade@kattenlaw.com
EU/UK DEVELOPMENTS		
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Nathaniel Lalone	+44.20.7776.7629	nathaniel.lalone@kattenlaw.co.uk

* Click here to access the *Corporate and Financial Weekly Digest* archive.

Katten

Katten Muchin Rosenman LLP www.kattenlaw.com

AUSTIN | CENTURY CITY | CHARLOTTE | CHICAGO | HOUSTON | IRVING | LONDON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SAN FRANCISCO BAY AREA | SHANGHAI | WASHINGTON, DC

Katten Muchin Rosenman LLP is an Illinois limited liability partnership including professional corporations that has elected to be governed by the Illinois Uniform Partnership Act (1997).

London: Katten Muchin Rosenman UK LLP.