THOMPSON HINE

Business Law Update

Summer 2022

Business Perspectives

Signed, Sealed, Delivered

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

In this edition we include a detailed discussion of a Delaware Chancery Court decision concerning proper documentation of board of director appointments. Now I can already read your minds—that's just the sort of dry, esoteric, nitpicky topic that sets lawyers' hearts aflutter and is of little consequence to the real world. Au contraire.

The origins of the word "law" in English are found in various ancient languages. They generally are thought to stem from the concepts of laying down or establishing things. "Laying down the law" as an expression nicely captures this concept. A lawyer is basically a person who is conversant with establishing and following the rules.

In those days, laws may have been carved on a permanent medium such as stone, or printed or written on parchment, or paper, also remarkably permanent as it turns out. Even so, experience taught the lawyers that special procedures were needed to assure that the carving, or writing, accurately represented the law being laid down, be it a public statute, private contract, or official appointment. An "official version" is needed. Innovations such as wax seals helped with this problem. The profession of "notary public" arose, comprising specialized lawyers trained in the forms and practice of authenticating documents.

Modern forms of communication, for all their wonderful, time-saving efficiency, can be remarkably unclear and impermanent. Text messages, in fact, may be deleted inadvertently from our smartphones and must be printed or otherwise archived. Apart from their impermanence, we all know how confusing long text or email strings can become,

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For more details on any of the topics covered in this *Business Law Update*, please contact the authors via the links at the end of each article or David R. Valz, editor-in-chief. For information on our Corporate Transactions & Securities practice, please contact Frank D. Chaiken, practice group leader.

and how difficult it can be to figure out what's being said or agreed to at the end of the day.

It is tempting, in our current era of accelerating innovation, to view the "old ways" as outdated and ripe for disruption. In many ways they are. Electronic signatures are well-accepted by now, and various applications exist to provide them. Still, providing clarity and certainty about what is being agreed, or decided, remains critically important.

One can only imagine the lawyers' fees and expenses that were incurred in the litigation that resulted in the Delaware Chancery Court decision outlined by my partner Lindsay Karas Stencel in this newsletter. That alone should provide a convincing argument for clients, businesspeople, and their lawyers to make sure that they have "laid down the law" in the appropriate manner – e-signed, e-sealed and e-delivered.

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

Stay safe,

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Frank Chaiken leads the firm's highly regarded Corporate Transactions & Securities practice and its more than 100 professionals, representing clients of all sizes across virtually every industry. He is also the partner in charge of Thompson Hine's Chicago office. If you have questions or would like to share your thoughts, please contact Frank at 513.352.6550 or Frank.Chaiken@ThompsonHine.com.

Retirement Plan Roundup: Recent Legal Developments & Best Practices

Please join us for a lunchtime webinar series focusing on the latest updates and guidance on retirement plans and related issues. All sessions are on Wednesdays from noon to 1 p.m. ET.

Session 1: Committee Best Practices/Missing Participants/Cybersecurity Compliance - September 14

Tim Brown and Laura Ryan kick off our series by reviewing compliance and risk mitigation best practices that fiduciaries should consider implementing as part of a prudent fiduciary process including steps designed to address missing participants and uncashed checks, cybersecurity risks and compliance with new requirements applicable to the provision of rollover advice and recommendations to plan participants. ***Register online.***

Session 2: Litigation Update - October 12

Brian Lamb will discuss the latest ERISA litigation developments, including 401(k) excessive fee class actions; pension plan actuarial assumptions litigation; and welfare plan fiduciary disputes. ***Register online.***

Session 3: Retirement Plan Investments (ESG, crypto, managed accounts, brokerage windows) - November 9

Ed Redder and Dominic DeMatties will explore recent developments related to retirement plan investments, including ESG considerations when selecting investments, fiduciary considerations when including cryptocurrency in investments and the fiduciary process for selecting and monitoring managed account services and brokerage windows. ***Register online.***

Session 4: Legislative Update - December 14

In our final session, David Whaley and Stephen Penrod will examine any retirement plan legislation passed by Congress this year, including potential legislation based on the Securing a Strong Retirement Act of 2022, Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg Act, and the Enhancing American Retirement Now Act. ***Register online.***

Questions? Contact Diane Weber at Diane.Weber@ThompsonHine.com.

Antitrust/ESG

Antitrust and ESG Make Strange Bedfellows

By Mark R. Butscha, Jr. and Joshua L. Shapiro

The corporate world is facing increased pressure from investors and other stakeholders to focus more on environmental, social, and governance (ESG) issues. At the same time, governments are trumpeting increased enforcement of antitrust and competition laws. Indeed, as we wrote in a recent edition of *Business Law Update*, the U.S. government—spurred by the Biden administration's Executive Order on Promoting Competition in the American Economy—has been pursuing a broader, more aggressive antitrust enforcement agenda. Because the goals of ESG—promoting social responsibility—and antitrust—promoting competition and free markets—are not the same, pressure to comply with both creates tension. Collaborations among competitors, even if the goals of the collaboration may be laudable, could run afoul of the antitrust laws. Thus, despite the recent push for more ESG initiatives, companies should remain vigilant of their antitrust compliance obligations.

Antitrust Enforcers Have Started Focusing on ESG

In September 2019, the head of the Antitrust Division of the U.S. Department of Justice (DOJ) wrote an op-ed in *USA Today* with the lede, "The loftiest of purported motivations do not excuse anti-competitive collusion among rivals." That piece came on the heels of news reports that DOJ was investigating the antitrust implications of a deal between the state of California and large automakers that would have required stricter emissions standards than those required by the federal government. The investigation, which focused on whether the emissions agreement would reduce output and limit consumer choice in violation of antitrust laws, was dropped several months later, but it illustrates the potential tension between ESG goals and antitrust.

More recently, in a March 2022 opinion piece in the *Wall Street Journal* below the headline "ESG May Be an Antitrust Violation," the Arizona attorney general declared that "[t]he biggest antitrust violation in history may be in plain sight" and argued that banks have engaged in "coordinated efforts to choke off investment" in oil and gas by pushing "climate goals," thereby manipulating the market. Much like the federal automobile emissions investigation, the Arizona investigation is likely to focus on whether the collaborative pursuit of environmental goals will reduce output and raise prices for consumers, which are the harms antitrust enforcement has traditionally focused on remedying.

Some have said that these investigations targeted at ESG collaborations are motivated more by politics than antitrust concerns. DOJ vehemently denied that with respect to the 2019 auto emissions investigation, and, in any event, it seems unlikely—given the current administration's focus on promoting ESG in SEC reporting—that the Biden DOJ will specifically target ESG initiatives like the Trump DOJ did. Nonetheless, these recent investigations highlight the need for careful consideration of ESG policies and collaborations to avoid or mitigate antitrust risk both at the state and federal levels.

Merger Investigations Include ESG Inquiries

Antitrust merger investigations historically have focused on issues related to whether the proposed merger is likely to result in increased prices and harm to innovation (i.e., harm to consumers) in a given product and geographic market. Recently, in addition to those traditional inquiries, the Federal Trade Commission (FTC) has started asking some merging parties about how the proposed merger will affect their ESG policies. (Perhaps notably, the current head of the Antitrust Division said in his confirmation hearings that ESG should not be a factor in antitrust merger review unless related to competition. This could be a development to watch, given the possibility of enforcement divergence between the FTC and DOJ.) It is not yet clear how the FTC intends to use ESG information to assess the competitive effects of mergers, but there are several possibilities.

One way is to assess whether companies have used ESG collaborations to facilitate unlawful collusion to increase prices or decrease output. This type of activity could be uncovered during a merger investigation, which ordinarily would involve the production of massive amounts of documents to the investigating agency. Collusion uncovered as a result of the review of these document productions could not only threaten the merger but also result in civil or criminal liability or further governmental investigations. Another way the agencies may focus on ESG is by analyzing ESG efforts through the lens of potential efficiencies associated with a merger. It is possible that the agencies may credit ESG-related efficiencies when considering if the procompetitive benefits of a merger outweigh its anticompetitive effects. Viewing ESG information in this way would mark a sea change in antitrust enforcement by focusing on non-price and non-innovation effects of a proposed merger. In the meantime, the FTC and DOJ are working to prepare new merger guidelines that may clarify the agencies' thinking on this topic.

Companies Should Approach ESG Collaborations with Caution

FTC and DOJ scrutinize competitor collaborations according to guidelines jointly published in 2000 (Antitrust Guidelines for Collaborations Among Competitors). Those guidelines would apply to ESG collaborations as well. Given the antitrust risk associated with ESG collaborations, companies should seek antitrust guidance if they are considering such collaborations. There likely are ways to mitigate risk associated with any potential ESG collaboration, most of which apply generally to all competitor collaborations. For example, best practices for meetings and communications with competitors (e.g., written agendas, no exchange of competitive sensitive information) should be followed, and collaborations with industry groups that set ESG standards or certifications should not exclude or discriminate against other competitors. Regardless, the bottom line is that ESG collaborations are on the rise and present antitrust risk that should be carefully considered and mitigated when possible.

With any questions, please contact Mark Butscha or Josh Shapiro.

Securities Quarterly Update – Summer 2022

Please visit our website for the latest edition of *Securities Quarterly Update*, our newsletter that provides updates and guidance on securities regulatory and compliance issues. In this edition, we discuss the SEC's updated regulatory agenda; recent updates to SEC electronic filing requirements; guidance on potential disclosure obligations relating to Russia's invasion of Ukraine; proposed climate and other ESG-related disclosures; and recent ESG-related enforcement activity.

New Ventures

Thanks to *Bäcker,* There's Probably More Paperwork

By Lindsay Karas Stencel

It's always incredibly exciting when you have worked for months – and sometimes years – to grow a business to a place where you can secure funding from outside third-party investors. It is often a long and arduous process and documentation of the investment always feels like it takes significant time and energy. As part of those investment transaction documents, there are a litany of agreements, including certificates of incorporation, voting agreements, investors' rights agreements, right of first refusal and co-sale agreements, opinions and a series of consents and approvals that new investors and existing shareholders agree to enter into and be bound by. Within those documents, investors are often granted rights to elect certain parties to the board of directors or make certain decisions in writing that are binding on the company.

For quite some time, the standard course of drafting practice in investment rounds has been to loop post-closing consent items (*i.e.,* appointing new board members or officers) into the closing consents. While all parties executing those documents clearly see the efficiency in papering closing and post-closing items collectively, non-participating minority shareholders may not necessarily appreciate their lack of voting say in the process and may even argue for a deviation from the governing documents—and now, thanks to *Bäcker, et al. v. Palisades Growth Cap. II, L.P.*, they would be correct. While a majority of new and existing shareholders may appreciate executing documents once to get past the funding round, recent shareholder litigation in Delaware indicates the courts will rebut them as a matter of equity where corporate formalities, documentation or statutes are ignored for the sake of convenience.

Litigation Backdrop

In *Bäcker, et al. v. Palisades Growth Capital II, L.P.,* the Delaware Chancery Court issued an opinion (Del. Supr. Jan. 15, 2021) adhering to the principle of needing consent to effectuate specific actions, including approving new board members. This case began its journey in 2009 with Appellant Alex Bäcker co-founding QLess, Inc., a privately held Delaware corporation. As the majority owner of the company's common stock, Bäcker controlled two board seats (one of which he held himself) and was CEO. The company's certificate of incorporation permitted Palisades Growth Capital II, L.P. (Palisades) and Altos Hybrid 2 L.P. (Altos), each majority stockholders of their respective investment share classes, to appoint one director to the board. Palisades' designee was Jeff Anderson and Altos' designee was Hodong Nam. According to the company's voting agreement, a fifth board seat was occupied by an independent director, Ivan Markman. The voting agreement also required the board to create a new CEO director seat to be filled by Bäcker's replacement in the event of Bäcker's termination.

In early 2019, employees began alleging to the board that Bäcker was creating a toxic work environment. Over the following months, the situation got worse, with Anderson and Nam ultimately concluding that the board should remove Bäcker as CEO and with Nam telling Bäcker that he should resign. Bäcker was not willing to resign, and as part of his efforts to retain his position as CEO, Bäcker fired the other common stock board director, Michael Bell, and replaced him with his father. This action led to a standoff – the two preferred stock directors (Anderson and Nam) wanted Bäcker removed as CEO, the two common stock directors (Alex Bäcker and his father) opposed the removal, and the independent director (Markman) was undecided.

As employees continued to allege complaints regarding Bäcker, the board voted to form a special committee consisting of Anderson, Nam and Markman, which hired a law firm to investigate employees' complaints. The law firm substantiated many of the complaints against Bäcker and provided a report to the special committee upon completion of its investigation. As a result, the special committee recommended that the full board terminate Bäcker.

In June 2019, the board voted to remove Bäcker as CEO, which triggered the provision in the voting agreement stating that if Bäcker were terminated as CEO, the stockholders would vote to expand the board to six seats and appoint the replacement CEO to the board. The board then conducted a CEO search and hired Kevin Grauman as QLess' new CEO. Soon after, Nam resigned his position on the board, and Altos decided that Paul D'Addario, a partner at Palisades, would replace Nam as Altos' designee. Subsequently, Altos' counsel erroneously advised them that board action would be required to fill the vacancy created by Nam's resignation, even though QLess' certificate of incorporation gave Altos the exclusive right to fill its Series A-1 director seat by vote or written consent in place of a meeting. Relying on this bad advice and contrary to the governing documents, Altos took no further action to elect D'Addario, waiting instead for the next board meeting. Bäcker requested that the board convene a meeting in November 2019 to finalize the votes for the new CEO. However, one day before the board meeting, Markman unexpectedly resigned his position as an independent director. Seeing that he now held a 2-1 board majority with himself and his father versus Anderson, Bäcker started executing a plan to be reinstated as CEO and lock in control of QLess.

Anderson and the company's outside counsel were concerned that Bäcker would attempt to take advantage of the board situation, but they concluded that Bäcker and his father were compelled by the voting agreement to vote in favor of D'Addario's appointment, which would be the first item on the board meeting agenda. After that, they believed Bäcker would be unable to take any unwanted actions as Anderson and D'Addario would be there to object.

Hours before the board meeting, the outside counsel emailed Bäcker and his father about the previously circulated board resolutions for the meeting, stating that they had not electronically signed a board consent adopting the resolutions, including resolutions to confirm Grauman's employment as CEO and board appointment as well as D'Addario's appointment to the board. The outside counsel noted that his understanding was that executing the consent was a prerequisite for the meeting and that without the executed consent, Anderson would not attend the meeting, leaving the board without a quorum. Bäcker and his father decided not to sign the consent and despite not hearing back from the Bäckers, Anderson decided to attend the board meeting.

Later that evening, Bäcker called the board meeting to order and, with his father, executed his agenda, which included, among other things, firing Grauman as CEO, hiring himself as CEO and CFO, appointing himself to the newly created CEO-director seat, and appointing a consultant friendly with Bäcker to his vacated director seat. Anderson and D'Addario objected to each board action, to no avail.

Days after the board meeting, Palisades filed a complaint in the Court of Chancery challenging the Bäckers' actions at the meeting. It argued that the email from Altos' general counsel that requested QLess take action to facilitate stockholder consent of D'Addario's appointment constituted a "vote" to place D'Addario on the board, and if the court held that the email was not a vote, it was a written consent. The complaint also alleged a breach of the voting agreement for failure to confirm Grauman to the CEO director seat.

First, the Chancery Court held (and was subsequently affirmed by the Delaware Supreme Court) that the email Altos' general counsel sent did not constitute a stockholder vote under the certificate of incorporation or under applicable law. The court explained that the Delaware

General Corporation Law (DGCL) is clear that stockholders vote at meetings. The court further held that Altos' general counsel's email was not a written consent because the email requested that QLess draft the stockholder consent and because, under 8 Del. C. § 228, electronic transmissions "still must [set] forth the action so taken by the stockholder giving the consent." Altos' general counsel's email did not comply with those formalities because it did not set forth action taken; it merely requested that a particular action be taken. Second, the court recognized that most of the board believed Grauman had been appointed before the meeting. Still, the court also acknowledged that under QLess' bylaws, a formal executed unanimous written consent would have been required for a valid appointment. Ultimately though, the court held that all the actions taken at the November board meeting were void as a matter of equity: "Relying on the evidence discussed above, the court found that "Anderson's presence at the meeting was secured under deliberately false pretenses." "If Anderson had known of [the Bäckers'] change of plans, he would have refused to participate in the meeting, defeating a quorum and thwarting the coup."" *Bäcker v. Palisades Growth Capital II, L.P.*, 246 A.3d 81, 94 (Del. 2021).

So Why Should Companies Care?

Looking to consents following the *Bäcker* decision, there may be an increase in formalities during the normal course of business, as well as after transactions, to ensure compliance with corporate documents and to ensure speed does not trump adherence to governing documents and corporate law. The *Bäcker* opinion is significant because the court found that it may void action by a board of directors – even where the action is not otherwise in violation of the corporate charter or the DGCL – when equity so requires. If Altos and Grauman had relied on a formal executed unanimous written consent, the need for litigation would have been alleviated. Ultimately, the decision in *Bäcker* is a reminder that "notwithstanding board members' adherence to the procedural requirements associated with conducting board business – as codified in statues, bylaws, and articles of incorporation – *directors may still be held liable for breaching fiduciary duties* if these procedures are deceptively employed (emphasis added)."

As a result, to ensure that the *Bäcker* case is not used in a manner to invalidate appointments of new board members or other corporate actions, strict adherence to corporate procedures, including obtaining consents in writing, and to statutory requirements is strongly advised for all clients impacted by Delaware law. In turn, this means that we now see a litany of written approvals at all intervals of the corporate life cycle to ensure that *Bäcker's* reach cannot be used to invalidate board appointments, decisions, or transactions in total.

So, when you think you have closed your transactions and the money is in the bank, remember: There is more to do thanks to the *Bäcker* decision and many more consents to execute after you think you have moved beyond the deal. Email alone is generally insufficient and the rules of equity, fairness and adherence to corporate formalities are principles that the Delaware courts are keeping a close eye on.

Please contact Lindsay Karas Stencel with any questions.

International Trade/Supply Chain

How to Comply with the Uyghur Forced Labor Prevention Act's Due Diligence Requirements

By Francesca M.S. Guerrero, Joyce Rodriguez and Alyssa Mottahed*

The Uyghur Forced Labor Prevention Act (UFLPA or Act) became effective June 21, 2022. It creates a rebuttable presumption that all products produced in whole or in part in the Xinjiang Uyghur Autonomous Region of China (XUAR or Xinjiang) or by persons designated to the UFLPA Entity List were produced with forced labor and must be denied entry into the United States. The Act builds on Section 307 of the Tariff Act of 1930, which generally prohibits the importation into the United States of *all* goods "mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions."

To comply and rebut the presumption, U.S. importers are required to meet forced labor due diligence standards set forth in the Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China (Guidance) published by the Department of Homeland Security (DHS). The Guidance provides the elements of an effective compliance program that importers are expected to have in place.

This briefing provides an overview of the Guidance and key considerations for all U.S. companies with supply chains involving China to ensure compliance with the UFLPA and its due diligence requirements.

What Goods Are Subject to the UFLPA's Rebuttable Presumption?

All goods sourced in whole or in part directly or indirectly from Xinjiang or from an entity on the UFLPA Entity List are subject to the UFLPA's rebuttable presumption, including raw materials and intermediate or finished goods imported into the United States from China or third countries. To date, Customs and Border Protection (CBP) has focused on products that are at high risk of forced labor, including goods containing any cotton, tomatoes or silica from the region or any goods involving the UFLPA Entity List entities. In a multi-agency report, the Xinjiang Supply Chain Business Advisory,

the U.S. government has highlighted industries at high risk in the region including renewable energy, construction, sugar, textiles, electronics assembly, extractives and food processing.

What Mechanism Will CBP Use for Imports Within the Scope of the UFLPA?

CBP will identify imports subject to the rebuttable presumption through data collection and analytics. CBP will notify importers of enforcement actions taken under the UFLPA on importations, which may include detention, exclusion, and seizure/forfeiture.

How Can Importers Respond to UFLPA Enforcement?

Importers may respond to UFLPA enforcement action by providing information sufficient to: (1) rebut the presumption and meet the conditions and requirements set forth in Section 3(b) of the UFLPA, or (2) demonstrate that the importation is outside the scope of the UFLPA (essentially, that it does not contain goods sourced from Xinjiang or companies on the UFLPA Entity List).

Rebutting the presumption requires the importer of record to show with sufficient documentation that it has:

- Fully complied with the Guidance and any implementing regulations;
- Fully responded to all inquiries for information to ascertain whether the goods were mined, produced or manufactured in whole or in part with forced labor; and
- By clear and convincing evidence shown that the good was not mined, produced or manufactured in whole or in part with forced labor.

The Guidance states that to fulfill the first prong of the rebuttable presumption test, importers must show effective due diligence (for example, monitoring compliance and remediating violations), supply chain tracing from the beginning to the finished product, and supply chain management to mitigate identified risks of forced labor. For example, documents evidencing an importer has UFLPA-compliant:

- **Due diligence systems** in place will include supply chain mapping and assessments as well as a code of conduct and evidence of training and monitoring compliance;
- **Supply chain tracing** measures will include information on all stages of production, all components and materials and all persons involved in the supply chain; and
- **Supply chain management** will include internal controls to prevent and mitigate forced labor risk and related accounting and auditing systems.

Showing that goods from China were not produced in whole or in part with forced labor will also require detailed supply chain mapping of the goods and their components, all stages of production including sourcing, information on the workers involved at each stage and credible audits. Additional information is required for goods involving high-risk materials like cotton, tomatoes or silica as noted in the Guidance.

Similar documentation can be used by importers to show that the imported goods and their inputs are sourced completely from outside of the Xinjiang region of China and have no connection to the UFLPA Entity List.

What Should All U.S. Companies with Supply Chains in China Do Right Now?

U.S. companies should take steps to understand whether they are importing or purchasing goods produced in whole or in part from Xinjiang or involving UFLPA Entity List entities and take the following steps:

- Assess whether current procedures for due diligence, supply chain tracing and supply chain management are aligned with the UFLPA.
- Gather and prepare documentation necessary for rebutting the presumption set forth in the Guidance and familiarize themselves with the CBP's Operational Guidance for Importers.
- Research and prepare for alternative sourcing and supply chains to comply with the UFLPA.

U.S. companies with supply chains in the region involving high-risk materials should:

- Understand their company's forced labor risk profile and identify goods that may be subject to the UFLPA.
- Engage their suppliers and request supply chain tracing information.
- Revise supplier codes of conduct and other terms and conditions on purchase orders.
- Train and educate internal stakeholders on supply chain tracing and the UFLPA requirements.
- If applicable, assess the impact of the UFLPA's enforcement on their supply chains to determine whether alternate sourcing will be necessary.

Please contact Francesca Guerrero or Joyce Rodriguez with any questions.

**Alyssa Mottahed (American University Washington College of Law, '24) contributed significantly to this article as a Thompson Hine summer associate; she is not admitted to the practice of law. Please contact Julia Zerman to learn more about our summer program.*