© Tetra Images/Corbis

GC Agenda

A round-up of major horizon issues for General Counsel

JULY/AUGUST 2015

ANTITRUST

FIX-IT-FIRST REMEDIES

Companies considering a merger should be aware of a recent Federal Trade Commission (FTC) decision allowing a merger between cigarette manufacturers Reynolds American, Inc. and Lorillard Inc. to proceed based on the parties' fix-it-first remedy.

Fix-it-first remedies involve merging parties preemptively proposing to sell assets before closing their merger. Divesting certain assets may eliminate anticompetitive effects of the merger and allow the parties to more easily obtain antitrust agency approval. In this case, the FTC entered into a consent order with the parties and allowed the merger to proceed based on Reynolds' offer to sell four cigarette brands to Imperial Tobacco Group plc.

The FTC Commissioners did not unanimously approve the remedy. Commissioner Wright argued that the parties' planned divestitures addressed the FTC's antitrust concerns and no formal consent order was necessary. Commissioner Brill issued a dissent taking the opposite view, arguing that the divestiture was not meaningful because Imperial:

- Was too small a buyer.
- Would not provide sufficient competition to challenge the merged entity's prices.

Recently, the FTC and Department of Justice have been skeptical of fix-it-first remedies, rejecting the parties' proposed remedy in mergers between:

- Sysco Corp. and US Foods.
- Comcast Corp. and Time Warner Cable Inc.

Of the two agencies, the FTC has historically been less likely to accept fix-it-first remedies. However, the Reynolds case demonstrates that the FTC may accept fix-it-first remedies involving substantial divestitures backed by a formal consent order. Nonetheless, counsel should consider the FTC Commissioners' individual views when contemplating a fix-it-first remedy to maximize its chance of acceptance.

Search Merger Remedies for more on the types of remedies the antitrust agencies use to preserve competition post-merger.

CAPITAL MARKETS & CORPORATE GOVERNANCE

BOARD OVERSIGHT OF SOCIAL MEDIA COMPLIANCE

Recent reports underscore the importance of monitoring a company's social media presence. To ensure proper board oversight of social media compliance, counsel should understand and fully communicate to the board the risks associated with the company's social media presence and the measures in place to comply with relevant social media policies.

According to a recent survey in *Corporate Board Member Magazine*:

- 91% of directors and 79% of general counsel surveyed believe they do not have a thorough understanding of the social media risks for their companies.

- 10% of directors indicated they are not confident in their general counsel's ability to handle the company's social media risks.

(*NYSE Governance Services, Corporate Board Member Magazine, 2nd Quarter 2015*.)

Further, a recent study by NextGate on social media compliance by Fortune 100 companies found an average of over 320 company-branded social media accounts with over 1,500 employee participants (*NextGate, State of Social Media Infrastructure Part III: A Compliance Analysis Fortune 100 Social Media Infrastructure, 2015*). Given the large number of employee participants, oversight can be difficult and there is a significant risk that employees on social media will, without authorization, appear to be speaking on behalf of the company, including by posting sensitive information.

To protect against social media risks, counsel may want to discuss with the company's board whether to implement the following measures:

- Periodically revising existing social media policies to keep up with the rapidly changing landscape.
- Scheduling ongoing social media training with clear lines of oversight and issue reporting.
- Limiting the number of individuals authorized to speak on behalf of the company.
- Aggregating company and employee social media postings on one or several official company web pages to set a standard for authorized disclosures and ease the monitoring process.
- Requiring employees to clearly specify in which capacity, individual or professional, their social media accounts are being used.

Search Social Media Compliance with Securities and Disclosure Laws for a detailed discussion of social media issues under securities and disclosure laws.

Search Social Media Guidelines (Public Company Short Form) for sample company social media guidelines.

COMMERCIAL

UPDATED FTC ENDORSEMENT GUIDES FAQs

Businesses that use endorsements in their advertisements should review the FTC's recently updated FAQs, *FTC's Endorsement Guides: What People are Asking* (FAQs). In the FAQs, the FTC answers common questions from advertisers, bloggers and other parties about their obligations under the FTC's *Guides Concerning the Use of Endorsements and Testimonials in Advertising* (Endorsement Guides).

The Endorsement Guides address how federal unfair and deceptive advertising laws apply to endorsements and testimonials. For example, under the Endorsement Guides, an advertiser generally must clearly and conspicuously disclose:

- Connections between the product's seller and an endorser.
- A consumer's generally expected results, if the advertiser does not have proof that an endorser's experience is a typical one.

The FAQs explain how the Endorsement Guides apply to:

- **Posts on social media and blogs.** For example, the FTC encourages advertisers to use the terms "sponsored," "promotion," or "paid ad" to disclose a sponsorship on social media.
- **Affiliate marketing campaigns.** For example, certain affiliate marketers must clearly and conspicuously disclose their relationship with retailers.
- **Consumers' use of "like" buttons on websites such as Facebook.** For example, buying fake "likes" from consumers is illegal.
- **An advertiser's solicitation of endorsements.** For example, if customers have reason to expect a benefit from providing feedback on a product, the advertiser should disclose that.

The FAQs also offer additional guidance on:

- Disclosure methods and other topics that it briefly discussed in its initial FAQs released in 2009.
- Promotions on media platforms, such as Twitter, that were relatively new in 2009 but are now more popular.

Endorsements can be an effective marketing tool for differentiating a product from its competition and increasing its sales. However, they create additional compliance issues and liabilities that businesses must fully consider.

Search Advertising and Promotions in Social Media for more on the Endorsement Guides.

CORPORATE AND M&A

DGCL AMENDMENTS

The amendments to the Delaware General Corporation Law (DGCL) proposed earlier this year to stem the tide of class-action lawsuits relating to public M&A deals have been passed by the Delaware General Assembly.

Regarding forum selection, the amendments:

- Permit a provision in a corporation's charter or by-laws that requires any or all "internal corporate claims" be brought solely in a Delaware court.
- Prohibit a provision in a corporation's charter or by-laws that precludes internal corporate claims from being brought in Delaware. The provision can designate both Delaware and another jurisdiction, but cannot exclusively designate a non-Delaware jurisdiction.

On the controversial issue of "loser-pays" or fee-shifting provisions, the amendments invalidate any provision in the charter or by-laws of a stock corporation that purports to shift the attorneys' fees or expenses of the corporation to a stockholder who brings an internal corporate claim. The amendments effectively prohibit fee-shifting charter or by-law provisions applicable to most stockholder litigation related to corporate governance and M&A transactions. A fee-shifting provision in a stockholders agreement or other writing signed by a stockholder remains enforceable against that stockholder.

The amendments also:

- Broaden the DGCL's procedures for ratifying corporate acts taken without proper authorization.
- Clarify the requirements for board approval of future stock issuances to be made from time to time (including in "at-the-market" offerings).

The amendments, which are expected to be signed by the governor, provide that they will become effective on August 1, 2015.

Search DGCL Amendments on Fee-shifting and Forum Selection Passed by Delaware General Assembly for more on these developments.

EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION

FINAL SBC REGULATIONS UNDER THE AFFORDABLE CARE ACT

Employers should plan to comply with the final regulations issued in June 2015 by the Departments of Labor, Health and Human Services and Treasury addressing the summaries of benefits and coverage (SBC) requirement under the Affordable Care Act (ACA). The final regulations will apply beginning this fall, but the updated SBC template, instructions, uniform glossary and supplementary information will not be finalized until January 2016.

Although the final regulations include only a few changes from the proposed regulations, they contain a short window for compliance. For SBCs provided to participants and beneficiaries who enroll or re-enroll in plan coverage through open enrollment, the final regulations apply beginning on the first day of the first open enrollment period that begins on or after September 1, 2015. A later applicability date governs if individuals do not enroll in coverage through open enrollment.

The final regulations include:

- A rule regarding SBC disclosure for plans that use two or more insurance products provided by separate insurers.
- A safe harbor for providing SBCs electronically, which was not expanded to apply to all individuals who are entitled to receive SBCs.
- Rules addressing SBCs provided by a plan or an insurer to participants and beneficiaries, including situations where a plan's coverage terms are still being negotiated.

For now, SBCs can reflect new content requirements involving minimum essential coverage (MEC) and minimum value (MV) under the ACA by including a cover letter that contains required MEC and MV statements.

The updated SBC template and related documents, which will apply to coverage that renews or begins on the first day of plan years beginning on or after January 1, 2017, may require additional, potentially significant changes to SBCs provided by plans and insurers.

Search Summaries of Benefits and Coverage under the ACA for more on SBC compliance.

CONTINUING ERISA FIDUCIARY DUTY TO MONITOR

ERISA plan fiduciaries should reconsider their fiduciary responsibilities following a US Supreme Court decision holding that ERISA's six-year statute of limitations for a breach of fiduciary duty is triggered by the fiduciary's failure to properly monitor plan investments and remove imprudent ones.

In *Tibble v. Edison International*, the plaintiffs alleged that the plan fiduciaries of Edison's 401(k) plan breached their fiduciary duties by not removing three retail-class mutual funds as plan investments when materially identical institutional mutual funds with lower expense ratios were available. Edison argued that the plaintiffs' claims were time-barred because these three mutual funds were added to the plan more than six years before the complaint was filed.

The Supreme Court rejected the Ninth Circuit's holding that only a significant change in circumstances creates a fiduciary duty to undertake a full review of plan investments. In doing so, the Supreme Court held that:

- Plan fiduciaries have a continuing fiduciary duty to monitor plan investments at regular intervals and remove imprudent ones.
- The continuing duty to monitor exists separate and apart from the duty of prudence that applies at the time plan investments are selected.

As a result of *Tibble*, plan fiduciaries should ensure that they:

- Maintain an investment policy establishing regular intervals to review plan investments.
- Continually monitor plan investments in accordance with the investment policy.
- Remove imprudent plan investments.
- Record their review of plan investments in writing.

Search Supreme Court Holds that ERISA's Six-year Statute of Limitations Triggered by Continuing Duty to Monitor for more on this decision.

FINANCE & BANKRUPTCY

WHOLLY UNDERWATER JUNIOR MORTGAGE LIENS

Junior and subordinate lenders can now survive bankruptcy proceedings and recover on certain claims that previously would have been voided after a recent US Supreme Court decision.

In *Bank of America, N.A. v. Caulkett*, the debtors filed for Chapter 7 bankruptcy and moved to void Bank of America's underwater junior mortgage liens as unsecured claims under section 506(d) of the Bankruptcy Code. The bankruptcy court granted the motion and the district court and the Eleventh Circuit affirmed.

On appeal, the Supreme Court reversed, holding that wholly underwater junior mortgage liens may not be voided in a Chapter 7 bankruptcy proceeding even if the debt owed on a senior mortgage lien exceeds the current value of the collateral. Under section 506(d), a lien that secures a claim against a debtor that is not an "allowed secured claim" is void. The parties disagreed over whether the lien was "secured" because the senior mortgages exceeded the equity in the collateral.

The Supreme Court relied on *Dewsnup v. Timm*, which held that a claim is not within the scope of section 506(d) if it is allowed under section 502 and is secured by a lien with recourse to the underlying collateral. Because Bank of America's claims were both allowed under section 502 and secured by liens, the Supreme Court held that they could not be voided under section 506(d).

Search Second Lien Loans for more on second lien loans and their characteristics.

BANKRUPTCY JUDGES MAY ADJUDICATE *STERN* CLAIMS WITH CONSENT

The US Supreme Court has held that Article III permits bankruptcy judges to adjudicate *Stern* claims, or claims for which parties are constitutionally entitled to adjudication by an Article III judge, with the parties' knowing and voluntary consent.

In *Wellness International Network, Ltd. v. Sharif*, Wellness sought to collect on an attorneys' fees award from Sharif. After Sharif filed for Chapter 7 bankruptcy, the bankruptcy court denied his request to discharge his debts and entered a default judgment against him in a separate adversary proceeding with Wellness. In that proceeding, the bankruptcy court declared that the previously undisclosed assets held by a trust administered by Sharif were part of his bankruptcy estate.

Sharif argued that under the Supreme Court's decision in *Stern v. Marshall*, bankruptcy courts lack the constitutional authority to enter final judgment on certain claims for which litigants are constitutionally entitled to an Article III adjudication. The Seventh Circuit agreed, concluding that the bankruptcy court lacked the constitutional authority to enter final judgment on the claim that the trust was part of Sharif's bankruptcy estate.

The Supreme Court reversed, holding that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge. The Supreme Court emphasized that Article III's guarantee of an impartial and independent federal adjudication is a personal right and subject to waiver. *Stern* does not compel a different result because the litigant in that case did not consent to the resolution of the claim in a non-Article III forum. The Supreme Court also rejected the argument that the consent to adjudication by a bankruptcy court must be express.

INTELLECTUAL PROPERTY & TECHNOLOGY

ONLINE INTEREST-BASED ADVERTISING

In light of expanded enforcement efforts by two online advertising self-regulatory organizations, companies that engage in online interest-based advertising (IBA) should review and update their privacy policies and practices.

The Network Advertising Initiative (NAI) issued *Guidance for NAI Members: Use of Non-Cookie Technologies for Interest-Based Advertising Consistent with the NAI Code of Conduct* (Guidance), which became effective May 18, 2015. NAI staff will enforce compliance with the Guidance following an implementation period. The Guidance establishes best practices for NAI members' use of digital fingerprinting and other new data collection technologies for IBA, including through advertising and media service providers.

The Digital Advertising Alliance announced that on September 1, 2015 it will begin enforcing its existing *Self-Regulatory Principles for Online Behavioral Advertising* and *Self-Regulatory Principles for Multi-Site Data* (together, Principles) in the mobile website and app environment. The Principles include specific obligations on consumer notice, transparency and control, and apply to all companies engaged in IBA.

Companies that collect and use data online for IBA, either directly or through advertising and media service providers, should assess their compliance with the Guidance and the Principles. Appropriate steps may include:

- Updating website and mobile app privacy policies to provide consumers with notice regarding the use of digital fingerprinting and other new non-cookie tracking technologies.
- Implementing opt-out mechanisms when using non-cookie tracking technologies that cannot be viewed or modified using the consumer's browser control.
- Requiring IBA service providers to submit proof of their compliance.

Search US Privacy and Data Security Law for more on privacy and data security law.

LABOR & EMPLOYMENT

RELIGIOUS ACCOMMODATION IN THE WORKPLACE

Following the US Supreme Court's decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*, employers should ensure their dress code and appearance policies, and religious accommodation practices and procedures, comply with Title VII.

In *Abercrombie*, the Supreme Court held that a job applicant seeking to prove a disparate treatment claim under Title VII only must show that the need for a religious accommodation was a motivating factor in the prospective employer's adverse decision. The applicant need not show that the employer had actual knowledge of the applicant's need for an accommodation based on a religious practice.

The case involved a Muslim applicant who wore a headscarf to her job interview at an Abercrombie retail store. The applicant, however, did not request a religious accommodation to wear the headscarf if hired. The applicant was rated as qualified by the interviewing manager, but was not hired because the headscarf would violate the company's "Look Policy" prohibiting caps.

As a result of this decision, employers should:

- Review facially neutral workplace policies and practices that may raise religious discrimination and accommodation issues, including those addressing:
  - dress code or appearance;
  - grooming standards;
  - scheduling of work hours; and
  - when and where breaks may be taken.

- Train managers on how to identify and handle situations involving an applicant or employee who may need a religious accommodation.
- Involve human resources, and if necessary legal counsel, in assessing whether:
  - an applicant or employee requires a religious accommodation; and
  - the religious accommodation would impose an undue hardship on the employer.

Employers should also ensure that written job descriptions contain all of the job's essential functions, which is an important factor when exploring potential religious accommodations.

Search Religious Discrimination and Accommodation under Title VII for more on employers' religious accommodation obligations.

LITIGATION & ADR

FALSE CLAIMS ACT STATUTE OF LIMITATIONS

A recent US Supreme Court decision provides more certainty about the statute of limitations for False Claims Act (FCA) defendants, but limits their ability to invoke the first-to-file bar. Counsel should be aware that this decision curtails the risk of indefinite liability and evaluate the timeliness of any FCA claims asserted.

In *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, a whistleblower brought FCA claims against defense contractors and their affiliates. The whistleblower alleged that the defendants fraudulently billed the government for deficient or non-existent services.

The Supreme Court held that the Wartime Suspension of Limitations Act (WSLA) does not toll the statute of limitations for civil actions under the FCA. The WSLA only applies to criminal prosecutions.

The Supreme Court further held that the portion of the whistleblower's claims that are timely are not barred by an earlier FCA action that was dismissed for failure to prosecute. Therefore, under the FCA's first-to-file bar, an earlier lawsuit bars a later lawsuit only while the earlier lawsuit remains pending, but ceases to bar that lawsuit once it is dismissed.

Given the Supreme Court's narrowing of the first-to-file bar, other defenses, such as the public disclosure bar, collateral estoppel or *res judicata*, may prove critical in defending against potential copycat litigation. Counsel should consider whether:

- Greater self-disclosure may bolster a public disclosure defense.
- Seeking a favorable judgment is more advantageous than settling.
- The timing and posture of the first-filed action may affect the defense strategy for other actions arising from the same facts.

Search Supreme Court Holds that False Claims Act's First-to-file Bar Applies Only to Surviving Related Claims for more on this decision.

SECURITIES FRAUD LIABILITY FOR CORPORATE INSIDERS

Companies should confirm that their policies establish appropriate and well-documented ownership roles and responsibilities and control protocols to narrow the scope of securities fraud liability for their officers and employees, in light of a recent Seventh Circuit decision.

In *Glickenhaus & Co. v. Household International, Inc.*, the plaintiffs filed a securities fraud class action under Rule 10b-5 under the Exchange Act against a mortgage lender and three of its top executives for making false and misleading statements that inflated the company's share price.

Peviously, the US Supreme Court held in *Janus Capital Group v. First Derivative Traders*, that the only proper defendant under Rule 10b-5 is the "maker" of a statement, meaning the person or entity with ultimate authority over the statement.

In *Glickenhaus*, the district court held that *Janus* applied only to legally independent third parties, not to corporate insiders like the executives. The Seventh Circuit reversed and remanded, determining in relevant part that the Supreme Court's interpretation of Rule 10b-5 in *Janus* applied generally, not just to corporate outsiders. Therefore, under *Glickenhaus*, a corporate insider who merely prepares or publishes a statement on behalf of another is not its maker and cannot be held liable for Rule 10b-5 fraud claims arising out of that statement.

Search Janus Extends to Corporate Insiders: Seventh Circuit for more on this decision.

ARISING-FROM AND RELATED-TO PROVISIONS BROADLY INTERPRETED

A recent Seventh Circuit decision reinforces the flexibility and reach of arising-from and relating-to arbitration provisions, and the federal policy of respecting those provisions. Companies should be aware that a time lapse between the termination of a contract and the conduct that forms the basis of a lawsuit will not necessarily void an arbitration provision.

In *Andermann v. Sprint Spectrum L.P.*, the Seventh Circuit reversed the district court's decision denying the defendant's motion to compel arbitration, finding that certain phone calls, which were made to the plaintiffs after the relevant service contract was terminated, still arose from and related to the contract.

The plaintiffs claimed that the defendant's repeated phone calls offering them cellular service violated the Telephone Consumer Protection Act. The calls were made because the previous carrier had assigned the plaintiffs' contract to the defendant and the plaintiffs' current phones were not compatible with the defendant's network. Without necessary changes, the plaintiffs' service would be terminated. The defendant did not know, however, that the plaintiffs had terminated the service the previous month.

The plaintiffs further argued that the mandatory arbitration clause (which expressly stated that it survives the termination of the contract) found in the contract between the plaintiffs and their original carrier was inapplicable because the contract was terminated, as they had signed on with another service provider before the phone calls were placed.

The Seventh Circuit disagreed with the plaintiffs' argument, finding that there was an "intimate relation" between the phone calls to the plaintiffs and the contract, explaining that the phone calls gave rise to the dispute. The plaintiffs were, therefore, required to arbitrate the dispute.

Search US Arbitration Toolkit and International Arbitration Clauses Toolkit for resources to assist counsel in drafting arbitration agreements.

TAXATION

FINAL INVERSION RULES

The IRS recently issued final regulations which adopt, with only minor modifications, the 2012 bright-line test for the substantial business activities exception to the inversion rules. This bright-line test will be difficult for a US multinational group to meet in any one jurisdiction, but is consistent with the IRS's policy to discourage inversions.

The inversion rules in IRC Section 7874 were enacted to prevent a corporate group with a US parent from restructuring so that a foreign corporation (usually in a jurisdiction with more favorable tax rules) becomes the parent of the group. Very generally, the inversion rules apply to a transaction in which a US company and a foreign company combine under a new foreign top holding company (new foreign parent) and after the acquisition:

- At least 60% of the new foreign parent stock is, by vote or value, owned by the former US company stockholders (the stockholder percentage test).
- The expanded affiliated group of which the new foreign parent is part does not have "substantial business activities" in the new foreign parent's jurisdiction (the substantial business activities test).

To meet the substantial business activities test, the new foreign parent's expanded affiliated group must meet a bright-line test which is only satisfied if at least 25% of the expanded affiliated group's employees (both by head count and compensation), gross tangible assets and gross income are located in the country where the new foreign parent company is incorporated.

Since the introduction of the bright-line test in temporary and proposed regulations in 2012, there have been very few inversions based on the substantial business activities test. The final regulations will continue to make it difficult for US multinationals to reduce their US tax bill by inverting.

GC Agenda Interviewees

GC Agenda is based on interviews with Advisory Board members and leading experts from Law Department Panel Firms. Practical Law would like to thank the following experts for participating in interviews for this month's issue:

ANTITRUST

Lee Van Voorhis
Baker & McKenzie LLP

Corey Roush and Logan Breed
Hogan Lovells US LLP

Laura Wilkinson
Weil, Gotshal & Manges LLP

CAPITAL MARKETS & CORPORATE GOVERNANCE

Adam Fleisher
Cleary Gottlieb Steen & Hamilton LLP

Thomas Kim
Sidley Austin LLP

Robert Downes
Sullivan & Cromwell LLP

COMMERCIAL

Gonzalo Mon
Kelley Drye & Warren LLP

EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION

Louis Mazawey and Tamara Killion
Groom Law Group, Chartered

Sarah Downie
Hughes Hubbard & Reed LLP

Alvin Brown, Jamin Koslowe and David Teigman
Simpson Thacher & Bartlett LLP

Neil Leff and Michael Bergmann
Skadden, Arps, Slate, Meagher & Flom LLP

INTELLECTUAL PROPERTY & TECHNOLOGY

Richard Raysman
Holland & Knight LLP

LABOR & EMPLOYMENT

Michael Droke
Dorsey & Whitney LLP

David Powell
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Frederick Smith
Seyfarth Shaw LLP

Thomas H. Wilson
Vinson & Elkins LLP

LITIGATION & ADR

Nikol Gruning Thompson
Arent Fox LLP

Lori Pines and Kristen Murphy
Weil, Gotshal & Manges LLP

TAXATION

Kim Blanchard
Weil, Gotshal & Manges LLP