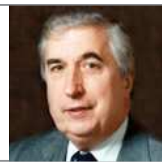
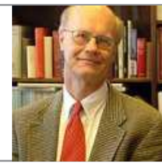
The SCOTUS Just Invented an Unlikely Sentry Against Corporate Tax Inversions: The Patent Troll

2



The Financial CHOICE Act of 2017: Will Collective Amnesia Triumph?

1 *By John C. Coffee, Jr.*



Delaware's Long Silence on Corporate Officers

By Lyman Johnson

THE CLS BLUE SKY BLOG

COLUMBIA LAW SCHOOL'S BLOG ON CORPORATIONS AND THE CAPITAL MARKETS

Skadden Discusses Disclosure Trends

By Michal Berkner, Brian V. Breheny and James A. McDonald June 5, 2017

Comment

The Brexit vote and President Donald Trump's election and proposed regulatory and other reforms have led to worldwide geopolitical uncertainty. We expect reporting companies will continue to disclose risk factors relating to these events in their quarterly and annual filings in the foreseeable future.

We previously examined the Form 10-Q quarterly reports of public reporting companies registered with the U.S. Securities and Exchange Commission (SEC) that were filed after the Brexit referendum on June 23, 2016, through August 31, 2016 (the Initial Analysis). (See our October 3, 2016, client alert "SEC Disclosure Brexit Trends.") In that analysis, we identified approximately 400 companies that disclosed Brexit-related risk factors that highlighted a number of political and economic risks companies were encountering in the wake of the referendum. Following the U.K.'s triggering of Article 50 of the Lisbon Treaty on March 29, 2017, which commenced the U.K.'s official withdrawal process from the European Union, we have again examined Brexit-related risk factors disclosed by SEC reporting companies in their annual reports filed on Forms 10-K and 20-F. We also reviewed how such filings describe risk factors relating to the Trump administration.

Our analysis covered all Forms 10-K and 20-F filed between September 1, 2016, and April 30, 2017 (the Review Period). Approximately 600 companies disclosed Brexit-related risk factors in filings made during that time. The concerns highlighted by such companies have remained relatively consistent with those summarized in our Initial Analysis. Similarly, during the Review Period, approximately 550 reporting companies disclosed risk factors relating to the Trump administration. We have found that reporting companies have generally disclosed six types of risks relating to Brexit and seven types of risks relating to the Trump administration.

Reporting companies have generally disclosed six types of risks relating to Brexit and seven types of risks relating to the Trump administration.

This note reviews the trends in public disclosure made by SEC reporting companies during the Review Period related to Brexit and the Trump administration, and provides some guidelines for companies to consider in their periodic reports and other public disclosure.

Risk Factors in SEC Filings

SEC reporting companies are required to include a "Risk Factors" section in certain SEC filings, such as an annual report or a prospectus relating to an offering, to describe significant risks that investors in the company may face. Such risk factor disclosures should be specific to the company and/or its industry and "explain how the risk affects the company or the securities being offered," but they should "not present risks that could apply to any company or any offering."[1]

In our Initial Analysis, we noted the lack of such specificity in many Brexit-related risk factors. Our updated analysis reveals that while several SEC reporting companies provided risk factors specifically focused on the impact that Brexit or President Trump's election may have on their business or industry, a number of the risk factors we reviewed included boilerplate language that appears to be applicable to any company or industry.

Common Brexit Risk Factors

Based on our review of filings during the Review Period, we have identified the following frequently disclosed Brexit-related risks. Companies that may be affected by Brexit should consider including similar disclosures tailored to their circumstances, to the extent applicable, in their periodic reports or other SEC filings.

Exchange Rate. Following the referendum, the British pound sterling fell sharply against the U.S. dollar and a number of other currencies and has remained volatile in the first four months of 2017. Since the referendum, the pound sterling has fluctuated as new developments regarding Brexit are made public, and many SEC reporting companies have disclosed that they expect this volatility to continue as the U.K. proceeds with negotiations to withdraw from the EU. Currency volatility could have a significant impact on the business and financial results of companies in the U.K. as well as in other countries that conduct significant business with the U.K. Many companies cited exchange-rate risks as one of the key Brexit-related issues. Companies that disclose exchange-rate-related risks should consider describing the company's specific exposure to post-Brexit currency effects, such as quantifying the percentage of their revenues, net income and/or debt that is denominated in pounds sterling or how the company's results are affected by fluctuations in exchange rates.

Economic Environment. Prior to the referendum, dire predictions were made about the U.K.'s economic prospects should voters choose to leave the EU. Notwithstanding the pound sterling's fall in value and the Standard & Poor's downgrade of U.K.'s credit rating, the British economy has otherwise been quite resilient in the wake of the referendum. Although the long-term impact of Brexit remains uncertain, the FTSE 100 ended 2016 at an all-time high, and many of the negative predictions about the U.K. economy have not materialized. A significant number of companies that disclosed Brexit-related risk factors cited concerns about the macroeconomic environment, either within the U.K. or abroad. Companies whose financial performance is related to macroeconomic conditions, particularly in the U.K., should consider disclosing how Brexit-related economic uncertainty may affect their business and industry with as much specificity as possible.

Cross-Border Trade. In a speech delivered on January 17, 2017, British Prime Minister Teresa May stated that the U.K. "cannot possibly" remain in the single market following Brexit, but she was vague on remaining in the customs union. Given the prime minister's stance, a number of companies have identified the risk that increased trade barriers, including increased tariff rates or customs duties, could have on their business or industry. A number of risk factors also highlighted the possibility that the election of President Trump in the U.S. could herald significant and radical reforms to the current global trade regime, complicating the U.K.'s attempts to secure trade relationships outside the EU.

Cross-Border Labor. On March 2, 2017, the House of Lords voted strongly in favor of guaranteeing the rights of EU citizens in the U.K. following Brexit, highlighting deep political divisions within the U.K. surrounding immigration and the freedom of movement. Several companies that disclosed Brexit-related risks cited concerns relating to cross-border labor in their risk factors. Companies operating in the U.K. that rely on employees from elsewhere in the EU should consider disclosing the potential impact of increased restrictions on the free movement of people and labor on their business.

Political Uncertainty. The referendum brought about the collapse of David Cameron's government. On April 18, 2017, Prime Minister May called for a general election, set for June 8, 2017, introducing further political risk in both the U.K. and the EU. As recent history demonstrated, elections can often play out in unexpected ways. A number of legal challenges have been brought against the U.K. government regarding the role of Parliament and the Scottish, Welsh and Northern Irish assemblies in the Brexit process. Political instability in the wake of the referendum has had a ripple effect throughout the EU, with Germany and Italy both facing critical elections in 2017. Most recently, in France, centrist Emmanuel Macron won the presidential election on May 7, 2017, after nationalist Marine Le Pen gained much support in the first-round election the previous month. The U.K. referendum, along with President Trump's election, has provided renewed energy to political parties seeking an exit from the EU or the euro zone. Each of these events, along with any political changes that may occur as a result of Brexit implementation, could substantially alter the political landscape in the U.K. and Europe. Several companies that disclosed Brexit-related risks mentioned political uncertainty, with particular concern regarding a possible trend of other member states holding similar referendums on EU membership. Companies should monitor the political situations in the U.K. and the rest of Europe in considering the potential exposure to future political events triggered or influenced by Brexit.

Regulatory Uncertainty. While the full scope of implementation of Brexit is unclear, companies exposed to the U.K. may face significant regulatory changes following Brexit, and compliance with new regulatory mandates may prove challenging and costly. In particular, in light of the U.K. government's stance on exiting the single market, financial service firms with operations in the U.K. and/or elsewhere in the EU are reviewing how a loss of passporting rights may impact their business. Significant portions of the U.K.'s regulatory regime related to intellectual property and data protection also are derived from or harmonized with broader EU directives. Technology companies and other businesses in heavily regulated industries should be aware of the risks that a changing regulatory environment could pose to their business, and they should disclose such risks, to the extent material to the company, in their SEC filings.

Common Risk Factors Relating to the Trump Administration

Based on our review of selected SEC filings through April 30, 2017, we have identified the following common themes relating to the Trump administration. Public companies whose business might be affected by the administration's policies should consider including similar disclosure, to the extent applicable, in their periodic reports or other filings with the SEC.

Tax Reform. President Trump has consistently indicated that U.S. corporate tax reform is a priority for his administration and announced an outline of his plan on April 26, 2017. In addition, House Republicans issued a tax reform "Blueprint," proposing changes to corporate tax rates, the taxation of income earned outside the U.S. (including the taxation of previously unrepatriated foreign earnings) and a "destination-based" tax system that would tax imported goods and services while exempting exported goods and services. The potential overlap between the Blueprint and President Trump's plan has yet to be seen, but companies should monitor developments to the U.S. corporate tax regime and examine the potential impact of any such changes on their financial results and regulatory compliance responsibilities. A destination-based tax system in particular may be of relevance to companies that have significant manufacturing operations outside the U.S.

Health Care Reform. Upon taking office, President Trump signed an executive order directing federal agencies to avoid enforcement of any provision of the Patient Protection and Affordable Care Act (the ACA), commonly referred to as "Obamacare," that imposed fiscal or regulatory burdens on states, individuals and/or a number of types of entities. Although an initial version of proposed legislation — designed to undo the ACA, replace it with a curtailed system of tax credits and dissolve an expansion of the Medicaid program — did not make it past the House of Representatives, the House recently passed a similar bill called the American Health Care Act of 2017 (the AHCA). As a result, there is growing uncertainty regarding the future of the current ACA framework. SEC disclosures by over 100 companies contemplated the effects of potential changes in health care regulation, including the potential decrease in insured Americans, changes to pharmaceutical prices and a reduction in funds currently available to patients as a result of repeal of significant portions of the ACA. Companies operating in the health care industry, including those dealing in pharmaceuticals, insurance and hospital care should consider disclosing the potential consequences of these reforms on their business, should the Trump administration continue to push the AHCA through the Senate.

Financial Regulation Reform. The Trump administration has indicated that changes, including repeal, to many provisions of the Dodd-Frank Act are high legislative priorities. The administration has cited the Volcker Rule (which restricts banks from making certain speculative investments), U.S. risk retention rules, Basel III capital requirements, the authority of the Federal Reserve and the Financial Stability Oversight Council as potential areas of reform. Companies that addressed financial regulation reform in their risk factors noted that significant changes to Dodd-Frank could have a material and adverse impact on operations and activities, financial condition, results of operations, growth plans and future prospects. Companies operating in the financial sector should anticipate potential costs as a result of such regulatory changes and potential new limitations on the way they conduct their business.

International Trade. Trade reform served as a consistent focal point of President Trump's platform as a candidate, and President Trump has frequently spoken of imposing a border tax, tariff or increased custom duties on products manufactured outside of the U.S., particularly in China and Mexico, and imported in. President Trump also has expressed concern with the U.S.' position in international trade agreements, indicating a strong interest in renegotiating existing trade agreements, including the North American Free Trade Agreement. Many companies included risk factors addressing the potential for these changes in the U.S.' position on trade to increase costs, decrease margins, reduce the competitiveness of U.S. products and services, and adversely affect companies' revenues and profitability. Companies whose businesses currently depend on the import of goods into the U.S. should consider disclosing the extent to which they rely on foreign businesses and suppliers in order to carry out their business.

The Environment. In an effort to promote economic activity and deregulation, the Trump administration, including President Trump's appointed heads of the Environmental Protection Agency and the Department of Energy, has set forth an agenda to eliminate certain environmental regulations. Several companies highlighted that it remains unclear what actions, if any, the Trump administration will undertake related to greenhouse gas emissions, and they pointed to the potential withdrawal of the U.S. from the Paris Agreement and the possible repeal of the Clean Power Plan as notable examples. Companies directly impacted by climate change regulation, including those operating in the energy, manufacturing and transportation sectors, should consider disclosing the potential impact of these policies on their operations and business prospects.

Immigration. Citing concern for American safety and job security, President Trump has frequently reinforced that restricting immigration into the U.S. is a high priority for his administration. Federal judges have blocked President Trump's travel ban executive orders prohibiting citizens of certain countries from entering the U.S. Meanwhile, the administration has undertaken efforts to make changes to U.S. work visa programs in order to encourage domestic hiring. Although the details and timing of potential changes to immigration law and enforcement efforts are difficult to predict, companies that rely on foreign workers should consider the new challenges that these immigration policies might pose to the recruitment and retention of such workers as well as possible increases in labor and compliance costs.

General Legislative/Regulatory Uncertainty. The Trump administration released a memorandum to heads of executive departments and agencies implementing a regulatory freeze that delayed all pending regulations from publication in the Federal Register pending review and approval. It also postponed any regulations published in the Federal Register but not yet in effect for 60 days. The Trump administration has since extended this freeze with respect to certain regulatory authorities. As with Brexit, these developments and potential political instability arising as a result may adversely affect companies operating in all sectors as well as the trading price of their shares.

Guidance for Future SEC Filings

Companies whose business may be affected by Brexit or the policies of the Trump administration should keep in mind the following guidelines when considering how to address potential changes or risks in their SEC filings and other disclosures:

- Carefully monitor the economic and political situation, and any decisions made by the U.K., other European governments and the U.S.;
- Continuously evaluate the company's exposure to the U.K., EU and U.S. financial markets and to interest rate and currency movements relative to the pound sterling, the euro and the U.S. dollar;
- Ensure that the forward-looking statements disclosure is consistent with the discussion of risk factors and other forward-looking disclosures in the SEC filing;
- Periodically review and consider amending and updating risk factors relating to Brexit or the Trump administration to ensure that such disclosures reflect any material changes and are not outdated or misleading; and
- Tailor any risk factor disclosures to risks specific to the company and its industry, and avoid any generic or boilerplate disclosure.

The economic and political repercussions as well as uncertainty in connection with Brexit and the Trump administration may continue for years to come. It would be prudent for all reporting companies whose business may be affected by these events to identify and discuss in public filings the specific effects they could have on their business and industry moving forward.

ENDNOTE

1 See Item 503(c) of Regulation S-K.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the alert, "SEC Disclosure Trends Related to Brexit and the Trump Administration," dated May 25, 2017, and available here. Associates Rahul Desai, Hakim A. Effiom-Dauw, Aliza Kempner, Caroline S. Kim, and Denis Klimentchenko assisted in the preparation of this alert.