

#SCFlash

August Developments 2017

A summary of legal developments over the last month that have impacted our clients' practices and industries.

INFRASTRUCTURE



Administration Issues Executive Order Designed to Streamline Federal Environmental Permitting Reviews for Infrastructure Projects:

Order Establishes a Two-Year Timeline for Processing Federal Environmental Reviews and a One Federal Decision Policy for Major Infrastructure Projects

On August 15, the President issued an Executive Order Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects with the intention of streamlining Federal environmental approval procedures that can delay infrastructure projects.

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MERGERS & ACQUISITIONS



Delaware's Most Recent Thinking on the Preferred-Common Conflict—*Hsu v. ODN Holding Corp.* and *In re Appraisal of GoodCents Holdings, Inc.*:

Delaware Court of Chancery Addresses the Rights of Preferred Stockholders in the M&A Context

In two recent decisions, the Delaware Court of Chancery addressed the differing rights of preferred and common stockholders in the M&A context. On April 14, 2017, in *Frederic Hsu Living Trust v. ODN Holding Corp.*, the Court refused to dismiss claims that a private equity fund and the directors of one of its portfolio companies breached their fiduciary duties to common stockholders by selling certain of the company's business lines and assets in order to fund a mandatory redemption of preferred stock.

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CORPORATE GOVERNANCE



S&C Publishes Corporate Governance Hot Topics Quarterly Update

On August 4, S&C published its Corporate Governance Hot Topics Quarterly updates for the second quarter of 2017.

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BANK REGULATORY



Volcker Rule:

Comptroller of the Currency Releases Request for Information on the Volcker Rule's Implementation, Application and Administration

On August 2, the Office of the Comptroller of the Currency issued a notice seeking public input (the "Request for Comment") on the final regulations (the "Final Rule") implementing section 13 of the Bank Holding Company Act of 1956, as amended, commonly known as the "Volcker Rule." The Request for Comment is intended to assist the OCC in determining how the Final Rule "should be revised to better accomplish the purposes of the statute," and solicits public comment on potential improvements regarding the ways in which the Final Rule has been applied and administered to date.

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M&A LITIGATION



Delaware Supreme Court Reverses DFC Global Appraisal Decision:

Court Finds That Merger Price Following Robust, Conflict-Free Sale Process is the Best Evidence of Fair Value, and Rejects "Private Equity Carve Out" Adopted by Court of Chancery

In *DFC Global Corp. v. Muirfield Value Partners, L.P.*, the Delaware Supreme Court reversed and remanded the Court of Chancery's appraisal decision arising out of the 2014 acquisition of DFC Global by private equity firm Lone Star Funds, in which the Court of Chancery had determined that the "fair value" of DFC Global was \$10.30 per share, \$0.80 above the merger price. The Court rejected competing arguments by the company and the petitioner, respectively, that an appraisal court should give exclusive or presumptive weight either to the deal price or to a discounted cash flow ("DCF") valuation.

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BANK REGULATORY



Federal Reserve Proposes to Refocus Expectations for Banking Organization Directors on Core Responsibilities: Proposal Recognizes the Distinct Role of the Board as Compared to Management and the Adverse Impact of Unduly Extensive Requirements on the Board's Attention and Effectiveness

On August 3, the Board of Governors of the Federal Reserve System (the FRB) proposed supervisory expectations for banking organization boards of directors that are intended, among other things, to better distinguish the roles and responsibilities of the board from those of management.

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FINTECH

Regulators Increase Focus on Virtual Currency and Digital Tokens, Including ICOs:

Recent SEC, FinCEN and CFTC Actions Demonstrate Continued Focus of U.S. Regulators on Virtual Currency and Digital Token Businesses

During the last full week in July, three U.S. regulators took actions that could have a significant effect on the development of virtual currencies and digital tokens.

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CORPORATE GOVERNANCE

Popular Indices to Bar IPO Companies With Limited Public Voting Rights:

S&P 500 and Russell 3000, Among Others, Will Bar New Companies With Low or No Public Voting Rights; Existing Constituents Not Immediately Impacted

S&P Dow Jones and FTSE Russell, publishers of widely used stock indices, have each announced new, more restrictive policies for including in their indices companies with limited voting rights in public hands.

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INFRASTRUCTURE

Federal Transportation Administration Proposes Procedures to Address Impediments to the Use of P3s and Private Investment in Transportation Projects:

Federal Transportation Administration Proposes Procedures for Requesting Waivers or Modifications of Certain Regulatory Requirements to Increase Use of P3s and Private Investment in Transportation Projects

On July 31, the United States Department of Transportation's Federal Transportation Administration (the "FTA") proposed a Private Investment Project Procedures rule (the "Proposed Rule") that would allow sponsors of public transportation capital projects benefiting from some form of Federal financial assistance to submit an application to the FTA requesting a modification or waiver of certain FTA regulations, practices or procedures that in the sponsors' view present impediments to the use of public-private partnerships ("P3s") or private investment in such projects.

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CYBERSECURITY

OCIE Issues Risk Alert Following Recent Cybersecurity Examinations of Financial Firms:

Office of Compliance Inspections and Examinations Summarizes Observations on Industry Practices and Identifies Continuing Areas of Weakness

On August 7, the SEC's Office of Compliance Inspections and Examinations (OCIE) issued a risk alert (Risk Alert) summarizing the findings of recent examinations conducted as part of its 2015 Cybersecurity 2 Initiative. Between September 2015 and June 2016, OCIE examined 75 financial firms registered with the SEC (including broker-dealers, investment advisers and investment companies) to assess industry practices and issues associated with the firms' cybersecurity preparedness.

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TAX



Cash Election Dividends Paid by Real Estate Investment Trusts and Regulated Investment Companies:

IRS Revenue Procedure Eliminates Need for REITs and RICs to Obtain IRS Rulings on Cash Election Dividends

On August 11, the Internal Revenue Service (the "IRS") issued Revenue Procedure 2017-45 (the "New Revenue Procedure"), which provides that certain stock distributions made by real estate investment trusts ("REITs") and regulated investment companies ("RICs") will be treated as taxable distributions for the purpose of determining both (1) the dividends-paid deduction of the REIT or RIC and (2) the treatment of the REIT's or RIC's shareholders.

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BANK REGULATORY



Federal Reserve Proposes New Rating System:

Federal Reserve Proposes to Establish a New Rating System for the Supervision of Large Financial Institutions Designed to Align with the Supervisory Program for Those Institutions and to Enhance the Clarity and Consistency of Supervisory Assessments

On August 3, the Board of Governors of the Federal Reserve System (the FRB) issued a proposal for public comment that would establish a new rating system for the supervision of large financial institutions (LFIs). The proposed LFI rating system would apply to all bank holding companies with total consolidated assets of \$50 billion or more; all non-insurance, non-commercial savings and loan holding companies with total consolidated assets of \$50 billion or more; and all U.S. intermediate holding companies of foreign banking organizations.

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INSURANCE



IAIS—Global Insurance Capital Standard ICS 1.0: IAIS Releases Insurance Capital Standard ICS 1.0 for Extended Field Testing

On July 21, the International Association of Insurance Supervisors (IAIS) released the Risk-based Global Insurance Capital Standard (ICS) Version 1.0 for Extended Field Testing. The ICS is a group-wide, consolidated insurance capital standard being developed by the IAIS for application to Internationally Active Insurance Groups (IAIGs) and Global Systemically Important Insurers (G-SIIs).

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BROKER-DEALER



FINRA Rule Amendments: SEC Approves FINRA Rule Amendments Relating to Qualification and Registration Requirements for Representatives and Principals

The Securities and Exchange Commission approved FINRA's adoption of new rules relating to qualification and registration requirements for representatives and principals. The new rules, among other things, restructure the current representative-level qualification examinations, create a general knowledge examination and specialized knowledge examinations, allow permissive registration, establish an exam waiver process for persons working for a financial services industry affiliate of a member, and amend certain Continuing Education requirements.

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BANK REGULATORY



Banking Organization Capital Requirements: Federal Banking Agencies Propose Extension of Certain Transitional Provisions for Non-Advanced Approaches Banking Organizations

On August 22, the Federal banking agencies published a proposed rule that would extend the existing transitional regulatory capital treatment for certain capital deductions, risk weightings and minority interest requirements for banking organizations that are not subject to the agencies' advanced approaches capital rules.

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