

A Biweekly
Newsletter of
Federal Securities,
Corporate &
Banking Law
Developments

*Kutak Rock would
like to extend our
warmest holiday
wishes!*

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TRANSFER RESTRICTIONS IN LICENSE HINDER SALE OF COMPANY

When a company's intrinsic value flows from a unique product (for example the Coca Cola formula) or a well known name (such as McDonald's), its ability to transfer that value is important in a sale or purchase of a company. The recent attempt by toy retailer FAO, Inc. to avoid liquidation by finding a suitable buyer was hampered by restrictions on its ability to transfer the FAO name.

FAO, Inc. does not own the rights to the name but rather licenses it from a foundation established by heirs of the company's founder. Based on published reports, the license agreement permits the foundation to block a transfer of the name if the buyer does not satisfy the foundation's quality standards.

Companies interested in selling or buying a business should investigate whether there exists any limitations on the transferability of the target company's most valuable assets, including intellectual property rights.

Legal audits of licensing arrangements before a transaction can help a company identify risk issues such as transfer restrictions.

■ NEW AVAILABILITY OF SEC REVIEW LETTERS ARE CAUSE FOR CONCERN

A private document search firm has recently launched a first-ever searchable database consisting of SEC comment letters issued to public companies from 2001 forward as well as the response letters from those companies.

The time-consuming process of requesting these letters from the SEC under the Freedom of Information Act (FOIA) tended to discourage the

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- FDIC Holds Individual Bankers Accountable for Unsafe Practices

If you would like more information on these topics or have any questions, please e-mail us at CorporateNotes@KutakRock.com.

public, effectively making these letters confidential. This is no longer the case.

While this subscription-based database provides an opportunity to monitor SEC policies, it also raises confidentiality concerns about private business information in the letters. Such information would be publicly available unless the company had requested and received confidential treatment under FOIA.

There is also a risk of shareholder lawsuits if the letters contain company statements that could be considered at odds with the company's public comments.

Companies should monitor information that is included in all future SEC correspondence, as though the information will not be kept confidential by the SEC. Confidentiality requests are usually only granted by the SEC for items such as trade secrets, pricing schedules, business formulas, and other highly sensitive technical information.

■ DIRECTOR LIABILITY FOR ENVIRONMENTAL RISKS NOT ALWAYS INSURED

Barry Steinberg of our Washington DC office writes:

As bank mergers continue to increase, directors of acquiring companies should consider whether their director and officer liability insurance properly covers all the risks of the target companies. For instance, directors may be surprised to learn that many D&O policies do not routinely cover any environmental risks of a business, whether their own or an acquired one, including those in acquired loan portfolios and acquired real estate.

In addition to heightened due diligence by seasoned professionals, directors can protect themselves with a special "environmental risk" endorsement to the D&O policy. An acquiring bank should consider that:

- An environmental risk endorsement is "manuscripted," i.e., always specially written, and therefore should be tailored to cover only the risks actually presented.
- Premiums for this type of endorsement are usually substantial but are negotiable because each endorsement is custom-made for a specific company.
- The amount of the "retention" (i.e. deductible) negotiated in the coverage could have an impact on any contingent liability disclosure in the financial statements.

Early use of experienced environmental professionals, especially when considering and negotiating an environmental endorsement for D&O coverage, can save a company thousands in premium costs and significantly mitigate the risk to directors.

■ FDIC HOLDS INDIVIDUAL BANKERS ACCOUNTABLE FOR UNSAFE PRACTICES

During 2003, the FDIC continued its focus on individuals in addressing unsafe and unsound

banking practices. The FDIC most recently announced the assessment of money penalties against 12 bankers and barred many of them from the banking industry. These recent actions bring the 2003 total of individuals cited by the FDIC through October 2003 to 50, as compared to totals of 26 in 2002 and 28 in 2001.

Among violations cited by the FDIC were engaging in unsafe or unsound banking practices, breaching fiduciary duty, participating in loan "kick-back" fee schemes, falsifying bank records, and misappropriating funds. (<http://www.fdic.gov/news/news/press/2003/index.html>) The penalties have included both removal and prohibition orders and civil money penalties of up to \$1.4 million.

We urge boards to review the sufficiency of their D & O coverage in this context, and also to consider whether directors should have separate insurance that directly pays their legal fees in such cases.

Kutak Rock LLP is a national law firm with more than 325 attorneys located in 16 offices throughout the United States practicing in the areas of corporate, banking and securities law, mergers and acquisitions and stock offerings, federal government contracts, and complex commercial litigation matters.

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