California Law Requiring Female Directors on Public Company Boards Held Unconstitutional

A California court has **held** that California **Senate Bill 826**, which required that "publicly held" corporations that listed a California address for their principal executive offices on the cover page of their Form 10-K reports must have specified numbers of female directors by certain dates, violates the California constitution and has enjoined the use of California taxpayer funds to carry out the 2018 law. This ruling follows the **decision** of another California court in April 2022 holding that California **Assembly Bill 979** violated the California constitution and the issuance of a similar injunction preventing California from using taxpayer funds to implement that law. Assembly Bill 979 was enacted in 2020 to add a requirement that publicly held corporations that were already subject to Senate Bill 826 also have specified numbers of directors from "underrepresented minorities," as defined in the law, by certain dates. If the state does not appeal these decisions and California appellate courts do not overturn these decisions, it appears that both of these legislative initiatives to promote more diverse representation on public company boards will have come to an end.

Read the **client alert**.

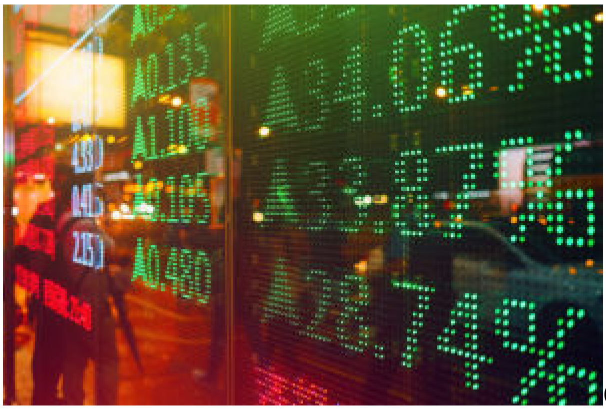
Conducting Internal Investigations – In-House Counsel's Guide

Whether you are a director, or a member of an in-house legal, human resources, or internal audit team, there are sensitive scenarios that occur daily in life sciences companies that trigger the need for an internal investigation.

Goodwin has crafted an "In-House Counsel's Guide" that sets forth a framework of best practices and key considerations for effective internal investigations, including special subject matter and industry-specific considerations; preserving the attorney-client privilege and attorney work product protection; the need for disclosure to and coordination with auditors, regulators, and others; and conducting investigations remotely.

Read the **In-House Counsel's Guide — Conducting Internal Investigations**

Nasdaq Takes a Stand: Board Diversity is Good Corporate Governance, Not a Trend



On December 1, 2020, Nasdaq filed a proposal with the SEC to adopt new listing rules relating to board diversity and heighted disclosure. Nasdaq's position is clear – "diversity in the boardroom is good corporate governance." Citing the recent social justice movement and a wide range of studies linking board diversity to improved corporate governance and financial performance, Nasdaq's proposal highlights the role of national exchanges in providing a regulatory push for companies to embrace meaningful board diversification.

The **proposal**, if adopted, would require Nasdaq-listed companies, subject to certain exceptions, to have at least one director who self-identifies as female and at least one director who self-identifies as an underrepresented minority or LGBTQ+. Listed companies would also be required to disclose statistical information on board diversity and, if applicable, their rationale for not meeting the diversity objectives. Smaller reporting companies and foreign private issuers could satisfy the requirement with two female directors.

Progress on board diversity has been slow, especially with respect to underrepresented racial and ethnic groups. Under the phase-in provisions of the proposal, companies would have to comply with the statistical disclosure requirement within one year of SEC approval and have at least one diverse director within two years, or explain their rationale for not meeting the objective. Full compliance would be required within four or five years depending on the company's listing tier.

While the phase-in provisions of the rule won't radically transform the public company board landscape any time soon, the disclosure requirements are potentially significant. If investors have clear and consistent information on board diversity, they can exert pressure on companies to accelerate their diversification efforts. Kudos to Nasdaq and its President and CEO Adena Friedman for pushing its over 3,250 listed companies to embrace board diversity as a rule rather than an exception.

Important Reminders for U.S. Boards of Directors Navigating COVID-19

While COVID-19 will affect the operations of different companies in different ways, the boards of directors of every company should think critically about their oversight role in the context of this unprecedented global pandemic. Here are some things to remember based on the intersection of the pandemic with directors' duties.

Read the Alert >>

Coronavirus and the Interaction with Force Majeure Provisions in Real Estate Contracts

The COVID-19 pandemic is disrupting the world's economy in ways that were unimaginable a few weeks ago. Will this disruption excuse you or your counterparty's contractual rights and obligations under real estate related contracts? The answer may depend on the presence (and specific wording) or absence of a force majeure clause.

Read the Alert >>

[What has contributed to the rising cost of Directors and Officers (D&O) Liability Insurance for new public companies?]

Over the past year, the cost of obtaining D&O insurance for new public companies has increased substantially. Rates have increased from $50-60,000 per million dollars of coverage to over $150,000 per million dollars of coverage. Along with increased premiums, retention amounts have increased substantially (from $5 million to $10 million for smaller public companies up to $30 million for very large public companies). The increased cost of D&O insurance has been driven by the record level of securities class action filings over the last three years, as well as the increased settlement value of such actions (44% higher average settlement value in 2018 than the average of the past nine years according to Cornerstone Research). Further contributing to the increased cost is the U.S. Supreme Court's ruling in the 2018 case, *Cyan, Inc. v. Beaver County Employees Retirement Fund*, that state courts can hear securities claims under the Securities Act of 1933, creating additional uncertainty regarding the outcomes of such cases. These factors in turn have caused some carriers to limit (or entirely eliminate) underwriting D&O insurance for new public companies.

Given that securities class action suits are filed against companies in the life science industry more than any other industry, life sciences companies have been especially impacted by the increased cost of D&O insurance premiums, with rates continuing to rise materially on a monthly basis. One oncology company was given an initial premium estimate of $2.3 million for a June 2019 IPO closing, but ended up paying a premium of $4.3 million when its IPO closed in September 2019. Given these changes in the D&O insurance marketplace, we recommend that companies engage a D&O insurance broker early on in the IPO process to ensure that they will be able to obtain competitive and comprehensive coverage and to avoid last minute surprises when their boards of directors are being asked to approve such high-cost packages. We recommend you contact your Goodwin life sciences or corporate lawyer for further guidance on obtaining D&O insurance.

[Key Takeaways from Goodwin + KPMG @ JPMorgan Symposium: Mergers and Acquisitions]

On Wednesday, January 15, 2020, during the J.P. Morgan Healthcare conference, Goodwin and KPMG held their initial all-day Symposium at the St. Regis hotel in San Francisco. The Symposium was composed of five separate "bursts" entitled (i) New Frontiers in Digital Diagnostics and MedTech, (ii) Europe Unleashed, (iii) Knowing the Best IPO Strategy, (iv) Trends in Biopharma and (v) Mergers and Acquisitions. Stéphane Bancel, the Chief Executive Officer of Moderna Therapeutics, provided the keynote address.

Burst Five consisted of a panel entitled *"The Brave New World of Antitrust in Life Sciences M&A."* This panel was moderated by **Stuart Cable** of Goodwin and consisted of **Lisa Haddad** and Andrea Murino of Goodwin. In this panel, participants provided their insights regarding recent antitrust activity in the life sciences M&A sector. Overall antitrust merger investigations are up under the Trump administration, with a total of 29 investigations in 2019. In addition, the average duration of significant investigations continues to increase, with an average of 12.6 months for the first three quarters of 2019 as compared to 9.8 months for the same period in 2018. Foreign regulatory authorities also continue to increase their focus on proposed mergers, including through working collaboratively with U.S. agencies. Antitrust concerns with respect to life science transactions, especially in hot pharma markets, such as gene therapy, are high.

Key takeaways from Burst Five were as follows:

1. ***Stay apprised of the state of antitrust merger review, as new developments may make a given transaction more risky than expected.*** Antitrust merger review is constantly changing, particularly as administrations change. Recent FTC decisions in life sciences M&A transactions suggest that the FTC has started to look at the entirety of a company's product pipeline (including drugs in development as well as approved drugs) to determine if a given transaction raises anti-trust concerns. For example, as a condition to the BMS/Celgene merger, BMS was required to divest Otzela, a product for the treatment of psoriasis, marketed by Celgene. The FTC argued that this divestiture was required to incentivize BMS to continue to develop its own product candidate for the treatment of psoriasis. This was the case even though there is guarantee that BMS's developmental product would ever be successfully developed or reach the market.
2. ***Seek guidance from experienced antitrust counsel early in the process to evaluate regulatory risks associated with a proposed transaction and to develop an antitrust filing strategy.*** Given the regular changes in antitrust law, it is important to seek the counsel of experienced antitrust counsel early-on in the M&A process. Experienced counsel can help companies assess the risk profile of a given transaction and help you develop a comprehensive antitrust filing strategy. The risk profile of a given M&A transaction will also inform the provisions to be included in the Merger Agreement and other transaction documents.
3. ***Given increased antitrust review timelines, make sure Merger Agreement contains proper protections for the seller.*** Given that antitrust review times have been increasing, it is important that Merger Agreements for transactions that are likely to be subject to extensive antitrust review contain the proper protections to avoid having the buyer just walk away from the seller. For example, sellers should consider strong covenants regarding the efforts that

must be taken to obtain regulatory approval, an end date that allows for extension if there is a regulatory delay, and reverse termination fee payable to the seller if the buyer wants out of the agreement.

Key Takeaways from Goodwin + KPMG @ JPMorgan Symposium: Knowing the Best IPO Strategy

On Wednesday, January 15, 2020, during the J.P. Morgan Healthcare conference, Goodwin and KPMG held their initial all-day Symposium at the St. Regis hotel in San Francisco. The Symposium was composed of five separate "bursts" entitled (i) New Frontiers in Digital Diagnostics and MedTech, (ii) Europe Unleashed, (iii) Knowing the Best IPO Strategy, (iv) Trends in Biopharma and (v) Mergers and Acquisitions. Stéphane Bancel, the Chief Executive Officer of Moderna Therapeutics, provided the keynote address.

Burst Three consisted of four parts. In the first part, Amit Sinha from Goldman Sachs provided a summary overview of the U.S. IPO market for biotech in 2019 and provided thoughts on the U.S. IPO market for 2020. Amit noted that biotech issuances remained near record levels in 2019, and while 2019 IPO volume was down in comparison to 2018, company valuations remained higher. In addition, pricing of biotech IPOs in 2019 remained mixed. Numerous macro factors, such as the 2020 presidential election and continuing effect of executed tariffs, are expected to drive macro sentiment in 2020, but the overall sentiment is that the pace of IPOs will continue in 2020, with many companies seeking to go public in the first half of 2020.

The second part of Burst Three was a panel entitled *"Traditional U.S. IPO Route: The Two Minute Drill to Complete a Successful IPO in the First Six Months of the Year."* This panel was moderated by **Janet Lehman** from KPMG and consisted of **Tom Koncsics** from KPMG, **Michael Bison** from Goodwin, Jack Cassel from Nasdaq and Amit Sinha from Goldman Sachs. In this panel, participants provided their advice regarding things for companies to consider if they want to go public in the near term.

The third part of Burst Three was a panel entitled *"Hong Kong IPO: Seizing Opportunities in a New Emerging Market for Biotech IPO."* This panel was moderated by **Wendy Pan** from Goodwin and consisted of **Irene Chu** from KPMG, Michael Chan from the Hong Kong Exchanges and Clearing Limited (HKEX) and Bin Li from Lake Bleu Capital. In this panel, participants provided an update on the Hong Kong IPO market and provided advice for biotech companies seeking to list on the Hong Kong Exchange. Participants noted that since their new listing regime launched in 2018, 15 biotech companies listed on the main board by 2019, raising HK$48.6 billion in total, and amongst these, eight were pre-revenue biotech firms. The Hong Kong Exchange hopes to continue to expand the types of listed biotech companies in the future.

The final part of Burst Three was a panel entitled "*Alternatives to U.S. IPO: Reverse Mergers and Direct Listings.*" This panel was moderated by **Deepa Rich** from Goodwin and consisted of **Gerry Schemidt** from KPMG, Mitchell H. Gold from Alpine Immune Sciences and David Snyder from Exicure. In this panel, participants provided their insight regarding going public through the reverse merger process. Overall panelists had the sentiment that we are likely to see more reverse mergers in the future given the number of public companies that have gone public through the traditional route.

Key takeaways from Burst Three were as follows:

1. ***Regardless of the strategy chosen for reaching the public markets, companies need to engage in various preparatory actions to ensure they are properly prepared, and therefore companies should engage with appropriate experts (legal, financial and stock exchange) early on in the process.*** Panelists stressed the importance of companies engaging experts, including legal and financial as early in the process of going public as possible in order to help them prepare for an efficient process. For example, in the traditional IPO process, legal experts can help the company understand timing for the various items that need to come together before a company goes public, while financial experts can help prepare the necessary audited financial statements for the registration statement. In a reverse merger process, engaging bankers early in the process can be useful in helping the company put together an attractive merger proposal. In all cases, the securities exchanges themselves can be helpful in providing the prospective public companies with resources to help the companies navigate the markets and listing compliance.
2. ***Feedback with respect to the new biotech chapter of the Hong Kong Exchange has been positive, but companies need to understand that some challenges remain.*** Panelists noted that although the feedback on the new biotech chapter has been overwhelming positive, challenges to listing on the Hong Kong Exchange still remain. Panelists noted that certain aspects of the ecosystem need to grow further. For example, more bankers and investors that are knowledgeable in biotech are still needed. In addition, there is a need to better inform potential companies seeking to list on the Exchange of the differing disclose standards as compared to the disclosure standards in the United States.
3. ***A reverse merger into an existing public company or a public company shell might be the best path to the public market for some companies, but the reverse merger process is unlikely to be cheaper than the traditional IPO route and is unlikely to be a true liquidity event.*** Panelists noted that a reverse merger may be the best path into the public market for some companies, for example, for companies whose capital structures do not allow them to go down the traditional IPO path, or for companies who are presented with an attractive proposal to merge into a failed existing public company. Panelists were also quick to note, however, that reverse mergers should not be viewed as a true liquidity event, because following or in connection with the reverse merger, a company needs to run a financing process. Therefore, panelists stressed that the reverse merger should be viewed as the beginning of the long process on the road to success.