ILLINOIS BUSINESS LAW JOURNAL

A Publication of the Students of the

University of Illinois College of Law

FALL 2011 ISSUE, VOLUME 13

Please direct all inquires to:

Illinois Business Law Journal
University of Illinois College of Law
504 E. Pennsylvania Avenue
Champaign, IL 61820
law-iblj@illinois.edu

Table of Contents

FRIED CHICKEN, SNUGGIES, DISH SOAP, AND THE NFL: THE COMMON DENOMINATOR 4

ANGER ACROSS THE ATLANTIC: FLYING TO EUROPE MAY BE MORE EXPENSIVE THAN EVER 10

"FRIEND" FOR FUNDING: ARE SOCIAL NETWORKS THE FUTURE OF STARTUP FUNDING? 14

WORLD BUSINESS CHICAGO: HELPING THE MASSES OR JUST A FEW? 19

THE NBA LOCKOUT: A MOMENTUM-KILLING MILLIONAIRE V. BILLIONAIRE SHOWDOWN 26

FLASH TRADING: THE INFORMATIONAL AGE GONE AWRY? 30

FRIED CHICKEN, SNUGGIES, DISH SOAP, AND THE NFL: THE COMMON DENOMINATOR

During a typical six-month season, the environment in National Football League ("NFL") stadiums can easily be characterized as masculine. However, during the month of October, players take the field in pink sweatbands, cleats, and chin straps; play with a pink, embellished pigskin; and even wipe their sweat with a pink towel. The referees also take part, blowing their pink whistles when a player in a pink-accented jersey does something that runs afoul of the game. This is the NFL's wayof supporting breast cancer awareness month alongside a multitude of other companies and nonprofits. During October, a breast-cancer-research "superfan" could purchase almost any product allegedly supporting the cause including dish soap, measuring cups, Snuggies, and bike helmets. If that fan is hungry, they can pick up a pink bucket of fried chicken from KFC. Breast cancer awareness month motivates companies to capture consumer dollars with a promise (even if implied) to raise funds for breast cancer research.

However, do all of these products actually benefit the research they claim to support? Last year, the National Cancer Institute, which receives its funding in part from voluntary organizations, private institutions, and corporations, reported spending $631.1 million on breast cancer research. This is more than double the amount spent on any other cancer research. Perhaps the most well-known nonprofit, Dallas-based Susan G. Komen for the Cure grossed $311.9 million in 2010. These are just two examples of the contributions that add up to the estimated $6 billion raised every year for breast cancer research. The money donated to breast cancer research has been instrumental in facilitating recent advances including the development of sophisticated digital mammography; the

discovery of genetic markers, which allow women to take preventative measures; and the creation of new drugs to help treat the disease.

Being such a profitable industry, breast cancer awareness has also been the target of charityscammers. Preying on the public's beneficence and counting on a lack of due diligence, these "sham nonprofits" pop up everywhere, and not just in the breast cancer context. For example, the Central Asia Institute, a nonprofit supported by President Obama for funding education in Pakistan and Afghanistan, has come under fire with allegations of misusing funds. Unfortunately, scammers are not opposed to taking advantage of benevolent consumers in the wake of tragedy. Notably, sham charities have cropped up in the aftermath of 9/11, Hurricane Katrina, and the Haiti Earthquake.

In addition to misusing unsuspecting consumer's sympathy funds, these sham nonprofits may also enjoy benefits from state and federal governments. First, a "nonprofit" is a state law conceptwith the benefits afforded to nonprofit-status companies varying by state. To obtain nonprofit status in Illinois, for example, a company needs to organize under one of the thirty-three allowable purposes, such as a charitable, social, or benevolent purpose.

After being incorporated, a company can apply for a federal tax exemption through the Internal Revenue Service ("IRS"). For a company to be exempt under § 501(c)(3), it is generally required that the company is organized and operated exclusively for an exempt purpose (i.e. charitable, religious, educational, or scientific), the company does not attempt to influence legislation as a substantial part of its activities, the company does not participate in any campaign activity for or against political candidates, and the company's earnings do not inure to any private shareholder or individual of the company. To make things easier for the

filing company, there are services available(for purchase) to assist in the process. Finally, in addition to the federal tax exemption, another major benefit of obtaining § 501(c)(3) exemption status is the ability to accept contributions and donations that are tax-deductible to the donor.

A nonprofit can also benefit from a state tax exemption. In Illinois, a nonprofit can mail a request to the Illinois Department of Revenue to have their sales taxes exempted from purchases through their company. Additionally, if an Illinois nonprofit qualifies for federal exemption status, the company is likewise exempted from paying Illinois income tax. As described above, to qualify for federal exemption status, a nonprofit company must go through the IRS and qualify under the Internal Revenue Code § 501(c)(3), which exempts the nonprofit from federal income tax requirements. Thus, § 501(c)(3) exemption status can make a nonprofit completely tax exempt, just through filling out the proper paperwork.

Given the relative ease of starting nonprofits, consumers have to be careful where they entrust their donations. Though it is good practice for charities to make their financial records accessible to the public, most do not. The IRS makes available all tax returns ("990s") for nonprofits they recognize. These are available on guidestar.org. However, since the tax returns are usually back dated a year or two, this information is usually not available for the younger nonprofits and the nonprofits that form in the wake of tragedies. Additionally, these tax returns can be filled out by anyone. There is no auditing requirement, and the returns do not have to be filled out or certified by an accountant. Finally, the average consumer might not be able to get a good sense of a company's financial status by just looking at the tax return form.

Luckily, there are other resources available to help consumers decide which nonprofits are best for their donations. Charity Navigator evaluates nonprofits and advises consumers on which nonprofit will take their dollar the furthest in terms of how much money is spent on actual services versus overhead and salaries. The Better Business Bureau ("BBB") offers resources similar to guidestar.org, but also allows consumers to file complaints against national charities. After a complaint is filed, the BBB will forward the complaint to the organization and request that appropriate action is taken. In 2010, the BBB reported that for all of the complaints against national charities 50% could not be settled while 16.7% were unable to be pursued. As an additional practice in dealing with complaints, the BBB states that it will review all issues, and possibly will include these reviews in their written reports.

There are several other ways to ensure charitable funds are not misused. First, consumers should demand transparency when it comes to nonprofit organizations. The IRS requires exempt organizations to provide annual returns. Individuals can request an exempt organization's materials from the IRS directly.

Second, consumers should skip the generic pink ribbon merchandise (Susan G. Komen for the Cure and other nonprofits have only trademarked their own distinct versions). Since nobody owns the rights to the pink ribbon design, any company can sell pink ribbon-branded products implying support of the cause even if they do not offer much financial support at all. This aversion to generic support should be applied to the support of other causes too. For example, the Oriental Trading Company offers many different breast cancer pink ribbon products (a few are Susan G. Komen for the Cure-trademarked, but most are generic) and "support our troops" products, with proceeds benefitting… the Oriental Trading Company. Recently, the rapper Jay-Z came under fire for his

"Occupy All Streets" T-shirt, which mimics the Occupy Wall Street ("OWS") movement's phrase and, as a result, was assumed to be financially benefitting the movement. However, an OWS spokesman told Business Insider magazine that the movement would not see any profits generated by the T-shirt sales. After Jay-Z was accused of trying to profit from the protests, the T-shirt disappeared from Jay-Z's website. These examples demonstrate that just because a product is cause-branded it does not necessarily mean that the profits support that cause.

Third, consumers should either donate directly to affected people they wish to support or invest in long-standing companies proven to be helpful to society. Guide Star, described above, offers lists of organizations deemed to be worthy of donations. Additionally, Great Nonprofits allows members to rate and comment on different nonprofits. Finally, a consumer can call the BBB and inquire specifically about a nonprofit organization's past complaints.

Fourth, consumers could donate things other than money. Nonprofits spend lots of money on overhead costs, including salaries. If more people donate their time through volunteering, those costs would, in theory, go down. Also, instead of donating money, consumers could elect to donate goods either to charitable organizations or directly to those in need. That way they know exactly where their money is going (the goods), and where the goods are going (those in need). Again, consumers should do their research ahead of time, even when donating time or goods to ensure that their efforts are going to the cause they are truly trying to support.

Lastly, if someone is thinking about starting a nonprofit organization, they should ensure awareness of the business responsibilities and planning that goes into forming a company. Businessmen and philanthropy executives Charles R.

Bronfman and Jeffrey R. Soloman conduct their philanthropy as a business, "with discipline, strategy and a strong focus on outcomes," and credit that philosophy to their success. If a well-intentioned but inexperienced individual starts a nonprofit they may try to mimic a larger, well-known nonprofit. This may lead to funds being wasted on informational brochures that are already available to the public or exorbitant funds being spent on events. While this is not a suggestion to dissuade those interested in starting a nonprofit, one should first think about how to ensure that one's time, money, and passion is well invested.

During the holiday season, nonprofits and charities benefitting those less fortunate can be inescapable. Santa Clauses outside of grocery stores ringing their bells for the Salvation Army and the Toys for Tots bins are just two examples. Charitable giving should not be obstructed by selfish organizations, but rather charitable giving should be catalyzed by generous organizations. A consumer can best help by first informing themselves about what their money is being used for. Taking the time to do this can make somebody's holiday season that much brighter, somebody's chances of living that much better, and somebody's hardships that much more manageable.

ANGER ACROSS THE ATLANTIC: FLYING TO EUROPE MAY BE MORE EXPENSIVE THAN EVER

How many times have you heard a friend or a coworker lament their dream of visiting Paris or London be deferred by the expense of a transatlantic flight? Well, get ready to hear a whole lot more lamenting! Earlier this fall, the European Court of Justice's (ECJ) Judge Advocate General, Juliane Kokott issued an opinion that the EU's decision to extend its Emissions Trading Scheme (ETS) does not offend other nation's sovereignty or international aviation agreements.[1] Her opinion is a hard pill to swallow for international actors like America and China who stand to be hit by fines. International actors can then either pass the cost of the fines onto their customers or alter their operations to meet the requirements and pass that cast on. That doesn't sound very non-threatening to sovereignty, does it?

The Emissions Trading Scheme (ETS),[2] created in 2005, limits greenhouse gases throughout Europe (specifically the European Union's 27 member states plus Iceland, Lichtenstein and Norway), through the "cap and trade" principle. Specifically, the ETS caps the amount of greenhouse gases various industries, such as manufacturing, energy or in this case, aviation, can produce. Industries receive emissions allowances within their caps and can trade and sell with one another and across borders. However, exceeding an emissions cap results in heavy fines.

A September press release[3] discussing the ETS' addition of aviation within its scope states that, "The EU ETS covers any aircraft operator, whether EU or foreign-based, that chooses to operate flights on routes to, from, or between

EU airports." Unlike other ETS provisions, which only affect the 30 nations outlined above, aviations caps and restrictions will affect 62 nations total. Unsurprisingly, many of these non-European nations are not pleased.

The United States has already engaged in litigation against ETS – this is what prompted the preliminary opinion by Juliane Kokott earlier this fall. Though the opinions of the Judge Advocate General are non-binding, the ECJ has followed them 90 percent of the time.[4] While the odds of winning litigation seem low, the United States has not stopped there. Recently the House of Representatives passed a bill[5] ("The European Union Emissions Trading Scheme Prohibition Act of 2011") prohibiting any "operator of a civil aircraft of the United States from participating in any emissions trading scheme unilaterally established by the European Union." The Bill requires approval from the Senate and President Obama but at the least it has established further resentment and opposition by the United States.

The U.S. is not the only country to be displeasedwith the ETS. China has confirmed it will engage in litigation against the ETS as well.[6] China has also threatened to cut back[7] on manufacturing airbuses for European carriers.

As tensions rise, more and more international actors outside the European Union are speaking up. Recently, the United Nations International Civil Aviation Organization issued a declaration[8] arguing that international actors should be exempt from the ETS. Among the nations represented in the declaration are the U.S., Russia, China, Brazil, India, and Japan. In response to the declaration, EU Climate Commissioner Connie Hedegaard issued the following statement: "[i]t is disappointing that ICAO discussions once again focus on what states should not do, instead of what they should do to curb growing aviation

emissions." "You could set a target for your aviation sector, you could make an incentive for them to improve fuel efficiency for aviation, it could be many things," she added.

However, one thing Ms. Hedegaard has not approached is the onus international implementation the ETS will levy upon passengers. A case study by Standard and Poor's[9] noted that even though the initial cost of implementing ETS might be "marginal", it would have a substantial impact on "financially weak airlines." Speaking of financially weak airlines, American Airlines recently reported losses of $162,000,000 in the third quarter.[10] In what is not a particularly prosperous time for most American air travel carriers, inclusion in the ETS is likely the last thing they need. The EU has attempted to reassure that impacts on prices will be minimal but its reassurance is dubious. In its own press release the EU has noted that 85 percent of aviation allowances will be issued free of charge in 2012 with 82 percent being free in following years. The EU has also noted that the change in ticket prices will be at most €2 per passenger on transatlantic and long haul flights. However, that proposition is questionable when international carriers engage in nothing but long haul and transatlantic flights to Europe. By operating numerous long haul flights in and out of Europe, international actors are hit hardest by the ETS. Commissioner Hedegaard has encouraged international actors to set carbon targets for their airlines or incentivize the development of greater fuel efficiency. Nonetheless, both of these suggestions will be expensive to implement and costs are likely to pass to passengers.

A flight to Europe has always been pricey and it only stands to get pricier if ETS remains implemented against the United States and other international actors. Hopefully, the ECJ does not rule in accordance with the

Judge Advocate General's initial ruling this fall. Contrary to the Judge Advocate General's Ruling, an emissions scheme imposed unilaterally by an economic and political union (the EU) against other nations certainly seems to offend sovereignty. Nations must comply or face fines and fees. In turn, it is the consumers who will have the burden of these fines passed on to them through higher ticket prices. An emissions scheme that affects how nations operate their airlines and how passengers fly is clearly offensive to sovereignty.

"FRIEND" FOR FUNDING: ARE SOCIAL NETWORKS THE FUTURE OF STARTUP FUNDING?

Soon, entrepreneurs may be able offer their Facebook "friends" and Twitter "followers" more than just virtual friendship and updates on what they had for breakfast. They may also be able to offer equity stakes in their business. In an increasingly rare instance of bipartisanship, last Thursday (Nov. 3) the House passed both the Entrepreneur Access to Capital Act ("Entrepreneur Act") and the Small Company Capital Formation Act ("Small Company Act"), each aimed at spurring small business growth through the method of "crowdfunding," "a form of capital raising whereby groups of people pool money, typically comprised of very small individual contributions, to support an effort by others to accomplish a specific goal." If approved by the Senate, the bills would allow entrepreneurs to use online social networks to solicit small equity investments in enterprises, a capital raising strategy that is illegal under current securities law. However, some warn that, if passed, the legislation will increase the risk of securities fraud and speculative risk to investors among other things.

Crowdfunding's roots can be traced to the practices of microlending and crowdsourcing. Microlending, or the lending of small amounts of money to, most often, low-income individuals, has inspired ventures like Kiva, which connects small individual investors with low-income entrepreneurs, while crowdsourcing has been harnessed to create things like Wikipedia, a user-generated online encyclopedia. Combine the two and you get crowdfunding, essentially the funding of projects with the combined small contributions of people. The numerous microlending and crowdsourcing projects have, in turn, inspired crowdfunding ventures such as Kickstarter, launched in 2009, which enables "large groups of

people to pool their money to help fund an idea." Such ideas range from documentary films to consumer products like iPod Shuffle watches, but investors areprecluded from expecting any return on their investment by current securities law. Instead, entrepreneurs offer rewards for patronage such as their band's album, a digital copy of their documentary, or an assortment of random goods. While these transactions, motivated primarily by patrons' personal interest in individual projects, would likely continue even if the bills are passed in the Senate, the scale of the crowdfunding marketplace could soon dramatically increase to include investors with little or no interest in projects other than their financial success.

The call for securities regulation reform has grown louder as the economy and lending market have struggled. Small businesses have been touted as a grassroots solution to job growth and economy turnaround by both Republicans and Democrats, but many small businesses cannot make it past the idea stage because of the lack of currently available funding. "Our current system tells businesses 'go out and create jobs' but don't tell people who might want to invest in your company,"says New York Democrat Carolyn Maloney. The proposed legislation aims to help solve this problem by changing "how much [small] businesses can raise, who they can raise it from, and how they can raise it without . . . registering a public offering with the Securities and Exchange Commission("SEC")." The federal legislation that governs these areas is the Securities Act of 1933 ("Securities Act"). In particular, the bills target the reform of Regulation A titled "Conditional Small Issues Exemption" and Section 4(2) of the Securities Act. Despite its title, Regulation A no longer offers any "exemption" for small equity offerings. Though Regulation A was originally intended to "provide an almost unconditional federal exemption for small offerings," the exemption was eliminated when the SEC failed to reinstate the

provision after making changes to the Securities Act in 1999.[1] As it currently stands, Regulation A requires entrepreneurs to file a Form 1-A Offering Statement with the SEC if it intends to make an equity offering.[2] Section 4(2) of the Securities Act prohibits entrepreneurs from soliciting equity offerings in private companies.[3] The Entrepreneur Act wouldamend Regulation A by exempting companies raising up to $1 million annually ($2 million with audited financials) from SEC registration and would limit individuals' investments to the lesser of $10,000 or 10 percent of their annual income. The Small Business Act would eliminate the ban on general solicitation of private business securities, allowing solicitation over social networks. For entrepreneurs looking to raise relatively small amounts of money (i.e. less than $2 million), the Entrepreneur Act's regulatory changes would make the previous barrier to doing business, Regulation A, a viable option for raising capital ("only three companies made offerings under Regulation A in 2010"). Additionally, the Small Business Act would vastly expand both the pool of potential investors for entrepreneurs as well as the pool of potential investments for investors. Despite these positives, skeptics feel that the proposed legislation raises several concerns.

Not all lawmakers and regulators are sold on the proposed crowdfunding legislation as a win-win stimulant to job and economic growth. Skeptics' main concern is the risk of securities fraud stemming from an increase in securities offerings by small businesses paired with the circumvention of SEC oversight. The North American Securities Administrators Association, LLC ("NASAA") president Jack Herstein was initially concerned stating that, "[i]f I'm a crook, I'd be licking my chops over [the Entrepreneur Act]." Additional concerns include the risk that unsophisticated investors will lose their shirts in the crowdfunding market and that small and inexperienced businesses will have difficulty administering securities. In response to the concerns of NASAA and others,

members of the House Financial Services committee, which supported the bill, worked to add safeguards to the legislation, ensuring state notification of all crowdfunding offerings, barring securities or financial regulation violators from using the crowdfunding exception, and limiting the amount individuals can invest in crowdfunding ventures. Even with these added safety measures significant questions remain unanswered.

In the current financial environment, even entrepreneurs with good ideas and successful track records are finding it difficult to raise capital. Total angel investment in startups has declined steadily (from $26 billion in 2007 to $17.6 billion in 2009) and less than three percent of the thousands of entrepreneurs seeking angel investment funding each year actually receive any.[4] The capital-raising challenges faced by entrepreneurs who lack these credentials are worse still. Even traditional sources of money for inexperienced entrepreneurs like bank loans and friend and family investment have been choked off by the tough economy.[5] The proposed legislation will bridge the gap between the few who receive venture capital and the everyman entrepreneur. Securities law as it stands was mostly drafted in a different time. Today, business models available to entrepreneurs should mirror and integrate the technological advances that have been made since the Securities Act was enacted in the 1930s including the use of social networks such as Facebook and Twitter to reach customers, create community, and, perhaps most importantly, raise capital. This is not to say that there should be no regulation of crowdsourcing and solicitation of private company equity stakes, but that current small equity offering regulation is akin to "killing a mosquito with a machine gun.[6]" With the goal of protecting investors and preventing fraud, regulators have restricted a potentially enormous vehicle for investing in and growing businesses. Though questions such as whether crowdsourcing will create jobs, how much transparency will exist, and how

crowdsourcing investors will sell shares remain, the weighing of the positive influence to business growth against the negative of increased risk to investors weighs heavily in favor of approving the proposed legislation.

[1] Nikki D. Pope, Crowdfunding Microstartups: It's Time for the Securities and Exchange Commission to Approve A Small Offering Exemption, 13 U. Pa. J. Bus. L. 973 (2011)

[2] *Id*.

[3] *Id*.

[4] Pope, *supra* at 996.

[5] *Id*. at 973.

[6] *Id*. at 982.

WORLD BUSINESS CHICAGO: HELPING THE MASSES OR JUST A FEW?

Chicago, Illinois… ever heard of it? Apparently their mayor, Rahm Emanuel, doesn't think enough businesses have, or at least seriously consider it as a place to set up shop. Incorporated in 1999, World Business Chicago ("WBC"), a city-funded nonprofit group, is the city's economic development office, tasked with the duties of "coordinating retention, attraction and expansion efforts in order to spur and accelerate economic growth." Emanuel has taken a specific interest in this office, roughly tripling its size since his election this past May. Wanting to stimulate Chicago's and Illinois' economic growth is warranted. You may have seen the "IL: Deadbeat State" headlines highlighting debts totaling $200 billion.

Despite such need for economic growth, Chicago's Inspector General has been skeptical of the WBC, even suggesting in the 2011 Budget Options to eliminate the $1.4 million city subsidy the WBC receives. This article explores the three reasons the Inspector General has proposed cutting the WBC: 1) leaders of the city's largest corporations should not have control over public funding and use of taxpayer dollars; 2) secrecy of WBC meetings and minutes makes it difficult to determine if Chicago receives any benefit by subsidizing the WBC; and 3) public funds should not be used to subsidize large, multinational corporations furthering their own business plans.

The leaders of the city's largest corporation make up the Board of Directors for the WBC; giving them authority over how public dollars are used to assist other businesses may not ensure the best use of taxpayer dollars

Mayor Emanuel appointed a 48-member board full of presidents, CEOs, founders, and chairmen of the top businesses in Chicago (i.e. Walgreens, Allstate, and Boeing). Along with their impressive credentials, board members are also quite generous having donated a combined $1.2 million to Emanuel's campaign with an additional $1 million coming from board members' employees and spouses. Emanuel appointed these business leaders because he "wants to leverage their global networks and strong business acumen on behalf of the city."

The operation and authority of the WBC board is not transparent because WBC board meetings are held behind closed doors and board minutes are unavailable. To explain this, Emanuel said at a news conference "If I told them all the meetings were going to be public, guess what, we wouldn't have real companies coming here to expand." Emanuel went on to reason that businesses want this privacy because they don't want competitors knowing what they are up to. Agreeing, WBC's Vice Chairman Michael J. Sacks echoed Emanuel's statement about the need for WBC's operations to be private but stated the WBC has already agreed to be transparent about their general activities, "to bring jobs to Chicago and increase the economic vitality of the city."

At least one of those "general activities" has garnered some scrutiny from the public. The WBC has control over Chicago's "Incentive Programs" which give government money to "encourage businesses to expand or locate in the area." For example, in 2009, CME Group was given $15 million to help renovate their corporate headquarters and trading space in return for them retaining "no less than 1,750 jobs over ten years" and creating 900 new jobs by the end of the decade. The Inspector General criticized the WBC for this subsidy explaining that there was a conflict of interest given the chairman of the CME Group's role on

WBC's board of directors. That same year, WBC failed to disclose that United Airline's CEO sat on their board when the company, at the recommendation of the WBC, received $35.5 million in "city incentives" to relocate its headquarters to Willis Tower.

Also of concern to the Inspector General is the Tax Increment Financing Program ("TIF"), funded separately from the WBC, which encourages businesses to invest in areas of Chicago possessing "numerous blighting factors." (An interactive TIF and Incentive Program map filter can be found here.) Currently, the TIF approval process starts with corporations applying for TIF funds. Then the WBC reviews the applications and submits letters of recommendation to the city for the corporations they deem worthy of such funding. In turn, the city relies on these letters as evidence of community support for the proposed TIF projects, though any actual community support outside the WBC is absent.

There are a few conflicts of interests the Inspector General notes. First, WBC is dependent upon the city for most of its funding, and as such is not an independent organization. Second, WBC does not thoroughly analyze the merits of the TIF proposals for which it advocates (it is unclear how the Inspector General knows this absent public meetings or minutes). Third, and most compelling, WBC directors each owe a fiduciary duty to their own companies creating an apparent conflict of interest in WBC's assessment of TIF proposals. Along with the CME Group and United Airlines subsidies, these potential conflicts of interest seem to be a worrying trend. Additionally, if there is a merited TIF proposal, by American Airlines for example, how would that play out at a WBC meeting with United's CEO on the board? I guess we'll never know as long as these meetings are held in secret.

Allegedly, Emanuel is cognizant of the conflict of interest problem caused by the WBC Board's assessment of TIF proposals. He is said to be setting up an oversight board with authority over these TIF proposals; however, it is unclear whether this oversight board would to police the TIF proposals, the board membership, or both.

Because of the secret meetings and minutes, it is hard to determine how Chicago and its citizens actually benefit from the WBC

Mayor Emanuel and WBC Vice Chairman Sacks have been clear about the need for secrecy when it comes to WBC meetings and minutes. Such a policy creates skepticism and uncertainty about what the WBC actually accomplishes and how its actions benefit the public. The "Successes" link on the WBC webpage provides an impressive list of economic activity in Chicago as evidence of what the organization has accomplished. Upon review, however, any specific reference linking the described economic success to WBC is absent. The fact that this city-funded organization, created to stimulate economic growth, cannot easily point to what they have done is problematic.

However, Mayor Emanuel has stated that 8,000 new jobs have been created since he took office. Five companies affiliated with the WBC are partly responsible for those jobs. No word on whether any city incentives were given out or had any impact on the job creation. Additionally, how those five companies, or any companies contributing to the 8,000 jobs were brought in or influenced by the WBC is not clear. Perhaps in cases like these, it would not hurt the WBC to make statements reciting a specific correlative effect between job creation and WBC actions.

Chicago should not use public funds to subsidize individual, sometimes large and multinational, corporations, to achieve their corporate goals

The services the WBC provides are navigating site selections for businesses, providing economic and industry data, site location assistances and state and local incentive information. Of the three arguments the Inspector General puts forth, this one seems to be the weakest. It is the norm for major cities to offer resources to businesses thinking about relocation. Philadelphia has a Business Services website which gives access to information on developing business plans, financial plans and marketing plans. The website also offers a helpful link for understanding their city's business regulations in addition to obtaining business permits and registering business ventures. New York and Los Angeles have similar websites.

Regardless, whether the exact practices of the WBC are the norm in other major cities is another story. The weight and authority given to recommendations by the WBC for handing out government money can be a serious concern. Heading into 2012, with a city budget $636 million in the red, Chicago might want to further scrutinize the funding they give out, especially to these large, fiscally-secure corporations. For the funding the city does provide, public disclosure of reports showing how the city will benefit from the initiative would likely put those concerns to rest.

Solutions

It is clear Chicago needs something to ignite their economy again, and Rahm Emanuel can be the mayor with the vision to do it. He has been proactive in creating jobs since taking office, and there is little doubt he will continue to do so.

The skepticism and concerns surrounding the WBC are understandable, but with a few fixes, Emanuel can restore public confidence and trust in the program, as well as Inspector General approval for the WBC.

First, for all TIF recommendations, the WBC should clearly note any perceived or potential conflicts of interest in their recommendation to the city. Accompanying that recommendation, financial reports should also be drawn up by a qualified, independent and impartial party, detailing the recommended subsidy and the projected cost and benefit for both Chicago and its citizens. A projected cost in the millions may seem daunting and inflated as a subsidy, but once the numbers are reported and explained it could be shown as a sound choice for the use of taxpayer dollars. If the subsidy that benefits a business would also allow for more economic gain for the city, a subsidy would be beneficial for Chicago. Additionally, if there are two competing TIF proposals, these reports should serve as the tiebreaker needed to make the recommendation to the city. Furthermore, a financial report drawn up for competing companies that the WBC Board did not recommend, could serve as a public "watchdog" to oversee that the Board is not abusing their positions by giving their companies an unfair advantage over others. In the alternative, if there is a conflict of interest with a competing company the financial report could be sent in to the city itself for approval.

Second, while preserving the "privacy" and "secrecy" of WBC meetings, and in the spirit of transparency, the WBC should release their minutes to the public immediately after each meeting. The content of these notices can redact sensitive information as needed, preserving the anonymity necessary to prevent scaring the "real" businesses away. This move would restore a lot of taxpayer confidence by showing them what their tax dollars are being used for.

There are other measures that could be taken, but these two would be a good start. Hopefully at the board's meeting on November 4th, some of these problems will be addressed. Who knows? Maybe they will strike that balance to attract "real" companies while not finding themselves on the proposed budget cut list by the Inspector General.

THE NBA LOCKOUT: A MOMENTUM-KILLING MILLIONAIRE V. BILLIONAIRE SHOWDOWN

On July 1, the National Basketball Association (NBA) instituted a lockout when its collective bargaining agreement (CBA) expired and negotiations, which began in January 2010, stalled. Over the past four months, owners and players have made multiple attempts to reach an agreement with no success. On October 10, NBA Commissioner David Stern canceled the first two weeks of the season and stated that both sides are still, "very far apart on virtually all issues… we just have a gulf that separates us." A number of issues have been discussed including: revenue sharing, salary caps, luxury penalties, guaranteed contract lengths, and player exceptions. The owners and players have three ways to resolve these issues: bargaining, mediation, and/or legal action. After bargaining failed, a federal mediator was called upon and, after a week of mediation, Stern cut an additional two weeks. If mediation also fails to produce results, owners and players could choose to leave the bargaining table and head to federal court. If this occurs, a number of legal issues would have to be considered including: decertification, injunctions, and antitrust claims. It is estimated that the two-week cancellation will result in a loss of about $83 million in ticket sales, not counting parking and concessions revenue. The losses become much more significant considering the fact that the NBA could very well be alienating a critical fan base by prolonging the lockout.

Though owners and players disagree on many issues, negotiation talks have been primarily focused on the issue of revenue sharing. It is estimated that basketball related income (BRI), the money made through basketball operations, totaled $3.8 billion last season. Under the prior CBA, players received 57% of this

revenue while owners kept 43%. After much back and forth, the owners are now in favor of a 50-50 split, while the players continue to insist on a 52.5% share, a difference of about $100 million per year. Considering that both the owners and players stand to lose a lot more than due to canceled games, it becomes pretty clear that both sides are more interested in “winning” than compromising.

Though the owners and players have expressed a desire to reach a deal through bargaining, there is still a possibility that the dispute will ultimately be resolved in court. Both sides have filed complaints with the National Labor Relations Board (NLRB) alleging that the other side was not engaging in good faith bargaining. However, the likelihood the NLRB will rule for either side is slim since it is apparent that some progress has been made. The players union (NBPA) has also considered following in the footsteps of the NFL union and decertifying. Decertification would allow the players to dissolve the union and file an antitrust suit against the league. In response to this threat, the league filed a federal lawsuit on August 2, seeking a declaratory judgment that the lockout is not in violation of federal antitrust laws and that if the NBPA’s decertification were found to be lawful, all existing player contracts would become void and unenforceable. The suit was filed in United States District Court for the Southern District of New York, a court that has previously ruled in favor of the league on similar disputes (in *NBA v. Williams*, the court held that the salary cap, college draft, and certain restrictions on free agency were not antitrust violations).

In response to the NFL player’s union decertification, the Eighth Circuit held that the Norris-LaGuardia Act, which prevents federal courts from issuing temporary or permanent injunctions in cases involving labor disputes, prohibited them from enjoining the lockout. Even though the Eighth Circuit refused to enjoin the lockout, it is known to be a conservative-leaning court with a tendency to side

with business on labor issues. Therefore, it is entirely possible that another court would rule in favor of the players and issue a preliminary injunction ending the lockout. Though the court for the Southern District of New York previously ruled in favor of the NBA in *Williams*, this may be of little help when it comes to avoiding an injunction, especially since the Williams court referred to the argument that the Norris-LaGuardia Act deprives the court of jurisdiction to enjoin a labor dispute as a "dubious proposition." Therefore, if the players choose to decertify, it is possible that the court will decide to grant the injunction and end the lockout. If nothing else, they have a much better chance in the Southern District of New York than they would in the Eighth Circuit.

In the case of the NFL, the lockout ended before the court could rule on whether or not it was an antitrust violation. The application of the Sherman Antitrust Act to professional sports has been the source of controversy and litigation for decades. From joint broadcast deals to restrictions on players' salaries, it is evident that professional sports leagues engage in conduct that can be deemed anti-competitive. However, Congress and the courts have created exceptions and exemptions to the Sherman Act that seeks to protect the leagues from antitrust litigation. For example, MLB has enjoyed total immunity from antitrust law since 1922 when the Supreme Court held in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs* that professional baseball did not constitute interstate trade or commerce and was, therefore, not subject to the Act. However, a lot has changed since 1922; professional sports leagues are now multi-billion dollar businesses that directly affect hundred of thousands of people. Due to the dramatic evolution of professional sports, it is highly unlikely that a court would grant another professional sports league total immunity as it did in 1922. However, it is likely

that they will continue to make exceptions that protect the league against antitrust claims.

Though some may see decertification as the only viable option for players, the actual likelihood of success on the antitrust issue is slim. Not only have the courts previously ruled in favor of the NBA on these matters, this kind of litigation would likely take longer than most players are willing to wait. In the past, cases such as these have arisen not because players or owners were particularly interested in litigation; instead, both sides have simply used the courts as a bargaining chip in the collective bargaining process. This is an issue of labor law and as such, should be resolved through bargaining, not intervention by the courts. One thing is clear, this dispute will not end until both sides decide to compromise rather than try to "win."

There's a chance that NBA owners are ready and willing to lose an entire season, much like the NHL owners did in 2004. Coming off a season that was arguably the best the NBA has had in the post-Michael Jordan era, the stoppage seriously risks alienating the fan base responsible for the soaring revenues and television ratings the league experienced. The public's perception of the lockout is likely to significantly hurt the NBA for years to come for an obvious reason: "the NBA is not the NFL; it doesn't have the luxury of extraordinary and unassailable popularity." By canceling the first four weeks of the season, each side has sacrificed more than they would have with the other side's deal. Though loyal NBA fans will certainly be disappointed by the shortened season, they will wait for the games to resume and return to the arenas once they do. However, the chances of the casual fan waiting are slim to none, and this is not a risk the NBA can afford to take.

FLASH TRADING: THE INFORMATIONAL AGE GONE AWRY?

Flash Trading: The informational age gone awry?

The historical purpose of the stock market, serving as a method for companies to affordably raise capital, is fading quickly. The proliferation of supercomputer trading algorithms and complex derivatives (e.g. Synthetic Collateralized Debt Obligations) has given rise to an age of increasingly complex trading methods. One of the foremost advances is the speed of trading, seen predominantly in high-frequency methods. The expansion of bandwidth and connection speeds has enabled traders to execute trades in as little as one-millionth of a second, a far cry from the historical telephone relays to traders in the pits. However, even with the public outcry for more transparency within the financial markets, little is known about the actual effect high frequency trading has on the markets and the everyday investor.

History

Computerized trading has existed in many forms for decades now, but the real expansion came in 1998 when the S.E.C. authorized electronic exchanges to compete with industry giants like the N.Y.S.E. However, this change did not immediately usher in an era of flash trading due to technological constraints. As technology advanced, so did specialized firms that coded algorithms to capitalize on specific inefficiencies or arbitrage opportunities within the market. The presence of high frequency traders has become so pronounced that the N.Y.S.E. is currently building their own data center to cater to them. Presently, these high-frequency traders account for roughly sixty percent of all shares traded in US

stock markets and are a large reason that volume on the N.Y.S.E. is up 164% since 2005. It is clear from these facts that high frequency trading is not a here today, gone tomorrow trend.

One Method, Two Results

Although at first glance firms use similar tactics, they actually operate in different capacities based on how they position themselves. "Market Makers" attempt to make profits through the bid-ask spread, the difference between the buying and selling price of a security. These firms look not to profit from market aberrations, rather, they focus more on small profits from each security sold, hoping to make a miniscule profit on each share that is then magnified over the trading of millions of shares. The other tactic is considered "signal" trading. These firms write complex coded algorithms that exploit subtle inefficiencies in securities pricing or market fundamentals that may only exist for less than a second. Even if these inefficiencies result in a penny per stock profit, the immense speed of the computers allow them to trade in bundles of thousands and make significant profits in mere seconds. Even with these advantages, some firms have used other tactics such as flash trading to squeeze out profits in questionable ways.

More Than a Speed Advantage

With the ability to execute trades in nanoseconds, firms have incorporated methods such as "flash trading" to glean increased knowledge to capitalize on their speed capabilities.1 Flash trading is utilized by both signal and market making high frequency firms to obtain exclusive knowledge about upcoming market orders. It is a practice where traders submit a limit order to buy or sell a security. When this order is placed, the market center flashes the order to a limited

number of other traders who can execute trades with their supercomputers in milliseconds before the open market even receives notice of the order.2 In order to obtain these advantages, high frequency traders pay exchanges such as Bats Global Markets for exclusive access to flash orders that they can trade on.3 In practice, a select few firms with the financial backing and trading capabilities are given a near monopoly on certain information before it reaches the general public. The methods used to exploit these advantages become increasingly complex, but at the crux of the matter is the informational inequality that results. At a point in time when average citizens question the integrity of financial institutions, it seems unique abilities like these merely exacerbate those fears.

The S.E.C. has recognized the potential abuses that can result from these practices and sought methods to curb the creation of a "two-tiered market". S.E.C. chairwoman, Mary L. Schapiro, pushed for the elimination of flash orders back in late 2009. It seems that her infuriation with the practice has not been significant enough because flash orders remain legal and are still being utilized. These open warnings about the dangers of flash trading, which later result in weak follow up, seem to be the norm considering the intertwined nature of high frequency trading and equity marketplaces. An impactful alteration in high frequency trading would drastically alterthe volume on many exchanges, not to mention sending shockwaves throughout every financial market. It appears that the inability of the S.E.C. to address high frequency trading when it first grew into prominence has now handcuffed their regulation abilities. The precocious nature of global equity markets makes any drastic changes in trading procedures seem unlikely until a far greater level of stability is reached.

Down, But Not Out

Although significant regulation alterations seem unlikely in the near future, the SEC has taken steps to temper the growth of these new practices.4 In an attempt to modernize U.S. markets and increase transparency, the SEC adopted Regulation NMS in 2005.5 The regulation included an Order Protection Rule "that governs access to limit orders and thus applies to flash orders."6 The rule "requires that the best bids and offers… for an equity security be immediately displayed in all markets."7 This rule would seemingly eliminate the split-second exclusivity created by flash orders. However, the rule "only applies to *immediately* accessible, automated quotations," (italics original) a distinction that the market centers who offer flash trading seized upon.8 These centers argued that flash orders are in actuality not immediately accessible.9 Even SEC Associate Director David Shilman agreed with the market centers assessment stating, "The Commission's view is that flash orders that are for a sub-second period of time are consistent with the quote rule which allows an exemption for orders that are accepted immediately."10 So, even when the SEC passes regulation that could restrict the proliferation of these questionable tactics, they back down when actually forced to clarify their stance.

Too Little Too Late

Even though the SEC has characterized flash trading and other similar practices as harming price discovery, increasing market volatility, and undermining public confidence, they still refuse to meet the problem head on.11 As a practically worthless concession to appease a fickle public, the SEC instituted the use of circuit breakers to temporarily halt trading if an index experiences too much fluctuation. This fluctuation is considered, in part, to be derived from the massive trades executed by high-frequency traders. Instead of actually regulating flash trading, the SEC has decided to merely institute stopgaps that will kick in when

the system goes seriously awry. The SEC has now proposed lowering the minimum threshold from 10 percent down to 7 percent and changing the index to represent a broader range of securities. While circuit breakers are certainly not an unwise practice, their value is only shown in extremely dire situations. The proposed 7 percent threshold would have been triggered only 10 times since October 1987, certainly not a frequent occurrence. While there is no fault in imposing circuit breakers, it seems to be a limited remedy at best.

Runaway Giant?

The difficulties created by flash trading and high frequency traders are clearly of concern to the SEC. However, the inability of the SEC to confront the problem early and effectively has rendered them nearly incapable of properly combating the problems posed by these practices. Global markets have begun to rely on the abilities and effects that high frequency traders create within the markets. To seriously impede or totally eliminate their influence would fundamentally transform markets overnight. This is not to say that the SEC and other regulators cannot reign in the influence of these practices, but it would require a forceful approach and significant support from many market makers, two elements that do not seem likely to occur anytime soon.

However, even without this support, it seems feasible for the SEC to eliminate flash trading and the informational inequalities that it creates. High frequency traders could still survive, and even thrive, without the ability to access flash trading information. The large trade volume created by high frequency trading is not based solely on flash orders. These firms still trade extensively using normal access to information so the elimination of flash orders would not greatly upset equity markets. It seems foolish to allow a group that already possesses many

unique advantages over the average investor the ability to expand that gap further. High frequency traders may find other ways to exploit their advantages if you take away flash trading, but at a minimum, the SEC should impose regulations that limit their advantages to information as well as speed. The SEC has dragged their feet for so long that the decision is now out of their hands in many regards. They still have the ability to regulate, but most regulation would merely create unnecessary volatility and uncertainty in an economy that is struggling to find stability. The questionable practices of flash trading and other methods employed by high frequency traders seemingly sprang up overnight, but it looks as if they are an evil we will have to live with unless the SEC starts following through on their intentions.

Footnotes:

[1] Mark D. Perlow, Gordon F. Peery, & Robert H. Rosenblum, Perlow, Peery and Rosenblum on Regulators Focus on Flash Orders, Indicators of Interest, Dark Pools and Co-location, Matthew Bender & Company, Inc., 2010, at 1, available at LexisNexis 2009 Emerging Issues 4172.

[2] Id. at 2.

[3] Id.

[4] Id. at 2

[5] Id. at 3.

[6] Id. at 4.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] Id. at 2.