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Federal Stimulus Bill Stimulates Lobbying Action

By Elizabeth Bennett
Of the DLW

The giant stimulus bill that became law last month means the lobbying has begun, as companies with products and processes suited to federal programs seek to catch the attention of the U.S. government.

Ellisa Habbart, of Wilmington firm The Delaware Counsel Group, recently helped her client, Eco Power Solutions, obtain the services of Washington, D.C., government affairs firm Fabiani & Co. to push through what is sure to be a crowded field.

"Because there are so many people going after the money, you need a way to educate people as to what you have to offer," Habbart said.

The Delaware Counsel Group focuses on transactional work and advising companies on Delaware business matters, but "because

I partner with my clients, my work is more than just any specific deal," Habbart said.

In this case, Habbart identified a few candidate firms, and accompanied Tom Thompson, the CEO of Eco Power, down to Washington to help him screen the potential lobbyists. The company is a Delaware corporation, but it is based in Quincy, Mass.

Habbart's job was to know what questions to ask — for instance, regarding conflicts — that might be overlooked by the CEO.

"The businessman and his lawyer was a good combination," she said.

Eco Power has a fully developed system called the Comply 2000 that recaptures and reuses the heat generated through manufacturing processes instead of letting it be lost through the flue stacks.

The system also reduces the harmful emissions sulfur dioxide and nitrogen oxide by about 96 percent and carbon dioxide by about 25 percent, the company's Web site says.

According to Recovery.gov, set up by the Obama administration to inform the public about the stimulus plan, the package includes about \$43 billion for investment in the energy sector, as well as about \$22 billion for tax relief.

After Habbart and Thompson met with the candidates, they both agreed Fabiani & Co. was the best choice to connect with some funds.

The firm had been recommended by the Altira Group LLC, a venture capital and private equity fund in Denver that made a \$7 million investment in Eco Power in October and has a seat on its board.

James Fabiani, the founder of Fabiani & Co., was a staff director on a U.S. Senate appropriations subcommittee until 1982. He worked with a private government affairs firm for years before starting his own outfit in 2002. It has grown to 19 staff members.

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Citigroup Suit Can't Clear Hurdle of Business Judgment Rule

By Elizabeth Bennett
Of the DLW

As banks have lost billions upon billions of dollars because of the collapse of the housing and credit markets, so too have their shareholders, resulting in more than a few derivative lawsuits.

One of the first opinions to examine claims related to subprime losses was entered by Chancellor William B. Chandler III of the Court of Chancery on Feb. 24.

Chandler dismissed all counts in the case *In re Citigroup Inc. Shareholder Derivative Litigation*, save one claim for corporate waste related to a \$68 million compensation package for outgoing Citigroup CEO Charles Prince that was approved by the board.

Regarding this claim, Chandler said that without more information, he could not judge whether the compensation package met the test for waste. Quoting case-law, the chancellor described waste as an

exchange so one-sided that no reasonable businessperson would judge the company had received adequate consideration. The chancellor also declined to stay the Citigroup case in favor of similar litigation in federal court in New York.

While Chandler noted that another set of facts could certainly lead to a different

outcome on the breach of fiduciary duty claims that he dismissed, he discussed the high bar shareholder plaintiffs need to surmount when pursuing such claims against a board of directors based on an alleged failure to properly oversee the business risk of a company.

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Chandler ruled, however, that the plaintiffs had not pleaded facts with the required specificity to excuse demand.

The complaint detailed what it called “red flags,” about the steadily worsening conditions in the housing and subprime market. Most of these were news reports.

According to a report by the Associated Press, Citigroup is one of the banks hardest hit by the financial crisis. A recent bailout deal by the U.S. government infused the bank with about \$25 billion in exchange for an equity stake of up to 36 percent. The deal was the third rescue attempt for the bank in the past five months, the report said.

“Since at least as early as 2006, in spite of the blatant red flags concerning the subprime crisis, the Individual Defendants knew or recklessly disregarded these risks, thereby failing to disclose and account for the fact that Citigroup was more exposed to the subprime market crisis than it had revealed,” the complaint stated.

These “warning signs” were not sufficient evidence the directors consciously disregarded their duties, the opinion said. Mostly, they are evidence that the directors made bad business decisions.

The business judgment rule was instituted for the express purpose of preventing jurists from using hindsight to second guess even catastrophic business decisions unless they were made in bad faith, the opinion said.

We must not let our desire to blame someone for our losses make us lose sight of the purpose of our law.’

— *Chancellor William B. Chandler III*

Chandler concluded the plaintiffs had not pleaded sufficient factual allegations of such bad faith in this case. Instead, he called their allegations “conclusory.”

The opinion contrasted the Citigroup situation with that described in a ruling from the Court of Chancery in the AIG case Feb. 10. *Delaware Law Weekly* wrote about the AIG case in its March 4 issue.

“Unlike the allegations in this case, the defendants in AIG allegedly failed to exercise reasonable oversight over pervasive fraudulent and criminal conduct,” Chandler wrote, adding, “There are significant differences between failing to oversee employee fraudulent or criminal conduct and failing to recognize the extent of a Company’s business risk.”

The conclusion of Chandler’s opinion does acknowledge that the unique character of these times. He noted the “staggering losses” that Citigroup has suffered.

“It is understandable that investors, and others, want to find someone to hold responsible for these losses, and it is often difficult to distinguish between a desire to blame someone and a desire to force those responsible to account for their wrongdoing,” the opinion said.

Delaware law, he continued, has been refined over hundreds of years and through many crises to provide guidance in such situations.

“We must not let our desire to blame someone for our losses make us lose sight of the purpose of our law,” Chandler wrote. “Ultimately, the discretion granted directors and managers allows them to maximize shareholder value in the long term by taking risks without the debilitating fear that they will be held personally liable if the company experiences losses.” •

Lobbying

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“I love to mention that Washington is a government town that has processes that appear generally to be chaotic,” Fabiani said. “If you can squeeze the chaos out of it, there are an awful lot of things Washington can do for business.”

Fabiani explained that a host of government decision makers will be examining a multitude of potentially good ideas pursuant to the American Recovery and Reinvestment Act of 2009, signed into law by President Obama on Feb. 17.

“The stimulus is meant to support those good ideas, but these ideas have to be sifted through and prioritized. That’s a tough process,” Fabiani said.

His firm, of course, handles that process for its clients: “Our business squeezes the chaos out,” Fabiani said.

In addition to the recent stimulus, there are many other programs — both existing and expected — of which an alternative energy technology company like Eco Power can take advantage.

A lobbyist does two things concurrently, Fabiani explained. One is to look for “pockets of money” in federal agencies such as the departments of defense, energy or the interior. A lot of the stimulus money would fall into this category, because it has already been allocated.

Competition is fierce for this money, Fabiani said, but the turn around time can be as quick as 90 days. About six months is the norm, however.

The other prong is going to Congress to try and get new monies into a particular project. This involves drafting and passing legislation and can take 15 to 18 months or longer.

“In that process the dollar amount can be larger and then can be more narrowly defined,” Fabiani said. “It’s more like a rifle shot where the other is more like a shotgun. In my firm, we do both of these things simultaneously. You can’t always win. You have to work both processes.”

Eco Power could benefit in a number of ways, Fabiani explained. There is straightforward government procurement of its system. For instance, the Defense Department has hundreds of millions of square feet of space and needs to convert 25

percent of its energy usage to renewable or sustainable energy by 2025.

Another possibility is a federal preference for Eco Power’s technology when it partners with the private sector. This means Eco Power could wind up as a subcontractor in a huge project that has General Electric or Siemens in the lead. The downside is that Eco Power is also in competition with these behemoths; hence the lobbyist.

Tax incentives are another piece of the federal monies picture.

“Like a lot of the stimulus money they are yet in the pipeline,” Fabiani said. “There are a half a dozen or more incentives to help investors or help a company like Eco Power reduce the cost of selling its technology.”

Eco Power needs to know when these incentives can be touted. Thompson also emphasized Fabiani’s legislative skills when it comes to changes in the law.

“One thing that is brutally apparent in this whole emissions environmental area is the lack of regulation at the federal level,” Thompson said. “Every state seems to have varying requirements. If Obama is true to his word, we certainly expect some kind of framework by later this year.” •