

Activist Files Suit Over Board Disqualification Bylaw

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Activist Stilwell Funds has sought to invalidate and enjoin the enforcement of HopFed Bancorp's bylaws on director qualifications, filing suit in the Delaware Court of Chancery. The activist owns 9.5% of the company's shares.

Stilwell Funds had previously nominated Robert Bolton, who was elected to the company's board at the 2013 meeting. In the complaint, the activist alleged that Bolton was excluded from committee service, and also barred him from major board deliberations by contending that he was affiliated with Stilwell. The complaint stated that the board even refused to reimburse Bolton for travel expenses to board meetings, and also discouraged his efforts to attend meetings by phone. Bolton chose not to seek re-election three years later when his term expired.

In 2015, Stilwell entered into a settlement with the SEC over a failure to adequately disclose conflicts presented by inter-fund loans between certain private investment partnerships it managed. The SEC order suspended Joseph Stilwell for 12 months from being affiliated with a registered investment adviser. In the same year, HopFed Bancorp added a provision to its bylaws covering director qualifications, which would render a director candidate ineligible if that person had been subject to a supervisory or enforcement action by a financial or securities regulatory agency that resulted in any kind of order. This prohibition extends to any representative or agent of, or a member of a group acting in concert with, anyone who is ineligible.

According to the plaintiffs, this would mean any nominee put forward by Stilwell Funds would not qualify as a director candidate if Stilwell himself were viewed as ineligible due to the SEC order. The activist alleged that the bylaw was adopted for the improper purpose of entrenching incumbent directors, is impermissibly vague and serves no legitimate purpose. As an example of the broad scope of the bylaw, the plaintiffs note that all of the major financial institutions and numerous other banks and investment firms, including several of the company's major institutional investors, have been subject to SEC orders for a variety of infractions.

The activist intends to make a nomination for the 2018 meeting and is seeking to have the court declare the bylaw invalid, or at least not preclude it from nominating candidates.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

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