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SEC/CORPORATE

SEC Issues No-Action Relief Pursuant to Rule 14a-8(i)(9)

As previously reported in the *Corporate and Financial Weekly Digest* edition of October 30, 2015, the Securities and Exchange Commission's Division of Corporation Finance ("Division") issued Staff Legal Bulletin No. 14H (SLB 14H) on October 22, 2015. SLB 14H established a new standard for determining when a shareholder proposal conflicts with a company proposal (providing that a direct conflict would exist if a reasonable shareholder could not logically vote for both proposals) and therefore may be excluded from the company's proxy statement under Rule 14a-8(i)(9).

On March 18, the Division issued its first no-action letter under the new standard detailed in SLB 14H, granting no-action relief to Illumina, Inc. Specifically, the Division stated that it would not recommend any enforcement action if Illumina excluded a shareholder proposal (proposed by corporate governance activist John Chevedden) requesting that the board take steps to ensure each voting requirement in the company's charter and bylaws that requires greater than a simple majority vote be eliminated and replaced by a requirement for a majority of the votes cast for and against the applicable proposal, or a simple majority in compliance with applicable laws.

In granting no-action relief, the SEC noted that the shareholder proposal directly conflicted with management's proposal seeking shareholder support for the retention of certain provisions in Illumina's charter and bylaws that require a vote of 66 $^{2/3}$ percent of the company's outstanding common stock, because a reasonable shareholder could not logically vote in favor of both proposals. Accordingly, the SEC determined there appeared to be a basis for Illumina to exclude the proposal under Rule 14a-8(i)(9). In granting no-action relief to Illumina, the SEC may have encouraged a strategy whereby a company puts forth its own proposal that intentionally directly conflicts with a shareholder proposal in order to prevent the shareholder proposal from being considered.

The complete text of no-action letter is available here.

SEC Issues New C&DI Relating to Description of Shareholder Proposals on Proxy Cards

On March 22, the Securities and Exchange Commission's Division of Corporation Finance issued a new Compliance and Disclosure Interpretation (C&DI) regarding how a registrant must describe a Rule 14a-8 shareholder proposal on its proxy card to be in compliance with Rule 14a-4 (a)(3) of the Securities and Exchange Act of 1934.

Rule 14a-4 (a)(3) requires that the form of proxy "identify clearly and impartially each separate matter intended to be acted upon." In that regard, C&DI clarifies that the proxy card should clearly identify and describe the specific action on which the shareholders will be asked to vote, regardless of whether it is a management or shareholder proposal. The C&DI provides the following specific examples of descriptions of proposals that would *not* satisfy the requirements of Rule 14 (a)(3):

- a management proposal to amend the company's Articles of Incorporation to increase the number of authorized shares of common stock as "a proposal to amend our articles of incorporation;"

- a shareholder proposal to amend a company's bylaws to allow shareholders holding 10 percent of the company's common stock to call a special meeting described as "a shareholder proposal on special meetings;" and
- the following other descriptions: (1) "A shareholder proposal on executive compensation;" (2) "A shareholder proposal on the environment;" (3) "A shareholder proposal, if properly presented;" and (4) "Shareholder proposal #3."

The complete C&DI is available here.

BROKER-DEALER

SEC Proposes Interpretation on Automated Quotations Under Regulation NMS

The Securities and Exchange Commission has proposed to issue an interpretation with respect to the definition of "automated quotation" under Regulation NMS. Rule 611 under Regulation NMS protects the best automated quotations of exchanges by prohibiting other exchanges from allowing trades to be executed at inferior prices, or "traded through." To be deemed an "automated quotation," a quotation must be, among other things, immediately executed and/or cancelled, transmitted and displayed, as appropriate. In the adopting release for Regulation NMS, the SEC provided that an "immediate" response meant the fastest response possible without any programmed delay. Any quotation that does not meet the requirements of an automatic quotation is deemed to be a "manual quotation."

In light of public comments on the national securities exchange application submitted by Investors' Exchange LLC, the SEC is proposing to grant more flexibility to exchanges with respect to automated quotations. Specifically, the SEC is proposing to interpret "immediate" to include response time delays at exchanges that are *de minimis*, whether intentional or not.

Interested persons may submit comments until 21 days after the SEC's proposed interpretation has been published in the *Federal Register*. The SEC's proposed interpretation is available here.

BANKING

Federal Reserve Board Proposes Enhanced Single-Counterparty Credit Limits for Large Banks

On March 4, the Federal Reserve Board (FRB) announced a re-proposal of rules that set single-counterparty credit limits for domestic and foreign bank holding companies with total consolidated assets of $50 billion or more. Prior versions of the rules, which will implement Section 165(e) of the Dodd-Frank Act, were proposed in 2011 and 2012.

In general, the rules will prohibit a US bank holding company, a foreign banking organization, and a US intermediate holding company of a foreign banking organization from having credit exposure to any unaffiliated company in excess of 25 percent of the entity's capital stock, and surplus if the entity has $50 billion or more in total consolidated assets. The rules impose even tighter limits on dealings between the largest financial institutions, so that a bank classified as a global systemically important bank, or a G-SIB, will be restricted to a credit exposure of no more than 15 percent of the bank's tier-one capital to another systemically important financial firm. In introducing the rules, FRB Chair Janet L. Yellen said, "We are determined to do as much as we can to reduce or eliminate the threat that trouble at one big bank will bring down other big banks."

A White Paper by the FRB that accompanies the proposed rule discusses the analysis and rationale for a more stringent single-counterparty rule that will apply to G-SIBs and for transaction between G-SIBs.

Comments on the proposed rules are due June 3.

The FRB press release and rule are available here.

The FRB White Paper is available here.

Regulators Issue New Guidance Related to Certain Prepaid Cards

On March 21, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration and the Financial Crimes Enforcement Network (collectively, the "regulators") issued new guidance related to the application of customer identification (CIP) program requirements to prepaid card customers. The regulators issued the guidance in connection with their authority under Section 326 of the US Patriot Act.

The guidance affects banks, savings associations, credit unions and branches of foreign banks and includes those prepaid cards that are marketed and managed by third-party program managers. The guidance requires the application of a CIP program to any prepaid card sold that is deemed by the regulators to be an "account" because it has any of the following characteristics: (1) the card can access a credit feature (e.g., a credit line); (2) the card has overdraft capability; or (3) the card has the ability to be reloaded with funds. If a prepaid card is deemed to be an account, the issuing bank (either directly or through its agent) is required to obtain the customer's name, date of birth and address, and is responsible for verifying the information provided by such customer.

Prepaid cards that cannot be reloaded by the customer or another party are not deemed to be "accounts" by the regulators and are therefore not subject to the CIP requirements. Additionally, if a card is sold that is not activated with any of the three characteristics described above, it is not an "account" until such characteristic has been activated.

In cases where cards do not have any of the three characteristics noted above, any program manager involved in the prepaid card program would be deemed to be the bank's customer and CIP requirements would apply to the vetting of the program manager as a customer of the issuing bank.

The guidance also sets forth contractual provisions that issuing banks should have in place with their prepaid card program managers, including an outline of each party's CIP obligations and the ability to inspect and receive information collected by such third party in connection with the issuing bank's CIP obligations.

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.

For more information, contact:

SEC/CORPORATE		
Mark J. Reyes	+1.312.902.5612	mark.reyes@kattenlaw.com
Mark D. Wood	+1.312.902.5493	mark.wood@kattenlaw.com
FINANCIAL SERVICES		
Janet M. Angstadt	+1.312.902.5494	janet.angstadt@kattenlaw.com
Henry Bregstein	+1.212.940.6615	henry.bregstein@kattenlaw.com
Kimberly L. Broder	+1.212.940.6342	kimberly.broder@kattenlaw.com
Wendy E. Cohen	+1.212.940.3846	wendy.cohen@kattenlaw.com
Guy C. Dempsey Jr.	+1.212.940.8593	guy.dempsey@kattenlaw.com
Kevin M. Foley	+1.312.902.5372	kevin.foley@kattenlaw.com
Jack P. Governale	+1.212.940.8525	jack.governale@kattenlaw.com
Arthur W. Hahn	+1.312.902.5241	arthur.hahn@kattenlaw.com
Christian B. Hennion	+1.312.902.5521	christian.hennion@kattenlaw.com
Carolyn H. Jackson	+44.20.7776.7625	carolyn.jackson@kattenlaw.co.uk
Ross Pazzol	+1.312.902.5554	ross.pazzol@kattenlaw.com
Fred M. Santo	+1.212.940.8720	fred.santo@kattenlaw.com
Christopher T. Shannon	+1.312.902.5322	chris.shannon@kattenlaw.com
Peter J. Shea	+1.212.940.6447	peter.shea@kattenlaw.com
James Van De Graaff	+1.312.902.5227	james.vandegraaff@kattenlaw.com
Robert Weiss	+1.212.940.8584	robert.weiss@kattenlaw.com
Lance A. Zinman	+1.312.902.5212	lance.zinman@kattenlaw.com
Krassimira Zourkova	+1.312.902.5334	krassimira.zourkova@kattenlaw.com
BANKING		
Jeff Werthan	+1.202.625.3569	jeff.werthan@kattenlaw.com
Christina J. Grigorian	+1.202.625.3541	christina.grigorian@kattenlaw.com

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