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SEC/CORPORATE

Register for Our 2021 Proxy Season Update Webinar

Please join Katten, Ernst & Young and Meridian Compensation Partners on Thursday, December 10 at 12:00 p.m. (CT) for a webinar discussion of key legal, governance and financial reporting developments and trends affecting public companies in the 2021 annual reporting and proxy season. CLE is available.

Further details are available here.

Registration is available here.

SEC Adopts Amendments Permitting Use of Electronic Signatures for EDGAR Filings

On November 17, the Securities and Exchange Commission adopted amendments to Regulation S-T to permit the use of electronic signatures in executing documents submitted electronically to the SEC through EDGAR.

Under existing Rule 302 of Regulation S-T, an electronic EDGAR submission is required to include a typed "conformed" signature of the signatory thereto. In addition, the signatory must manually sign the signature page to the electronic filing, with such manual signature serving as an authentication of the typed signature appearing in the EDGAR submission. The filer must retain a copy of the manual signature for a period of five years and be able to furnish a copy to the SEC upon request.

Acknowledging that the COVID-19 pandemic has increased the difficulty associated with obtaining manual signatures, and the improvements in technology and the otherwise widespread use of electronic signatures, the SEC has adopted amendments to Rule 302(b) of Regulation S-T to permit the use of electronic signatures by signatories, if certain conditions are satisfied.

Electronic Signature Standards

Under the amended rules, the EDGAR Filer Manual will require that, in order for a signatory to use an electronic signature, the signing process for the electronic signature must:

- require the signatory to present a physical, logical or digital credential that authenticates the signatory's identity;
- reasonably provide for non-repudiation of the signature;
- provide that the signature be attached, affixed or otherwise logically associated with the signature page; and
- include a timestamp to record the date and time of the signature.

We expect that the use of popular third party services for electronic signatures, such as DocuSign, will satisfy the applicable SEC requirements.

Initial Manually Signed Attestation

In addition, before a signatory initially uses an electronic signature, the signatory must manually sign a document attesting that the signatory agrees that the use of electronic signatures constitutes the legal equivalent of such individual's manual signature for purposes of authenticating the signature to any SEC filing. The signatory must maintain the manually signed attestation document for at least seven years after the date of the most recent electronically signed document.

The other requirements of Rule 302, including that the filer retain the signature page for a period of five years, remain unchanged.

The amendments will become effective immediately upon publication in the *Federal Register*.

The SEC's adopting release is available here.

ISS Issues Its 2021 Proxy Season Updates

On November 12, Institutional Shareholder Services (ISS) issued updates to its 2021 US benchmark proxy voting policies. ISS will apply the updated policies to shareholder meetings occurring on or after February 1, 2021.

Proxy advisory firms, such as ISS, review proposals to be voted on at public company shareholder meetings and make voting recommendations to their clients based on the firm's voting policies and standards.

Certain significant changes that ISS announced to its voting policies for 2021 are summarized below.

Gender Diversity

ISS recommends shareholders vote against or withhold votes from nominating committee chairs at companies where there are no women on the board of directors. For 2021, ISS has reduced the mitigating factors that provide an exception to situations where the company had both a woman on the board at the prior annual meeting ***and*** the board makes a firm commitment to return to a gender-diverse status within one year. Previously, ISS provided an exception in the case of either one of the two foregoing factors.

Racial and Ethnic Diversity

For shareholder meetings in 2021, ISS will identify in reports, but not recommend specific action with respect to, boards with no apparent racial and/or ethnic diversity. Starting in 2022, ISS will recommend a vote against or withhold vote for the nominating committee chair where there is no apparent racial and/or ethnic diversity on the board. ISS will provide an exception where the company had racial and/or ethnic diversity at the prior shareholder meeting ***and*** the board makes a firm commitment to appoint at least one racial and/or ethnic diverse member within one year. This follows California's new law requiring that, by the end of 2021, any public company with a principal executive office in California must have at least one director on its board from an "underrepresented community."

Poison Pills

ISS is maintaining its existing policy to recommend votes against or withhold votes from all director nominees where the company has a poison pill that was not approved by shareholders or the company makes a material adverse modification to an existing poison pill without obtaining shareholder approval. For 2021, ISS will now also recommend a vote against or withhold vote where a company has a poison pill with a "deadhand" or "slowhand" feature. These features, part of a "continuing director" requirement, generally limit or delay the ability of a board to redeem or terminate a poison pill when members of the board are replaced, including as a result of a proxy contest.

Director Term Limits

ISS policy had been to recommend against proposals that limit the tenure of outside directors through term limits. Going forward, this blanket recommendation will be replaced by a case-by-case analysis.

Federal Forum Selection Provisions

In the absence of serious concerns about corporate governance or board responsiveness to shareholders, ISS will generally recommend a vote in favor of a federal forum selection provision in a company's charter or bylaws that specifies the "district courts of the United States" as the exclusive forum for federal securities law litigation. Relatedly, the Delaware Supreme Court ruled in 2020 that federal forum selection clauses requiring that claims under the Securities Act of 1933 be brought in federal court are valid under Delaware law. ISS will recommend a vote against provisions that restrict the forum to a particular federal court.

State Law Forum Selection Provisions

ISS will recommend a vote in favor of exclusive forum provisions in charters or bylaws that specify Delaware courts as the exclusive forum for corporate law matters for Delaware corporations, in the absence of serious concerns about corporate governance or board responsiveness to shareholders, replacing the prior policy of reviewing such provisions on a case-by-case basis. For companies incorporated in states other than Delaware, ISS will maintain a case-by-case analysis for forum selection provisions. Going forward, ISS generally will recommend a vote against any provision that specifies a state other than a company's state of incorporation as the exclusive forum for corporate law matters.

Virtual Shareholder Meetings

ISS will generally recommend a vote for proposals allowing for shareholder meetings to be held by electronic means, so long as they do not preclude in-person meetings.

ISS's policy encourages companies to disclose the circumstances under which virtual-only meetings would be held and further encourages companies to allow for comparable rights and opportunities for shareholders to participate in electronic meetings as they would during in-person meetings.

In the case of shareholder proposals concerning virtual-only meetings (completely in lieu of any in-person meetings), ISS will make a case-by-case recommendation, taking into consideration the scope and rationale of the proposal and the concerns identified with the company's prior meeting practices.

Mandatory Arbitration/Sexual Harassment

ISS has issued new guidance on shareholder proposals requesting "reports" on a company's use of mandatory arbitration on employment-related claims and "reports" on company actions to strengthen policies and oversight to prevent workplace sexual harassment or risks posed by a failure to prevent workplace sexual harassment. ISS will consider these items on a case-by-case basis, taking into account the company's current polices and disclosures, and whether the company has been the subject of a recent controversy, litigation or regulatory action related to these matters.

The ISS's 2021 benchmark policy updates are available here.

SEC's Division of Corporation Finance Issues Updated C&DI Regarding Equity Line Financings

On November 13, the Division of Corporation of Finance (Division) of the Securities and Exchange Commission updated Compliance and Disclosure Interpretation 139.13 (C&DI).

The C&DI addresses equity line financings, whereby a company will rely on the private placement exemption from registration to sell securities under an equity line and then seek to register the "resale" of those securities. In an equity line transaction, an investor will commit to buy equity securities from a company on a periodic basis, and the company will have the right to "put' such securities to the investor on the terms set forth in the agreement. The Division views these registered re-sales as "indirect primary offerings" due to the company's right to put shares to the investor in the future and the lack of market risk resulting from the formula price contained therein.

The at-the-market limitations contained in Rule 415 under the Securities Act of 1933 (the Securities Act) would generally prohibit the registration of these transactions for companies that are not eligible to use Form S-3 or Form

F-3 for primary offerings. However, the C&DI provides, the Division will not object to companies registering the resale of the securities prior to the exercise of the equity line put, if the following conditions are satisfied:

- the company and the investor have entered into a binding agreement with respect to the private equity line financing at the time the registration statement is filed;
- the "resale" registration statement is on a form that the company is eligible to use for a primary offering;
- there is an existing market for the securities, as evidenced by trading on a national securities exchange or alternative trading system; and
- the equity line investor is identified in the prospectus as an underwriter, as well as a selling shareholder.

The revised C&DI removes the requirement that the company have "completed" the private transaction of all the securities it is registering prior to filing the registration statement.

In addition, the Division has indicated that they will not object to filing a registration statement for an equity line financing prior to the issuance of the securities, even when there are contingencies attached to the investor's obligation to accept a put of shares, so long as the above conditions are satisfied and the following terms are agreed upon by the parties and disclosed by the company at the time the registration statement is filed:

- the number of shares registered for resale;
- the maximum principal amount available under the equity line agreement;
- the term of the agreement; and
- the full discounted price (or formula for determining it) at which the investor will receive the shares.

Also on November 13, the Division withdrew C&DIs 139.15, 139.16, 139.17, 139.18, 139.19 and 139.20, which mainly related to the now-removed requirement that the private transaction have been "completed" prior to the filing of the registration statement.

The updated C&DI is available here.

SEC Division of Corporation Finance Releases Financial Reporting Manual Updates

On November 18, the Division of Corporation Finance (Division) of the Securities and Exchange Commission released updates to the Division's Financial Reporting Manual. The Financial Reporting Manual is a key source of the Division's informal accounting guidance and has been updated with changes through October 30.

In particular, the updates address:

- previously announced amendments to the definition of "Smaller Reporting Company;"
- changes to conform to the SEC's 2018 Disclosure Update and Simplification;
- previously announced amendments to the "Accelerated Filer" and "Large Accelerated Filer" definitions; and
- the removal of outdated Division guidance and Generally Accepted Accounting Principles (GAAP) references.

In addition, the updated Financial Reporting Manual formalizes the Division's existing policy and practice regarding audit requirements for target company financial statements included in proxy statements and registration statements on Form S-4 and Form F-4 of special purpose acquisition companies (SPACs). Where the target company's financial statements become those of the registrant upon consummation of the SPAC merger, the Financial Reporting Manual provides that the target's financial statements should be audited in accordance with the standards of the Public Company Accounting Oversight Board (PCAOB).

The updated Financial Reporting Manual does not yet give effect to the recently announced new rules relating to acquired company financial statements.

The updated Financial Reporting Manual is available here.

BROKER-DEALER

FINRA Files Proposed Rule Change to Address Firms With History of Misconduct

On November 16, the Financial Industry Regulatory Authority (FINRA) filed with the Securities and Exchange Commission a proposed rule change to (1) adopt FINRA Rule 4111 (Restricted Firm Obligations), which would impose additional conditions on member firms with a history of misconduct; and (2) adopt FINRA Rule 9561 (Procedures for Regulating Activities Under Rule 4111) and amend FINRA Rule 9559 (Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series) to create a new expedited proceeding to implement proposed Rule 4111.

Specifically, FINRA Rule 4111 would require member firms that have significantly higher levels of risk-related disclosures than similarly sized peers to maintain a deposit in a segregated account from which withdrawals would be subject to FINRA's approval, adhere to specified conditions or restrictions on the operations and activities of the member firm and its associated persons, or comply with a combination of such obligations. FINRA would preliminarily identify these member firms by using numeric, threshold-based criteria based on information primarily disclosed through Forms BD, U4, U5 and U6, as applicable.

A copy of the proposed rule change is available here.

DERIVATIVES

See "CFTC Extends Temporary Swap Data Reporting Relief for Certain International Swap Dealers and Major Swap Participants," "CFTC Extends Relief for SEFs From Certain Block Trade Requirements," "CFTC Extends No-Action Relief to SEFs From Certain Audit Trail Requirements Related to Post-Execution Allocation Information," "CFTC Unanimously Approves Final Rule for Granting Exemptions From DCO Registration," and "CFTC Unanimously Approves Final Rule Amending SEF Requirements" in the CFTC section.

CFTC

CFTC Extends Temporary Swap Data Reporting Relief for Certain International Swap Dealers and Major Swap Participants

On November 19, the Commodity Futures Trading Commission's Division of Market Oversight (DMO) issued a staff letter extending no-action relief to certain CFTC-registered swap dealers (SDs) and major swap participants (MSPs). The no-action relief, which was initially granted in 2013 and subsequently extended several times, was set to expire on December 1.

Under the terms of CFTC Letter No. 20-37, DMO confirms that it will not recommend that the CFTC take an enforcement action against a non-US SD or a non-US MSP for failure to comply with the swap data reporting requirements in Part 45 and Part 46 of the CFTC's regulations, provided:

- the swaps are with non-US counterparties that are not guaranteed affiliates, or conduit affiliates, of a US person;
- the entity is established in Australia, Canada, the European Union, Japan, Switzerland, or the United Kingdom; and
- the entity is not part of an affiliated group in which the ultimate parent entity is a US SD, US MSP, US bank, US financial holding company, or US bank holding company.

The no-action relief is time-limited and will expire on the earlier of December 1, 2022 or 30 days following the issuance of a CFTC comparability determination on swap data reporting rules for the jurisdiction in which the non-US SD or non-US MSP is established.

CFTC Letter No. 20-37 is available here.

CFTC Extends Relief for SEFs From Certain Block Trade Requirements

On November 13, the Commodity Futures Trading Commission's Division of Market Oversight (DMO) issued CFTC Staff Letter No. 20-35, which extends temporary no-action relief to swap execution facilities (SEFs) and other market participants originally provided by CFTC Staff Letter No. 17-60. (For additional information regarding CFTC Staff Letter No. 17-60, please refer to the November 17, 2017 edition of *Corporate & Financial Weekly Digest*.) Staff Letter No. 17-60 provided that DMO would not recommend enforcement action against a SEF that has rules and/or procedures that use the SEF's non-order book trading systems or platforms to facilitate the execution of block trades for swaps that are intended-to-be-cleared, and thus are not compliant with CFTC Regulation 43.2, subject to certain conditions being met.

The relief provided by CFTC Staff Letter No. 20-35 will expire on the compliance date of the Part 43 Real-time Public Reporting Requirements final rule, which codified the relief provided in CFTC Staff Letter No. 17-60 by amending the definition of "block trade" to allow block trades for intended-to-be-cleared swap blocks to be executed on a SEF's non-order book trading systems or platforms.

CFTC Staff Letter No. 20-35 is available here.

CFTC Extends No-Action Relief to SEFs From Certain Audit Trail Requirements Related to Post-Execution Allocation Information

On November 13, the Commodity Futures Trading Commission's Division of Market Oversight (DMO) issued CFTC Staff Letter No. 20-36, which extends no-action relief to swap execution facilities (SEFs) from the requirement to capture post-execution allocation information in their audit trail data.

The no-action relief provided by CFTC Staff Letter No. 20-36 is conditioned upon the SEF having a rule which requires that market participants provide post-execution allocation information to the SEF for particular trades, in the event that the SEF, at the request of the CFTC or otherwise, requests such information. Further, if in the course of a trade practice surveillance or market surveillance investigation into any trading activity involving post-execution allocations undertaken in response to a request of the CFTC or otherwise, the SEF must ascertain whether a post-execution allocation was made, and if so, the SEF must request, obtain, and review the post-execution allocation information as part of its investigation.

The relief provided by CFTC Staff Letter No. 20-36 will expire on the earlier of either (1) November 15, 2021 at 11:59 p.m. EST; or (2) the applicable effective or compliance date of a CFTC action (including a rulemaking or order) providing a permanent solution for SEF audit trail obligations related to post-execution allocation information.

CFTC Staff Letter No. 20-36 is available here.

CFTC Unanimously Approves Final Rule for Granting Exemptions From DCO Registration

On November 18, the Commodity Futures Trading Commission unanimously approved a final rule (Final Rule) establishing a framework for the CFTC to grant a clearing organization organized outside of the US an exemption from registration as a derivatives clearing organization (DCO) to permit the clearing organization to clear swaps transactions on behalf of certain US persons. Subject to the terms and conditions set out in the Final Rule, the CFTC may grant an exemption from registration if: (1) the CFTC determines that the clearing organization is subject to comparable, comprehensive supervision and regulation by its home country authorities; and (2) the clearing organization agrees that its clearing services on behalf of US persons will be limited to:

1. a US person that is a clearing member of the exempt DCO that clears swaps only for itself and those persons that fall within the definition of "proprietary account" set forth in CFTC Regulation 1.3;

2. a non-US person that is a clearing member of the exempt DCO that clears swaps for any affiliated US person that falls within the definition of "proprietary account"; and

3. a futures commission merchant that is a clearing member of the exempt DCO, or otherwise maintains an account with an affiliated broker that is a clearing member, for the purpose of clearing only proprietary swaps positions for itself and those persons that fall within the definition of "proprietary account."

The Final Rule codifies existing CFTC policies and procedures for granting such exemptions and establishes procedures the CFTC can use to modify or terminate an exemption. To date, the CFTC has exempted four non-US clearing organizations from registration.

The Final Rule will be effective 30 days after publication in the *Federal Register*.

The Final Rule is available here.

CFTC Unanimously Approves Final Rule Amending SEF Requirements

On November 18, the Commodity Futures Trading Commission (CFTC) unanimously approved a final rule (Final Rule) amending CFTC regulations relating to the execution of "package transactions" on swap execution facilities (SEFs) and the resolution of error trades on SEFs.

The final rule amends part 37 of CFTC regulations to allow the swap components of certain categories of package transactions to be executed on-SEF but through flexible means of execution, as opposed to the prescribed methods of execution for "required transactions." In addition, the Final Rule amends part 36 of CFTC regulations to provide for an exemption from the trade execution requirement for swap transactions that are executed as a component of a package transaction that also includes a new issuance bond component. The Final Rule codifies the majority of relief currently provided in CFTC No-Action Letter No. 20-31.

The Final Rule also enables SEFs to permit market participants to execute swaps transactions to correct operational or clerical errors using execution methods other than those required by CFTC regulations for required transactions. The Final Rule codifies the intent of CFTC No-Action Letter Nos. 17-27 and 20-01 to allow SEFs and market participants to correct operational or clerical errors.

The Final Rule will become effective 60 days after publication in the *Federal Register*.

The Final Rule is available here.

BREXIT/UK DEVELOPMENTS

Regulatory Capital – UK Authorities Jointly Publish Statement on New UK Prudential Rules

On November 16, the UK's HM Treasury, Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) jointly published a statement on the introduction of the new Investment Firms Prudential Regime (IFPR) and the UK implementation of Basel standards reflecting the CRR II Regulation (the Statement).

The European Union's own reforms of regulatory capital/ prudential rules (the Investment Firms Directive and Regulation (collectively IFR)) are scheduled to go into effect on June 26, 2021; however, the UK Government has not committed to implementing the IFR in the UK in light of the Brexit transition period ending at 23:00 UK time on December 31. This is, in part, because of what the Statement refers to as "the general volume of regulatory reform in 2021". However, HM Treasury, the FCA and the PRA have set a target to implement UK-specific and similar reforms by January 1, 2022. This does not affect the target implementation date for the final Basel III reforms (known as Basel 3.1) of January 1, 2023.

In the Statement, HM Treasury indicates that it will ensure the relevant legislation will be introduced in good time, and the FCA and the PRA collectively aim to provide the industry with as much insight on the final rules as possible ahead of January 1, 2022.

The legislative framework for these reforms will be introduced through the Financial Services Bill 2019-21.

The Statement is available here.

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

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