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SEC/CORPORATE

ISS Publishes Updated Policies for Proxy Voting Recommendations

On November 19, Institutional Shareholder Services (ISS) published updated policies for determining its proxy voting recommendations for meetings to be held on or after February 1, 2011. ISS's policy updates for 2011 include the following:

Executive Compensation

- ISS has adopted a new policy regarding the frequency of "say on pay" advisory votes. ISS will generally recommend that shareholders vote for annual advisory votes on compensation. In ISS's view, having say on pay votes every two or three years (as permitted under the recently adopted Dodd-Frank Wall Street Reform and Consumer Protection Act) would make it difficult to create meaningful and coherent communication between issuers and their shareholders with respect to executive compensation.

- ISS has revised its list of "egregious" pay practices that, by themselves, are generally sufficient to warrant a recommendation that shareholders vote against (or withhold votes for) say on pay proposals, equity incentive plan proposals and the election of compensation committee members. ISS will consider the following problematic pay practices to be "egregious": (1) re-pricing or replacing out-of-the-money stock options or stock appreciation rights; (2) excessive perquisites or tax gross-ups; and (3) new or extended agreements that provide for change in control payments exceeding three times base salary and the officer's average, target or most recent bonus, or change in control severance payments without involuntary job loss or substantial diminution of duties, or change in control payments with excise tax gross-ups. Whereas, in the past, ISS has accepted commitments from issuers to eliminate problematic pay practices going forward (precluding a vote recommendation from ISS), ISS will no longer accept such commitments, and encourages companies to adopt forward-looking policies to address problematic pay practices.

- ISS has adopted a new recommendation policy with respect to compensation packages triggered by a change in control. Although such recommendations will be evaluated on a case-by-case basis, the following practices may result in a recommendation to vote against so-called "golden parachute" provisions (under the Dodd-Frank Act, a separate advisory vote on "golden parachute" compensation is required in connection with a shareholder vote in an M&A transaction): (1) recently adopted or materially amended agreements that include excise tax gross-up provisions or single triggers; (2) single-trigger payments that will happen immediately upon the occurrence of a change in control, despite an executive's failure to achieve performance goals; (3) single-trigger vesting of equity based on shareholder approval of a change in control (rather than the consummation of the transaction); (4) potentially excessive severance payments; (5) golden parachute packages that are so attractive as to influence transactions that may not be in the best interests of shareholders; (6) unusual or outsized payments or option grants prior to a merger; (7) the company's assertion that a proposed transaction is conditioned on shareholder approval of the golden parachute advisory vote.

Elections and Voting

- ISS generally recommends that shareholders vote against individual directors who attend less than 75% of board and committee meetings without a valid excuse. Although ISS previously accepted either public or private disclosure explaining excessive absences, ISS's updated policy removes the option of privately disclosing an excuse. Instead, ISS will recommend voting against (or withholding a vote for) any director who failed to attend at least 75% of meetings, unless the company discloses in its proxy statement or other public filings the reasons for the director's absences. Generally, acceptable reasons include medical issues, family emergencies and missing only one meeting if the director's total service was three meetings or fewer.

- ISS modified its policies to provide that it will recommend shareholders vote against (or withhold votes for) all incumbent directors if the board failed to act on (1) a shareholder proposal that was approved by a majority of the shares outstanding in the previous year and (2) a shareholder proposal that was approved by the majority of shares cast in the last year and one of the two previous years (rather than the previous two consecutive years, under ISS's former policy).

- In recognition of potential abuses of the right of shareholders to act by written consent, particularly in hostile situations, ISS will consider on a case-by-case basis shareholder proposals to provide shareholders with the ability to act by written consent if the issuer has the following governance and anti-takeover provisions: (1) an unfettered right for shareholders to call special meetings at a 10% threshold, (2) a majority vote standard in uncontested director elections; (3) no non-shareholder approved poison pill; and (4) an annually elected board. Previously, ISS's policy was to generally recommend that shareholders vote for shareholder proposals to enable shareholders to vote by written consent.

Authorized Capital Stock; Reverse Stock Splits

- ISS has revised its policies to emphasize the importance of adequate disclosure in proxy statements soliciting shareholder approval of an increase in the number of authorized shares of common or preferred stock. In formulating a recommendation to vote for or against such proposals, ISS will now take into account whether the issuer has disclosed, at a minimum, the specific and severe risks to shareholders of not approving the increase in authorized shares or reverse stock split.

- ISS has also indicated that it will recommend that shareholders vote against proposals to increase the number of authorized shares if a proposal to conduct a reverse stock split is included on the same ballot. Similarly, ISS will recommend that shareholders vote against proposals to conduct reverse stock splits without a proposal to proportionately reduce the number of shares that the issuer is authorized to issue, unless a stock exchange has provided notice to the issuer of a potential delisting or the effective increase in authorized shares resulting from the reverse stock split is less than the allowable increase calculated in accordance with ISS's increase in authorized shares policies.

Application of ISS's U.S. Governance Policies to Foreign Issuers

- Although ISS currently applies its benchmark policy based on an issuer's country of incorporation, ISS has revised its policy to apply its U.S. policy to issuers that are incorporated outside of the United States, but file reports with the U.S. Securities Exchange Commission on forms 10-K, 10-Q and Schedule 14A. Accordingly, ISS will consider issuers incorporated outside of the United States but listed on U.S. exchanges to be domestic issuers.

To view the complete text of ISS's U.S. Corporate Governance Policy 2011 Updates, click here.

BROKER DEALER

SIPC Proposes Bylaw Change Relating to SIPC Fund Assessments

On October 8, the Securities Investor Protection Corporation (SIPC) filed a proposed bylaw amendment with the Securities and Exchange Commission regarding the minimum annual assessments for SIPC members. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 amended the Securities Investor Protection Act of

1970 (SIPA) by changing the minimum assessments from $150 to 0.02% of a member's *gross revenues* from securities business.

SIPC now proposes to amend its bylaws to be consistent with SIPA, as amended by the Dodd-Frank Act. SIPC, however, proposes to change the minimum assessments benchmark from gross revenues to *net operating revenues*. SIPC believes most securities firms no longer structure their business on a gross revenue basis and instead use a net operating revenue basis (i.e., exclude interest and dividend expenses in their revenue calculations). Since assessments based on net operating revenues will be less than assessments based on gross operating revenues, SIPC's proposed rule change will still be consistent with SIPA, as amended by the Dodd-Frank Act.

On November 30, the Securities and Exchange Commission published a notice soliciting public comment on SIPC's proposal.

To read the SEC release, click [here](#).

CBOE and ISE Provide Guidance Regarding Professional Orders and Aggregation of Accounts

On December 1, the Chicago Board Options Exchange and C2 Options Exchange (collectively, CBOE) and the International Securities Exchange (ISE) issued regulatory circulars providing guidance on the definition of "professional" under each Exchange's rules. Under CBOE's and ISE's rules, a "professional" is any person or entity that (1) is not a broker-dealer in securities, and (2) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

CBOE and ISE clarified that for purposes of determining the average number of orders placed per day, a customer must aggregate all of its beneficial accounts. Thus, customers cannot avoid designation as a "professional" by spreading (or disaggregating) orders over numerous accounts.

Click [here](#) to read the Regulatory Circular.

CFTC

CFTC Announces Fifth Series of Dodd-Frank Rulemakings

The Commodity Futures Trading Commission has requested comments on the following five rule proposals to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

- *Segregation of Customer Funds Relating to Cleared Swaps*: Section 724 of the Dodd-Frank Act requires the CFTC to promulgate new rules concerning the segregation and protection of the collateral of swaps customers of futures commission merchants (FCMs). The CFTC is requesting information concerning the costs and benefits of various models for such segregation and protection requirements both at individual entities and across the industry. In particular, the CFTC is considering a range of models, including: (1) a model requiring individual segregation of each customer's collateral at all levels (at the FCM, the clearinghouse and at each custodian); (2) a model in which collateral of multiple customers may be commingled, but the value of the collateral for each customer's positions is treated on an individual basis; (3) a model in which the collateral of non-defaulting customers may be used in the event of an FCM default, but only after other elements of the clearinghouse's default resources package, including the clearinghouse's own contribution and the clearing member-funded guarantee fund; and (4) the current futures model, which treats an FCM's customers on an omnibus basis. Comments on these proposed rules must be submitted within 45 days of the proposal's publication in the *Federal Register*.

- *Protection of Collateral of Counterparties to Uncleared Swaps*: Section 724(c) of the Dodd-Frank Act requires that swap dealers (SDs) and major swap participants (MSPs) notify their counterparties that they have a right to require that any initial margin posted to guarantee uncleared swaps be held with a third party custodian. The CFTC is proposing a rule which would require any such custodian to be independent from both the SD or MSP and the counterparty, and that any such custody arrangement be made pursuant to a written custody agreement that meets certain minimum standards of clarity.

The proposed rule would additionally require segregated margin to be invested only pursuant to CFTC Rule 1.25. The proposed rule would not, however, limit the types of margin collateral that a customer could post or limit any commercial arrangements between the parties concerning allocation of gains and losses resulting from such investments.

The proposed rule further touches on two additional unrelated matters. Section 713(c) of the Dodd-Frank Act requires the CFTC to ensure that, and the proposed rules clarify that, securities held in a portfolio margining account carried as a futures account are customer property and the owners of those accounts are customers for the purposes of the commodity broker provisions of the Bankruptcy Code. Finally, the proposed rule would change certain time periods concerning commodity broker bankruptcies to seven calendar days to conform with the Statutory Time-Periods Technical Amendments Act of 2009.

- *Real Time Public Reporting of Swap Transactions and Pricing Data*: The Dodd-Frank Act requires that information regarding swap price and volume be publicly reported "as soon as technologically practicable" following execution of a swap transaction. Accordingly, the CFTC has announced proposed rules requiring reporting of swap data (such as the contract type, the underlying asset class and commodity and the payment frequencies) to a "real-time disseminator," such as a swap data repository (SDR), which would make such information publicly available. The reporting requirement would be satisfied either by (a) a swap execution facility (SEF) or designated contract market (DCM) for swaps executed on an SEF or DCM, or (b) the appropriate counterparty to the swap for swaps not executed on an SEF or DCM, according to the following order of precedence set forth in the rules: (1) an SD counterparty, if applicable, (2) an MSP counterparty, if applicable, or (3) either counterparty, as decided by the parties, if neither of the parties is an SD or MSP, or both parties are SDs or MSPs.

  According to the CFTC, "as soon as technologically practicable" means "as soon as possible, taking into consideration the prevalence, implementation and use of technology by comparable market participants." Under the proposed rules, data regarding block trades and other large notional swaps is subject to a reporting delay. The delay for standard contracts which are traded on an SEF or DCM (or are subject to the end-user exemption) is 15 minutes from the time the transaction is executed. The CFTC has requested comment on the appropriate time delay for reporting customized trades.

  The appropriate minimum block size for block trades and other large notional transactions would be determined by using the larger size outcome of two tests: the "distribution" test, which determines the transaction size that is larger than 95% of transactions for the applicable category of swap instrument over the prior calendar year, and the "social size multiple" test, which determines the transaction size that is five times the largest of the mean, median and mode of transaction sizes for the applicable category of swap instrument over the prior calendar year. The CFTC has requested comment on whether the appropriate minimum block size should be set such that less than 10% of swap transactions in the applicable category of swap instrument would have qualified as a block trade or large notional swap transaction.

- *Registration and Regulation of Swap Data Repositories*: The CFTC has also proposed a new series of rules (the Part 49 Rules) to implement Section 728 of the Dodd-Frank Act, which creates a new registration category under the Commodity Exchange Act for "swap data repositories." SDRs will collect and maintain data related to swap transactions and will make such data directly available to the CFTC and other specified foreign and domestic regulatory agencies. Under the Part 49 Rules, SDRs would be required to file for registration electronically using new Form SDR, after which the CFTC would have a 180-day period in which to review such application (subject to extension for good cause). However, during the first year after adoption of the Part 49 Rules, an applicant would be permitted to request provisional registration while its application remains under review by the CFTC.

  The Part 49 Rules implement various statutory duties applicable to SDRs, including requirements that SDRs (a) establish policies and procedures regarding the acceptance, confirmation and confidential treatment of data collected by an SDR, (b) provide the CFTC with direct electronic access to such information, and (c) maintain records in accordance with CFTC regulations. The Part 49 Rules also (1) prescribe additional duties for SDRs, including the adoption of system safeguards and recovery plans, provision of disclosure documents to market participants, maintenance of sufficient financial resources and establishment of provisions to ensure non-discriminatory access, and (2) implement the core principles applicable to SDRs under the Dodd-Frank Act (relating to antitrust considerations, governance arrangements and conflicts of interest). Under the CFTC proposal, the new Part 49 Rules would take effect no earlier than July 15, 2011.

- *Swap Data Recordkeeping and Reporting*: Section 728 of the Dodd-Frank Act requires SDRs to collect and maintain information regarding swap transactions, and to make such data electronically available to regulators. The CFTC has accordingly issued a proposed rulemaking to establish standards for SDRs' recording of swap data. The proposal would require that such records (a) be maintained during the life of a swap transaction and for at least five years following the swap's termination or expiration, and (b) be readily accessible during the course of the transaction and for at least the first two years of this five-year period. Additionally, swap data must be reported at the time of the swap's creation and during the life of the swap, until its termination or expiration, using unique identifiers specified by the proposed rules. The proposals provide for SDRs to designate appropriate facilities, methods and data standards for reporting. Finally, while the proposed rules permit registered entities and counterparties to contract with third-party service providers to facilitate reporting of swap data, such parties would remain accountable for reporting requirements under the rules.

Unless otherwise noted, the comment periods for the above proposed rulemakings will expire 60 days from the dates of the publications of the respective rule proposals in the *Federal Register*. Information regarding all of the CFTC proposals, including the text of the CFTC releases, fact sheets and Q&As can be found here.

CFTC's Fourth Series of Dodd-Frank Rulemakings Published for Comment in Federal Register

A number of the proposals approved by the Commodity Futures Trading Commission at its meeting on November 10 and reported in the November 19 edition of *Corporate and Financial Weekly Digest* were published for comment in the *Federal Register*.

The release requesting comment on the CFTC's notice of proposed rulemaking regarding registration of foreign boards of trade is available here. The CFTC's proposed rule requiring each futures commission merchant, swap dealer (SD), and major swap participant (MSP) to designate a chief compliance officer and file an annual report regarding its compliance activities is available here. Both of these releases were published November 19; the comment period for each ends January 18. Additionally, the release requesting comment on the CFTC's proposed rules that would establish and govern the duties of SDs and MSPs is available here. The CFTC's notice of proposed rulemaking regarding conflicts of interest requirements applicable to SDs and MSPs is available here. Finally, the CFTC's proposed rules governing registration of SDs and MSPs is available here. All three of these releases were published November 23, and the comment period for each ends January 24.

CFTC Requests Comment on Interagency Study

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Commodity Futures Trading Commission is charged with leading an interagency working group in (1) conducting a study regarding the oversight of existing and prospective carbon markets, and (2) making recommendations to Congress for the oversight of carbon markets to ensure their efficiency, transparency and security. The CFTC has requested public comment on the study, specifically with regard to the study's regulatory objectives and the ultimate oversight of the carbon markets.

The comment period closes December 17. The CFTC's notice and request for comment is available here.

LITIGATION

Ninth Circuit Holds Assertion of Counterclaim Does Not Waive Improper Venue Defense

Investors filed a complaint in the U.S. District Court for the District of Arizona against the former president and CEO of a corporation that no longer had any assets, his wife, and the company's former securities counsel. Defendants filed answers that included an affirmative defense of improper venue premised on the forum selection clauses in the agreements between the parties. Defendants also filed counterclaims, as well as a third-party complaint against the individual who sold the shares in the corporation to plaintiffs. The district court dismissed the complaint for improper venue based on the forum selection clauses.

On appeal, plaintiffs argued that by filing an answer with affirmative defenses and counterclaims, and a third-party complaint, defendants waived any improper venue defense. Affirming the district court's decision, the U.S. Court of Appeals for the Ninth Circuit held that the mere assertion of a counterclaim will not waive a defense of improper venue that was explicitly asserted in an answer. The court also found that parties may argue alternative positions without waiver. (*Hillis v. Heineman*, No. 09-17040, 2010 WL 4673675 (9th Cir. Nov. 19, 2010))

Motion to Dismiss Consumer Protection Claims Denied

Plaintiffs brought claims against defendant, a satellite digital audio radio service provider (SDARS), alleging that the 2008 merger of defendant's predecessors created a monopoly in the surviving company and violated federal antitrust laws and various state consumer protection laws, among other things.

The complaint alleges that defendant now controls 100% of the market for SDARS and that there is no economically viable alternative product that is interchangeable with that provided by defendant. The complaint further alleges that the merger was a willful attempt to exert monopolistic control over the SDARS market since the merged companies had been the only SDARS providers, and entry into the SDARS market is prohibitively costly. Plaintiffs assert that defendant's allegedly monopolistic actions resulted in artificially inflated, noncompetitive prices, thereby harming plaintiffs, who are defendant's subscribers, and all others similarly situated.

Defendant moved to dismiss the state consumer protection claims, asserting that plaintiffs do not have standing to bring claims under the consumer protection statutes of states in which no plaintiff resides. The court denied the motion, reasoning that the claims should be allowed to go forward until the pending motion on class certification is decided. The court further noted that plaintiffs in a proposed class action commonly bring claims under consumer protection laws of states where they do not reside in order to preserve those claims in anticipation of eventually being joined by class members who do reside in the states for which claims have been asserted. (*Blessing v. Sirius XM Radio Inc.*, No. 09 Civ. 10035, 2010 WL 4642607 (S.D.N.Y. Nov. 17, 2010))

BANKING

Nationwide Meetings Slated on OTS Integration into OCC

The Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS) are sponsoring a series of nationwide informational meetings detailing the OTS's integration into the OCC. OTS- and OCC-regulated institutions are invited to the meetings, and representatives from both agencies will discuss, among other topics, what federally chartered savings associations can expect from the change.

The OCC/OTS sessions will run from 8:30 a.m. to 2:15 p.m. Federal Reserve representatives will host sessions beginning at 2:30 p.m. on the transition of savings and loan holding company supervision.

The list of dates is available here.

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