

CORPORATE & FINANCIAL

WEEKLY DIGEST

February 18, 2011

SEC/CORPORATE

SEC Division of Corporation Finance Issues Seven New C&DIs Regarding Say-On-Pay and Golden Parachute Compensation

On February 11, the Securities and Exchange Commission's Division of Corporation Finance issued Compliance and Disclosure Interpretations (C&DIs) with respect to Regulation S-K, Item 402(t) – Golden Parachute Compensation and Rule 14a-21 under the Securities Exchange Act of 1934 – Shareholder Approval of Executive Compensation.

C&DI 128B.01 clarifies Instruction 1 to new S-K Item 402(t)(2) relating to golden parachute compensation disclosure. Although the instruction provides that disclosure is required for those executive officers included in the most recently filed Summary Compensation Table, disclosure is always required for the principal executive officer and principal financial officer, even if disclosure was not provided for such individuals in the most recently filed Summary Compensation Table pursuant to Items 402(a)(3)(i) and (ii) because they assumed such positions after the Summary Compensation Table was filed.

C&DI 169.04 states that the say-on-frequency vote required by Rule 14a-21(b) does not need to be in the form of a resolution.

C&DI 169.05 states that the say-on-pay vote does not need to include the formal words "pursuant to Item 402 of Regulation S-K" and may instead include a plain English equivalent, such as "pursuant to the compensation disclosure rules of the Securities and Exchange Commission, including the compensation discussion and analysis, the compensation tables and any related material disclosed in this proxy statement."

C&DI 169.06 states that it is permissible for the say-on-frequency vote to include the words "every year, every other year, or every three years, or abstain" in lieu of "every 1, 2, or 3 years or abstain."

C&DI 169.01, 169.02 and 169.03 all address how to determine whether an issuer is a smaller reporting company as of January 21, 2011. If an issuer is a smaller reporting company as of that date, the issuer will be entitled to rely on the delayed phase-in period for holding say-on-pay and say-on-frequency votes. An issuer's status as a smaller reporting company is based on such issuer's public float or annual revenues at the end of the second fiscal quarter of 2010. A change in status, if any, based on the issuer's second fiscal quarter of 2010 results is effective on the first day of such issuer's first quarter of 2011, regardless of whether such issuer has filed a report with the SEC indicating its new status.

C&DI 169.03 provides an example of an issuer who, based on its public float at the end of the second fiscal quarter of 2010, will no longer qualify as a smaller reporting company in its next fiscal year, which for such issuer begins on April 1, 2011. As this issuer's reporting status will change on the first day of its first quarter of 2011, April 1, 2011, such issuer will still be a smaller reporting as of the January 21, 2011 determination date and entitled to rely on the delayed phase-in period.

Click [here](#) to read C&DI 128B.

Click [here](#) to read C&DI 169.

BROKER DEALER

SEC Approves Consolidated FINRA Rule Governing Reporting Requirements

The Securities and Exchange Commission has approved the Financial Industry Regulatory Authority, Inc.'s proposal to adopt a rule on reporting requirements for the Consolidated FINRA Rulebook. FINRA Rule 4530, modeled after National Association of Securities Dealers (NASD) Rule 3070 and New York Stock Exchange Rule 351, requires member firms to report to FINRA certain specified events and quarterly statistical and summary information regarding written customer complaints, and file with FINRA copies of certain criminal actions, civil complaints and arbitration claims. According to Regulatory Notice 11-06, in most cases, the requirements of FINRA Rule 4530 are based on similar requirements in the NASD and NYSE rules.

FINRA Rule 4530 goes into effect on July 1. Any matter that becomes subject to reporting or filing prior to July 1 must be reported or filed in accordance with NASD Rule 3070 and NYSE Rule 351, as applicable, and any matter that becomes subject to reporting or filing on or after July 1 must be reported or filed in accordance with FINRA Rule 4530.

Click [here](#) to read FINRA Regulatory Notice 11-06.

FINRA Revises the FINRA Sanction Guidelines

The Financial Industry Regulatory Authority, Inc. has made modifications to the FINRA Sanction Guidelines (Regulatory Notice 11-07). According to the notice, the changes reflect the experience of FINRA's Departments of Market Regulation and Enforcement in settling and litigating cases, and incorporate the findings of federal appellate court and Securities and Exchange Commission precedent in recent FINRA disciplinary cases. The revised Sanction Guidelines are effective immediately and are available on [FINRA's website](#). Among other things, the revisions: (i) remove the Minor Rule Violation Plan Letter from the definition of a disciplinary "action" for purposes of considering prior actions; (ii) modify the guidelines for violations related to the sale of unregistered securities to reflect that adjudicators should consider higher fines and firm suspensions in egregious cases; and (iii) expressly provide for restitution or disgorgement in certain trading halt and best execution cases.

Click [here](#) to read FINRA Regulatory Notice 11-07.

FINRA Requests Comment on Proposed Consolidated FINRA Rules Governing Markups, Commissions and Fees

The Financial Industry Regulatory Authority, Inc. is requesting comment on proposed consolidated FINRA rules governing markups, markdowns, commissions and fees. FINRA proposes to transfer National Association of Securities Dealers (NASD) Rule 2440, NASD Interpretive Material-2440-1 and NASD IM-2440-2 to the Consolidated FINRA Rulebook (Rulebook) as FINRA Rule 2121, subject to significant changes. Among other things, FINRA proposes to eliminate the "5% policy" and the "proceeds provision" in NASD Rule IM-2440-1. FINRA also proposes to require firms to provide commission schedule(s) for equity securities to retail customers, and to notify and obtain consent from a customer to charge a commission when a firm misses the market and trades with the customer on a principal basis. In addition, FINRA proposes to transfer NASD Rule 2430 to the Rulebook as FINRA Rule 2123, and to require member firms to provide retail customers with schedule(s) of charges and fees for services. Comments must be received by FINRA by March 28.

Click [here](#) to read FINRA Regulatory Notice 11-08.

LITIGATION

Delaware Chancery Court Upholds Airgas's Poison Pill

The Delaware Chancery Court recently upheld the use of a shareholder rights plan, or "poison pill," by Airgas, Inc. (Airgas) to ward off a hostile takeover attempt by Air Products and Chemicals, Inc. (Air Products). The Chancellor's decision came after a lengthy hostile take-over battle waged by Air Products during which it made an

all cash tender offer for all outstanding shares of Airgas. Air Products's initial offer was priced at \$60 per share and ultimately was raised to a final offer of \$70 per share. Airgas's board unanimously concluded that the Air Products offer was inadequate, even after Air Products was able to have three of its own nominees elected to the board, and refused to remove its poison pill.

In a lengthy opinion, Chancellor Chandler concluded that the Airgas board's refusal to remove its poison pill was proper and not in breach of the board members' fiduciary duties. Chancellor Chandler analyzed the reasonableness of the Airgas's board decision to keep the pill in place under the heightened standard set by the Delaware Supreme Court in 1985 in *Unocal Corp. v. Mesa Petroleum Co.*, rejecting Airgas's argument that the business judgment rule should apply because there was "overwhelming evidence" of the directors' independence and good faith. Nevertheless, even under the heightened standard set forth in *Unocal*, which applies because of the "omnipresent specter" that a board may act in its own interests in a takeover situation, Chancellor Chandler concluded that the Airgas board acted reasonably.

Applying the *Unocal* standard, Chancellor Chandler concluded that Airgas demonstrated that it "had reasonable grounds for believing a danger to corporate policy and effectiveness existed" and that the steps it took in response to that threat were reasonable. In particular, the court determined that the board acted in good faith in responding to the offers from Air Products. In reaching this conclusion, the court pointed out that the board is comprised primarily of outside directors, including directors nominated by Air Products who ultimately agreed with the decision to keep the pill in place, and that it relied on the advice of several independent financial advisors in determining to reject the offer. Although noting that he believed the Airgas pill had served its legitimate purpose by giving the board time to express its view to stockholders on the merits of the tender offer, Chancellor Chandler held that the board's determination to reject the offer based solely on its conclusion that it was for an inadequate price was reasonable under current Delaware law. ([*Air Products and Chemicals, Inc. v. Airgas, Inc.*, Civ. Action Nos. 5249-CC, 5256-CC \(Del. Ch. Feb. 15, 2011\)](#))

District Court Finds Failure to Disclose All Relevant Information Renders Statements Misleading

The U.S. District Court for the District of Connecticut denied defendants' motion to dismiss plaintiff's complaint for securities fraud brought under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The complaint alleged that defendant Sturm Ruger, a company that designs, manufactures, and sells firearms, failed to disclose problems with its transition to a "lean manufacturing" model, and thereby misled plaintiffs into purchasing the company's stock at an artificially inflated value. After the announcement in late 2006 of its new manufacturing strategy, the company's share price rose, eventually trading at a high of over \$13 per share in March 2007. However, after two positive quarters, sales fell dramatically in the third quarter of 2007, as a result of the company's inability to produce its products at the necessary rate, and, not surprisingly, the company's stock price also suffered.

In their complaint, the plaintiffs pointed to a number of statements in the company's filings that they asserted were materially misleading because they did not reflect the "actual financial position of the company." The defendants moved to dismiss the complaint, arguing that the allegedly false statements upon which the securities fraud claims are based were not actionable, because the statements were (i) puffery and mere expressions of corporate optimism, (ii) forward-looking statements accompanied by reasonable cautionary language; or (iii) accurate. The district court agreed that a number of the statements were not actionable because they constituted mere puffery or forward-looking statements subject to the safe-harbor provisions in the Private Securities Litigation Reform Act.

The court concluded, however, that the complaint adequately alleged that several statements concerning the company's performance were materially misleading because they omitted critical information. Thus, for example, the court concluded that the complaint adequately alleged that the company's statements concerning the magnitude of its backlog were materially misleading without the additional disclosure that the backlog was due to a slow rate of production, not increased demand for the company's products. As a result, and because the court also determined that the plaintiffs had adequately alleged scienter, the court denied the motion to dismiss. (*In re Sturm, Ruger and Co.*, No. 3:09-cv-1293, 2011 WL 494753 (D. Conn. Feb. 7, 2011))

BANKING

FFIEC Finalizes Call Report Changes for Banks

The Federal Financial Institutions Examination Council (FFIEC) announced on February 14 that it has approved revisions to the reporting requirements for the Consolidated Reports of Condition and Income (Call Report). These revisions will take effect as of March 31, and include most, but not all, of the proposed Call Report changes that the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve Board, and the Office of the Comptroller of the Currency (the agencies) published on September 30, 2010. The agencies made certain modifications to their original proposal in response to the comments they received.

The Call Report revisions are intended to provide data to meet safety and soundness needs or for other public purposes. The revisions will help the agencies better understand banks' credit and liquidity risk exposures, primarily through enhanced data on loans, deposits, and securitization activities. A number of the reporting changes will be relevant to only a small percentage of banks. The reporting changes include:

- A breakdown by loan category of the existing Memorandum items for loans that are troubled debt restructurings in Schedule RC-N – Past Due and Nonaccrual Loans, Leases, and Other Assets, and Schedule RC-C, part I – Loans and Leases, as well as the elimination of the exclusion from reporting restructured troubled consumer loans in these items;
- The addition of automobile loans as a new loan category separate from other consumer loans in Schedule RC-C, part I; Schedule RC-D – Trading Assets and Liabilities; Schedule RC-N; and Schedule RI-B, part I – Charge-offs and Recoveries on Loans and Leases;
- A breakdown of the existing items for commercial mortgage-backed securities between those issued or guaranteed by U.S. Government agencies and sponsored agencies and those not issued or guaranteed by these agencies in Schedule RC-B – Securities, and Schedule RC-D;
- A new item for the estimated amount of non-brokered deposits obtained through the use of deposit listing service companies in Schedule RC-E – Deposit Liabilities;
- A breakdown of the existing items in Schedule RC-E for brokered deposits of \$100,000 or more and time deposits of \$100,000 or more with a remaining maturity of one year or less that will distinguish between deposits of (1) \$100,000 through \$250,000 and (2) more than \$250,000. This change will enable the agencies to modify the definitions of core deposits, non-core liabilities, and short-term non-core liabilities for Uniform Bank Performance Report calculation purposes beginning with Call Report data reported as of March 31;
- A new Schedule RC-V – Variable Interest Entities for reporting the assets of consolidated variable interest entities (VIEs) that can be used only to settle the VIEs' obligations, the liabilities of consolidated VIEs without recourse to the bank's general credit, and the other assets and liabilities of consolidated VIEs, with these data reported separately for securitization vehicles, asset-backed commercial paper conduits, and other VIEs;
- A breakdown by category of the existing items for loans and other real estate owned covered by FDIC loss-sharing agreements in Schedule RC-M – Memoranda, along with a breakdown by loan category of past due and nonaccrual covered loans in Schedule RC-N;
- A breakdown of the existing item for "Life insurance assets" in Schedule RC-F – Other Assets, into items for general account, separate account, and hybrid account life insurance assets;
- New items for the total assets of captive insurance and reinsurance subsidiaries in Schedule RC-M;
- New Memorandum items in Schedule RI for credit valuation adjustments and debit valuation adjustments included in trading revenues for banks with total assets of \$100 billion or more;
- A change in reporting frequency from annual to quarterly for the data reported in Schedule RC-T – Fiduciary and Related Services, on collective investment funds and common trust funds for banks with fiduciary assets greater than \$250 million or gross fiduciary income greater than 10 percent of bank revenue; and
- Instructional revisions that would incorporate residential mortgages held for trading within the scope of Schedule RC-P – 1-4 Family Residential Mortgage Banking Activities and clarify the reporting of construction loans following the completion of construction in Schedule RC-C, part I, and other schedules that collect loan data.

For the March 31 report date, banks may provide reasonable estimates for any new or revised Call Report item initially required to be reported as of that date for which the requested information is not readily available. After considering the comments received on the Call Report revisions proposed last year, the FFIEC decided not to implement the proposed items for interest income and quarterly averages for automobile loans, but, as noted above, new items for automobile loans will be added to other Call Report schedules. In addition, the FFIEC is not adding the proposed breakdown of deposits of individuals, partnerships, and corporations into deposits of individuals and deposits of partnerships and corporations in Schedule RC-E. The agencies also are not introducing a proposed change to the instructions for reporting repricing data that would have revised the treatment of assets and liabilities with interest rates that have reached contractual ceilings or floors.

To view the Call Report Forms, click [here](#).

To view Reports of Condition and Income Forms and User Guides, click [here](#).

ANTITRUST

FTC Revises Hart-Scott-Rodino Filing Thresholds

The Federal Trade Commission has raised the thresholds governing premerger notification filings that must be made under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR, or the Act). Effective February 24, transactions valued above \$66 million will require HSR notification when they meet the other requirements of the HSR Act. This is an increase from the previous threshold of \$63.4 million. The filing thresholds for larger transactions have been adjusted as well. The old \$126.9 million threshold has been increased to \$131.9 million, and the old \$634.4 million threshold has been increased to \$659.5 million.

Under the new thresholds, the filing fee for notifiable transactions valued above \$66 million but less than \$131.9 million remains at \$45,000. Transactions valued above \$131.9 million but below \$659.5 million will require a filing fee of \$125,000. Transactions valued above \$659.5 million will require a filing fee of \$280,000.

For transactions valued between \$66 million and \$263.8 million under the Act, the “size of person” test must also be met for a filing to be required. The size of person thresholds have also been revised. Under the new thresholds, one party to the transaction must have net sales or total assets of at least \$13.2 million, and another party to the transaction must have net sales or total assets of at least \$131.9 million. Transactions valued greater than \$263.8 million under the HSR rules will require a filing regardless of the size of the persons involved.

The above changes to the HSR thresholds have been published in the Federal Register, available [here](#).

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