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Corporate and Financial Weekly Digest

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SEC/CORPORATE

SEC Issues New Interpretations on Executive Compensation and Corporate Governance Reporting

On February 16, the Securities and Exchange Commission's Division of Corporation Finance issued new Compliance and Disclosure Interpretations (C&DIs) on executive compensation reporting under Regulation S-K. The SEC also published new C&DIs addressing proxy disclosure obligations with respect to outgoing directors and the timing of filing current reports under new Item 5.07 of Form 8-K.

The SEC's new guidance on executive compensation disclosures included the following:

- The SEC stated that for registration statements on Form S-1 for which an issuer seeks effectiveness after the end of the issuer's fiscal year but before the issuer's annual report for such year is filed on Form 10-K, the registration statement must include executive compensation disclosure under Item 402 of Regulation S-K for such fiscal year before it can be declared effective.
- The SEC opined that if an executive officer receives an equity award which, by its terms, does not provide for acceleration of vesting, and such equity award is subsequently modified to provide for vesting acceleration upon the occurrence of a certain event (such as the executive's departure), the issuer must include in its Summary Compensation Table for the grant year the original fair value of the award as of the grant date, and in the year in which the acceleration occurs the incremental fair value as a result of acceleration. If the award grant and the subsequent acceleration for such award occur in the same year, then the executive's total compensation for that year should include the original fair value of the award and the incremental fair value due to acceleration.
- The SEC stated that if an executive receives an annual incentive award which, by its terms, does not permit stock settlement, and the executive subsequently agrees with the issuer to settle the award in stock, the award should be reported (1) in the non-equity incentive plan award column of the Summary Compensation Table with an appropriate footnote and (2) in the estimated future payouts under non-equity incentive awards columns of the Grants of Plan-Based Awards Table. The SEC further asserted that the stock issued to the executive upon settlement of the incentive award should not be included in the Grant of Plan-Based Awards Table.
- The SEC stated that if an executive receives an annual incentive award which allows for settlement in stock or cash, and the executive elects to settle the award in stock, the award should be included in the Summary Compensation Table and Grant of Plan-Based Awards Table for such year as an equity incentive award. If the executive elects to settle the award in cash, the award should be included in each table for such year as a non-equity incentive plan award.

The SEC's guidance also provided that disclosures under Item 401(e) of Regulation S-K, which requires a description of the business experience and other directorships held by directors, need not be made in an issuer's proxy statement for any directors whose terms will not continue after the shareholders meeting.

In addition to the C&DIs provided with respect to Regulation S-K, the SEC clarified that current reports filed on Form 8-K pursuant to the new Item 5.07, which requires an issuer to disclose the results of voting at any shareholders meeting, must be filed by the fourth business day following the date on which the shareholder meeting ends.

The SEC's adoption of new governance disclosures and Item 5.07 was previously reported in the December 18 edition of *Corporate and Weekly Financial Digest*, as well as a Katten *Client Advisory* published on January 7.

Click here to view the C&DIs (Questions 116.07, 117.05, 119.22 and 119.23) with respect to Regulation S-K.
Click here to view the new C&DI (Question 121A.01) with respect to Form 8-K.

LITIGATION

Communications, Single Meeting Insufficient to Confer Personal Jurisdiction

The U.S. District Court for the District of Colorado adopted a magistrate judge's report and recommendation, holding that communications directed to Colorado and a personal meeting in Colorado did not provide a basis for personal jurisdiction over defendants in Colorado.

The case arose out of a contract between plaintiff, a Maryland limited liability company with a Colorado principal place of business, and defendants, Chinese and Delaware corporations. Plaintiff sent orders for goods from Maryland, which defendants would then ship from China to Maryland. During the course of performance, some communications took place with plaintiff's representatives in Colorado, and at least one face-to-face meeting took place in Colorado. Defendants ultimately breached the contract and plaintiff commenced suit in Colorado.

Defendants argued that they were not subject to jurisdiction in Colorado. Plaintiff cited numerous interstate phone calls and emails with its personnel in Colorado, as well as a personal meeting in Colorado, all of which allegedly had some connection with servicing the contract. However, the court held that the phone calls and emails to Colorado only took place in "non-routine circumstances" such as when there was a problem with an order—routine communications about the contract were directed to Maryland. The court determined that the meeting was not related to either contract formation or breach and that as a result, it could not provide a basis for jurisdiction in Colorado. (*G&G Internat'l LLC v. Camsing Co. LLC*, No. 09-CV-0366, 2010 WL 466812 (D.Co. Feb. 9, 2010))

Bankruptcy Court Grudgingly Permits Financial Advisor's Tail Fee Provision

The U.S. Bankruptcy Court for the Southern District of Texas issued a stern warning to professional services providers regarding "tail fees," establishing a presumption of unreasonableness against contract terms requiring fees not attached to tangible, identifiable and material benefits to the debtor's estate.

The case arose from the proposed retention by the debtor of an investment banking firm to act as financial advisor. As part of the heavily negotiated payment terms, the financial advisor contracted for a tail fee which could result in payment to the investment firm in the case of a transaction consummated within a period of 12 months, after the firm's contract was terminated, even if the investment bank had no involvement in procuring the transaction. The court stated that such a fee arrangement was presumptively unreasonable when sought in addition to other forms of compensation such as, for example, fixed monthly fees. However, in this case, the debtor overcame the presumption based on the extensive negotiations, the experience of the debtor's negotiator and the otherwise favorable payment arrangements with the investment banking firm. (*In re Bigler L.P.*, 2010 WL 447034 (Bankr. S.D.Tex. Feb. 9, 2010))

BROKER DEALER

FINRA to Propose Expansion of Broker Information Publicly Available through BrokerCheck

The Financial Industry Regulatory Authority announced this week that it will soon propose to the Securities and Exchange Commission a significant expansion of the amount of information about current and former securities brokers it makes available to the public through its free online BrokerCheck service. Proposed changes include disclosing all complaints filed against a broker since 1999 (when electronic filing of such information started), increasing the amount of time a former broker's records are publicly available from two years to ten years after the broker leaves the securities industry, and further expanding the amount of information that is permanently available about a former broker (including criminal convictions and certain civil decisions).

Read more.

FINRA Reminds Firms of Sales Practice Obligations with Respect to Reverse Exchangeable Securities

The Financial Industry Regulatory Authority issued a Regulatory Notice reminding firms that sell reverse exchangeable securities (aka, reverse convertibles) to ensure that their promotional materials and other public communications regarding such products adequately disclose the risks associated with them and that the firms' registered representatives understand such risks and perform an adequate suitability analysis before recommending reverse convertibles to customers.

Read more.

BANKING

Banking Agencies Release Statement on Meeting Credit Needs of Small Business Owners

On February 5, the Board of Governors of the Federal Reserve System, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Fund and the Conference of State Bank Supervisors (Banking Agencies) issued a joint statement regarding prudent lending to creditworthy small business owners (Statement).

In discussing the need for the Statement, the Banking Agencies noted that there has been a significant decline in loans outstanding to small businesses and farms and that such decline was attributable to a number of factors, including "weakness in the broader economy, decreasing loan demand, and higher levels of credit risk and delinquency." It was also noted that the decline may have also been caused by a desire on the part of some financial institutions to strengthen their own capital positions and balance sheets.

The Statement encourages the banks and credit unions to engage in prudent small business lending after performing a comprehensive review of a borrower's financial condition. Underwriting considerations should specifically include the strength of the borrower's business plan and the borrower's competition and local market conditions. Moreover, "to the maximum extent possible, loan decisions should be made based on the creditworthiness of the individual borrower, consistent with prudent management of credit concentrations."

For more information, click here.

Federal Reserve Releases Website Describing Consumer Credit Card Protections

On February 19, the Board of Governors of the Federal Reserve System (Federal Reserve) announced that it had launched a new interactive website to help consumers better understand the new credit card protections that take effect February 22.

The site is found at www.federalreserve.gov/creditcard and describes the main provisions of the new rules and explains how they will affect customers. A glossary of common credit cards is also found on the site, as well as facts about credit card options, interest rates and fees.

For more information, click here.

ANTITRUST

DOJ Challenging Non-Reportable Acquisition Nine Months After Deal Closed

The Department of Justice (DOJ) recently sued to dissolve a closed merger that did not require a filing under the Hart-Scott-Rodino (HSR) Act. In the suit, the DOJ seeks to undo Dean Food Company's April 2009 acquisition of Foremost Farms USA's Consumer Products Division. The transaction did not have to be cleared with federal antitrust agencies in advance because the purchase price was below the minimum reporting threshold set by the HSR Act. The case involves the acquisition by one milk processor of the plants of a competitor.

The complaint made extensive use of ill-considered internal documents and emails of the parties in which they explicitly discussed the acquired company's price competition using inflammatory language such as "irrational pricing." The DOJ seized on this language in alleging that the acquisition reduced competition in the sale of milk to school districts in Wisconsin and the Upper Peninsula of Michigan and reduced competition in the sale of milk to supermarkets, grocery stores and other commercial consumers in those areas as well as in northeastern Illinois. The DOJ is requesting that the court order Dean to divest the assets acquired in the deal, permanently enjoin Dean from reacquiring those assets and require Dean to notify the antitrust authorities prior to any future acquisition of any school milk or fluid milk processing system.

As this case demonstrates, the fact that the HSR Act does not require a transaction to be reported does not immunize it from subsequent scrutiny. The DOJ has the power to challenge deals even after they are consummated (nine months later, in this case) if there is evidence of anticompetitive effects. Therefore, acquirers need to be careful and judicious about the documents they create concerning competitors and potential acquisition targets, even when they do not have HSR reporting obligations. (*United States of America, et al. v. Dean Foods Company*, Case No. 10-C-0059 (E.D. Wis. filed Jan. 22, 2010))

EXECUTIVE COMPENSATION AND ERISA

Federal Budget Proposal for 2011 Contains COBRA Subsidy Extension

President Obama's proposed federal budget for fiscal year 2011 would extend the 65% subsidy for eligible individuals who wish to continue group health plan coverage through the Consolidated Omnibus Budget Reconciliation Act (COBRA). The America Recovery and Reinvestment Act of 2009 contained a COBRA continuation coverage premium subsidy that allowed eligible individuals, those who had lost group health plan coverage due to an involuntary termination of employment between September 1, 2008, and December 31, 2009, to pay only 35% of the regular COBRA premium for up to nine months. The Department of Defense Appropriations Act of 2010 then (1) extended the eligibility time period to those who were involuntarily terminated before February 28, 2010, (2) removed the requirement of the loss of health plan benefits, and (3) extended the subsidy time period to 15 months. The proposed federal budget for 2011 would enable employees who are involuntarily terminated from March 1, 2010, through December 31, 2010, to receive the subsidy. While a bipartisan jobs bill that contained provisions to extend the subsidy was scrapped last week, it is likely that the provisions will be re-introduced in another bill over the next several weeks.

Click here for more information about the original COBRA subsidy.
Click here for more information about the original extension.

UK DEVELOPMENTS

FSA Fines Oil Company Executives for Market Abuse

On February 16, the UK Financial Services Authority (FSA) published the final notices it had issued to three executives of Genel Enerji A.S., a Turkish oil exploration company, after finding all three men (Mehmet Sepil, Murat Ozgul and Levent Akca) had engaged in market abuse relating to dealing in the shares of Heritage Oil Plc, a UK listed company.

The fine imposed on Mr. Sepil, Genel's chief executive officer, was £967,005 (approximately $ 1,509,500), the largest market abuse fine by the FSA against an individual. The FSA fined Mr. Ozgul, Genel's chief commercial officer, and Mr. Akca, its exploration manager, £105,240 (approximately $164,250) and £94,062 (approximately $146,800), respectively. The fines reflected a 30% discount for settlement at an early stage of the FSA's investigation. Each fine included a sum representing disgorgement of profits: respectively £267,005 ($411,529), £35,240 ($54,315) and £10,062 ($15,507).

In March 2009, Genel entered into a joint venture with Heritage, regarding the exploration of the Miran oil field in Northern Iraq. On May 4, all three executives flew to London and discussed the positive test results which had been received from the oil field. The following day they all purchased Heritage shares.

On May 6, Heritage announced the results of the drilling tests at Miran and its share price increased by approximately 25%. On the same day, the three Genel executives sold their Heritage shares.

In each case, the FSA final notices state that the level of the penalty reflects the fact that the three men voluntarily contacted the FSA, expressed remorse, made admissions as to their conduct and cooperated in the FSA's investigation. The final notices also contain findings that the men did not set out to commit market abuse, were not familiar with the legal requirements which prohibited them from dealing in Heritage shares, and had not received legal advice at the time. Nonetheless, the FSA concluded that they were serious examples of insider dealing by persons in positions of responsibility, and in determining the appropriate level of the fine, the FSA considered, among other things, the need to punish them appropriately to deter others in similar positions from committing market abuse.

Click here to read the final notice for Mehmet Sepil.
Click here to read the final notice for Murat Ozgul.
Click here to read the final notice for Levent Akca.

Fine Imposed for Change of Control Offense

On February 17, the UK Financial Services Authority (FSA) announced that at the City of Westminster Magistrates Court, Semperian PPP Investment Partners Limited Partnership had pleaded guilty to acquiring an authorized firm before it had received the necessary FSA approval, an offense under Section 191(3) of the Financial Services and

Markets Act 2000. Semperian notified the FSA in mid-December 2008 that it proposed to acquire the firm in question but completed the purchase three weeks later, before FSA approval had been obtained.

The court imposed a fine of £1,000 (approximately $1,540), stating that Semperian had taken a calculated risk that the FSA would not prosecute. In determining the level of the penalty, the court noted that the maximum fine at the date of the offense was £5,000 (approximately $7,711; the penalty has since been increased to an unlimited fine), the fact that Semperian had pleaded guilty at the earliest opportunity and that there had been no adverse impact upon consumers.

For more details click here.

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