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SEC/CORPORATE

Proxy Advisory Firms Release Policy Updates for 2015

Institutional Shareholder Services (ISS) and Glass Lewis, two leading proxy advisory firms, recently published their 2015 proxy voting guidelines for US companies, which include several updates applicable to the 2015 proxy season.

Institutional Shareholder Services

Two significant updates included in ISS's 2015 proxy voting guidelines (the proposals of which were discussed previously in *Corporate & Financial Weekly Digest*) are as follows:

Equity Plan Scorecard: ISS adopted a "scorecard" model for evaluating equity plan proposals whereby voting recommendations will largely be based on a combination of factors, both positive and negative, related to (1) plan cost, (2) plan features, and (3) grant practices. Under the new scorecard approach, for S&P 500 and Russell 3000 companies, cost will be weighted 45 percent, grant practices 35 percent and plan features 20 percent, with roughly a dozen individual factors within each of these three areas. The scorecard approach replaces the series of "pass/fail" tests (focused on cost and certain egregious practices) previously used by ISS to determine whether to recommend voting "against" an equity plan.

Independent Chair Shareholder Proposals: Under the previous policy, ISS generally recommended in favor of independent chair shareholder proposals unless the company satisfied all of its six criteria. For 2015, ISS updated its independent chair proposal policy by adding new governance, board leadership and performance factors to its analytical framework and adopting a more holistic approach in which factors are examined in their totality.

In addition to the changes described above, ISS adopted a stand-alone policy (which codifies ISS's existing policy of evaluating bylaw and charter amendments under the "Governance Failures Policy") of recommending votes against (or withhold votes from) directors, generally, where the board amends the company's bylaws or charter without shareholder approval in a manner that materially diminishes shareholders' rights or that could adversely affect shareholders. With respect to bylaw amendments affecting shareholders' litigation rights, ISS expanded its policy of a case-by-case analysis applicable to exclusive forum provisions to also apply to bylaw amendments mandating arbitration or providing for fee-shifting. ISS also updated and refined its policies for analyzing proposals with respect to disclosure of political contributions, trade association spending policies and activities, as well as proposals relating to greenhouse gas emissions goals.

Glass Lewis

Glass Lewis's 2015 proxy voting guidelines also contained several updates.

Governance Committee Performance: Glass Lewis may recommend that shareholders vote against the chairman of the governance committee (or the entire committee) where the board, without shareholder approval, has amended the company's governing documents to reduce or remove important shareholder rights or to otherwise impede the ability of shareholders to exercise such rights. Examples of such amendments include charter or bylaw amendments that eliminate or reduce the ability of shareholders to act by written consent, call a special meeting, amend the company's charter or bylaws or pursue full legal recourse (including arbitration, forum selection and fee shifting bylaws); amendments providing for a classified board structure; or amendments that eliminate the power of shareholders to remove a director without cause. Glass Lewis generally will also recommend a vote against all members of the governance committee during whose tenure a shareholder proposal relating to important shareholder rights received majority support of the votes cast and the board failed to respond accordingly.

Pre-IPO Charter and Bylaw Provisions: Glass Lewis has increased its scrutiny of certain provisions (such as anti-takeover provisions, exclusive forum bylaws and fee-shifting bylaws) adopted in a company's charter or bylaws prior to its initial public offering. In the case of post-IPO director elections where these provisions are present, Glass Lewis will consider recommending votes against all members of the board, the chairman of the governance committee or all members of the governance committee.

"Material" Transactions with Directors: With respect to Glass Lewis's $120,000 threshold for directors employed by a professional services firm where the company pays the firm, rather than the individual, for services, Glass Lewis may deem such a transaction to be immaterial if the amount represents less than one percent of the firm's annual revenues and the board provides a compelling rationale as to why the director's independence is not affected.

Compensation: Glass Lewis has added a new discussion on its approach to analyzing "one-off" awards granted outside of existing incentive programs and added discussion regarding its approach to analyzing employee stock purchase plans.

To view the full text of ISS's 2015 proxy voting guideline updates for US companies, click here.

To view the full text of Glass Lewis's 2015 proxy voting guidelines for US companies, click here.

BROKER-DEALER

CBOE Makes Enhancements to Its Market-Maker Trade Notification System

The Chicago Board Options Exchange (CBOE) has issued Regulatory Circular RG14-155 regarding enhancements to its Market-Maker Trade Notification system. When a floor broker uses the CBOE's Public Automated Routing system to complete the trade endorsement process and a market-maker is a contra party on the transaction, a Market-Maker Trade Notification (MMTN) is generated by CBOE systems and made available to CBOE market-makers and their vendors.

In late November 2014, the MMTN message will be enhanced to give trading permit holders the following additional information on transactions between the market-maker and such floor brokers: (1) the time of execution recorded by the floor broker; and (2) a numeric value that serves as an alert code that is generated when a trade executed between the market-maker and a floor broker is a potential regulatory exception (which will be referred to as a "Trade Through" alert code). There are multiple conditions under which an alert will be included in the MMTN message, such as if the transaction is priced at or through a customer book or through the national best bid and offer (NBBO) or CBOE best bid offer (BBO) at the time the execution is recorded for CBOE audit trail purposes, or if the transaction is priced outside the market that existed when the floor broker pressed the "Represent" button on the PAR terminal. These alerts will be provided only as informational data based on a comparison of the transaction price to CBOE and/or away markets based on specific timestamps and are intended as an aid to trading permit holder compliance.

Click here for Regulatory Circular RG14-155.

DERIVATIVES

OTC Derivatives Regulators Group Issues Report to G20 Leaders

The OTC Derivatives Regulators Group (ODRG) has issued an update to the G20 Leaders on the ODRG's effort to resolve cross-border issues relating to over-the-counter derivatives reform. This update sets out the progress made by the ODRG since it published a report on cross-border issues in advance of the G20's St. Petersburg Summit in September 2013.

The report is available here.

CFTC

CFTC Issues Further Relief for Package Transactions

The Division of Market Oversight (DMO) of the Commodity Futures Trading Commission has issued an extension of no-action relief for swap execution facilities (SEFs), designated contract markets (DCMs) and swap counterparties from the trade execution requirement for certain "package transactions." As described in DMO's no-action letter, a "package transaction" is a transaction (1) between two or more counterparties involving two or more instruments, (2) that is priced or quoted as one economic transaction with simultaneous or near simultaneous execution of all components, (3) where the execution of each component is contingent upon the execution of all other components, and (4) that has at least one component that is a swap that has been made available to trade (MAT) and therefore subject to the trade execution requirement in Section 2(h)(8) of the Commodity Exchange Act (CEA).

As set forth below, the no-action letter grants relief for the following categories of package transactions:

MAT/Agency MBS. In this category, each swap component is subject to the trade execution requirement and all other components are agency mortgage-backed securities. For MAT/Agency MBS transactions, DMO has granted temporary relief (1) to counterparties from the trade execution requirement in CEA Section 2(h)(8), which would otherwise require counterparties to execute the swap components on a DCM or SEF, and (2) to DCMs and SEFs from the method of execution requirements in CFTC Regulation 37.9 and CEA Section 5(d)(9), which would otherwise restrict the execution methods that SEFs and DCMs may offer for the swap components. This relief expires May 15, 2015, for all affected parties.

MAT/New Issuance Bond. In this category, at least one swap component is subject to the trade execution requirement and at least one component is a bond issued and sold in the primary market. For MAT/New Issuance Bond transactions, DMO has granted temporary relief (1) to counterparties from the trade execution requirement in CEA Section 2(h)(8), (2) to SEFs and DCMs from the method of execution requirements in CFTC Regulation 37.9 and CEA Section 5(d)(9), and (3) to SEFs from the minimum trading functionality requirement in CFTC Regulation 37.3(a)(2), which would otherwise require SEFs to list the swap components on an order book. This relief expires February 12, 2016, for all affected parties.

MAT/Futures. In this category, at least one swap component is subject to the trade execution requirement and all other components are futures contracts. For MAT/Futures transactions, DMO has granted temporary relief (1) to counterparties from the trade execution requirement in CEA Section 2(h)(8), (2) to SEFs and DCMs from the method of execution requirements in CFTC Regulation 37.9 and CEA Section 5(d)(9), and (3) to SEFs from the minimum trading functionality requirement in CFTC Regulation 37.3(a)(2). This relief expires November 14, 2015, for all affected parties.

MAT/Non-MAT (Uncleared), MAT/Non-Swap Instrument and MAT/Non-CFTC Swap. In a MAT/Non-MAT (Uncleared) transaction, at least one swap component is subject to the trade execution requirement and at least one component is a swap that is subject to the CFTC's exclusive jurisdiction but is not required to be cleared. In a MAT/Non-Swap Instrument transaction, at least one swap component is subject to the trade execution requirement and at least one component is not a swap. In a MAT/Non-CFTC Swap transaction, at least one swap component is subject to the trade execution requirement and at least one component is a swap over which the CFTC does not have exclusive jurisdiction. For all three categories, DMO has granted temporary relief (1) to counterparties from the trade execution requirement in CEA Section 2(h)(8), (2) to SEFs and DCMs from the method of execution requirements in CFTC Regulation 37.9 and CEA Section 5(d)(9), and (3) to SEFs from the minimum trading functionality requirement in CFTC Regulation 37.3(a)(2). This relief expires (1) February 15, 2015, for counterparties and (2) February 12, 2016, for SEFs and DCMs.

In addition to the categories listed above, DMO additionally noted that no-action relief has already expired for the following categories of package transactions:

MAT/MAT. In this category, each component is a swap subject to the trade execution requirement.

MAT/Non-MAT (Cleared). In this category, at least one swap component is subject to the trade execution requirement and each of the other components is subject to the clearing requirement.

US Dollar Swap Spreads. In this category, each swap component is subject to the trade execution requirement and all other components are US Treasury securities.

CFTC Letter No. 14-137 is available here.

CFTC Issues 30.7 Customer Funds No-Action Relief and Interpretation

The Division of Swap Dealer and Intermediary Oversight (DSIO) of the Commodity Futures Trading Commission has issued no-action relief and interpretive guidance for futures commission merchants (FCMs) with customers that trade foreign futures and foreign options (i.e., 30.7 customers). As background, CFTC Regulation 30.7(c) limits the amount of 30.7 customer funds that FCMs may hold outside the United States with foreign brokers or other permitted depositories to no more than 120 percent of the required margin for 30.7 customers' foreign futures and foreign options positions. The no-action relief authorizes an FCM to exclude from the calculation of 30.7 customer funds permitted to be held outside of the US, those 30.7 customer funds held in a properly titled account established by the FCM in a bank or trust company located outside of the United States, provided the bank or trust company (1) maintains regulatory capital of at least $1 billion, and (2) provides the FCM a written acknowledgment letter in the form required by Appendix E to Part 30 prior to, or contemporaneously with, the opening of the account.

DSIO has also issued interpretations on two additional matters relating to 30.7 customer funds. Because of inherent delays in transferring 30.7 customer funds between US and non-US markets, DSIO has clarified that an FCM may net the funds it has requested from a foreign broker or clearing organization with the amount of funds the foreign broker or clearing organization is requesting from the FCM. Two separate transactions are not required in such situations.

DSIO has also clarified that transactions that rebalance an FCM's 30.7 customer accounts are for the benefit of the FCM's customers when the FCM first deposits US dollars into the accounts prior to withdrawing the equivalent amount in foreign currencies from the accounts. Because these transactions are for the benefit of customers, the FCM does not have to complete certain required daily computations before withdrawing the equivalent amount from the accounts.

CFTC Letter No. 14-138 is available here.

LITIGATION

Delaware Chancery Requires Payment of Merger Consideration to Dissenting Stockholder After Expiration of Appraisal Period

The Delaware Court of Chancery recently dismissed corporate mismanagement and breach of fiduciary duty claims filed by a dissenting stockholder, but ordered that the surviving corporation in a merger was required to pay the merger consideration to the dissenting stockholder when the statutory appraisal period expired.

Plaintiffs Ram and Neena Mehta ("Plaintiffs") owned shares of Smurfit-Stone Container Corporation, which had declared bankruptcy in 2009 and, post-bankruptcy, merged with Rock-Tenn Company in 2011. Plaintiffs made a timely demand for appraisal after the merger announcement but never perfected their statutory rights. In fact, Plaintiffs withdrew their appraisal demand roughly a year after making it, and no other stockholder filed an appraisal petition. Rock-Tenn, however, refused to pay the merger consideration to Plaintiffs unless Plaintiffs agreed to broad settlement terms.

Plaintiffs, appearing *pro se*, alleged breaches of fiduciary duty against the past and present directors of Smurfit and Rock-Tenn. Defendants moved to dismiss for failure to state a claim. The court found that Plaintiffs' claims concerning Smurfit's management and bankruptcy were barred by the broad releases set forth in the confirmation order approving Smurfit's plan of reorganization. The court further found that Plaintiffs' claims concerning the Smurfit/Rock-Tenn merger were barred by releases contained in the settlement agreement entered into in the customary "merger objection" litigation that followed the transaction.

The court, however, found that Plaintiffs had stated a claim against Rock-Tenn for failure to timely pay the merger consideration. Characterizing the denial of merger consideration as either breach of contract or unjust enrichment, the court held that the lapse or expiration of statutory appraisal rights creates an obligation to pay putatively dissenting shareholders their shares. Here, Rock-Tenn's refusal to pay Plaintiffs' merger compensation after their appraisal rights expired supported a claim for damages.

The court then provided three possible ways to measure damages based on the stock portion of the merger consideration. The shares could be valued on the date payment was due, the date of judgment, or, in recognition of Plaintiffs' power to sell at any time after the date the shares should have been issued and the judgment date, the date at which the value was greatest. The court refrained from adopting any particular method and indicated that such considerations would be more appropriate at a later stage in the case.

Mehta v. Smurfit-Stone Container Corp. et al., C.A. No. 6891-VCL (Del. Ch. Oct. 20, 2014).

Delaware Chancery Clarifies Discovery Obligations of Domestic Affiliate of Foreign Company

The Delaware Court of Chancery recently held that, for purposes of responding to a non-party subpoena, documents held by the foreign affiliate of a US corporation were not within the US corporation's "possession, custody, or control" and therefore were not required to be produced.

Theravectys SA had a contract with Henogen SA, a Belgium-based manufacturer of biomolecules. Theravectys sued Immune Design Corporation on the theory that Immune Design Corporation induced Henogen to breach its contract with Theravectys and/or that Immune Design Corporation misused Theravectys's confidential and proprietary information. Theravectys then served non-party Novasep Inc., a Pennsylvania-based corporate affiliate of Henogen, with various discovery requests.

Novasep claimed that it only markets Henogen to American clients and generally ceases interaction with the client once a manufacturing agreement is signed; as such, relevant documents (concerning Henogen's manufacture and shipment of products to Immune Design Corporation) were only located in Henogen's files. The court agreed that documents held by Henogen, a foreign affiliate, were not in the "possession, custody or control" of Novasep. Absent facts warranting veil piercing or application of the alter ego doctrine, US entities are not required to produce documents held by foreign affiliates.

The court did find that Novasep must produce documents in its own files concerning its corporate structure so that Theravectys could supplement its efforts to demonstrate Novasep's control over Henogen sufficient to obtain the Immune Design Corporation-manufacturing and -shipping documents located in Henogen's files. Although Novasep's corporate structure was not itself relevant, the corporate structure documents were "reasonably calculated" to lead to the discovery of admissible evidence.

Theravectys SA v. Immune Design Corp., C.A. No. 9950-VCN (Del. Ch. Oct. 31, 2014).

BANKING

CFPB Issues Broader Than Expected Prepaid Card Proposal and Model Forms

On November 13, the Consumer Financial Protection Bureau (CFPB) issued its long-awaited proposal with respect to prepaid cards. This proposal, which consisted of 870 pages, covers traditional prepaid cards as well as mobile and other electronic prepaid accounts that can store funds. The prepaid products covered by the proposal include payroll cards, certain federal, state, and local government benefit cards—such as those used to distribute unemployment insurance, child support, and pension payments—student financial aid disbursement cards, tax refund cards, and peer-to-peer payment products.

The CFPB proposed that card issuers be required to follow existing credit card protections established under the Truth in Lending Act and Credit Card Accountability Responsibility and Disclosure Act if they offer a credit product in connection with a prepaid account. Under the proposal, companies cannot open a credit card account or increase a credit line related to a prepaid card unless they consider the consumer's ability to make the required payments. For consumers under the age of 21, the companies would be required to assess these consumers' independent abilities to repay the credit. Prepaid companies would be required to give consumers the same monthly periodic statement that credit card consumers receive. This statement would detail consumers' fees, and if applicable, interest rates, what they have borrowed, how much they owe, and other key information about repaying the debt. Further, prepaid companies must give consumers at least 21 days to repay their debt tied to a prepaid card before charging a late fee that is "reasonable and proportional" to the violation of the account terms, and the total fees for a prepaid credit during the first year cannot exceed 25 percent of the credit limit. Prepaid companies could not automatically demand and take credit repayment whenever a prepaid account is next loaded with funds, nor could they take funds loaded into the prepaid account to repay the credit when the bill is due unless the consumer has affirmatively opted in to allow such a repayment. Finally, the CFPB's proposal would require companies to wait 30 days after a consumer registers the prepaid account before they could formally offer credit to the consumer.

The CFPB also is proposing that consumers be responsible for no more than $50 of unauthorized charges so long as they quickly report the activity to the financial institution.

Under the CFPB proposal, financial institutions would be required to either provide periodic statements or make account information easily accessible online and for free, and would also have to investigate errors that consumers report on registered accounts and to resolve those errors in a timely manner. If the financial institution cannot resolve an alleged error within a certain period of time, it would be required to temporarily credit the disputed amount to the consumer to use while the institution finishes its investigation. Prepaid card issuers also must post their account agreements on their websites and submit them to the CFPB for posting on an agency-maintained website.

While consumer groups voiced pleasure with the proposal at the public hearing conducted in connection with the proposal as a "good first step," it is expected that they will push for further protections, particularly in the area of overdrafts, which some groups feel ought to be completely prohibited in the prepaid card context. With respect to disclosure, the proposal would require card issuers to use model forms allowing apple-to-apple comparisons between cards. The CFPB's proposal includes two required forms, one short and one long; the short form would highlight key prepaid account information, including common costs like the monthly fee, fee per purchase, ATM withdrawal cost, and fee to reload cash onto the account. The long form would contain all of the fees on the short form, plus any other potential fees that could be imposed in connection with the account.

The proposal will be open for comment for 90 days after it's published in the Federal Register, which is expected soon.

The proposed regulation may be viewed here.

UK DEVELOPMENTS

FCA Requirement for Legal Entity Identifiers

On November 7, the UK Financial Conduct Authority (FCA) has confirmed that it will require all financial institutions conducting business in or from the United Kingdom to have a Legal Entity Identification (LEI). This announcement comes some nine months after the European Banking Authority (EBA) announced that it supports the adoption of the LEI system, aimed at achieving a unique, worldwide identification of parties to financial transactions. The LEI system is not globally operational yet, but the EBA has already recommended that European Union regulators use LEIs when providing supervisory information to the EBA, and that firms use LEIs in their respective templates under supervisory reporting.

The FCA has announced that it expects all relevant firms to obtain their LEIs from the London Stock Exchange and submit them to the FCA by December 31 at the latest. The FCA has explained that firms or groups that are required to report to the FCA consolidated basis will need to obtain LEIs for all relevant group entities on which information is required by the FCA, including the reporting firm's parent company. Once LEIs have been obtained, the reporting firm is required to submit them (and for group entities, if applicable) to the FCA immediately via the FCA's survey tool here, and to use the LEIs in all applicable FCA reporting conducted from the first reporting reference date in 2015.

Instructions on obtaining LEI from the LSE can be found here.

For the EBA's announcement please click here.

EU DEVELOPMENTS

ESMA Takes First Steps Toward Determining Whether To Extend AIFMD's Passport to Non-EU AIFMs

On November 7, the European Securities and Markets Authority (ESMA) published a Call for Evidence (available here) seeking industry views that will be used to help shape its opinion and advice required to be provided by July 22, 2015. Under Article 67(1) of the Alternative Investment Fund Managers Directive (2011/61/EU) (AIFMD), ESMA is required to provide (1) an opinion on the functioning of the passport for EU alternative investment fund managers (AIFMs) pursuant to Articles 32 and 33 and the functioning of the national private placement regimes set out in Articles 36 and 42 of the AIFMD, and (2) advice on the application of the passport to non-EU AIFMs and non-EU alternative investment funds (AIFs).

Article 67(4) sets forth the criteria that ESMA must consider in determining whether to issue positive advice that includes information related to investor protection (including reciprocity between the EU and non-EU authorities), risk of market disruption and any impact on competition that disadvantages the EU fund industry and the monitoring of systemic risk. As expected, ESMA intends on treating each non-EU country on a case-by-case basis.

The deadline for comments is January 8, 2015.

OECD Proposes Changes to the Definition of Permanent Establishment

As previously reported (here), the Organisation of Economic Co-operation and Development (OECD) published a 15-point Base Erosion and Profit Shifting (BEPS) Action Plan that provided a set of recommendations for a coordinated approach intended to fight tax avoidance by multinational enterprises. The OECD's prior articles addressed the initial elements of those recommendations as a series of Actions.

As part of the BEPS project, the OECD published on October 31 a discussion draft (Draft) entitled "BEPS Action 7: Preventing the Artificial Avoidance of PE Status" (available here). The Draft seeks public comments by January 9, 2015 on several proposals that would amend the definition of permanent establishment contained in Article 5 of the OECD's model tax treaty (available here). The proposed amendments were influenced by the OECD's report "Addressing the tax challenges of the digital economy" (available here).

Some of the proposed changes are designed to (1) address the use of commissionaire structures and similar arrangements used primarily for the purpose of eroding the taxable base of the state where the sales took place,

(2) narrow the specific activity exemptions contained in Article 5(4) to apply to those activities that are preparatory or auxiliary, and (3) address issues involving splitting up contracts through the application of an anti-avoidance rule.

Clients with multi-national operations should review BEPS Action 7 to determine what potential impact any of these changes could have on their respective business models.

ESMA Consults on Revisions to Trade Reporting Requirements Under EMIR

The European Securities and Markets Authority (ESMA) announced a new consultation to consider revisions to the regulatory technical standards (RTS) and implementing technical standards (ITS) for trade reporting under the European Market Infrastructure Directive (EMIR). The RTS and ITS were finalized in 2012 and 2013 at a time when, according to ESMA, "there was only limited practical experience with the reporting of derivatives." Since then, reporting counterparties have identified a series of issues requiring further clarification, which has led ESMA to publish a series of questions and answers relating to trade reporting requirements (Q&As) in an effort to address these concerns. ESMA now proposes to transpose certain of the key elements of the Q&As into technical standards.

ESMA has classified its proposed amendments as clarifications, adaptations and introductions. "Clarifications" refer to instances where the meaning of a reporting field is open to interpretation or where completing the field is approached inconsistently by reporting counterparties. For example, mark-to-market value reporting will be adjusted in light of market practice in valuing different types of derivatives: futures and options will be marked-to-market based on the size of the contract and the current market price, whereas other types of derivatives, such as swaps and forwards, will be valued based on their replacement cost, taking into account delivery of the underlying asset. Cleared trades will be valued based on the central counterparty (CCP)'s settlement price. By contrast, an "adaptation" is an update to an existing reporting field to reflect clarifications made in the Q&As. This would include expanding the range of possible values beyond "financial counterparty" and "non-financial counterparty" to include CCPs and certain public or international entities. Finally, an "introduction" is a new field or value to reflect market practice or other regulatory requirements. In this regard, ESMA has proposed new data fields to distinguish between trade-level and position-level reporting as well as to provide greater clarity on the identity of the underlying reference asset for a derivative contract.

The consultation paper contains a series of questions for which ESMA requests public comment. The consultation period will close on February 13, 2015. The European Commission will have three months from the publication of ESMA's final report to endorse the proposed amendments to the RTS and ITS. The consultation paper can be found here.

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