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CORPORATE & FINANCIAL
WEEKLY DIGEST

February 17, 2012

SEC/CORPORATE

SEC Issues New C&DI on Description of Say-on-Pay Advisory Vote on Proxy Card and Voting Instruction Form

On February 13, the Securities and Exchange Commission's Division of Corporation Finance issued a new Compliance and Disclosure Interpretation (C&DI 169.07) which provides guidance as to the proper description on a proxy card and voting instruction form of an advisory shareholder vote to approve a registrant's executive compensation (Say-on-Pay) that is required by Rule 14a-21 of the Securities Exchange Act of 1934, as amended. C&DI 169.07 provides the following examples of Say-on-Pay advisory vote descriptions that would be consistent with Rule 14a-21:

- To approve the company's executive compensation.
- Advisory approval of the company's executive compensation.
- Advisory resolution to approve executive compensation.
- Advisory vote to approve named executive officer compensation.

However, the description "To hold an advisory vote on executive compensation" would not be consistent with Rule 14a-21 because it is not clear from this description what shareholders are being asked to vote on. According to the SEC, shareholders could interpret the immediately foregoing description as asking shareholders to vote on whether or not the registrant should hold an advisory vote on executive compensation, rather than asking shareholders to actually approve, on an advisory basis, the compensation paid to the registrant's named executive officers.

Click here to view C&DI 169.07.

PRIVATE INVESTMENT FUNDS

Treasury Form SHC and Private Fund Advisers

Form SHC is due once every five years as part of a survey conducted by the U.S. Department of the Treasury regarding ownership of foreign securities by U.S. residents. The Form solicits information identifying foreign securities owned by U.S. residents. The Form is due on March 2, 2012 for the year ending December 31, 2011.

An adviser to hedge funds, private equity funds or other private investment funds may have to file Form SHC if its private funds that are organized in the United States own, in the aggregate, at least $100 million of foreign securities. A private fund adviser will also be required to file Form SHC even without meeting the foregoing threshold if instructed to do so by the Federal Reserve Bank of New York (FRBNY). Note that U.S. custodians, as well as U.S. residents that are not private funds or private fund advisers, have Form SHC reporting obligations as well.

For purposes of calculating $100 million of foreign securities, only gross long positions are included; short positions are not netted from long positions. Foreign securities maintained with U.S. custodians are not included, unless at least $100 million in foreign securities are maintained with a single U.S. custodian that is not also a U.S. central securities depository (such as the Depository Trust Company or FRBNY). Securities held by U.S. feeder funds in affiliated non-U.S. master funds are included, but "direct investments" are not included. A "direct investment" relationship exists when a U.S. resident owns 10% or more of the voting equity securities of an incorporated foreign business. Ownership of an interest in an offshore limited partnership does not carry voting rights; therefore, such ownership, even if greater than 10%, is included.

If you need assistance with your filing or with determining whether you are required to file, or if you have been contacted by FRBNY about your filing, please let us know.

Form SHC, including filing instructions, can be found here.

INVESTMENT COMPANIES AND INVESTMENT ADVISERS

SEC Revises the "Qualified Client" Standards for Registered Investment Advisers

The Securities and Exchange Commission has adopted amendments to Rule 205-3 under the Investment Advisers Act of 1940, as amended (the Advisers Act), to revise the definition of "qualified client." Under Rule 205-3, accounts of qualified clients are exempted from the Advisers Act's general prohibition against SEC-registered investment advisers charging performance-based fees to their advisory clients. Currently, a qualified client generally includes any client that has either (1) $750,000 or more under management with the investment adviser or (2) a net worth of at least $1.5 million.

Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, the SEC is required to adjust the dollar amount tests set forth in certain of its rules, including the qualified client definition, for inflation. Under the amendments to the rule, the qualified client definition will be revised to increase the "assets under management" threshold described above from $750,000 to $1 million and the "net worth" threshold from $1.5 million to $2 million. In addition, the revised definition will exclude the value of a natural person's primary residence (and associated secured indebtedness) for purposes of the net worth threshold. The SEC will make similar inflation adjustments every five years.

Finally, the amendments to the rule include new transition rules which will have the effect of "grandfathering" many existing performance-based fee arrangements. Specifically, increases in the "qualified client" dollar amount thresholds (including future inflation adjustments) will not apply retroactively to an investment adviser's clients (including investors in private funds managed by the investment adviser) whose performance-based fee arrangements were permissible under the law in effect at the time of entering into the advisory contract, even if the client subsequently invests additional funds with the adviser. In addition, for advisers that were previously exempt from SEC registration pursuant to Section 203 of the Advisers Act and subsequently register with the SEC, the restrictions on performance-based compensation will not apply to existing clients or private fund investors whose advisory contracts were entered into while the adviser was exempt from SEC registration, but will apply to new clients and investors.

The changes to Rule 205-3 will go into effect 90 days after they are published in the Federal Register. A copy of the SEC's adopting release is available here.

The proposed rules will be published in the Federal Register for a 60-day public comment period. To read the proposed amendments to Rule 17a-5, click here. To read SEC Chairman Mary Schapiro's opening statement at the SEC Open Meeting: Proposals to Amend Rule 17a-5, click here.

LITIGATION

Court Addresses Challenges to Adequacy of Lead Plaintiff in Consolidated Class Action

The U.S. District Court for the Southern District of New York recently addressed lead plaintiff designation in a consolidated class action brought under the Private Securities Litigation Reform Act (PSLRA).

Plaintiffs Randall Humphreys and Forsta AP-Fonden (API) each brought a putative class action suit on behalf of investors who claimed to suffer damages in their purchases of Agnico-Eagle Mines Ltd. (AEM) securities. After consolidating the actions, each of which asserted causes of action under the Securities Exchange Act of 1934 in connection with allegedly false or materially misleading statements made on behalf of AEM, the Court determined the appropriate lead plaintiff.

Although API represented the largest financial interest in the relief sought by the class with $3.6 million in asserted losses, Humphreys raised several challenges to API's appointment. Among other things, Humphreys contended that API lacked standing to pursue claims on behalf of the class because API's asserted losses may not have been losses of API itself but of API's clients. Humphreys further argued that API's purchases of AEM securities on foreign exchanges might make API vulnerable to unique defenses, and that API's home country of Sweden may not enforce a ruling of the Southern District of New York. As a result, Humphreys contended, API was atypical of the purported class.

The Court found that API's sworn assertion that it "owns all of the investments that it purchases" was sufficient to establish its standing under the PSLRA. It further noted that the purchase of AEM securities on at least one foreign stock exchange did not pose any barrier to API's adequacy as lead plaintiff. Finally, the Court was not persuaded that API was inadequate to serve as lead plaintiff because of the risk of Swedish courts denying res judicata effect to its ruling, noting that non-U.S. investors, including Swedish funds, had been appointed lead plaintiffs.

Stone v. Agnico-Eagle Mines Ltd. et al, Nos. 11-CV-7968 (JPO), 11-CV-8466 (JPO) (S.D.N.Y. Feb 6, 2012).

EXECUTIVE COMPENSATION AND ERISA

Agencies Issue Final Rules On Summary of Benefits for Health Plans and Insurance Coverage Under PPACA

Under final regulations issued February 9, group health plans must issue a summary of benefits and coverage and a uniform glossary. The final rule implements a Patient Protection and Affordable Care Act (PPACA) requirement of group health plans to provide its enrollees and potential enrollees with certain disclosures to help them better understand their health coverage, as well as to learn about additional coverage options. The final regulations were the combined effort of the Internal Revenue Service, the Employee Benefits Security Administration, and the Centers for Medicare & Medicaid Services, the three agencies responsible for implementing healthcare reform legislation under PPACA.

The final regulations also set forth the standards for who provides the summary of benefits and coverage, to whom, and when. For insured plans, the insurer is responsible for providing the summary, while the plan administrator has such responsibility for self-insured plans. The summary must be provided in several different circumstances, such as during open enrollment, when an individual first applies for coverage, upon a renewal, or upon request.

Each summary must contain certain items, including uniform standard definitions of medical and health coverage terms; a description of the coverage provided; and information regarding any exceptions, reductions or limitations under the coverage. The summary must also include coverage examples and illustrations of plan benefits. The regulations also contain rules related to the appearance of the summary of benefits and coverage, including font size and length restrictions.

In conjunction with the final regulations, the agencies developed a uniform glossary containing definitions for certain insurance-related and medical terms, as well as other terms that will help enrollees and potential enrollees understand and compare the terms of coverage and the extent of the plan's medical benefits. The agencies also published a six page template and other sample guidance for plans to use in preparing the required summaries. The glossary must be in the appearance specified by the agencies, so that the glossary is presented in a uniform format and uses terminology understandable by the average plan enrollee. To obtain the uniform glossary, individuals should have an Internet address by which they may review the glossary and a contact number they may call to obtain a paper copy. In addition, they should receive a disclosure that paper copies are available. The Internet address may be a place where the document can be found on the plan's or issuer's website, or on the Department of Labor's or Department of Health and Human Services' website. The issuer (if an insured plan) or the plan administrator (if self-insured) must provide a paper copy of the glossary within seven business days upon request.

In general, the final regulations apply for disclosures with respect to participants and their beneficiaries enrolling in a health plan beginning on the first day of the first open enrollment period beginning on or after September 23, 2012. For potential participants and their beneficiaries applying for coverage outside of open enrollment, the final regulations apply beginning on the first day of the first plan year that begins on or after September 23, 2012.

A link to the final rule can be found here.

BANKING

Deadline to Request Review Under the Independent Foreclosure Review Extended to July 31

The Office of the Comptroller of the Currency (OCC) and the Board of Governors of the Federal Reserve System (Federal Reserve) announced on February 15 that the deadline for submitting requests for review under the Independent Foreclosure Review has been extended. The new deadline, July 31, 2012, provides an additional three months for borrowers to request a review if they believe they suffered financial injury as a result of errors in foreclosure actions on their homes in 2009 or 2010 by one of the servicers covered by enforcement actions issued in April 2011.

As part of enforcement actions issued in April 2011, the OCC, Federal Reserve, and the Office of Thrift Supervision required 14 large mortgage servicers to retain independent consultants to conduct a comprehensive review of foreclosure activity in 2009 and 2010 to identify borrowers who may have been financially injured due to errors, misrepresentations, or other deficiencies in the foreclosure process. If the review finds that financial injury occurred, the borrower may receive compensation or other remedies.

For more information, click here.

Agencies Issue Guidance on Junior Lien Loan Loss Allowances

On January 31, four federal financial regulatory agencies, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency, issued supervisory guidance on allowance for loan and lease losses estimation practices associated with loans and lines of credit secured by junior liens on one- to four-family residential properties, including second mortgages and home equity lines of credit taken out by mortgage borrowers.

The guidance, which includes instructions to examiners on how to examine for the risks imposed by second liens, may be found here.

OCC Announces Reduction of Printing and Mailing

On February 2, the Office of the Comptroller of the Currency (OCC), regulator of national banks and federal savings associations, announced that it will phase out printing and mailing of hard-copy publications, including many now mailed to national banks, employees, and other interested parties. By June 1, the OCC will discontinue the printing and mailing of most publications. The publications for external and internal audiences that will no longer be printed and mailed include OCC alerts, bulletins, legal interpretations, consumer advisories, and Banking Regulations for Examiners. This also includes e files DVDs.

The OCC strongly encourages national banks, federal savings associations, employees, and other interested parties to obtain publications and information by clicking here and signing up to receive information through the agency's other electronic dissemination tools.

OCC publications are available to subscribers of the OCC News E-Mail List, OCC News Feeds, Facebook, Twitter, and other social media. National banks, federal savings associations, employees, and other interested parties can subscribe to the OCC News E-Mail List here. They may receive OCC news releases, bulletins, and alerts by subscribing to the agency's four RSS news feeds here.

The OCC will consider on a case-by-case basis requests to print and mail copies of agency publications for those who do not have access to the Internet.

For more information, please click here.

EU DEVELOPMENTS

Some European Short Selling Restrictions Lifted

As reported in the August 19, 2011 edition of *Corporate and Financial Weekly Digest*, France, Belgium, Spain and Italy imposed short selling bans in relation to certain banking and financial institutions in August 2011.

On February 13 and 15, the French (AMF), Belgian (FSMA) and Spanish (CNMV) financial markets regulators announced the end of their respective bans on establishing or increasing net short positions in relation to certain banking and financial services issuers. The applicable French, Belgian and Spanish net short position disclosure regimes continue to be in force, as do prohibitions on naked short selling.

The AMF, FSMA and CNMV have each made clear that they will continue to monitor market developments and will re-impose restrictions on short selling if they deem it necessary.

The equivalent Italian ban remains in force for the present. It is currently scheduled to expire on February 24, 2012. As with the other three jurisdictions, Italy's net short position reporting requirements, as well as a ban on naked short selling of Italian stocks, remain in force indefinitely.

For more information on France, please click here.
For more information on Belgium, please click here.
For more information on Spain, please click here.
For more information on Italy, please click here.

UK DEVELOPMENTS

OFT Indicates Possible Bank Competition Investigation

On February 16, the Office of Fair Trading (OFT) published a speech by its Chief Executive, John Fingleton, addressing issues with respect to competition in the UK banking sector. Mr. Fingleton addressed several issues which had been identified in various previous governmental or regulatory inquiries and investigations of the UK banking industry. He noted that UK banks had made certain incremental changes and improvements but observed that concerns still remained about the competitive structure and performance of the UK banking market.

Mr Fingleton concluded the speech by stating that the UK banking sector is now potentially at a turning point due to the possibility of greater competition from new entry and changes in the approach to regulation by the successor regulators which will replace the Financial Services Authority in 2013. He stated that banks must be more active in delivering change and must enabled the OFT to see evidence demonstrating that the market dynamics of entry and account switching are sufficient to drive stronger customer-focused competition. Unless this happens, the OFT will consider making a reference to the Competition Commission for it to conduct a full market investigation.

For more information, click here.

Former Corporate Broking Managing Director Fined £350,000 for Inside Information Disclosure

On February 16, following on from the disciplinary actions against David Einhorn, Greenlight Capital, Alexander Ten-Holter and Caspar Agnew reported in the January 27, 2012 and February 3, 2012 editions of *Corporate and Financial Weekly Digest,* the UK Financial Services Authority (FSA) published a further final notice and announced that it had imposed a fine of £350,000 (approximately $550,000) on Andrew Osborne, a former Corporate Broking Managing Director of a major investment bank, for engaging in market abuse by improperly disclosing inside information ahead of a significant equity fundraising by Punch Taverns Plc (Punch) in June 2009.

The FSA found that during a conference call between Punch management and Greenlight, Osborne improperly disclosed inside information - namely that Punch was at an advanced stage of the process towards a significant equity fundraising, probably within a week after the call. As an approved person with considerable experience, Osborne was fully aware of his duties not to disclose inside information and to consider the risk of market abuse. He failed in both these duties and engaged in market abuse by the improper disclosure of inside information to Greenlight.

The FSA also found that shortly after the conference call, Osborne became aware that Greenlight was selling Punch shares. He failed to raise concerns with senior management, legal or compliance personnel or take any steps to address the risk that Greenlight's conduct constituted market abuse.

Tracey McDermott, acting director of enforcement and financial crime, said: "Osborne was a highly experienced broker in a position of considerable responsibility at a leading financial institution. He was trusted as the gatekeeper of inside information and should have been extremely cautious in proceeding with the call with Greenlight in light of the clear legal and regulatory risks involved. By disclosing inside information, Osborne engaged in serious market abuse. His actions undermined the orderliness and integrity of the market and the high penalty reflects the seriousness of his breach. There should be no doubt about the FSA's commitment to take tough action where approved persons fail in their responsibilities."

For more information, click here.

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