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SEC / CORPORATE

Delaware State Bar Association Council Releases Proposed Amendments to the Delaware General Corporation Law

The Corporate Council of the Corporation Law Section of the Delaware State Bar Association released proposed legislation to amend certain provisions of the Delaware General Corporation Law (DGCL). The proposed amendments are primarily technical and attempt to clarify and resolve certain ambiguities and inconsistencies in the DGCL by, among other changes, (1) further align the merger statutes with the appraisal statute and (2) clarify the manner in which defective corporate acts may be ratified.

- The proposed amendment to Section 262(b) would extend the so-called "market out exception" to the availability of statutory appraisal rights in "intermediate-form" mergers (exchange offers followed by control mergers) pursuant to Section 251(h). If the amendment is adopted, appraisal rights would not be available for holders of shares of target corporations listed on national securities exchanges or held of record by more than 2,000 holders immediately prior to the execution of an exchange and merger agreement, as long as such holders are not required to accept in exchange of their shares anything except: (1) stock of a surviving corporation; (2) at the effective time of the merger, stock of any other corporation listed on a national securities exchange or held of record by more than 2,000 holders; (3) cash in lieu of fractional shares or fractional depository receipts; or (4) any combination of the foregoing. In effect, such proposed amendments would reduce the number of transactions that would be subject to appraisal claims, and therefore potentially increase the number of transactions taking advantage of intermediate-form mergers rather than more traditional "long-form" mergers involving proxy solicitations.

- Section 204 of the DGCL enables ratification of defective corporate acts, a potentially very valuable power to address innocent mistakes made in the course of managing a corporate family. The proposed amendments would clarify (1) that ratification of defective corporate acts pursuant to Section 204 may be used where there is no valid stock outstanding (e.g., immediately following formation of a subsidiary, but prior to issuance of stock), even if such acts require stockholder approval; (2) which holders must receive notice of such ratification; (3) that Section 204 may apply to any act or transaction within a corporation's power under subchapter II of the DGCL (expanding the scope and usefulness of Section 204); and (4) that the definition of "failure of authorization" includes any failure of an act or transaction to be approved in compliance with a disclosure set forth in any proxy or consent solicitation statement. Such proposed amendments should provide in-house counsel further power to address prior defective acts, and comfort that Delaware is serious about ensuring the efficacy of Section 204.

If approved by the Corporation Law Section, these amendments will be introduced to the Delaware General Assembly.

The proposed amendments are available here.

ISS Updates Frequently Asked Questions for US Proxy Voting Policies and Procedures for 2018

On March 29, proxy advisory firm Institutional Shareholder Services (ISS) updated its frequently asked questions (FAQs) for US proxy voting procedures and policies (excluding compensation-related policies and procedures). The following is a brief summary of the new/updated FAQs.

- Proxy analyses will generally be issued to ISS clients 13-30 days before a shareholder meeting (although delivery may be closer to 13-18 days from April to June, during the peak of the proxy season). For special purpose acquisition company acquisition reports, where meeting materials are usually filed only 10-13 days before the meeting, analyses will generally be delivered 5-8 days before the meeting.

- ISS has clarified their process for changing a vote recommendation in a proxy alert:

  For ISS to respond to new or revised information shared by a company with its shareholders after an ISS proxy report has been published, such information must be publicly disclosed, preferably via a relevant regulator's public website, such as EDGAR for SEC filers or the Securities Exchange Act Filing System or OTC Markets site for non-SEC filers (or if neither of these are applicable, in a press release or on the company website). ISS should generally be alerted to any new information at least five business days before a meeting for ISS to review the information and consider changing a vote recommendation. ISS will evaluate if the new material warrants an update, and if it does ISS will issue a proxy alert.

- To request an engagement with a US research analyst, a company should email the Research Helpdesk at globalresearch@issgovernance.com with a detailed agenda for the engagement, a list of the company's participants and a preferred date/time for such engagement. ISS reminded all company participants that all discussions are on the record and should not include material non-public information.

- Accepting an engagement remains at the sole discretion of ISS. For non-contentious meetings, ISS prefers meetings scheduled August–February, and meetings related to new ISS policies should be scheduled after the ISS policy updates in November. Most engagements take place prior to the filing of proxy materials. After a proxy is filed, ISS will only be able to undertake engagement with companies where necessary and appropriate. For contentious meetings, such as proxy fights or contested mergers, ISS will generally reach out directly to both sides to schedule the engagement once proxy materials are released. A vote-no campaign against directors may be sufficiently contentious to warrant engagement, as decided by ISS after a review of the materials, at which point ISS will reach out to both sides. A vote-no campaign would need to be via EDGAR filings to warrant consideration by ISS.

- For non-contentious meetings, ISS prioritizes requests from companies with substantive governance issues, such as a company with low shareholder support on its say-on-pay or director elections, majority-supported shareholder proposals, ISS recommendations against management proposals at the prior election or a company undergoing a major transition.

- There is no blackout period for engagement with research, but there is a blackout period for ISS Corporate Solutions from the filing of the proxy statement through the date of the shareholder meeting (the period during which ISS research is analyzing and making voting recommendations). Governance QualityScore data verification is closed from the filing of the proxy statement until the publication of the ISS proxy report.

In addition to the above procedural questions, ISS also addressed certain substantive questions:

- ISS further clarified its position that absences from board and committee meetings by newly appointed directors are generally exempted from ISS's 75 percent threshold for meeting attendance by directors, because companies generally schedule their board and committee meetings more than a year in advance, and new directors do not have advance notification.

- ISS updated its FAQ regarding how ISS will evaluate a board's implementation of proxy access in response to a majority-supported shareholder proposal. Specifically, ISS clarified that providing the board with broad and binding authority to interpret the proxy access provision, while problematic, may not void the right on its own, but would be considered with restrictions or conditions on proxy access that ISS views as problematic.

- ISS clarified that it will recommend against director nominees at companies with non-shareholder approved poison pills regardless of when they were adopted, and will generally not continue to exempt pills adopted/renewed prior to November 2009, a reversal of their previous grandfathered poison pill policy from their updates in 2004 and 2009.

- In addressing how a company may terminate a poison pill prior to its expiration, ISS clarified that most companies are able to accelerate the pill's expiration date without involving the costs of redemption, and points to Alliant Energy Corporation's pill redemption on January 13.

- ISS reiterated that it still considers deadhand or slowhand provisions problematic and will recommend against the board of any company holding a long-term pill that has not been ratified by its shareholders.

- If a company adopts a poison pill before a company goes public, and the pill is not put to a binding shareholder vote at the first shareholder meeting, ISS will recommend a withhold or against vote on all director nominees.

- Under the Governance Failures policy, ISS has been recommending against the boards of the Indiana-incorporated companies that have yet to opt out of the state's 2009 law that requires a classified board. For 2018, ISS separated this as a stand-alone policy.

- For newly-public companies, ISS will generally continue to recommend adverse voting recommendations due to adoption of a multi-class structure, classified board and/or supermajority vote requirements. ISS will also continue withhold recommendations for fee-shifting provisions.

- ISS clarified its position that the Governance Failures policy is designed to catch one-off egregious actions that have not yet applied to enough companies, or persisted year after year, to necessitate being broken out by ISS into their own standalone policy. For 2018, ISS separated out standalone policies related to excessive pledging and the failure to opt out of state statutes requiring a classified board (in Indiana-incorporated companies), as ISS noted that these withhold recommendations recurred year after year.

The ISS' new/updated FAQs for US proxy voting research procedures and policies is available here.

UK/BREXIT DEVELOPMENTS

FCA Adopts Senior Managers Regime for Its Own Senior Management

The UK Financial Conduct Authority (FCA) has published a document setting out its intention to self-apply the principles of the Senior Managers Regime (SMR) to strengthen transparency and "reinforce the standards," noting that certain differences in the application of the principles are inevitable due to the FCA's status as a regulatory authority and public body, rather than a regulated firm. However, the document also notes that the FCA will not be implementing the Certification Regime, which, when included with the application of the SMR, is included in the wider regulatory framework of the Senior Managers and Certification Regime (SMCR).

The FCA imposes direct accountability and conduct standards on senior individuals in regulated firms through the SMR. In force since March 2016, the SMR focuses on raising governance standards, increasing individual accountability and restoring consumer confidence in the financial services sector.

With regards to the application of the SMR to the FCA, the document comprises:

- Management Responsibilities Maps and the allocation of responsibilities between senior management;
- details of the individuals identified as coming within scope of senior management;
- governance and management arrangements; and
- Statements of Responsibility for senior managers.

The SMCR already applies to the banking sector, but will extend to include insurers—from December 10—and firms regulated by the FCA alone (solo-regulated firms). The start date for compliance by solo-regulated firms is still to be announced by HM Treasury.

The document is available here.

FCA Publishes Changes Affecting Authorized Fund Managers and Proposes Further Changes

On April 5, the UK Financial Conduct Authority (FCA) published a policy statement with the final rules from its consultation paper 17/18 on asset management market study remedies and changes to the FCA Handbook. The policy statement announces the following prominent changes, among others:

- Authorized Fund Managers (AFMs) must assess the overall value delivered to investors and publish a description of this assessment in a fund's annual report (or a separate composite report);
- "box profits" (i.e., risk-free profits resulting from differences in the bid-offer prices) will need to be paid to the fund or individual investors, as opposed to asset managers retaining these profits, which is currently the case;
- removing the requirement in the FCA guidance for asset managers to obtain investor consent before "conversion" from more expensive share classes to cheaper, but otherwise identical, share classes; and
- requiring AFMs to appoint at least two independent directors, comprising at least 25% of total board membership.

The FCA has deferred the implementation dates, by up to as much as 6 months, for some of these changes. For example, the rules prohibiting the retention of box profits will take effect on April 1, 2019, and the independent directors requirement on September 30, 2019. AFMs must publish the assessment of value for accounting periods ending on or after September 30, 2019.

Alongside the policy statement, the FCA also published consultation paper 18/9 proposing changes to the rules and guidance for AFMs. The key proposed changes include:

- prohibiting performance fees calculated on gross performance, by amending the performance fee rules so that fees must be calculated net of other fees in every instance;
- publishing guidance reminding AFMs to express a fund's objectives and investment policies to make them more useful to investors (for example, by reducing the use of technical jargon and including important information about how a fund is managed);
- introducing new rules to require AFMs to clarify why they use certain benchmarks, or if they do not, how investors should assess a fund's performance; and
- requiring AFMs using benchmarks to reference those benchmarks consistently across a fund's documents and, where making reference to past performance, require comparison against constraints on portfolio construction or target benchmarks.

The FCA is seeking feedback on the consultation paper from retail and professional investors, and their advisers and representatives, until July 5.

The consultation paper is available here.

The policy statement is available here.

House of Commons Committee Publishes Report on Post-Brexit UK-EU Relationship

On April 4, the House of Commons Exiting the European Union Committee published a report on the future UK/EU relationship following the United Kingdom's withdrawal from the European Union. The report examines existing EU relationships with Canada, Ukraine, Switzerland, Norway and Turkey, the impact of trading on World Trade Organization terms (i.e., without a trading agreement in place), and the United Kingdom's future relationship with the European Union.

The report set outs certain tests by which the committee will judge the political declaration it expects to be reached by October. Notable examples include:

- any new immigration arrangements set up between the United Kingdom and the European Union must not act as an impediment to the movement of workers providing services across borders or to the recognition of their qualifications and their right to practice;
- there must be no additional costs to businesses that trade in goods or services;
- UK providers of financial and broadcasting services must be able to continue to sell their products into EU markets as at present; and
- UK providers of financial and other services should be able to retain automatically, or with minimal additional administration, their rights of establishment in the European Union, and vice versa, where possible on the basis of mutual recognition of regulatory standards.

The report concludes that the Comprehensive Economic and Trade Agreement between the United Kingdom and Canada could be a starting point for the UK-EU agreement, but that it would require significant additions to reflect that the United Kingdom and European Union markets are "already very much more integrated."

The report is available here.

FCA Welcomes Agreement on Terms of Brexit Implementation Period; BoE Announces "Dear CEO" Letters and PRA Policy Statements

On March 28, the UK Financial Conduct Authority (FCA) published a statement on the withdrawal of the United Kingdom from the European Union (Brexit) following UK-EU agreement in relation to aspects of the transition period—notably the end date for the transition period of December 31, 2020.

As previously discussed in the *Corporate & Financial Weekly Digest* edition of March 16, the FCA intends that firms and funds will be able to continue to provide cross-border services into the United Kingdom from other European Union/European Economic Area jurisdictions (passporting) during the transition period, subject to notifying the FCA of their desire to do so.

The FCA also confirmed that it is continuing to work with HM Treasury and the Bank of England/Prudential Regulation Authority (PRA) to make certain that the UK legal and regulatory framework functions regardless of Brexit outcome.

On the same day, the Bank of England (BoE) also issued a press release updating its regulatory approach in preparing for Brexit. In the form of updates following the March 2018 European Council, the press release announced the publication of:

- a "Dear CEO" letter from Sir Jon Cunliffe, Deputy Governor Financial Stability, on the operation of non-UK central counterparties in the United Kingdom after Brexit;
- a "Dear CEO" letter from Sam Woods, Deputy Governor Prudential Regulation and PRA Chief Executive Officer, on firms' preparations for Brexit; and
- PRA policy and supervisory statements concerning its approach to branch authorization and supervision in relation to international banks and insurers.

The statement is available here.

The press release, which includes links to each document described above, is here.

EU DEVELOPMENTS

ESMA Publishes Final Report: Technical Advice Under the Prospectus Regulation

On April 3, the European Securities and Markets Authority (ESMA) published a final report with its technical advice under the European Union Prospectus Regulation. The report covers the format and content requirements for a prospectus, the EU growth prospectus, and the scrutiny and approval process for a prospectus.

The publication of the report is in line with the timescale set out in the mandate from the European Commission (EC) received by ESMA on February 28, 2017 (Mandate); the report fulfils the first part of the mandate.

The second part of the mandate, to be received by the EC by August 31, focuses on documents containing the minimum information required for a takeover by way of an exchange offer, a merger or a division. It also covers advice regarding the general equivalence criteria that should be applied with respect to the information requirements imposed by third countries.

The report is available here.

ESMA's press release in relation to the report is available here.

For additional coverage on financial and regulatory news, visit *Bridging the Week*, authored by Katten's Gary DeWaal.

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