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SEC/CORPORATE

SEC Proposes New Pay-for-Performance Rules

On April 29, the Securities and Exchange Commission proposed new rules to require annual disclosure in proxy and information statements under the Securities Exchange Act of 1934 regarding the relationship between executive compensation actually paid by, and the financial performance of, registrants (excluding foreign private issuers, registered investment companies and emerging growth companies). The SEC is required to adopt pay-for-performance rules pursuant to The Dodd-Frank Wall Street Reform and Consumer Protection Act.

The new rules, if adopted, would ultimately require registrants to disclose information for the last five years (or three years in the case of smaller reporting companies), subject to a phase-in period.

If the proposed changes are adopted, registrants would need to present the compensation that has actually been paid (1) to the principal executive officer separately and (2) on average, to the other "named executive officers." While disclosure under the proposed rules would utilize information set forth in the summary compensation table already required in proxy or information statements, a new table would be required and registrants would need to disclose adjustments made to amounts presented in the summary compensation table. For example, disclosure by registrants that are not smaller reporting companies would need to deduct any change in pension value reflected in the summary compensation table and add back the actuarially determined service cost for services rendered by executives during the applicable year. Furthermore, equity awards would be considered actually paid on each vesting date and at the fair market value on such date; and, to the extent valuation assumptions at the time of vesting are materially different from those disclosed in financials as of the grant date, additional disclosure would be required.

The proposed rules would rely on total shareholder return (TSR), as provided for in Item 201(e) of Regulation S-K, as the primary metric for capturing the relationship between executive compensation and financial performance, and would require a registrant to provide comparisons of its TSR against the TSR of the companies in the peer group that such registrant identifies in its stock performance graph or in its compensation discussion and analysis. This information would need to be presented in the new table.

Using the amounts presented in the new table, registrants would then be required to describe (graphically and/or as a narrative) the relationships between (1) compensation actually paid and its TSR and (2) its TSR and the TSR of its peer group.

These new disclosures would be required to be tagged in XBRL.

Click here for a copy of the SEC release.

NASAA Launches a Streamlined Filing Process for Form D

The North American Securities Administrators Association (NASAA) recently announced the launch of the online Electronic Filing Depository (EFD). The EFD is an online system that creates a streamlined process to enhance

the efficiency of paying the filing fee and submitting a Form D filing for a Regulation D, Rule 506 offering to multiple state securities regulators at once.

To the extent that EFD filing is available and an issuer makes its own state blue-sky filings, the EFD is an effective and useful tool. It should be noted, however, that the EFD only allows for the filing of certain materials and paying the filing fee. Therefore, to the extent that specific states require additional information, an issuer will be required to provide that information to the state regulator outside of the EFD. Additionally, states must opt in to make an EFD filing permissible and currently it is not available in twelve states (Arizona, California, Connecticut, Delaware, Florida, Louisiana, Massachusetts, Michigan, Minnesota, New York, North Carolina and Oregon). Four states (New Jersey, New Mexico, Texas and Utah) are now mandating the use of EFD to submit Form D filings and other states have expressed their intentions to do the same.

Unless and until all states agree to permit the use of the EFD to submit a complete Form D filing, issuers may be forced to use two different methods to make Rule 506 notice filings.

Additionally, issuers should be aware that to utilize the EFD, the only way to pay the filing fee is via direct debit by EFD from the filer's account. The NASAA is exploring allowing payment by credit card, but has not publicly announced an expected timeframe for that implementation.

For more information and a link to the EFD website please click here. For a link to the New Jersey orders or rules requiring the use of EFD, click here; for New Mexico click here; for Texas click here; and for Utah click here.

CFTC

CFTC Proposal Eases Trade Option Obligations for Non-SD/MSP Counterparties

The Commodity Futures Trading Commission has proposed to amend part 32 of its regulations governing trade options to reduce the reporting requirements for counterparties that are not swap dealers or major swap participants (non-SD/MSP counterparties), including commercial end-users that enter into trade options in connection with their businesses. Under the proposal, non-SD/MSP counterparties would have no obligation to report trade options on CFTC Form TO. Instead, each non-SD/MSP counterparty would be required to notify the CFTC's Division of Market Oversight by e-mail (1) within 30 days after entering into trade options having an aggregate notional value exceeding $1 billion during any calendar year or (2) when the non-SD/MSP counterparty reasonably expects to enter into trade options having an aggregate notional value exceeding $1 billion during any calendar year.

The proposal additionally clarifies that with respect to part 45 recordkeeping obligations, non-SD/MSP counterparties are only required to comply with CFTC Regulation 45.2. This would eliminate certain recordkeeping obligations related to unique swap identifiers in CFTC Regulation 45.5 and unique product identifiers in CFTC Regulation 45.7. However, each non-SD/MSP counterparty that entered into trade options with a swap dealer or major swap participant would be required to have a legal entity identifier (LEI) and submit its LEI to its counterparty as required under Rule 45.6.

The proposing release is available here.

CFTC's Global Markets Advisory Committee Meeting on May 14

The Commodity Futures Trading Commission's Global Markets Advisory Committee will meet on May 14.The meeting will consist of two panels. The first will consider issues related to assessing clearinghouse safeguards, with a focus on clearinghouse capital contributions and stress testing. The second panel will discuss the extra-territorial application of the CFTC's proposed margin requirements for uncleared swaps.

More information, including webcast and dial-in information, is available here.

LITIGATION

Ninth Circuit Honors Canadian Business Law's Exclusive Remedy Provision

The US Court of Appeals for the Ninth Circuit recently affirmed dismissal of a counterclaim for breach of fiduciary duty brought under Section 242 of the Alberta Business Corporations Act (ABCA), finding that only an Alberta court could provide the remedy provided by the ABCA, and thus the counterclaim failed to state a claim upon which relief could be granted. In 2009, Seismic Reservoir 2020, Inc. brought suit against Bjorn Paulsson for alleged violations of the Lanham Act and breach of fiduciary duty. Paulsson, in his capacity as a shareholder and director of Seismic's Canadian parent company, counterclaimed for, among other things, breach of fiduciary duty under the ABCA. After additional briefing on Canadian law, the US District Court for the Central District of California found that the ABCA conferred exclusive jurisdiction upon the Court of the Queen's Bench of Alberta, and dismissed Paulsson's counterclaim based on lack of jurisdiction. The Ninth Circuit, however, explained that the ABCA's exclusive jurisdiction provision cannot divest the District Court of its statutory subject matter jurisdiction. Instead, the interplay between the ABCA's exclusive jurisdiction and remedy provisions was such that the District Court was unable to grant the relief requested. As such, dismissal under Federal Rule of Civil Procedure 12(b)(6) (failure to state a cause of action), rather than under Rule 12(b)(1) (lack of jurisdiction), was appropriate. The Ninth Circuit also held that an opportunity to amend was not required because Paulsson "cannot possibly win relief" in light of the ABCA's provisions.

Paulsson v. Dorosz et al., Case No. 13-55413 (9th Cir. April 27, 2015).

Delaware Court of Chancery Holds Forum Selection Clause Trumps Prior-Filed Action Doctrine

The Delaware Court of Chancery recently upheld a non-exclusive forum selection clause and denied a motion to dismiss despite a prior-filed action pending in a different state based on largely the same claims. In 2013, Utilipath, LLC purchased certain of its own membership units pursuant to a Redemption Agreement. The Agreement provided for a price adjustment after the transaction closed, and Utilipath sought to enforce that clause. Because the defendants disputed the price adjustment, Utilipath filed an action in Delaware to compel arbitration. The defendants sought dismissal based on, among other things, the pendency of a prior filed action involving similar parties in United States District Court for the Eastern District of Pennsylvania. Defendants sought dismissal of the Delaware court action pursuant to the *McWane* doctrine, under which a court may dismiss or stay a later-filed action "when there is a prior action pending elsewhere . . . involving the same parties and the same issues." The Delaware Court of Chancery found that dismissal or stay was precluded on *McWane* grounds because the Agreement expressly provided that the parties irrevocably agreed and waived any objection to venue in the courts of Delaware. Notably, the court rejected defendants' argument that the Agreement's forum selection clause was non-exclusive, and thus less compelling evidence of the parties' intent to submit to Delaware courts. The court declined to decide whether the parties' dispute was arbitrable or conclusively precluded the possibility of a stay at some point in the future.

Utilipath, LLC v. Hayes et al., C.A. No. 9922-VCP (Del. Ch. April 15, 2015).

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