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GT Insights for Public Companies

November 14, 2016 A Bi-Weekly Update

Conference Highlights

Highlights from PLI 48th Annual Institute on Securities Regulation

The PLI 48th Annual Institute on Securities Regulation conference was held from Nov. 2-4, 2016. Below are some of the highlights from the conference:

- ***SEC Applying Commonsense Approach to Non-GAAP Financial Measures***. The Staff of the SEC Division of Corporation Finance stated that it is taking a commonsense approach to non-GAAP disclosures in registrants' filings. For example, the Staff indicated that:
  - presenting non-GAAP measures without equally prominent GAAP measures in a CEO's earnings release quote may not violate the equal or greater prominence rule if the rest of the earnings release is balanced, and
  - issuers need not necessarily discuss and analyze GAAP measures *each time* non-GAAP measures are discussed and analyzed in the MD&A.

  The Staff also highlighted three areas of concern that may lead to non-GAAP measures being materially misleading:
  - the exclusion of normal, recurring, cash operating expenses,
  - excluding non-cash charges without excluding corresponding gains, and
  - the use of individually tailored accounting principles.
- ***Boilerplate disclosure on Revenue Recognition Is Not Sufficient***. SEC Chief Accountant Wes Bricker stated that the Staff expects that 2016 Form 10-Ks will include, at a minimum, qualitative disclosure on the effects of the new revenue recognition accounting standard – even though the standard does not go into effect until 2018. Mr. Bricker warned issuers that, at this stage, boilerplate disclosure indicating that the issuer is still evaluating the impact of the change will not be sufficient in most cases and could trigger an SEC comment. He further clarified that even if an issuer has not yet quantified the impact of the new standard, it should still provide disclosure regarding:
  - the directional effects of the new standard,
  - how it is handling the implementation of the new standard, and
  - the status of the issuer's implementation plan.
- ***Regulation S-K Concept Release***. The Staff highlighted some of the comments it received in response to the SEC's Regulation S-K concept release, including those that suggested:
  - mandating environmental, social and governance (ESG) disclosures,
  - consolidating MD&A guidance in one location and eliminating comparative analysis for the third fiscal year in Form 10-K, and
  - opposing a magnitude/probability risk factor framework suggested in the release and any

limitations on length of risk factor disclosures.

- ***Stricter Scrutiny for Exclusion of Shareholder Proposals***. In light of the upcoming proxy season, the Staff clarified its position with respect to Rule 14a-8 exclusion requests. Specifically:
  - the presence of proxy access in a company's bylaws does not mean the proposal has been substantially implemented,
  - in response to a request to exclude on vagueness grounds, the Staff will not quibble with mere disagreements over language in the proposal,
  - the materially false or misleading standard will only apply to truly "major" materially false or misleading statements, and
  - the Staff will not object to the use of charts and graphs in shareholder proposals, though issuers may still challenge their relevance in seeking to exclude them.
- ***Management Responsible for Going Concern Analysis***. The Staff reminded registrants that, effective for the 2016 fiscal year, management, not auditors, will bear the responsibility of assessing whether there is a going concern issue under FASB ASU 2014-15.

SEC Regulation

Annual Reports may be Posted on Web In Lieu of Mailing to the SEC

On Nov. 2, 2016, the Division of Corporation Finance issued guidance permitting issuers to post their annual reports to shareholders on their websites in lieu of mailing it to the SEC. Rules 14a-3(c) and 14c-3(b) previously required that issuers mail to the SEC seven copies of their annual report to shareholders. There is a similar requirement in Form 10-K with respect to certain Section 15(d) registrants, requiring that these registrants furnish to the SEC for its information four copies of any annual report to security holders.

Pursuant to the new CDI, an issuer must post its annual report on its website by the dates specified in Rule 14a-3(c), Rule 14c-3(b) and Form 10-K, as applicable (generally, the date the annual report is mailed to shareholders, or, in the case of Form 10-K, the date on which it is filed). The report must remain accessible for at least one year after posting.

https://www.sec.gov/divisions/corpfin/guidance/exchange-act-rule-14a3-14c3.htm

SEC Provides Guidance on "Baby Shelf" Limitations

On Nov. 2, 2016, the Division of Corporation Finance issued guidance regarding the use of Form S-3's "baby shelf" provisions. Under Form S-3, an exchange-listed company with less than $75 million in public float may rely on Instruction I.B.6 of Form S-3 to sell no more than one-third of its public float within a 12-month period.

The SEC clarified that an issuer cannot effectively evade the offering size limitation by issuing securities on a primary basis to one or more investors under the shelf, and simultaneously issuing securities in a private placement that it concurrently registers for resale on a separate Form S-3. Under the CDI, the securities registered for resale on Form S-3 would be counted against the issuer's available capacity.

Consequently, an issuer may not register the resale of the privately-placed securities on Form S-3 unless it has sufficient capacity under Instruction I.B.6 to issue that amount of securities at the time of filing the resale registration statement. If an issuer does not have sufficient capacity, then it must either register the resale on Form S-1 or wait until it has sufficient capacity under Instruction I.B.6 to register the resale on Form S-3.

https://www.sec.gov/divisions/corpfin/guidance/safinterp.htm

SEC Provides Guidance on Form S-8 and Fee Calculations

On Nov, 9, 2016, the Division of Corporation Finance issued guidance on Form S-8 and Fee Calculations:

- Filing fees associated with excess shares under a prior Form S-8 can be transferred only after completion or termination of a registered offering or the registration statement has been withdrawn. However, as discussed below, a separate newly-issued CDI provides that if the excess securities are or may become authorized for issuance under another issuer plan, the issuer may file a post-effective amendment to the original Form S-8 to disclose that these excess securities will be sold under the other plan.
- An issuer has two alternatives for registering on Form S-8 shares under a new option plan plus shares that will roll over from an earlier plan that were previously registered on Form S-8:
  - The issuer can register on a new Form S-8:
    - shares under the new plan,
    - shares remaining under the earlier plan that are not subject to options, and
    - an estimated number of shares underlying outstanding awards upon expiration or cancellation that are registered under the earlier plan.

    However, under this alternative, issuers are not able to transfer the registration fee as an offset against the registration fee due for the new Form S-8.
  - Alternatively, the issuer can file a post-effective amendment to the earlier Form S-8 indicating that the Form S-8 will also cover the issuance of the roll-over shares once they become authorized for issuance under a new plan. No new filing fee would be due upon the filing of the post-effective amendment.

https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#240.11

https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#240.15

Governance

Company Receives First Proxy Access Nomination

On Nov. 10, 2016, a shareholder filed the first ever Schedule 14N announcing that it used a company's proxy access bylaw to nominate a director for election at the company's 2017 annual meeting. The company's bylaw, which was adopted in March 2016, provides that a shareholder, or a group of up to 20 shareholders, owning 3% or more of the company's outstanding common stock continuously for at least three years may nominate and include in the company's proxy materials directors constituting up to 20% of the board, provided that the shareholders(s) and the nominee(s) satisfy the bylaw requirements.

The shareholder filed both a Schedule 13D/A and Schedule 14N providing the necessary information including information regarding its ownership interest in the company percentage and its nominee.

https://www.sec.gov/Archives/edgar/data/70145/000092189516006095/sc14n05867018_11102016.htm

Focus on Auditor Independence-Related Disclosure Expected to Continue for 2017 Proxy Season

The United Brotherhood of Carpenters' Pension Fund (the "UBC Pension Fund") recently announced that it once again will be advocating for enhanced auditor independence disclosures in proxy statements in 2017. This letter-writing campaign, which commenced in 2013, resulted in the UBC Pension Fund sending letters to 91 Fortune 500 firms in advance of the 2016 proxy season. For the 2017 proxy season, the UBC Pension Fund expects to send letters to about 75 companies starting next month.

The UBC Pension Fund requests issuers to include the following in their audit committee disclosures:

- confirmation that the audit committee:
  - is directly responsible for the appointment, compensation, retention and oversight of the independent auditor,
  - is responsible for negotiating the independent auditor's fees, and
  - periodically considers whether there should be a rotation of the independent auditor,
- the year the independent auditor was first engaged,
- that the audit committee and its chairperson are directly involved in selection of the independent auditor's lead engagement partner at the time of mandatory rotation, and
- that the board of directors and audit committee believe the continued retention of the independent auditor is in the best interests of the company and its investors.

Mr. Durkin, director of corporate affairs at UBC Pension Fund, indicated that the results of the campaign to date have been promising, with 63 issuers agreeing to disclose all six items and 48 disclosing five of the requests. A recently released report by the Center for Audit Quality and Audit Analytics seems to support that position. CAQ's joint report with Audit Analytics on auditor independence noted that an increased number of companies are providing voluntary, enhanced disclosures around the oversight of independent auditors as compared to the prior two years of its study.

http://www.gtlaw.com/portalresource/carpenters-fund-disclosure

Audit Committee Transparency Barometer: http://thecaq.org/2016-audit-committee-transparency-barometer

SEC Enforcement and Litigation

Director Fined for HSR Act Violations Arising from Failure to Report Stock Purchases

A public company director recently entered into a settlement agreement with the Federal Trade Commission, or FTC, pursuant to which he agreed to pay $720,000 in civil penalties to settle allegations that he violated the Hart-Scott-Rodino Act, or HSR Act, by failing to report purchases of stock from two companies. The HSR Act requires individuals and companies to notify the FTC and the Department of Justice of acquisitions of stock in excess of certain dollar thresholds, and to observe a waiting period before closing the acquisition. While acquisitions of up to 10% of a company's voting securities made solely for investment purposes are exempt from this requirement, the exemption does not apply if the purchaser is a member of the issuing company's board of directors.

In the recently-announced settlement, the FTC alleged that the director acquired, over a period of years, shares of two public companies on which he served on the boards of directors, crossing over several filing thresholds under the HSR Act without making the required filings.

For more information regarding the FTC settlement, see the Greenberg Traurig Alert, "Board Director Fined for Failure to File Under the HSR Act for Incremental Acquisitions of Stock of Multiple Issuers."

http://www.gtlaw.com/News-Events/Publications/Alerts/199445/Board-Director-Fined-for-Failure-to-File-Under-the-HSR-Act-for-Incremental-Acquisitions-of-Stock-of-Multiple-Issuers

https://www.ftc.gov/news-events/press-releases/2016/10/investment-firm-founder-fayez-sarofim-pay-720000-settle-ftc

Questions about topics covered in this newsletter should be directed to the GT attorney with whom you regularly contact or to the Executive Editor:

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