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GT Insights for Public Companies

February 13, 2017 A Bi-Weekly Update

SEC

SEC Revisits Pay-Ratio and Conflict Minerals Reporting

Last week, the acting chair of the SEC, Michael Piwowar, reopened for public comment the Dodd-Frank pay-ratio rule, which mandates that companies disclose median worker pay and compare it with CEO compensation. The order comes only one week after Piwowar directed the SEC staff to reconsider its conflict minerals rule, which requires companies to report their use of minerals from certain war-torn regions.

Despite these orders, the SEC currently has not adopted any changes or new guidance with regard to these rules. As such, companies should still be preparing to make pay-ratio disclosures in 2018 (based on this year's pay), and if applicable, continue to comply with their current conflict minerals obligations.

President Trump's pick to chair the SEC, Jay Clayton, is still awaiting confirmation.

Pay Ratio:
https://www.sec.gov/news/statement/reconsideration-of-pay-ratio-rule-implementation.html

Conflict Minerals:
https://www.sec.gov/news/statement/reconsideration-of-conflict-minerals-rule-implementation.html

President's Two-for-One Deregulation Executive Order Does Not Apply to SEC

On Jan. 30, 2017, President Trump signed an executive order requiring, among other things, that unless prohibited by law, whenever an executive department or agency publicly proposes for notice and comment or otherwise promulgates a new regulation, it must identify at least two existing regulations to be repealed, and that any new incremental costs associated with new regulations be offset by the elimination of existing costs associated with at least two prior regulations.

Although the President referenced the Dodd–Frank Wall Street Reform and Consumer Protection Act when announcing the order, the order does not apply to "independent agencies," which include most financial regulatory agencies, such as the Securities and Exchange Commission, Commodities and Futures Trading Commission and Federal Reserve Board. Thus, the order does not cover many of the regulations enacted under Dodd-Frank. Additionally, the SEC cannot officially remove a rule without a formal rulemaking process, which entails a public comment period and economic analysis. Any such effort could be limited in the short-term since only two of the five SEC commission seats are currently filled, one by a Republican and one by a Democrat.

Further, on Feb. 8, 2017, Public Citizen, the Natural Resources Defense Council and the Communications Workers of America sued the President and other officials in the U.S. District Court for the District of Columbia seeking to block the order, claiming that it "exceeds President Trump's constitutional authority, violates his duty under the Take Care Clause of the

Constitution, and directs federal agencies to engage in unlawful actions that will harm countless Americans."

Notwithstanding the inapplicability of the order to the SEC, as discussed elsewhere in this newsletter, the acting chair of the SEC has already laid the groundwork for reviewing Dodd-Frank rules regarding pay ratio and conflict mineral disclosure.

https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling

The SEC Expands Cooperation Agreement with Hong Kong Regulators

On Jan. 19, 2017, the SEC announced that it had established a comprehensive arrangement with the Hong Kong Securities and Futures Commission to enhance the oversight of regulated entities that operate across national borders. This new cooperation arrangement will expand efforts with regard to information sharing between the two regulators. The new arrangement expands upon a 1995 arrangement that only pertained to investment management activities. In addition to investment management activities, the new arrangement will expand cooperation with regard to investment advisors, broker-dealers, securities exchanges, market infrastructure providers, and credit rating agencies.

The two regulators agreed to meet regularly and discuss areas of mutual supervisory interest. The SEC release also noted that enforcement cooperation helps establish mechanisms for ongoing consultation and the exchange of information regarding the oversight of global firms and markets. The SEC stated that such information may include routine supervisory information as well as information regulators need to monitor risk concentrations, identify emerging risks, and better understand globally active regulated entity's compliance culture. Additionally, these types of arrangements facilitate the SEC and its foreign counterparts to conduct on-site examinations of registered entities located outside the U.S.

Governance

NYSE Issues Annual Memo for 2017

On Feb. 1, 2017, the staff of NYSE Regulation issued its annual memo describing recent developments and reminders applicable to companies listed on the NYSE. Among the developments and reminders highlighted in the memo were:

- As of Sept. 30, 2016, the NYSE no longer requires listed companies to report their shares issued and outstanding. Instead the NYSE will begin relying solely on a company's transfer agent for this information.
- The SEC's proposed amendments to Rule 15c6-1(a) to shorten the standard settlement cycle from T-3 to T+2. The memo notes the industry target date for the transition to the T+2 settlement cycle is Sept. 5, 2017, but is dependent upon the approval of rule changes and completion of industry-wide testing.
- In October 2016, the NYSE began the roll out of a new Listing Manager platform allowing listed companies to easily connect with the NYSE and to comply with key requirements, including the reporting of cash dividends and stock distributions. Until the roll out is complete, companies should continue to use the egovdirect.com portal for submitting information regarding their annual meetings, changes in officers and directors, annual/interim affirmations and treasury share reporting.
- The NYSE's timely alert/material news policy requires listed companies to promptly release to the public any information which might reasonably be expected to materially affect the market for its securities. If material news is released between 7:00 a.m. and 4:00 p.m. (Eastern time), a company must call the NYSE at

least 10 minutes prior to issuing the information and provide a copy of the announcement. Outside of these hours, companies are not required to call the NYSE but should still provide a copy of the news once it is disclosed.

- If a listed company changes the date of its earnings release, the company should ensure that the date change is promptly and broadly disseminated to the market non-selectively and should avoid selective disclosure of such information.

Other important deadlines and requirements noted in the memo include:

- *Notice of Record Dates*: Companies are required to notify the NYSE of the setting of record dates in connection with shareholder meetings and other corporate actions, such as dividends and distributions. The NYSE has no authority to waive this notification requirement, so strict compliance is important.
- *Proxy Materials*: Companies must provide three copies of all proxy materials (including the proxy card) to the NYSE no later than the date on which the materials are sent to any security holder.
- *Written Affirmation/CEO Certification*: Companies must provide the annual written affirmation and CEO Certification to the NYSE no later than 30 days after the annual shareholders' meeting. In addition, an interim Written Affirmation and CEO Certification must be filed within 5 business days of any triggering event specified in the form.

https://www.nyse.com/publicdocs/nyse/regulation/nyse/2017_NYSE_Listed_Company_Compliance_Guidance_Memo_for_Domestic_Companies.pdf

SEC Litigation and Enforcement

Federal Securities Lawsuit Filings Surge to Record Levels in 2016

Cornerstone Research recently released its 2016 year in review report on securities class action filings.

According to the report, in 2016, the number of new federal securities class action filings reached a record high of 270, which represents a 43 percent increase over the 189 federal securities class action claims filed in 2015. This is particularly remarkable given that there are a lower number of companies listed on U.S. securities exchanges in 2016 as compared to past years. The litigation exposure of U.S. exchange-listed companies to traditional class action suits was a record 3.9 percent in 2016, which was higher than any prior year.

The increase in federal securities class action filings was mainly driven by the significant rise in the number of federal filings of class actions involving merger and acquisition transactions. There were a total of 80 such filings in 2016, which is more than four times greater than in 2015.

As background, in January 2016, the Delaware Chancery Court rejected a disclosure-only settlement in connection with a merger objection lawsuit. Many view this ruling as the first of many to follow that will establish the Delaware Chancery Court's and other state courts' growing aversion to disclosure-only settlements of merger objection lawsuits. In these types of settlements, many state courts believe the agreed-upon supplemental disclosures provide little value to the stockholders and that the stockholder releases received by the company are too broad. Given the Delaware courts' position, an increased number of merger objection lawsuits are being filed in federal courts rather than in state courts.

https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2016-YIR

$15 Million Penalty for Failure to Disclose Negotiations with White Knight Following Tender Offer Bid

On Jan. 17, 2017, the SEC settled claims that a target of a hostile tender offer failed to disclose negotiations with third parties following the announcement of the tender offer.

In response to a hostile bid, the target filed a Schedule 14D-9 recommending that the target's shareholders reject the tender offer. It further stated that it was not in negotiations with any other party with respect to a merger or other transaction. Subsequently, the target engaged in negotiations, including on price, with (i) "A" about a possible acquisition of A by the target (which would have complicated the hostile bid by making the target a larger company) and (ii) "B", a potential "white knight" (which ultimately acquired the target). The target never disclosed the negotiations with A and only disclosed the negotiations with B when it entered into a merger agreement with B.

The SEC stated that with respect to A, the target was obligated to update its Schedule 14D-9 to indicate that negotiations were underway and were in the preliminary stages once the target received a counterproposal from A on price. With respect to B, the target's counter-proposal on price to B triggered an amendment to the Schedule 14D-9 to disclose that negotiations had begun, even though they were in the preliminary stages.

While Schedule 14D-9 does not require disclosure of the names of the parties or the terms of the transaction until an agreement in principal is reached if the target board believes disclosure would jeopardize the negotiations, the target is required to disclose that negotiations are underway and are preliminary. Further, the SEC noted that if the negotiations ripen into an agreement in principal, disclosure of the agreement would be required.

As part of the settlement, the target agreed to pay a $15 million penalty.

https://www.sec.gov/news/pressrelease/2017-16.html

US AG Jeff Sessions Says He Will Enforce FCPA

In responding to a question from fellow Senator Sheldon Whitehouse, D-RI, regarding enforcement of the Foreign Corrupt Practices Act, Senator Sessions explained to the members of the Senate Judiciary Committee: "Yes, if confirmed as attorney general, I will enforce all federal laws, including the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998, as appropriate based on the facts and circumstances of each case." The question stems from President Trump's comments and criticism of the FCPA prior to his candidacy for President. However, it is still unclear whether or not the Department of Justice under Senator Sessions will continue the robust FCPA enforcement efforts of the last several years.

SEC Whistleblower Bounty Program Awards another $7 Million

In late January 2017, the SEC Office of the Whistleblower announced another significant award of more than $7 million split among three whistleblowers that assisted with the SEC's prosecution of an investment scheme. Since implementing its whistleblower program in 2011, approximately $149 million has been paid out to 41 individuals who voluntarily provided the SEC with original and useful information that led to a successful enforcement action. Whistleblower awards can range from 10 percent to 30 percent of the money collected when the monetary sanctions exceed $1 million. The SEC has reported that enforcement actions arising from whistleblower tips have resulted in more than $935 million in financial remedies. In September 2014, the SEC announced that it had approved a $30 million award to a foreign national for help in a successful enforcement action – the largest publicly-announced award to date.

https://www.sec.gov/news/pressrelease/2017-27.html

Antitrust

Revised Jurisdictional Thresholds Under the HSR Act

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act), requires, among other things, that parties seeking to consummate a merger, acquisition, or certain transfers of assets or securities first file a notification and report form with the Federal Trade Commission (FTC). Whether the parties must file with the FTC depends on the size of the transaction, measured in dollars, and, for transactions less than $323.0 million, the size of the party to the transaction.

In January, the FTC increased the initial threshold for a notification under the HSR Act from $78.2 million to $80.8 million. For transactions valued between $80.8 million and $323 million (up from $312.6 million), the size of the person test will continue to apply. That test will now make the transaction reportable only where one party has sales or assets of at least $161.5 million (up from $156.3 million), and the other party has sales or assets of at least $16.2 million (up from $15.6 million). All transactions valued in excess of $323 million are reportable without regard to the size of the parties. The increased thresholds become effective on Feb. 27, 2017.

For a complete copy of the GT Alert with respect to the increased thresholds and revisions to the thresholds that trigger a prohibition on companies having interlocking memberships on corporate boards, please visit http://www.gtlaw.com/News-Events/Publications/Alerts/201177/Revised-Jurisdictional-Thresholds-Under-the-HSR-Act-and-for-the-Prohibition-of-Interlocking-Directorates.

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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