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SEC/CORPORATE

ISS Survey on Current Governmental and Compensation Policy Issues

In a report released on September 26, Institutional Shareholder Services Inc. released its 2011-2012 Policy Survey Summary of Results (the Survey).

The Survey participants consisted of both corporate issuers (93% of whom had a market capitalization in excess of $500 million) and large institutional investors, in both cases mostly U.S.-based. The Survey results show that the top governance issues for U.S. respondents continue to be executive compensation and risk oversight, followed by board independence.

With respect to U.S. compensation practices, institutional investors, by an overwhelming majority, unsurprisingly found executive compensation comparisons to peer pay levels and to market performance to be “very relevant.” A majority of both investor respondents (72%) and issuer respondents (52%) believe there should be "an explicit response from the board" regarding improvement in pay practices where opposition to a say-on-pay vote reaches more than 30% (investor respondents) and more than 40% (issuer respondents). In effect, there is agreement that a say-on-pay proposal does not have to fail for board remedial action to be warranted.

Among other governance issues surveyed, most investor and issuer respondents viewed a director's recent industry/sector experience as the key issue in evaluating board nominees, although both investor and issuer respondents viewed director biographic information, performance of companies where the director serves or served on boards, and the governance track records of such companies as relevant to their evaluations.

The ISS Survey can be found here.

CFTC

CFTC Announces New Certification Procedure for Foreign Security Index Products

The Commodity Futures Trading Commission has adopted a final rule that creates a new certification procedure for foreign boards of trade (FBOTs) seeking to offer “broad-based” security index futures or options contracts (Index Products) to persons in the U.S. FBOTs are currently required to obtain no-action relief from CFTC staff prior to offering an Index Product to U.S. persons. The new procedure replaces the current no-action letter process and provides for expedited review, allowing an FBOT that is registered as such with the CFTC or that has previously received no-action relief from the CFTC – either for stock index products or allowing the FBOT to offer direct access to its electronic trading systems – to offer and sell an Index Product in the U.S. 45 days after submitting a request to the CFTC with respect to such product, absent notification from the CFTC to the contrary. The final rule also permits an FBOT to offer new Index Products after an expedited 15-day review period in reliance upon prior CFTC relief issued to that FBOT where the new Index Product is based on the same index that was the subject of such prior relief and is “substantially identical” to the Index Product covered by such prior relief. Finally, previously granted no-action relief will be grandfathered under the new regime, provided that the

applicable FBOT submits a written statement representing that the covered Index Products remain fully compliant with the requirements of such relief.

The final rule, available here, will take effect on October 26.

CFTC Requests Comment on Eurex Clearing AG's Application for Registration as a DCO

The CFTC is requesting public comment on an application by Eurex Clearing AG for registration as a derivatives clearing organization. The CFTC staff intends to complete its review of the application on or before March 31, 2012. Comments should be submitted on or before October 31.

The CFTC press release may be found here.
The documents submitted by Eurex Clearing are available here.

BROKER DEALER

FINRA Reminds Firms of Trade Reporting Requirements in OTC Equity Securities and Restricted Equity Securities Transactions

The Financial Industry Regulatory Authority has issued a Trade Reporting Notice (the Notice) to remind firms that over-the-counter (OTC) trades in OTC Equity Securities and trades in Restricted Equity Securities under Securities Act Rule 144A must be reported to FINRA's OTC Reporting Facility (ORF) in accordance with FINRA trade reporting rules.

The term "OTC Equity Security" is defined in FINRA Rule 6420 as any equity security that is not a National Market System stock and is not a Restricted Equity Security. Thus, "OTC Equity Security" is broadly defined and could include non-exchange-listed equity securities of issuers that have recently emerged from bankruptcy, have no visible public market or are closely held, and non-exchange-listed contingent value rights. "Restricted Equity Security" is defined in Rule 6420 as any equity security that meets the definition of "restricted security" as contained in Securities Act Rule 144(a)(3).

The fact that a security does not have a valid symbol at the time of execution of the trade does not relieve a firm of its trade reporting obligations under FINRA rules. If a firm executes a trade in a security for which there is no valid OTC symbol, the firm must obtain a symbol so it can fulfill its trade reporting obligations. The Notice provides that failure to do so is a violation of FINRA trade reporting rules. Moreover, a pattern and practice of executing reportable trades without obtaining a symbol and reporting the trade to FINRA may be considered conduct inconsistent with high standards of commercial honor and just and equitable principles of trade in violation of FINRA Rule 2010.

In the Notice, FINRA reminds firms that they must have policies, procedures and internal controls in place, including, as necessary, consultation with their counsel regarding whether FINRA trade reporting obligations are triggered, whether a security meets the definition of OTC Equity Security or Restricted Equity Security, and whether any exceptions apply.

Click here to read the Trade Reporting Notice.

FINRA Reminds Firms of Trade Reporting Requirements Relating to Customer Sales of Low-Value OTC Equity Securities

The Financial Industry Regulatory Authority has issued a Trade Reporting Notice (the Notice) to remind firms that sales of low-value over-the counter (OTC) equity securities positions from customer accounts that may be deemed by the customer and firm to be worthless are subject to FINRA trade reporting rules and must be reported to FINRA for publication purposes.

In the Notice, FINRA provides that if a firm purchases its customer's positions in low-value OTC equity securities (for example, to enable the customer to claim a capital loss for tax purposes), the sales are considered trades (i.e., there is a beneficial change in ownership) and are not expressly excluded from FINRA trade reporting rules.

Accordingly, firms must report these sales to FINRA for public dissemination purposes as they would any other trade.

FINRA notes that the OTC Reporting Facility (ORF) can accommodate six decimal places for purposes of reporting a per share price. If the per share price is equal to or less than $.000001, firms should report a price of $.000001. Any trade reported at a per share price less than $.0001 will be publicly disseminated with a price of $.0000.

In the Notice, FINRA also reminds firms that in these transactions, best execution obligations under NASD Rule 2320 still apply, and firms are required to use reasonable diligence to ascertain whether there is a market for the security.

Click here to read the Trade Reporting Notice.

SEC to Publish for Public Comment Updated Market-Wide Circuit Breaker Proposals to Address Extraordinary Market Volatility

The Securities and Exchange Commission announced that the national securities exchanges and the Financial Industry Regulatory Authority are filing proposals to revise existing market-wide circuit breakers that are designed to address extraordinary volatility across the securities markets. When triggered, these circuit breakers halt trading in all exchange-listed securities throughout the U.S. markets. The existing market-wide circuit breakers, which were originally adopted in October 1988, have only been triggered once (in 1997). These circuit breakers were not triggered during the severe market disruption of May 6, 2010, which led the exchanges and FINRA, in consultation with SEC staff, to assess whether the circuit breakers needed to be modified or updated in light of today's market structure.

The proposals would update the market-wide circuit breakers by:

- Reducing the market decline percentage thresholds necessary to trigger a circuit breaker;
- Shortening the duration of the resulting trading halts that do not close the market for the day to 15 minutes;
- Simplifying the structure of the circuit breakers;
- Using the broader S&P 500 Index as the pricing reference to measure a market decline (rather than the Dow Jones Industrial Average); and
- Providing that the trigger thresholds are to be recalculated daily rather than quarterly.

Click here to read the SEC Press Release.

LITIGATION

Shareholder Advisory Vote Constitutes Evidence of Board's Breach of Duty of Loyalty

The U.S. District Court for the Southern District of Ohio declined to dismiss a complaint brought by shareholders of Cincinnati Bell, a publicly-traded company, suing the company's directors for breach of the duty of loyalty. The shareholder derivative suit was based on the directors' grant of $4 million in bonuses on top of $4.5 million in salary and other compensation to the chief executive officer in the same year that Cincinnati Bell had incurred significant declines in net income, earnings per share, share price and a negative annual shareholder return. Ordinarily, courts will not inquire into board decisions under the business judgment rule, but the court found that the presumption of this rule had been rebutted by the plaintiffs' allegations of evidentiary facts demonstrating that Cincinnati Bell's board members did not act in the best interests of the company or its shareholders. Included among these evidentiary facts was the Cincinnati Bell board's unanimous approval of the executive compensation at issue, notwithstanding an advisory vote, required under the Dodd-Frank Wall Street Reform Act, in which 66% of voting shareholders voted against such compensation.

NECA-IBEW Pension Fund ex rel. Cincinnati Bell, Inc. v. Cox, No. 1:11-cv-451 (S.D. Ohio Sept. 20, 2011).

Misrepresentations Regarding Financing of Buy-Out of LLC Interest Not a 10b-5 Violation

The U.S. Court of Appeals for the Eleventh Circuit affirmed summary judgment dismissing claims for, *inter alia*, alleged violations of federal securities laws and conspiracy to defraud brought by a member of a limited liability company (LLC) and its owners against the defendant who had financed the buy-out of the member's one-half interest in the LLC at issue. Defendant, Shelby Peeples, falsely stated that he had no involvement in the buy-out of member DynaVision Group, LLC's, interest in Signature Hospitality Carpets, LLC, when, in fact, Peeples had financed the buy-out. The circuit court found that Peeples' misrepresentation regarding his (lack of) involvement in the buy-out did not play a causative role in DynaVision's decision to sell its interest in the LLC, and thus did not rise to a level of fraud actionable under Rule 10b-5. Specifically, the circuit court found that because DynaVision lacked the expertise necessary to operate Signature, could not have persuaded the individual members of the LLC to stay on board, and was forced to choose between cashing out and total ownership (based on a buy-sell provision in Signature's operating agreement), DynaVision would be unable to prove the reliance element of a 10b-5 claim.

Ledford v. Peeples, No. 06-10715, 2011 WL 4424448 (11th Cir. Sept. 23, 2011*).*

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