ALSTON+BIRD LLP

Securities Law ADVISORY

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SEC Quarterly Update

The first quarter of 2010 has continued to be an active time at the Securities and Exchange Commission (the SEC). This advisory is intended to provide a brief quarterly update about some of the SEC developments that may be of particular interest to our issuer clients.

Proxy Statements and Rules

At the end of 2009, the SEC adopted new rules requiring disclosure in company proxy statements. The new disclosures relate to:

- compensation policies as they relate to risk
- the potential conflicts of interest of compensation consultants
- director and nominee qualifications (including more information about backgrounds and experience)
- board leadership structure
- diversity policies relating to board membership

The SEC also adopted amendments to require the disclosure of stockholder voting results in a Form 8-K, and to revise the disclosure of stock and option awards in the summary compensation tables and director compensation tables. These rules are effective now. Please see our **advisory** on this rulemaking.

Since adoption of the new rules, the Division of Corporation Finance (the "Division") has published a number of new or revised Compliance and Disclosure Interpretations (C&DIs) relating to these new disclosures and provided answers to specific technical questions. These C&DIs are available **here** and **here**.

It is obviously crucial to consult these when preparing proxy disclosure. Also note that when the Staff withdraws prior C&DIs, such **withdrawal** notices can be informative.

In 2009, the SEC also proposed rules regarding shareholder proxy access and the proxy solicitation process. (See our **advisory**.) These rules are still in the proposal stage, but members of the SEC staff have frequently noted that they expect to address these proposals in the first half of 2010.

Shareholder Approval of Executive Compensation by TARP Recipients

The SEC in January issued final rules implementing the requirement that TARP recipients provide shareholders with the opportunity to cast an advisory (i.e., non-binding) vote on executive compensation. Please see our **advisory** where these requirements are summarized.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

Although currently only applicable to TARP recipients, both the House and Senate versions of financial reform legislation would require an annual advisory shareholder vote on executive compensation at ALL public companies, not just financial services companies receiving federal assistance. Depending on the final form of that legislation, these SEC rules may constitute a roadmap for future compliance by other public companies.

Revisions to E-Proxy Rules

In February, the SEC announced amendments to Rule 14a-16, governing Internet-based posting of proxy materials. In response to significant drops in shareholder participation in elections following the adoption of E-Proxy by issuers during last year's proxy season, the SEC amended the Notice and Access rules to:

- provide additional flexibility regarding the format and content of the Notice
- permit inclusion of explanatory materials regarding the process for reviewing proxy materials and voting
- revise the time frame for soliciting persons to deliver a Notice when utilizing the Notice-only option

The amendments to Rule 14a-16 took effect on March 29, 2010.

Regulation G and Non-GAAP Measures

On January 11, 2010, the Division provided new guidance on Non-GAAP Financial Measures. These interpretations are important because they reverse more limiting prior guidance. Following the adoption of Regulation G in 2003, the Staff issued a number of phone interpretations and issued comments in connection with reviews that went beyond what the new rules actually required. These new interpretations reverse those positions, particularly those relating to Adjusted EBITDA and recurring items, giving issuers more flexibility to use Non-GAAP measures in their press releases and SEC filings. That being said, issuers should be particularly careful that there are no inconsistencies between what they say in their public filings and what they say outside of their filings. SEC examiners will listen to conference calls and review investor presentations posted on issuers' websites and issue comments when there are inconsistencies.

Staff Legal Bulletin 18: Rule 12h-3

The majority of no-action letters issued recently have been letters related to ceasing reporting under Rule 12h-3. Despite the simple nature of these letters, the Staff has always taken the position that each issuer required its own no-action letter in order to cease reporting in situations where Rule 12h-3 by its terms did not apply. In March, the Staff published Staff Legal Bulletin 18 ("SLB 18"). Pursuant to SLB 18, in two situations—an abandoned initial public offering or acquisition of an issuer—issuers can "go on their own" and do not need to get a no-action letter from the Staff before ceasing reporting if they meet the conditions of the SLB.

Debt Restructurings Using Section 3(a)(9)

The Staff recently issued an important interpretive letter related to debt restructurings. The letter permits reliance on Section 3(a)(9) of the Securities Act of 1933 for the issuance of a new parent security in exchange for an outstanding parent security that has one or more "upstream" guarantees from the parent's 100-percent-owned subsidiaries. The Staff had previously issued no-action letters regarding the availability of Section 3(a)(9) for exchanges of guaranteed securities that involved "downstream" guarantees (i.e., situations where the parent guaranteed a security issued by one or more of its subsidiaries), but had not previously approved use of Section 3(a)(9) for "upstream" guarantees.

Liquidating Trust No Action Relief

The Staff recently issued a no-action letter to T-REIT Liquidating Trust stating that the Staff would not recommend enforcement action if T-REIT were to extend the initial termination date of the Liquidating Trust and continue to file modified reports with the SEC. Liquidating trust no-action letters are fairly common, but the Staff requires that both the term of the trust and the no-action relief be limited to an initial three-year term and can only be extended by receiving additional no-action relief from the Staff. This letter represents the first time a liquidating trust has requested and received an extension of the relief.

Regulation FD

The SEC filed another Regulation FD case in March. *SEC v. Presstek, Inc*., Civil Action No. 10-1058 (E.D.N.Y. Filed March 9, 2010). Last year, the SEC brought its first Reg. FD case in a long time, *In the Matter of Christopher A. Black*. In that case, the SEC did not bring an action against the company, only the individual who made the disclosures. Together these two cases may mark renewed enforcement interest in Regulation FD.

In *Presstek*, the SEC's complaint alleges that, while acting on behalf of Presstek, its CEO selectively disclosed material non-public information regarding Presstek's financial performance during the third quarter of 2006 to a managing partner of a registered investment adviser who traded on the information. The complaint also alleges that Presstek did not simultaneously disclose to the public the information provided by its CEO to the partner.

The complaint alleges violations of Exchange Act Section 13(a) and Regulation FD. The company settled with the SEC, and agreed to pay a $400,000 civil penalty and to a permanent injunction. The SEC acknowledged the remedial actions of the company, including revising its communications policies and governance principles, replacing its management team, appointing new independent board members and creating a whistleblower's hotline.

Dear CFO letter: Accounting and Disclosure

Recently, the Division of Corporation Finance's Office of Chief Accountant (CFOCA) published a "Dear CFO" **letter** providing disclosure guidance to issuers relating to repurchase agreements, securities lending transactions or other transactions involving the transfer of financial assets with an obligation to repurchase the transferred assets. The Staff had previously sent essentially the same letter tailored to the Chief Financial Officers of nearly two dozen financial and insurance companies. These letters, and the generic Dear CFO letter, are probably the result of a bankruptcy examiner's revelations that Lehman may have used repurchase agreements to hide $50 billion in debt.

In this letter, the Staff asks whether any of these types of transactions have been accounted for as sales as opposed to collateralized financings. The Staff is requesting historical data about these agreements along with additional detail supporting the sale accounting determination. The Staff will also expect a justification regarding the level of disclosure provided in MD&A.

Structured Finance

The SEC has issued new rules that impose informational requirements on credit rating agencies. As part of these rules, issuers who provide information to rating agencies in connection with the issuance or maintenance of a rating have a new requirement to make that same information available to other rating agencies. These rules will be effective in June.

Also, the SEC will propose new disclosure rules updating Regulation AB next **week**.

Short Selling

Short selling is always a matter of great interest. In late February, after a very contentious public comment process, the SEC finally **adopted** new rules related to short selling. The new rule imposes an "Alternative Uptick Circuit-Breaker" rule on short sales: if an equity security listed on a national market declines in price 10 percent or more in a day, a short sale may not be made at a price at or below the national best bid price for the rest of that trading day and the following trading day. For more details about the new rules, please see our **advisory**.

The new rule follows the **release** of five variations on two approaches to short sale regulation in April 2009. Later, in August 2009, the SEC **re-opened** the comment period for the April release and issued a new proposal for consideration. In addition, the SEC **held** **two** roundtable discussions on short-sales, with representatives of issuers, broker-dealers and retail investors taking part in the discussions.

Climate Change Interpretive Release

In January, the SEC adopted an interpretive release on existing SEC disclosure requirements as they apply to business or legal developments relating to the issue of climate change. The release does not create new legal requirements nor modify existing ones, but is intended to provide clarity and enhance consistency for public companies and their investors. Specifically, the SEC's interpretative guidance highlights the following areas as examples of where climate change may trigger disclosure requirements: The impact of legislation and regulation, the impact of international accords, the indirect consequences of regulation or business trends and physical impacts of climate change.

The SEC was very clear to emphasize that it was not taking a position with respect to the science of climate change. Whether or not "global warming" is real, the possibility of legislation and the impact of public perception are real and may require disclosure. The Staff was also very clear to point out that they did not believe the release changes any requirements. That is, these disclosures, when material, were already required. That being said, whether the release is a result of political pressure that will quickly be forgotten or is something that will spur Staff comments is yet to be seen.

Alston & Bird prepared an **advisory** on the interpretive release regarding climate change disclosures.

Proposed Revisions to Rule 10b-18

In January, the SEC proposed amendments to Rule 10b-18's "safe harbor" for issuer repurchases. The proposed amendments are intended to clarify and modernize the safe harbor provisions.

The SEC's proposals include a proposal to modify the price condition and limit the general disqualification provision to provide issuers with greater flexibility to conduct repurchases in fast moving markets with reduced potential for abuse. The SEC's proposals to modify the timing condition and the "merger exclusion" provision

are intended to maintain reasonable limits on the safe harbor, so as to minimize the market impact of the issuer's repurchases on the market.

We prepared an **advisory** on the proposed revisions to Rule 10b-18. In addition, see the ABA **comment letter** on the proposed revisions.

Review of Equity Market Structure

In January, the SEC began a broad review of the equity market structure with its approval of a Concept Release. In the release, the SEC acknowledged that the secondary market for U.S.-listed equities has changed dramatically in recent years. As a result of this, the SEC explained, it is undertaking a comprehensive review of equity market structures in order to understand the effects that changes to the equity markets have had and whether regulatory initiatives are required.

Specifically, the concept release requests comments on:

- Equity market structure performance, including market quality metrics and fairness considerations with regard to the interests of long-term investors, and other measures of market performance
- Strategies and tools related to high frequency trading, specifically including passive market making, arbitrage, structural, directional strategies, and co-location and private data feeds by high-frequency traders, and whether these strategies and tools pose systemic risks to the integrity of current market structure
- Un-displayed liquidity, including order execution quality, public price discovery, and fair access and other ATS regulation

For more information, contact your Alston & Bird LLP attorney or one of the attorneys in the firm's Securities Group.

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