Client Advisory

CARTER LEDYARD & MILBURN LLP
Partners for Your Business®

Corporate Department

June 22, 2017

Recent Developments: Mid-Year Scorecard

As we are at the mid-year point in the year, we thought this would be a good time to circulate a list of developments in U.S. securities law for the first half of the year that might interest you.

SEC Published Taxonomy for Foreign Private Issuers' Submission of Data in XBRL

In March the U.S. Securities and Exchange Commission ("SEC") published on its website the tags or "taxonomy" needed by foreign private issuers that prepare their financial statements in accordance with International Financial Reporting Standards ("IFRS") to submit those reports using the interactive data format known as eXtensible Business reporting Language ("XBRL").[1] XBRL is a machine-readable format that allows investors and other data users to more easily access, analyze and compare financial information across reporting periods and across companies. Foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the International Accounting Standards Board are required to begin submitting their financial statements in XBRL with their first annual report on Form 20-F or 40-F for a fiscal period ending on or after December 15, 2017.

Adopted: "Links to Exhibits" in SEC Filings

In March, the SEC adopted new rule and form amendments requiring that the exhibit indices in registration statements and reports under the Securities Exchange Act of 1934 (the "Exchange Act") contain links to the exhibits that are listed in the applicable exhibit index and that these filings be made available in HTML.[2]

The effective date is delayed for most companies until September 1, 2017, and for smaller reporting companies and non-accelerated filers that use the ASC11 format, until September 1, 2018.

Adopted: T+2 Settlement But Firm Commitment Underwritings are Unchanged

In March, the SEC adopted an amendment to Rule 15c6-1(a) mandating a T+2 settlement cycle.[3] The amendment prohibits a broker-dealer from effecting a contract or transaction that provides for payment and delivery of securities later than 2 business days after the trade date—unless otherwise expressly agreed to by

---

[1] IFRS Taxonomy for Foreign Private Issuers That Prepare Their Financial Statements in Accordance with International Financial Reporting Standards as Issued by the International Accounting Standards Board, SEC Release Nos. 33-10320 and 34-80128 (Mar. 1, 2017), https://www.sec.gov/rules/other/2017/33-10320.pdf.
[2] Exhibit Hyperlinks and HTML Format, SEC Release Nos. 33-10322 and 34-80132 (Mar. 1, 2017) (to be codified in 17 C.F.R. Parts 229, 232, and 249), https://www.sec.gov/rules/final/2017/33-10322.pdf.
[3] Securities Transaction Settlement Cycle, SEC Release No. 34-80295 (Mar. 22, 2017) (to be codified at 17 C.F.R. Part 240), https://www.sec.gov/rules/final/2017/34-80295.pdf.

the parties at the time of the trade. The amendment did not change the settlement cycle for firm commitment underwritings for securities sold for cash, which is typically T+3 unless the parties agree to a longer settlement period.

Cover page Changes for Many Forms

In April, changes to many of the SEC's forms under the Securities Act of 1933 (the "Securities Act") and the Exchange Act became effective.[4]

Most of these changes affect cover pages, which will help the SEC identify whether a filer is an "emerging growth company" or "EGC." Many cover pages have changed for these forms regardless of whether the registrant is an EGC or not.

Congress Nullified SEC's Resource Extraction Issuer Payment Disclosure Rule

In a joint resolution, the House of Representatives and the Senate nullified the resource extraction issuer payment disclosure rule of the SEC. President Donald Trump signed the resolution on February 14, 2017.[5] As a result, the resource extraction issuer payment disclosure rule will ***not*** go into effect.

Conflict Minerals: SEC Halts "Source/Custody Chain" Diligence

The SEC issued a statement indicating that, pending further review, it would not pursue enforcement proceedings against companies that did not comply with the source and "chain of custody" due diligence requirements in Item 1.01(c) of Form SD.[6]

While the conflict minerals rule remains effective, the source and chain of custody due diligence requirements in Item 1.01(c) are widely regarded as its most burdensome aspects. Consequently, companies will not be subject to enforcement action if they perform only a reasonable country-of-origin inquiry and include that disclosure on a Form SD but do not provide the disclosure that could otherwise be required in a conflict minerals report or have an audit performed or perform the due diligence inquiry into the source and chain of custody of their conflict minerals required under Item 1.01(c).

NYSE Proposal To Facilitate Direct Listings

The New York Stock Exchange ("NYSE") has proposed a rule change to facilitate a direct listing without an initial public offering ("IPO") for companies filing a resale registration statement.[7] However, direct listings

---

[4] *See* Inflation Adjustments and Other Technical Amendments Under Titles I and III of the JOBS Act, SEC Release Nos. 33-10332 and 34-80355 (Mar. 31, 2017) (to be codified at 17 C.F.R. Parts 210, 227, 229, 230, 239, 240, and 249), https://www.sec.gov/rules/final/2017/33-10332.pdf. The amended forms are available on the SEC Division of Corporate Finance website, at https://www.sec.gov/divisions/corpfin/forms/securities.shtml for Securities Act forms and https://www.sec.gov/divisions/corpfin/forms/exchange.shtml for Exchange Act forms.

[5] Pub. L. No. 115-4, 131 Stat. 9, *available at* https://www.congress.gov/115/plaws/publ4/PLAW-115publ4.pdf.

[6] SEC, "Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Mineral Rule" (Apr. 7, 2017), https://www.sec.gov/news/public-statement/corpfin-updated-statement-court-decision-conflict-minerals-rule.

2 Wall Street, New York, NY 10005 212-732-3200 Fax: 212-732-3232

without an IPO are already possible under existing rules. This proposal is intended for companies that have sold common equity securities in a private placement without having previously registered their common equity securities under the Exchange Act. Those companies may wish to list common equity securities on the NYSE at the time of effectiveness of a resale registration statement filed solely for the resale of the securities held by selling stockholders.

Generally, a direct listing could be of significant interest for issuers that have completed equity offerings pursuant to Rule 144A under the Securities Act; for issuers that have completed numerous private placements and have venture capital or private equity investors that need liquidity; and for issuers, including foreign issuers, that are well-funded and do not need a capital raise through an IPO, but would still like to have their securities listing or quoted on a securities exchange.

Non-GAAP Financial Measures

In May 2016, the SEC's Division of Corporation Finance issued new guidance in the form of Compliance and Disclosure Interpretations ("C&DIs"), identifying a number of potentially problematic uses of non-GAAP financial measures.[8] Since then, the SEC comments letters to companies have focused on:

- Failure to present GAAP measures with equal or greater prominence;
- Inadequate explanations of usefulness of non-GAAP measures;
- Misleading adjustments, such as exclusions of normal, recurring cash expenses;
- Inadequate presentation of income tax effects of non-GAAP measures;
- Individually tailored revenue recognition or measurement methods;
- Misleading titles or descriptions of non-GAAP measures; and
- Use of non-GAAP per share liquidity measures.

Enforcement: SEC Targets Control Contest Disclosures

In February, the SEC's Division of Enforcement announced two new actions involving disclosure violations that took place during takeover and activist battles. [9] Disclosure in this arena seems to be an area of emphasis for the SEC. The SEC recently sanctioned one company for failing to disclose merger negotiations with third parties while it was the subject of a tender offer.

---

[7] Notice of Filing of Proposed Rule Change to Amend Section 102.01B of the NYSE Listed Company Manual, SEC Release No. 34-80313 (Mar. 27, 2017), https://www.sec.gov/rules/sro/nyse/2017/34-80313.pdf.
[8] SEC, Compliance & Disclosure Interpretations: Non-GAAP Financial Measures, https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm (last updated May 17, 2016).
[9] SEC, Press Release, "SEC Announces Cases Related to Disclosures During Battles for Corporate Control" (Feb. 14, 2017), https://www.sec.gov/news/pressrelease/2017-48.html.

2 Wall Street, New York, NY 10005 212-732-3200 Fax: 212-732-3232

The first proceeding involved inadequate disclosures about "success fees" payable by the target to two investment banks that it retained to help fight off a tender offer. The second action addressed failures by individuals and investment funds to comply with beneficial ownership reporting obligations under Section 13(d) and 16(a) of the Exchange Act in connection with their joint efforts in several activist campaigns. Public companies have long complained about activists playing fast and loose with beneficial ownership disclosure requirements.

BlackRock: Boards Must Address Climate Change and Board Diversity

BlackRock recently posted its 2017–2018 engagement priorities, which included climate change risk and gender diversity. BlackRock made a push for more and better disclosure of climate risks and board diversity and indicated that it will use its vote to pressure companies who lag on addressing those issues and may vote against the re-election of certain directors it deems most responsible for board process and risk oversight.[10]

HSR Act Revised Jurisdictional Thresholds

The thresholds set forth in the Hart–Scott–Rodino Antitrust Improvements Act (the "HSR Act") have been revised based on the change in gross national product. The minimum size of a transaction subject to the HSR Act has been raised from $78.2 million to $80.8 million.[11]

FINRA Established New Limited Registration Regime for "Capital Acquisition Brokers," For Institutional Placement Agents

The Financial Industry Regulatory Authority ("FINRA") recently established a new limited membership category for broker-dealers engaged solely in certain corporate financing advisory and capital raising activities, referred to as "capital acquisition brokers" or "CABs."[12] Under the new regime, firms that engage only in these limited activities can elect to be regulated as CABs, subject to a streamlined set of FINRA rules, including significantly less burdensome and restrictive rules governing communications with the public. Notably, certain firms that act as placement agents for private investment funds may be eligible to be regulated as CABs.

CAB status may be of interest to firms serving as placement agent with an institutional customer base (for the greater flexibility the CAB rule set provides to communications with predictions or projections of performance), and to M&A and other corporate finance advisory firms whose activities come within those permitted to CABs (for the lessened compliance burdens). However, the prohibition on acting as a Rule 15a-

---

[10] BlackRock, Inc., Investment Stewardship: Our Engagement Priorities for 2017–2018 (Mar. 13, 2017), https://www.blackrock.com/corporate/en-us/about-us/investment-stewardship/engagement-priorities.
[11] FTC Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 82 Fed. Reg. 8524 (Jan. 26, 2017) (to be codified at 16 C.F.R. Parts 801–803).
[12] FINRA Regulatory Notice 16-37: Capital Acquisition Brokers (Oct. 17, 2016), http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-16-37.pdf.

2 Wall Street, New York, NY 10005 212-732-3200 Fax: 212-732-3232

6 chaperone and on the use of dual-hatted personnel who carry out securities-related functions for other entities will pose a significant challenge to some firms considering CAB status.

For more information concerning the matters discussed in this publication, please contact the author, **Guy P. Lander** (212-238-8619, lander@clm.com), or your regular Carter Ledyard attorney.

2 Wall Street, New York, NY 10005 212-732-3200 Fax: 212-732-3232