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Chairman Clayton Outlines 2019 Priorities

On December 6, SEC Chairman Jay Clayton reviewed the SEC's achievements in 2018 and outlined his views on its rulemaking agenda and priorities for 2019. Key initiatives include reviewing ownership and resubmission thresholds for shareholder proposals, considering proxy advisory reforms and improvements to "proxy plumbing," an increased focus on Brexit, LIBOR and cybersecurity disclosures, continued monitoring of initial coin offerings and distributed ledger technology, initiatives to facilitate capital raising for issuers, and consideration of the adequacy and appropriateness of mandated quarterly reporting.

Proxy Process Roundtable

On November 15, the SEC held a roundtable on the proxy process addressing proxy voting mechanics and technology, shareholder proposals and proxy advisory firms.

Panelists disagreed on several fundamental issues – such as whether there should be any change to existing shareholder proposal and proxy advisory regulations. However, they generally agreed that current stock voting mechanics and processes are cumbersome, outdated and in need of reform, and that the SEC should ultimately undertake a wholesale review of the proxy voting system to reflect current markets and technology. There appeared to be growing support for moving forward on some more readily achievable solutions, such as identifying causes for declining retail participation, making changes around default broker rules and shareholder education surrounding objecting-beneficial-owner (OBO) and non-objecting-beneficial-owner (NOBO) designations, moving towards a universal proxy card (so long as the "devil in the details" aspects are worked out) and leveraging technology (such as the potential use of a distributed ledger or blockchain technologies) to streamline and provide better authentication in the proxy voting process.

New Rules for Mining Disclosures

On October 31, the SEC adopted new rules (available here) governing mining disclosures, which will replace Guide 7 and more closely align the SEC's disclosure requirements with current industry and global regulatory practices and standards. Among other things, the new rules eliminate the general restriction on the disclosure of mineral resources, which currently may be disclosed only in limited circumstances.

Shareholder Proposal Guidance

On October 23, the SEC staff issued Staff Legal Bulletin No. 14J (available here) providing further guidance on shareholder proposals submitted pursuant to Rule 14a-8 under the Exchange Act. The bulletin provides guidance on board analyses contained in no-action requests that seek to rely on Rules 14a-8(i)(5) or 14a-8(i)(7) as a basis to exclude shareholder proposals, the scope and application of micromanagement as a basis to exclude a proposal under Rule14a-8(i)(7), and the scope and application of Rule 14a-8(i)(7) for proposals that touch upon senior executive or director compensation matters.

SEC Reminds Registrants to Consider Cyber Threats when Implementing Internal Accounting Controls

On October 16, the SEC issued a Report of Investigation (available here) cautioning public companies to carefully consider cyber threats when implementing and maintaining their internal accounting controls. The report is based on the Enforcement Division's investigations of nine SEC registrants spanning multiple industries that were victims of cyber fraud. Although the SEC declined to take enforcement action, it noted that public company internal accounting controls may need to be reassessed in light of risks from increasingly widespread cyber-related frauds.

The report highlights the SEC's increased focus on cybersecurity issues following its release of guidance in February 2018 to assist registrants in preparing disclosures concerning cybersecurity risks and incidents. The guidance, discussed in our earlier client alert, reminds registrants to assess whether they have sufficient disclosure controls and procedures in place to ensure that relevant information about cybersecurity issues is processed and reported to the appropriate personnel to enable senior management to make decisions about public disclosure and fulfill their certification obligations. Shortly following the release of that guidance, the company formerly known as Yahoo! was fined $35 million to settle charges that it misled investors by failing to disclose a significant data breach (see our client alert here).

SEC Adopts Updates to Rationalize Disclosure Requirements

On August 17, the SEC adopted amendments (available here) to certain of its disclosure requirements that have become redundant, duplicative, overlapping, outdated or superseded, in light of other SEC disclosure requirements, U.S. GAAP, International Financial Reporting Standards and changes in the information environment. The SEC also adopted amendments to certain disclosure requirements that overlap with U.S. GAAP, and referred other disclosure requirements to the Financial Accounting Standards Board for potential incorporation into U.S. GAAP. The amendments are an effort to streamline the SEC's disclosure requirements and do not significantly alter the total mix of information currently provided to investors or otherwise implement the substantive revisions to Regulation S-K discussed in the SEC's April 2016 concept release, "Report on Review of Disclosure Requirements in Regulation S-K" (available here).

SEC Proposes Simplified Disclosure Requirements for Guaranteed and Secured Notes in Registered Offerings

On July 24, the SEC proposed rules (available here) amending and simplifying the financial disclosure requirements of Rule 3-10 of Regulation S-X for guarantors and issuers of guaranteed securities and of Rule 3-16 of Regulation S-X for affiliates whose securities collateralize registered securities. The proposed rules are intended to focus disclosures on material information, reduce the cost of compliance and encourage issuers to offer guaranteed or collateralized securities on a registered basis or on a private basis with registration rights. The proposed rules result from an ongoing evaluation of the SEC's disclosure requirements pursuant to the Disclosure Effectiveness Initiative, a broad-based staff review of the SEC's disclosure requirements mandated by the Jumpstart Our Business Startups Act of 2012.

SEC Adopts Final Rules Raising Rule 701 Disclosure Threshold and Issues Concept Release

On July 18, as mandated by the Economic Growth, Regulatory Relief and Consumer Protection Act (see our client alert here and below), the SEC adopted final rules (available here) to revise Securities Act Rule 701(e) to increase, from $5 million to $10 million, the aggregate sales price or amount of securities sold during any consecutive 12-month period in excess of which an issuer is required to deliver additional disclosures to recipients of awards under Rule 701. Rule 701 establishes an exemption from the registration requirements of the Securities Act for securities issued to officers, directors, employees and consultants pursuant to a written compensatory benefit plan by companies that are not subject to the reporting requirements of the Exchange Act.

In addition to amending Rule 701, the SEC issued a concept release (available here) seeking comment on ways to modernize compensatory securities offerings and sales pursuant to Rule 701 and Form S-8, given the significant evolution that has taken place both in the types of compensatory offerings issuers make and the composition of the workforce since the SEC last substantively amended Rule 701 in 1999.

SEC Broadens Definition of “Smaller Reporting Company” and Requires Inline XBRL in Certain Filings

On June 28, the SEC adopted rules broadening the definition of “smaller reporting company” (available here) and requiring the use of the Inline XBRL format in certain operating company and mutual fund filings (available here). The new smaller reporting company definition allows a company with less than $250 million of public float to take advantage of the scaled disclosure accommodations, as compared to the $75 million threshold under the prior definition. The final rules also expand the definition of smaller reporting company to include companies with less than $100 million in annual revenues during their most recently completed fiscal year if they also have either no public float or a public float of less than $700 million. Previously, the revenue test required no public float and less than $50 million in annual revenues. The SEC estimates that almost 1,000 additional companies will be eligible for smaller reporting company status in the first year under the new definition.

Supreme Court Rules on SEC Administrative Law Judge Appointments

On June 21, the Supreme Court held in *Lucia* v. *SEC* that the process by which the SEC selects administrative law judges (ALJs) violates the U.S. Constitution. The Court concluded that SEC ALJs are “Officers of the United States,” who must be appointed by the SEC itself or by another proper authority under the Appointments Clause. For pending cases that are tainted by an unconstitutional ALJ appointment, *Lucia* will require reassignment and rehearing of prior proceedings. In the near term, that is likely to be disruptive to the enforcement process at the SEC and other affected agencies, and beneficial to respondents in their administrative proceedings. Beyond pending cases in which a constitutional objection has been raised, the long-term implications of *Lucia* are less clear. The SEC and other federal agencies that employ ALJs may presumably satisfy constitutional requirements going forward through a process by which the “Heads of Departments” appoint the ALJs.

Federal Agencies Propose Amendments to Volcker Rule

On June 5, following approval by the Federal Reserve, the Department of the Treasury, the FDIC and the CFTC, the SEC approved a notice of proposed rulemaking (available here) by a vote of 3-2 that attempts to simplify and more narrowly tailor the Volcker Rule, one of the key elements of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

The Volcker Rule (Section 13 of the Bank Holding Company Act of 1956) prohibits insured depository institutions and certain other banking entities from engaging in proprietary trading or acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with hedge funds and private-equity funds ("covered funds"). The limitations set forth in the Volcker Rule incorporate a number of definitions and provide for a variety of exceptions that many market participants have argued need to be clarified and streamlined. While the proposed rules attempt to simplify compliance burdens under the Volcker Rule, in particular for small and mid-size firms that do not have large trading operations, they do not undo its fundamental structure.

Among other things, the proposed rules:

- tailor the Volcker Rule's compliance requirements based on the size of a firm's trading assets and liabilities, with the most onerous requirements applying to firms with the most trading activity and reduced compliance and recordkeeping requirements for firms with moderate or limited trading assets and liabilities;
- revise the definition of "trading account;"
- clarify that firms that trade within appropriately developed internal risk limits are engaged in permissible market-making or underwriting activity, and streamline the criteria that apply when a banking entity seeks to rely on the hedging and foreign bank exemptions; and
- simplify metrics reporting requirements.

In addition, the agencies requested comment on the definition of, and permitted relationships with, a "covered fund."

President Signs Dodd-Frank Reform Legislation

On May 24, President Trump signed into law a financial services reform bill relaxing certain provisions of the Dodd-Frank Act. The bill, titled the "Economic Growth, Regulatory Relief, and Consumer Protection Act," limits the application of various provisions of the Dodd-Frank Act to small and mid-sized banks and raises asset thresholds above which larger banks are subject to increased oversight and regulation. The Act also amends certain other provisions of the federal securities laws.

Among other things, the Act:

- amends the Bank Holding Company Act of 1956 to exempt banks with assets valued at less than $10 billion from the Volcker Rule;
- raises the threshold for designation of a bank holding company as a Systemically Important Financial Institution ("SIFI") from $50 billion in assets to $250 billion in assets. Banks designated as SIFIs must, among other requirements, adhere to stricter rules and oversight and produce "living wills" describing how they would liquidate their assets in the event of a bankruptcy;
- exempts small and regional banks falling below new, higher asset thresholds from certain requirements for loans, mortgages and trading, and allows them to avoid other federal oversight such as stress tests and leverage ratio requirements; and
- liberalizes the exemption under 3(c)(1) of the Investment Company Act of 1940 applicable to venture capital funds.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Mark S. Bergman
+44-20-7367-1601
mbergman@paulweiss.com

Andrew J. Foley
+1-212-373-3078
afoley@paulweiss.com

David S. Huntington
+1-212-373-3124
dhuntington@paulweiss.com

Hank Michael
+1-212-373-3892
hmichael@paulweiss.com