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Meridian Client Update

NASDAQ and NYSE Issue Compensation Committee Certification Forms

Earlier this month, NASDAQ and the New York Stock Exchange (NYSE) posted on-line forms that listed companies must complete to confirm their compliance with new listing rules on compensation committee independence standards.

These forms may be found at the following links:

https://usequities.nyx.com/sites/NYSE_Section_303A_Annual_Written_Affirmation

https://listingcenter.nasdaqomx.com/NASDAQ_Compensation_Committee_Certification

The NYSE form, entitled “Domestic Company Section 303A Annual Written Affirmation” and NASDAQ form, entitled “Compensation Committee Certification”, may be submitted electronically. The NYSE form must be executed by a company officer and the NASDAQ form must be executed by a company authorized representative.

The NYSE form simply requires a listed company to “affirm” that it has a compensation committee meeting the requirements of Section 303A.05 of the NYSE Listed Company Manual. In addition to covering compensation committee independence standards, the NYSE form also requires a listed company to affirm compliance with other NYSE corporate governance standards under Section 303A, including those relating to majority board and director independence, executive sessions, nominating/corporate governance committee, audit committee and corporate governance guidelines.

The NYSE requires that the Domestic Company Section 303A Annual Written Affirmation be filed simultaneously with the Domestic Company Section 303A Annual CEO Certification which may be found at the following link: https://usequities.nyx.com/NYSE_Section_303A_Annual_CEO_Certification

Under NASDAQ’s form, a listed company must “certify” to the following:

- The Company has adopted a formal written compensation committee charter specifying the items enumerated in Rule 5605(d)(1) (e.g., scope of committee’s responsibilities; committee’s responsibility for setting compensation of the CEO and other executive officers; exclusion of CEO when committee votes or deliberates on CEO compensation; and committee responsibilities and authority to select advisors pursuant to Rule 5605(d)(3).
- The Compensation Committee will review and reassess the adequacy of the charter on an annual basis.
- The Company has, and will continue to have, a compensation committee of at least two members each of which is an “Independent Director” as defined under Rule 5605(a)(2).

- In affirmatively determining the independence of any director who will serve on the compensation committee, the board of directors has considered, and will continue to consider, all factors specifically relevant to determining whether a director has a relationship to the Company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to:
 - The source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the Company to such director; and
 - Whether such director is affiliated with the Company, a subsidiary of the Company or an affiliate of a subsidiary of the Company.

The initial certifications/affirmations are due the earlier of 30 days after a company's first annual meeting after January 15, 2014, or October 31, 2014. Thereafter, the NYSE affirmation form must be submitted each year no later than 30 days after a company's annual meeting. NASDAQ does **not** require annual certification.

SEC Issues Favorable Guidance on "Unbundling" Rules Applicability to Equity Plan Proposals

The federal securities laws set forth specific rules with regard to the manner in which a matter must be presented to shareholders for a vote. Generally, two or more distinct matters must be subject to separate shareholder votes. This rule is commonly referred to as the "unbundling rule." However, the Securities and Exchange (SEC) staff has indicated that where multiple matters are so "inextricably intertwined" as to effectively constitute a single matter, such matters need not be unbundled.

Whether two or more matters may be bundled or must be unbundled for shareholder voting is inherently a factual determination. A recent federal court decision shed light on this issue in a case involving Apple Inc. That case involved Apple bundling four amendments to its charter, including one on the elimination of "blank check" preferred stock, as a single matter for a shareholder vote. The court enjoined Apple from holding this shareholder vote, ruling that the vote likely violated the SEC rules of bundling separate matters into a single vote.

This ruling raised concerns whether a management proposal on equity plans could be bundled to include other related items such as plan provisions required for compliance with Section 162(m) of the Internal Revenue Code.

The SEC staff favorably answered that question through interpretative guidance issued on January 24, 2014 (Compliance and Disclosure Interpretation (C&DI) on Exchange Act Rule 14a-4(a)(3), Question 101.03). This guidance provides that the following proposed changes to a registrant's equity plan may be bundled into a single proposal subject to shareholder approval:

- An increase in the total number of shares reserved for issuance under the plan;
- An increase in the maximum amount of compensation payable to an employee during a specified period for purposes of meeting the requirements for qualified performance-based compensation under Section 162(m) of the Internal Revenue Code;
- Adds restricted stock to the types of awards that can be granted under the plan; and
- Extends the term of the plan.

It appears that the SEC staff does not intend for the above list to be exhaustive of changes that may be bundled. The C&DI suggests that **any** changes to an equity plan may be bundled **even if** the changes would be material in the context of the equity plan and the rules of the applicable national securities exchange would require shareholder approval of each of the changes if presented on a standalone basis. For example, the NYSE characterizes the following changes to an equity plan as material and, therefore, requiring shareholder approval:

- A material increase in the number of shares available under the plan (other than an increase solely to reflect a reorganization, stock split, merger, spin-off or similar transaction).
- An expansion of the types of awards available under the plan.
- A material expansion of the class of employees, directors or other service providers eligible to participate in the plan.
- A material extension of the term of the plan.
- A material change to the method of determining the strike price of options under the plan.
- The deletion or limitation of any provision prohibiting repricing of options.
- A revision that would have the effect of materially increasing the potential dilution of shareholders over the lifetime of the plan.
- Any revision that has an effect similar to revisions listed above.

Based on the SEC guidance, it would appear two or more of these material revisions could be bundled into a single management proposal submitted for a shareholder vote.

Meridian comment. Although a C&DI reflects the view of the staff of the SEC Division of Corporation Finance, a C&DI does not carry the force of law or represent a definitive interpretation. However, the C&DI provides comfort to registrants that the SEC will not object to a proxy that bundles equity plan changes into a single management proposal. The laws governing whether two or more management proposals may be bundled or must be unbundled are complex and involve rules under state corporate law, federal securities laws, national stock exchange listing standards and an issuer's charter and bylaws. Given the complexity of the unbundling rules and the increase in litigation concerning proxy disclosures on executive compensation and on equity plan proposals, careful analysis is required to determine whether a relatively routine proposal on an equity plan includes two or more separate matters that must be unbundled and subject to separate shareholder votes.

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The **Client Update** is prepared by Meridian Compensation Partners' Technical Team led by Donald Kalfen. Questions regarding this Client Update or executive compensation technical issues may be directed to Donald Kalfen at 847-235-3605 or dkalfen@meridiancp.com.

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