CTC Investor Relations
Market News

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A monthly review of IR developments for our clients and friends. . .

NIRI likes a lot about House-passed JOBS Act update, but has a few qualms

Much has been written about the 32 items wrapped into the JOBS and Investor Confidence Act of 2018 that breezed through the U.S. House of Representatives on a 406-4 vote in July. The package won praise for balancing the interests of wannabe IPO companies and protections for their investors, but Senate passage remains uncertain. The National Investor Relations Institute, however, red-flagged two potentially troublesome items in the bill, and mentioned two items dropped from the bill that it liked. One included item would direct the SEC to consider new restrictions on Rule 10b5-1 plans. Another would require issuers with multiple share classes to disclose more about the voting power of certain shareholders. NIRI said the omnibus bill didn't include two of its favorites: a measure to regulate proxy advisors, and another that raises thresholds for resubmitted shareholder proposals.

Disclaimers make bad forecasts easier to swallow for non-professional investors

A recent study conducted by the University of Iowa and Georgia Institute of Technology concluded companies can get away with a lot when they include in an earnings release a forward-looking statement accompanied by a legal disclaimer, typically a safe harbor statement. Responses from 441 non-professional investors showed them more likely to forgive management for missed projections and knowingly misleading statements, even if they lose money, when the disclaimers are used. Disclaimers are more effective if they contain less boilerplate language, are written in plain English, and integrated within the disclosure to qualify specific forward-looking statements.

Shareholder rights most popular proposal in 2018 proxy season…but

The 138 shareholder rights proposals in the first half of 2018 were the most since 2015, according to Proxy Insight, accounting for a quarter of all proposals. However, only 12 percent of the proposals passed, down from 28 percent in 2017 and 40 percent in 2016. Analysts point out that support for the proxy access movement is declining because investors don't want to change what they previously amended. Instead, proposals asking for the the right to call a special meeting and to act by written consent (i.e., without a shareholder meeting) were more likely to be successful. Seventeen percent of proposals requesting the right to act by written consent passed and 12 percent of resolutions amending the right to call a special meeting were approved.

FEI notes patterns in early SEC revenue recognition comments

The Financial Executives Institute says that trends are emerging in the SEC's comment letters about adoption of the new revenue recognition rules. Top of the SEC's comments list is disaggregation of revenue, followed by disclosure of performance obligations, consideration of significant payment terms, performance obligations, and determination whether promised goods/services are distinct. Other items getting SEC attention are timing of satisfaction of performance obligations, principal versus agent considerations, transaction prices, and costs to obtain and fulfill a contract. The FEI says it will continue to monitor SEC comments and update the trend list when appropriate.

Activists turn-up the heat, despite a strong market
In the first half, activists have spent a record $40 billion, targeting 136 companies with market value more than $500 million, according to a study by Lazard Asset Management. That is the most since the investment bank started collecting data in 2013. Only 94 companies were targeted in 2017. And to date, activists won a record 119 directorships, a 75 percent increase from 2017. Eighty-five percent of those seats being won through settlements, according to Lazard. Almost 20 percent of this year's campaigns were initiated by first time activists, as the success draws new blood into the market.

Directors' pay is all over the board
The median pay for directors in the top 100 companies rose 3.4 percent last year to over $300,000, according to consultant Compensation Advisory Partners, with some companies paying their directors as much as $1.77 million. However, some large companies run against the norm on director pay. Berkshire Hathaway paid its ten non-management directors between $2,700 and $6,700 last year: $900 for attending a meeting, $300 for conference calls and $1,000 a quarter to audit-committee members. Better yet, most Amazon directors received no cash compensation from the company in 2017. But they were granted shares periodically. In 2017, two directors were given shares valued at nearly $900,000.

Court ruling slices into class action suits over M&A deals
With "disclosure-only" settlements falling out of favor with courts, fewer investors are suing companies for additional information on planned deals. Litigation challenging M&A deals shot up from 40 percent of deals in 2005 to 94 percent in 2015, as courts were willing to approve disclosure-only settlements. This changed drastically in January 2016, when the Delaware Court of Chancery ruled to limit its approval of "disclosure-only" settlements. It said the practice was epidemic as "short-selling investors and over-insuring companies" moved a majority of these lawsuits from state to federal courts. The rate of case resolution before deal closing declined from 78 percent in 2012 to a 10-year low of 43 percent in 2017.

Don't mention "trade secrets" in your 10-K
The American Accounting Association, in conjunction with Iowa State University, drew data from 7,500 public companies from 2006 through 2014 and found that one-third of their 10-Ks mentioned that the company possessed trade secrets. Although essential information about the trade secret was withheld in most cases, the study showed their admitting their existence in the 10-Ks increased the chances of a cyber-breach to gain information on the trade secret by 30 percent. Patents have to be publicly disclosed, not trade secrets.

Rules vague about disclosing why CEOs are fired
The *Washington Post* followed up Barnes & Noble's dismissal of its CEO last month with an analysis of what companies are required to report about why chief executives depart. The answer? Not much. SEC rules require 8-K filings that cover severance pay, Board status and whether the firing was prompted by a disagreement on "operations, policies or procedures." But unlike Intel, which disclosed two weeks earlier that its CEO resigned after violating the chipmaker's anti-fraternization policy, Barns & Noble was mum about why. SEC rules do require a brief description of circumstances when directors are removed for cause or disagree with management, but little guidance about what it must include. Lawyers say some companies worry about disclosures that might embarrass a dismissed executive enough to fuel a wrongful termination lawsuit, or come in the early phase of an investigation when the facts aren't yet clear.

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