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***Behind the SEC Curtain
Practical Tips for Interacting with the SEC Staff***

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Structure of the Division of Corporation Finance

- Director, Bill Hinman
- Disclosure Operations (11 offices based on industry)
- Other Policy and Support Offices
 - Office of Mergers and Acquisitions
 - Office of Chief Counsel
 - Office of Chief Accountant
 - Office of Small Business Policy
 - Office of Capital Markets Trends
 - Office of Rulemaking
 - Office of Structured Finance
 - Office of International Corporate Finance
 - Office of Enforcement Liaison

Where are the Comments Coming From?

- Probably disclosure operations
 - Can find AD office on the company page on EDGAR
- Whom should you call with a question?
 - Depends on the nature of your question
 - If related to a particular filing or pending review, start with the contact person listed on the letter
 - If a general interpretive issue – OCC
 - If an interpretive issue regarding Reg M-A or tender offer rules, OMA
 - If an EDGAR technical question, EDGAR Filer Support
- If an interpretive issue related to Reg S-X or accounting rules, CF-OCA or OCA. If the question relates to disclosure operations or waiver letters, go to CF-OCA first.

What Are the Different Levels of Staff Review?

- No Review
- Limited Review (also called a monitor)
 - E.g., legal, financial, targeted issue, enforcement matter, etc.
- Full Review

What are the Different Levels of Staff Review? (cont'd)

- No Review –best outcome for the company. Means the staff will not be providing comments. Can request acceleration on your timeline.

What are the Different Levels of Staff Review? (cont'd)

- Monitor – This is used if the Staff is targeting the review for only certain issues:
 - First sentence of letter often reads – “We have limited our review of your filing to those issues we have addressed in our comments.”
- Common issues include
 - Technical legal rules (e.g., primary versus secondary offering)
 - Financial statements
 - Open enforcement investigation on the company
- Generally staff will not disclose in initial call the reason for the monitor. Will find out later if a comment letter is issued.
- Depending on the issue, can be staffed with only an attorney, accounting, or others from support office

What are the Different Levels of Staff Review? (cont'd)

- Full review – full scrubbing of the filing
 - 2 attorneys – examiner and reviewer
 - 2 accountants – examiner and reviewer
 - Tip: Send 4 courtesy copies to the review team upon learning the filing is a full review (not 10-K reviews though)
- Introductory paragraph and contact information
 - First sentence often reads--“We have reviewed your filing and have the following comments.”
- Attorney will conduct a full rules check
- Looks at recent events, website, etc.

What are the Different Levels of Staff Review? (cont'd)

- Bedbug – not a level of review, actually just says the filing is so “materially deficient” that the staff will not look at it.

How is a Registration Statement Screened for Review?

- Criteria evolves depending on workload, relevant issues, and judgment of screener.
 - Factors considered:
 - Is it the IPO for the company?
 - Novel of unique transaction?
 - Going private?
 - Hostile or contested transaction?
 - Company reviewed in last 2 years?
 - Open enforcement investigation?

****The practical observations in this presentation are based on experience and generalities. Facts and circumstances and different personnel within the Division make a difference.**

How is a Registration Statement Screened for Review?

- Some rules of thumb:
 - S-1 IPO – full review
 - S-4 merger – full or monitor (though some recent deals have not been reviewed)
 - S-4 Exxon Capital exchange offer – monitor or no review, but could be a full review if unusual facts
 - Schedule TO – full review
 - Selling stockholder S-3 – Could be a monitor or full review
 - Tip: think about primary versus secondary offering concerns (i.e., a selling shareholder selling over 1/3rd of the public float in the offering is likely to be considered an underwriter, and therefore the offering would be a primary offering, not secondary)
- Automatically effective registration statements are by definition not reviewed
 - S-8
 - S-3ASR - (but note that 424 takedowns may be reviewed in connection with a 10-K review; comments on the takedown probably won't be issued though)

Preliminary Proxy Statement Screening

- Definitive proxies are not screened
- Different process of screening
 - Deadline: Because of the 10 day rule in 14a-6, staff needs to inform company if it intends to review the filing by day 10. Otherwise, the company is free to file on day 11.
 - Counting: For deadline purposes, counting starts on the day of filing. For example, if the company filed the preliminary proxy on April 1, then day 10 would be April 10. If the Staff did not notify the company by April 10 of a review, then the company is free to print and mail on day 11, or April 11.

Preliminary Proxy Statement Screening

- Tips for preliminary proxies:
 - Increase in authorized/reverse split: This is a common proposal. Normally the staff would look for a representation in the document that the company has no current plans to use the shares. If there are current plans, they need to be discussed, and NOTE A issues might arise.
 - Note A says that if a solicitation is for the purpose of approving the authorization of additional shares which are to be used to acquire another specified company, and the registrant's security holders will not have a separate opportunity to vote upon the transaction, the solicitation to authorize the securities is also a solicitation with respect to the acquisition (e.g., financials, MD&A, etc.)
 - Proxy contests are almost always reviewed by OM&A. Disclosure ops will also co-review.

Should you call the staff to check on the screening?

- Generally not needed. Staff tries to respond within a week of filing
- Remember no call on the proxy statement means you are free to file on day 11
- If you haven't heard from the staff on the registration statement after about a week, it is OK to call the disclosure operations office to check on its status. Best person to contact is the legal branch chief of the AD office.

Staff Review Process

- Timing:
 - For full reviews and monitors, comments will be issued 27-30 days of filing
 - For amendments, comments issued 10 calendar days from filing
 - Time period may shorten as comment process winds down

Staff Review Process

- Types of comments:
 - Revise disclosure in filing
 - The staff will issue these types of comments on registration statements
 - Asks the company to revise the disclosure by filing an amendment to that particular filing. e.g., by filing an S-1/A

Staff Review Process

- Types of comments (cont'd):
 - Futures comment
 - Generally issued in the context of 10-K reviews or other periodic reports
 - Asks the company to revise disclosure in future filings
 - Should you include draft future filing language?
 - Sometimes the staff will ask for it, so in these situations you are required to
 - If not prompted, it is a judgment call
 - Practice is mixed

Staff Review Process

- What should I do if I don't understand what the comment is asking the company to do?
 - OK to call the examiner to get clarification
 - Don't expect to engage in a back-and-forth on the phone regarding the merits of the comment. This is done through the written comment process
 - If comment is an accounting comment, call the accountant examiner
 - If the comment is a legal comment, call the legal examiner
 - If not sure, call the legal examiner

Staff Review Process

- How to respond to comments?
 - Preferred approach is to recite comment and then put company response underneath. Makes it convenient for the staff to review.
 - Provide hard copies of redlined revised disclosure to examination team.
 - Tandy language no longer needed

Staff Review Process

- What if I disagree with the comment?
 - It is OK to disagree with a comment; this is very common
 - Explain clearly why the comment is not warranted in your situation.
 - Research if the comment has been issued elsewhere
 - How are other companies responding to the comment?
 - Were the arguments winning arguments?
- If the comment remains outstanding after multiple rounds, and the comment is of material importance to the company, consider discussing the issue with the staffer that issued the comment. Probably helpful to have a call with the examiner and reviewer.
 - Appeals are rare
 - If you wish to appeal the comment, you can request to appeal up the ladder:
 - Legal side: Assistant Director, Associate Director, Deputy Director, then Director.
 - Accounting side: Office SACA, AD, CF-OCA, then SEC-OCA.
- As you go up the ladder, the odds of success get slimmer

Staff Review Process

- How to obtain confidential treatment for portions of a filing or response letter?
 - Comment letters - Process is under Rule 83. Omission will not be subject to review until a FOIA request is made
 - Filings – Rule 406 and Reg 24b-2

Requesting Acceleration of Effectiveness

- Staff generally asks for an acceleration request two days prior to the day when you want to be declared effective
- Staff can shorten this period if needed to accommodate market timing concerns

10-K Reviews

- The substantive review process on the '34 Act side is similar to the '33 Act
- Procedures are different
 - SOX requires the SEC to review a company at least once every 3 years
 - Larger companies are reviewed more frequently
 - A company will not know it is being reviewed unless comments are issued
 - 10-K reviews happen throughout the year, so don't be surprised if you get a comment letter Nov. 1 on a 10-K that was filed March 15.
 - Generally an examiner undertaking a 10-K review will also review the 10-Qs, 8-Ks, look at website information, review analyst reports, look at transcripts. Depth of review sometimes depends on facts and situation of the company.
 - Tip: A company that received a futures comment in the past but is caught by the Staff not complying with the comment in the next 10-K review will likely be required to amend the 10-K.
 - 10-K amendments are typically not required, but can happen if issue is material enough or relates to a material deficiency in the filing

Rules of thumb for other filings

- Section 16 filings – don't expect a comment on your footnote disclosure. Be more concerned with plaintiff lawyers and the media
- Section 13D and 13G – can be important in the context of hostile actions and beneficial ownership table reporting. Note that the SEC has brought actions related to failure to update item 4 of 13D (purpose of the transaction)
- Form 10 – treated similar to '33 Act registration statements.
- Form 144 – don't expect comments
- Form D – don't expect comments

Recent Developments

- Non-GAAP
- Segment presentation
- Revenue recognition
- Tax bill implications
- S-X waiver letters
 - Suggest calling the Staff first prior to sending in a letter

Questions?

Contact Information:

Feel free to reach out to me directly at
(615) 742-7756 or jknight@bassberry.com
if you have any follow-up questions.

Thank you