

Proxy Statements: SEC Clarifies the “Unbundling Rule”

Background

The Securities and Exchange Commission (“SEC”) recently released three Compliance and Disclosure Interpretations¹ (the “CDIs”) concerning Exchange Act Rule 14a-4(a)(3)² (the “Rule”) applicable to proxy statements. The Rule requires the unbundling of matters for which proxy authority is solicited so as to “identify clearly and impartially each separate matter” to be acted on. Prior to the release of the CDIs, the SEC had only provided guidance on the application of the Rule in the specific context of mergers, acquisitions and similar transactions in its September 2004 “Fifth Supplement.”³

Last year, in *Greenlight Capital, L.P. v. Apple, Inc.*,⁴ the District Court for the Southern District of New York enjoined Apple from bundling four charter amendments⁵ into a single proposal, holding that the unbundling rules were intended to prevent shareholders from choosing between registering a false vote and risking a failed Board election. The court also held that the fact that the SEC did not raise the unbundling issue does not validate a filed proxy statement.⁶

Questions and Answers of General Applicability

Prompted by *Apple*, the CDIs provide that:

- Proxy statements need not unbundle multiple matters that are so “inextricably intertwined” as to effectively constitute a single matter. The Staff would not consider two matters to be “inextricably intertwined” simply because they were negotiated as part of one transaction or because the matters represent terms of a contract that one or the other of the parties considered essential to the overall bargain. In contrast, if the matters each speak to a basic financial term of the same series of capital stock, the Staff would view them as “inextricably intertwined” and the matters would not have to be unbundled.⁷

¹ The CDIs are available at <http://www.sec.gov/divisions/corpfin/guidance/14a-interps.htm>.

² The Rule is available at <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&rgn=div5&view=text&node=17:3.0.1.1.1#17:3.0.1.1.1.2.87.222>.

³ Supplement No. 5 is available at <http://www.sec.gov/interps/telephone/phonesupplement5.htm>. A memorandum regarding Supplement No. 5 is available at <http://cgmysps1/Firm%20Memos/Recent%20Securities%20Law%20Developments%20-%20Corporate%20Governance%20and%20Proxy%20Matters.pdf>.

⁴ *Greenlight Capital, L.P. v. Apple, Inc.*, No. 13 Civ. 900(RJS), 2013 WL 646547 (S.D.N.Y. Feb. 22, 2013) (“*Apple*”).

⁵ The amendments: (1) eliminated certain language relating to the term of office of directors in order to facilitate the adoption of majority voting for the election of directors; (2) eliminated “blank check” preferred stock; (3) established a par value for Apple’s common stock of \$0.00001 per share; and (4) made other conforming changes, including eliminating provisions in the Articles of Incorporation relating to Apple preferred stock. Greenlight objected to elimination of the preferred stock.

⁶ The court cited Rule 14a-9(b) “[t]he fact that a proxy statement, form of proxy[,] or other soliciting materials has been filed with or examined by the [SEC] shall not be deemed a finding by the [SEC] that such material is accurate or complete or not false or misleading, or that the [SEC] has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders.”

⁷ See CDI Question 101.01.

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- Proxy statements can bundle any number of immaterial matters with a single material matter. In determining materiality, registrants should consider whether a given matter substantively affects shareholder rights. The SEC stated that, if management knows or has reason to know that a particular amendment which, even if it does not substantively affect shareholder rights, is one on which shareholders could reasonably be expected to wish to express a view other than the view expressed by management, the amendments should be unbundled.⁸
- An omnibus amendment to a registrant's equity incentive plan does not require unbundling, even though each matter may be individually material.⁹

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.

⁸ See CDI Question 101.02.

⁹ See CDI Question 101.03.