

## **SEC Settles with CEO for Failure To Disclose Executive Perks to Shareholders**

The Securities and Exchange Commission (“SEC”) recently announced that it had entered into a settlement with Miles S. Nadal (“Nadal”), the former Chief Executive Officer (“CEO”) of MDC Partners Inc. (“MDCA” or the “Company”), a New York-based marketing company, in connection with SEC charges brought against Nadal alleging his failure to properly disclose the compensation he received from MDCA in MDCA’s definitive proxy statements, which omitted \$11.285 million worth of perquisites, personal expense reimbursements and other items of value during the period 2009-2014.<sup>1</sup>

Without admitting or denying the SEC’s factual allegations, Nadal agreed to pay disgorgement of \$1.85 million, \$150,000 in prejudgment interest and a civil penalty of \$3.5 million, for a total of \$5.5 million, and additionally agreed to refrain from serving as an officer or director of a public company for a period of five years.<sup>2</sup> In addition, Nadal returned \$11.285 million to the Company and, during the pendency of the investigation, had resigned from his position at the Company.<sup>3</sup>

### **I. Background**

According to the SEC’s release, MDCA’s proxy statements from 2009 through 2014 disclosed approximately \$3.87 million worth of perquisites and personal benefits provided to Nadal in executive compensation, including an “annual \$500,000 perquisite allowance; interest benefits received on interest free loans in 2009, 2010, 2011 and 2012; disability, medical, life insurance benefits in 2009 and 2010; and legal fees and the use of company aircraft and apartment in 2014.”<sup>4</sup> Over this same period, however, the disclosures omitted an annual average of approximately \$1.88 million worth of a wide range of additional perquisites and personal benefits provided to Nadal, “thereby understating the perquisites and personal benefits portion of Nadal’s compensation by an average of almost 300% each year.”<sup>5</sup> The proxy statements were incorporated by reference into MDCA’s annual reports.

On January 18, 2017, the SEC announced that the Company had agreed to a settlement relating to, among other things, its violations of various federal securities laws associated with its problematic disclosure practices, including the failure to properly disclose Nadal’s compensation.<sup>6</sup>

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<sup>1</sup> See SEC Press Release, SEC Charges CEO With Failing to Disclose Perks to Shareholders (May 2017) (the “Press Release”), available at <https://www.sec.gov/news/press-release/2017-99>.

<sup>2</sup> See Order Instituting Cease and-Desist Proceedings, In the Matter of Miles S. Nadal, Adm. Proc. File No. 3-17980 (May 11, 2017) (the “Order”), available at <https://www.sec.gov/litigation/admin/2017/34-80652.pdf>.

<sup>3</sup> See Press Release.

<sup>4</sup> Order at ¶2.

<sup>5</sup> *Id.* As the SEC order described, “[i]tems that Nadal received, but were not disclosed, included private aircraft usage, cosmetic surgery, yacht-and-sports-car-related expenses, jewelry, cash for tips and gratuities, medical expenses for Nadal, family members and others, charitable donations in Nadal’s name, pet care, vacation and personal travel expenses, club memberships, and certain expenses for which supporting documentation or information was incomplete.”

<sup>6</sup> See Order Instituting Cease and-Desist Proceedings, In the Matter Of MDC Partners Inc., Adm. Proc. File No. File No. 3-17795 (January 18, 2017) (the “MDCA Order”), available at <https://www.sec.gov/litigation/admin/2017/33-10283.pdf>.

## II. Violations

The SEC alleged that Nadal's conduct violated Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and SEC Rule 10b-5, which prohibit fraud in connection with the purchase or sale of securities. MDCA was involved in the sale of securities through the issuance of \$735 million of its debt securities sold from March 2013 - April 2014. In connection therewith, the Company filed registration statements with the SEC, which were signed by Nadal and which incorporated by reference the deficient executive compensation disclosures included in MDCA's April 2013 and April 2014 definitive proxy statements.<sup>7</sup>

Additionally, the SEC alleged that Nadal violated Section 14(a) of the Exchange Act and SEC Rules 14a-3 and 14a-9 thereunder.<sup>8</sup> Section 14(a) and the related Rules provide that corporate management may not solicit proxies which include deceptive or misleading statements. As stated in the SEC order, in soliciting proxies for his election as a director and for approval of his compensation by using materials that included the deficient executive compensation disclosures, Nadal "knew, or was reckless in not knowing, that the proxy statements contained materially false and misleading executive compensation disclosures, and that they omitted, among other things, numerous personal expenses for which Nadal had sought and obtained reimbursement as if such items were proper business expenses."<sup>9</sup>

Further, the SEC alleged that Nadal's conduct violated Section 13(b)(5) of the Exchange Act and SEC Rule 13b2-1 thereunder.<sup>10</sup> These rules prohibit any person from knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying any book, record, or account described in Section 13(b)(2) of the Exchange Act.<sup>11</sup> MDCA disclosed the unreported items at issue as business expenses, rather than properly identifying them as personal expenses and benefits treated as compensation. Nadal also improperly received payments from MDCA by submitting unsubstantiated expenses outside of MDCA's expense reimbursement process, totaling more than \$1.5 million.<sup>12</sup> As a result, MDCA's books, records and accounts did not, in reasonable detail, accurately and fairly reflect its disposition of assets.

Lastly, the SEC alleged that Nadal violated SEC Rule 13a-14 under the Exchange Act,<sup>13</sup> which requires that an issuer's principal executive certify each annual and quarterly report.<sup>14</sup> As CEO of MDCA, Nadal acted as principal executive of the Company when he certified each of the annual reports that had incorporated by reference the deficient proxy statements containing the materially misleading executive compensation disclosures relating to the perquisites paid on Nadal's behalf. Accordingly, the SEC alleged that Nadal violated Rule 13a-14 and additionally caused MDCA to violate Section 13(a) of the Exchange Act and Rule 13a-1 thereunder.<sup>15</sup>

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<sup>7</sup> Order at ¶ 3.

<sup>8</sup> 17 CFR § 240.14a-1 and 17 CFR § 240.14a-9, respectively.

<sup>9</sup> Order at ¶ 2.

<sup>10</sup> Order at ¶ 4.

<sup>11</sup> 15 U.S. Code § 78m. Rule 13(b)(2)(A) of the Exchange Act requires reporting companies to make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect their transactions and dispositions of their assets.

<sup>12</sup> See MDCA Order at ¶ 3.

<sup>13</sup> Order at ¶ 3.

<sup>14</sup> 17 CFR § 240.13a-14.

<sup>15</sup> Order at ¶ 5.

### III. Conclusion

This matter serves as an example of the SEC's continued interest in ensuring the accurate disclosure of executive compensation.

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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 Bradley J. Bondi at 202.862.8910 or [bbondi@cahill.com](mailto:bbondi@cahill.com); Charles A. Gilman at 212.701.3403 or [cgilman@cahill.com](mailto:cgilman@cahill.com); Kimberly Petillo-Décossard at 212.701.3265 or [kpetillo-decossard@cahill.com](mailto:kpetillo-decossard@cahill.com); John Schuster at 212.701.3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com); or Simon Heimowitz at 212.701.3361 or [sheimowitz@cahill.com](mailto:sheimowitz@cahill.com).