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E-ALERT | Securities

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GREENLIGHT CAPITAL V. APPLE AND ITS POTENTIAL IMPACT ON THE 2013 PROXY SEASON

Just as many companies are putting the finishing touches on their proxy statements for upcoming annual meetings, a recent decision may cause them to re-evaluate the presentation of management proposals in their proxy statements. In *Greenlight Capital v. Apple*, a Federal court in the Southern District of New York last week enjoined Apple Inc. from conducting a proxy solicitation relating to a proposal at its annual meeting of shareholders. The court found that Apple's presentation of the proposal regarding changes to its articles of incorporation likely violated the SEC's proxy rules under the Securities Exchange Act of 1934. [1]

GREENLIGHT CAPITAL'S CHALLENGE

In the case, Greenlight alleged that the following proposal violated a SEC proxy rule against the "bundling" of items to be voted upon. Specifically, the Apple proposal provided as follows:

> To amend the Company's Restated Articles of Incorporation to (i) eliminate certain language relating to the term of office of directors in order to facilitate the adoption of majority voting for the election of directors, (ii) eliminate "blank check" preferred stock, (iii) establish a par value for the Company's common stock of $0.00001 per share and (iv) make other conforming changes as described in more detail in the Proxy Statement.

Greenlight Capital believed that shareholders should be able to vote on each element of the proposal and based its challenge on Rule 14a-4, the so-called "bundling" rule, which was adopted by the SEC in 1992 to "prohibit electoral tying arrangements that restrict shareholder voting choices."[2] Under Rule 14a-4(a)(3), the form of proxy must "identify clearly and impartially each separate matter intended to be acted upon, whether or not related to or conditioned on the approval of other matters". Also, Rule 14a-4(b)(1) provides that "means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to approve, disapprove or abstain with respect to each separate matter, other than elections."

Despite the broad language of Rule 14a-4, the staff of the SEC has historically applied Rule 14a-4 relatively narrowly. For example, there is only one published interpretation regarding the bundling rule, and that interpretation focuses exclusively on the application of the bundling rule in the M&A context.[3] Similarly, published comment letters that cite to Rule 14a-4 generally have raised bundling comments in mergers, acquisitions, stock splits, recapitalizations, spin offs, reincorporations, and similar transactions. Few of the published comment letters that include Rule 14a-4 bundling concerns are outside M&A transactions, such as with respect to relatively routine votes involving amendments to governing instruments presented at an annual meeting.

Notwithstanding the relatively narrow way in which Rule 14a-4 has been construed in practice, Greenlight Capital persuaded the court that Apple's presentation of the proposal violated the rule, and the court enjoined Apple from using proxies it solicited on the proposal at its annual meeting of

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[1] *See Greenlight Capital LP v Apple, Inc.*, Case 1:13-cv-00900-RJS (S.D.N.Y. Feb. 22, 2013)
[2] SEC Rel. No. 34-30849 (Jun. 23, 1992)
[3] *See generally* Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations Fifth Supplement September 2004.

shareholders. As a result, Apple withdrew the proposal from consideration at its annual meeting of shareholders, which was held on February 27, 2013. Following this decision, Greenlight Capital has now withdrawn its lawsuit.

TAKEAWAYS

Although only one decision, this one is noteworthy because, as carefully noted in the opinion, the court considered and specifically rejected the argument that Apple's presentation of proposed changes to its articles was consistent with current practices with respect to "bundling" under Rule 14a-4. And, in this respect, Apple had a point. Its approach followed that taken by numerous other companies in soliciting approval of various changes to governing instruments. The court's rejection of that argument will likely strengthen the SEC's hand when reviewing proxy statements and provide useful precedent for other interested shareholders in similar contexts.

As a result, companies should consider the following in preparing proxy materials in the future:

- **Within each matter that is subject to shareholder approval, look carefully for what could be viewed as discrete topical subcategories.** For changes to charters and bylaws, for instance, consider whether to break-out for separate votes changes that are not clearly administrative and/or related.
- **Evaluate investor sentiment regarding matters to be voted upon.** One implication of the case is that a matter may be deemed to be "bundled" if shareholders could reasonably expect the opportunity to vote on that matter separately from other matters.
- **Consider conditioning separate matters upon each other where appropriate.** Although shareholders must be given a choice to vote upon each separate matter under Rule 14a-4, the rule specifically allows a company to condition the approval of one matter on the approval or disapproval of other matters.[4] This should give companies some flexibility where they unbundle matters that they intend to be considered together.
- **Monitor developments in this area.** The case may cause the SEC to re-evaluate its historical approach to bundling matters, as well as encourage other shareholders to follow suit in situations similar to Greenlight Capital's. Companies should be monitoring for either of these developments as the proxy season unfolds.

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[4] *See* SEC Release No. 34-31326 (Oct. 16, 2002) at Sec. II.H (Rule 14a-4 does "not prohibit the soliciting party from conditioning the effectiveness of any proposal on the adoption of one or more other proposals, if permitted by state law. In such cases, appropriate disclosure will be required to advise shareholders that a vote against one proposal may have the effect of a vote against the group of mutually-conditioned proposals.")