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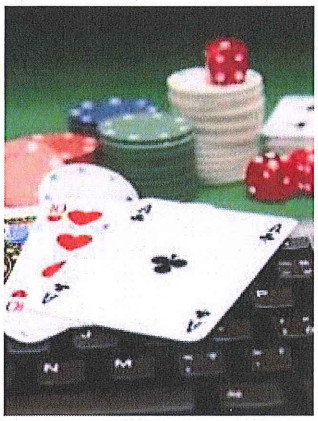

IROQUOIS CALLS FOR REPLACEMENT OF MGT'S MANAGEMENT

Iroquois Capital Management LLC, one of the most active investors in private investments in public equity, is calling for the management and board of gaming company MGT Capital Investments Inc. to be replaced because of their "horrendous record as stewards of shareholder value." Joshua Silverman, the managing member of New York-based Iroquois, made the remarks in a letter to MGT Capital, CEO Robert Ladd, CFO Robert Traversa and the company's board. Iroquois said it has a 9.99% stake in MGT, making the hedge fund manager the company's largest unaffiliated shareholder. Iroquois invested $1 million in a $4.5 million private placement of convertible preferred stock by MGT in 2012.

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SBA concerned about crowdfunding

New analysis urged

BY DAN LONKEVICH

The U.S. Small Business Administration has raised concerns about the Securities and Exchange Commission's proposed rules for crowdfunding, arguing that they would be too costly and burdensome for small businesses and that they don't comply with federal law.

The SEC should conduct a new analysis of the proposed crowdfunding rules and solicit comment on it from the public, the SBA's Office of Advocacy said in a Jan. 16 letter to the SEC.

The letter says that the current proposal, which was put forth by the SEC last October, does not comply with the Regulatory Flexibility Analysis Act, a law that requires the federal government to seek out flexible approaches to regulation of small businesses.

The SEC failed to adequately describe the proposed rules' costs for small businesses, and to propose alternatives to accomplish the SEC's goals, as is required by the Regulatory Flexibility Act, the SBA said.

The SBA Office of "Advocacy is concerned that the Initial Regulatory Flexibility Analysis (IRFA) contained in the proposed rule lacks essential information required under the Regulatory Flexibility Act," said Winslow Sargeant, chief counsel for the Office of Advocacy, and Dillon Taylor, assistant chief counsel, in the letter.

"The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act, gives small entities a voice in the rulemaking process. For all rules expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small businesses and to consider less burdensome alternatives."

The SBA's criticism of the potential costs of the SEC's proposal comes after private organizations have also accused the commission of making inadequate cost-benefit analysis when it proposes rules.

The SEC's proxy-access rule, meant to make it easier for investors to vote out company board members, was thrown out by the federal appellate court in Washington in 2011 after the U.S. Chamber of Commerce and Business Roundtable challenged the SEC's analysis of the rule's costs and impacts. Currently, the SEC is fighting a similar legal challenge to its conflict-minerals rule, which requires companies to disclose their use of minerals from

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Ekso helps partially paralyzed walk

BY BILL MEAGHER

Tamara Mena has used a wheelchair since 2005. But since 2012, she has had the opportunity, at least for short periods of time, to walk again.

Mena, 25, is one of eight ambassadors for **Ekso Bionics Inc.**, a company that has produced the Ekso, a robotic suit which makes it possible for some wheelchair users to walk again. The company went public Jan. 15 in a reverse merger transaction and raised $20.6 million in private placement financing.

Forsaken by venture capital funds, the Richmond, Calif.-based company instead raised $30 million before it went public from angel investors including the Chickasaw Indian nation, to produce the Ekso.

The 50-pound suit is worn on the back and legs. It consists of a computer, a pair of lithium batteries, and an aluminum and carbon fiber frame with a series of harnesses worn on the legs. Small motors at the hips and knees power the user's legs. Crutches allow the user to balance and control the suit.

Mena, who is a motivational speaker and model, says she hopes to one day have her own personal Ekso Bionic suit. For now, however, she is happy to commute from Modesto, Calif., about 90 miles southeast of Ekso's San Francisco Bay Area headquarters, to train with the suit. She has used it about 20 times.

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MARKET UPDATE

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the Democratic Republic of the Congo and the surrounding regions, where mining profits have been used to finance conflict.

Douglas Ellenoff, a securities attorney with the law firm of **Ellenoff Grossman & Schole LLP** in New York, said that "as a highly sensitive government agency," the SEC is likely to take the comments of another government agency "very seriously."

The SEC was required to propose rules for Internet-based crowdfunding under the Jumpstart Our Business Startups Act, a package of provisions passed in 2012 that were meant to make it easier for small companies to raise capital. The crowdfunding provisions of the JOB Act will allow private companies to raise up to $1 million from small investors in a 12-month period, through Internet-based offerings.

The SBA is not alone in calling for a re-analysis of the proposed crowdfunding rules. The National Association of Homebuilders wrote to the SEC on Jan. 31, supporting the SBA's argument.

"NAHB views crowdfunding as an exciting new opportunity to raise capital for home building projects," David Ledford, senior vice president of housing finance and regulatory affairs for the trade group, wrote. "NAHB appreciates the steps that the SEC has taken to address the need to protect investors while providing opportunities to small businesses to access capital through a new financing tool.

"However, NAHB believes that the proposed rule's intense focus on investor protection does not follow the intent of Congress to ease capital access for small businesses. NAHB feels a more appropriate balance can be achieved. NAHB urges the SEC to take into consideration the comments submitted by the Small Business Administration's Office of Advocacy and to address Advocacy's concerns with the cost of the proposed rule on small entities."

The SBA's letter highlights two areas of concern that NAHB member have expressed, Ledford said: The disclosure requirements for companies that raise money through crowdfunding, and its requirements for intermediaries that facilitate crowdfunding transactions.

"Small business representatives and owners expressed concern to Advocacy that the proposed rule's disclosure requirements would impose high costs and burdens," Ledford said.

In particular, Ledford said small business representatives are concerned about the potential cost of providing audited financial statements, as would be required for companies raising more than $500,000.

"Because the JOBS Act provides the SEC authority to change the threshold for audited financial statements, small business representatives suggested that the SEC should consider alternatives, such as raising the threshold amount, so that the proposals' audited financial statement requirement is less burdensome for small businesses," Ledford wrote.

Also, as an alternative to nonfinancial disclosures that would be required under the proposal, small business advocates have suggested "a simple 'question and answer' format," which would be less burdensome for small businesses while still providing the SEC with the information it is seeking.

For intermediaries, the SBA is calling for the SEC to clarify that broker-dealers and funding portals would not be subject to personal liability as securities issuers.

They also urge the SEC to do away with the prohibition on funding portals' ability to "curate" an offering. The term refers to the organization or displaying of offerings based on subjective criteria.

"The prohibition on curation is burdensome because it would place funding portals at a disadvantage to broker dealers (who may curate under the proposal)," the SBA said. "Moreover, if funding portals are not permitted to screen issuers on the basis of subjective factors, the funding portals could potentially be exposed to greater risk of personal liability for the offers on the portal."

Alternatives to solve this problem include creating a safe harbor for funding portals to curate on the basis of subjective factors that do involve activities that could be considered solicitations.

Another alternative would be for the SEC to permit funding portals to curate on the basis of subjective factors so long as the portals disclosed to the public that its curation does not constitute an investment recommendation.

The SBA's criticisms of the potential costs of the proposed rules echo concerns raised in many of the hundreds of comments that have been submitted on the proposal by would-be crowdfunding entrepreneurs, angel investors, attorneys and academics, among others.

"The SEC recognizes the concerns," Ellenoff said. "That's why the proposed rules are as long as they are, some 585 pages."

Still, the SEC is unlikely to do a supplementary analysis of the proposal, as the SBA suggests, according to David Pankey, a partner with the law firm of **McGuireWoods LLP** in Washington.

"The SEC probably will determine that a supplemental analysis is not necessary," he said. "The audit requirement at $500,000 is built into the statute and the rest of the ideas in the January 16 letter are the kinds of things that generally get dealt with in the process of formulating final rules, and would usually be discussed in the adopting release."

Pankey and others noted that protecting investors is the SEC's core mission and was also a concern of members of Congress that is reflected in the crowdfunding provision of the JOBS Act.

"What you are seeing is what I call the soft underbelly of the crowdfunding concept," Mitchell Littman, a partner with the law firm of **Littman Krooks LLP** in New York, said in an e-mail. "On the one hand, you have those on the Hill who sponsored the JOBS Act who are of course very focused on seeing the intent of the bill—making it easier for small business to raise capital and thus create jobs—come to pass, vs. the regulators, and of course in particular the SEC, who to their credit, have to make sure the rules are implemented in a way to protect the investing public; after all the SEC is the 'investors advocate.'

"So there is an underlying tension here that ultimately when resolved, will probably make those on both ends of the spectrum a little bit happy but probably more unhappy.

"There is no question that from an economic point of view, it will be 'expensive' capital for those issuers relying on crowdfunding; the financial requirements alone will eat up a not insignificant amount of capital, which as you are aware is capped at $1 million a year. So while there is no question that the SEC is sensitive to those issues, I don't see ultimately a lot of movement on giving up 'investor rights' just to compensate for it."

Investor protection is a legitimate concern, Pankey said.

"What the SEC is trying to prevent is the use of this mechanism by people who will be long gone by the time anyone realizes there's been a fraud," he said. "They're going to do it offshore and they're not going to do it once, they're going to do it a hundred times and then move to some other jurisdiction with no recourse." ■