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SEC Charges Keurig With Making Incomplete and Inaccurate Disclosure Regarding Recyclability of K-Cups

This past September, in *In the Matter of Keurig Dr Pepper Inc.*,[1] the Securities and Exchange Commission (the "SEC" or the "Commission") concluded that Keurig Dr Pepper Inc. ("Keurig") violated Section 13(a) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and Rule 13a-1 thereunder (Section 13(a) and Rule 13a-1, together, "Section 13(a)") by making certain statements and omissions in its annual reports regarding the recyclability of its K-Cup beverage pods. Without admitting or denying the SEC's findings, Keurig was fined $1,500,000 and was ordered to cease and desist from causing any present or future violations of Section 13(a), which requires issuers to file complete and accurate annual reports. In dissent, Commissioner Hester Peirce argued that in reaching its conclusion, the SEC "both misread[] Keurig's statement and overreact[ed] to its own misreading." With control of the Commission about to change, dissenting views such as this may hold more sway at the SEC in the future.

I. Background and Findings

In 2014, Keurig Green Mountain Inc. ("Keurig Green Mountain"), now a subsidiary of Keurig, released its Sustainability Report, announcing certain sustainability goals, one of which was to make 100% of pods that it manufactured recyclable by 2020. According to Keurig, all pods that it manufactured for sale in the United States and Canada were made of recyclable plastic by the end of 2020.

In part to address concerns in the recycling industry that small items, like its pods, could not be processed and recycled at recycling facilities, Keurig Green Mountain performed tests at various recycling facilities in the United States and Canada beginning in 2016. These tests demonstrated that the pods "typically could be successfully sorted from other materials" to get to a point in the recycling process where they could be sorted into groups for further processing by third parties. However, two recycling companies involved in the testing conveyed significant negative feedback to Keurig, with one company noting that the benefits of including the pods in curbside recycling programs were insufficient to make recycling them commercially feasible. The recycling companies also indicated that they did not presently intend to accept pods at their own recycling facilities. According to the SEC, the two companies involved are among the nation's largest recycling companies.

Notwithstanding this negative feedback, in its Annual Reports on Form 10-K for the fiscal year ended December 31, 2019 and for the fiscal year ended December 31, 2020, Keurig stated: "we have conducted extensive testing with municipal recycling facilities to validate that [pods] can be effectively recycled." The Commission

[1] The SEC's order can be found here.

concluded that Keurig's statements in these Forms 10-K claiming, without qualification, that pods could be "effectively recycled" were incomplete and inaccurate because they did not also disclose the negative feedback Keurig received from the two recycling companies described above. Accordingly, the Commission held that Keurig had violated Section 13(a).

II. Dissenting View

In Commissioner Peirce's dissent,[2] she noted that Keurig's claim regarding the recyclability of its pods was not found by the SEC to be a material misstatement and argued that the pods were in fact recyclable, and that Keurig's statement that the pods *could* be recycled did not necessarily imply that they *would* be recycled. She noted the pods could be effectively recycled, but decisions by third parties meant that it was likely they would not be recycled. While conceding the SEC's order may dissuade companies from talking about immaterial items in their SEC filings, she also noted that the order will "expose companies to endless second-guessing by the Commission" unless they also include a "mountain of caveats."

III. Conclusion

With control of the Commission about to change with the new administration, it remains to be seen whether the approach taken in Commissioner Peirce's dissent will gain traction in determining if Section 13(a) has been violated. Until then, the order is an important reminder to Exchange Act reporting companies and other issuers of securities to provide a complete picture concerning sustainability efforts and other initiatives.

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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 in it, please do not hesitate to call or email authors Javier Ortiz (partner) at jortiz@cahill.com or 212.701.3301, Geoffrey E. Liebmann (senior counsel) at gliebmann@cahill.com or 212.701.3313, or Landon Walls (associate) at lwalls@cahill.com or 212.701.3522; or email publicationscommittee@cahill.com.

[2] Commissioner Peirce's statement can be found here.