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FINANCIAL INSTITUTIONS DEVELOPMENTS

Savvy Investors Reject Suspect ISS Analysis in Supporting Strategic Merger

The pending merger between PrivateBancorp and CIBC crossed an important hurdle last Friday in receiving the resounding approval of PrivateBancorp stockholders, with more than 80% of the shares voting on the deal cast in favor. This outcome was achieved despite an ISS recommendation to vote against the merger, with many institutional shareholders typically identified as ISS followers recognizing the questionable content and process of the ISS analysis and rejecting the recommendation.

The PrivateBancorp/CIBC deal has been widely covered in the media and its process thoroughly documented in the companies' SEC filings. The transaction at announcement featured consideration comprised 60% of CIBC stock and 40% cash. Four months later, the U.S. Presidential election prompted an unanticipated U.S. market upswing, with U.S. banks in particular obtaining significantly higher valuations that were not matched by their Canadian counterparts. In view of this valuation reset's impact on the implied premium of the stock consideration, the Board of PrivateBancorp delayed the originally scheduled stockholder meeting and patiently pursued a process of comprehensive stockholder engagement and discussions with CIBC to assess potential revised terms that could obtain the support of stockholders. The parties never wavered in their belief that the strategic transaction was the right thing for both companies, and in the spirit of a committed partnership announced revised terms on two occasions. The diligent, deliberate efforts of the PrivateBancorp Board and management team in carrying out all of their fiduciary obligations in the face of exogenous shocks led to significantly more than a billion dollars in value creation for stockholders, as the value of the deal increased from approximately $3.8 billion at announcement in June 2016 to nearly $5 billion today. Despite the delayed vote, changing and vocal stockholder base and media attention, at no time did a competing offer emerge.

Following these efforts, PVTB stock appreciated greatly as expected, but still traded at a discount to the deal price in the days and weeks leading up to the May 12 vote, as the parties provided detailed explanations of the long process and analysis that led to this strategic merger and the ultimate financial terms. Conventional wisdom would hold that a proxy adviser observing a deliberate and lengthy Board process, two price bumps, no competing offer and a market that trades at a customary discount would promptly recommend the deal. That is exactly what occurred with two competitor firms, Glass Lewis and Egan Jones. On the contrary, ISS decided to play fundamental financial analyst and substituted its judgment for that of the Board and an efficient market, based on speculation about tax reform, the future value of U.S. regional bank stocks and the housing market in Canada. Notably, in coming up with its radical recommendation ISS did not engage with PrivateBancorp after the second price increase, and declined offers from senior executives of CIBC to speak about their company and the Canadian markets. A fundamentally flawed process leads to a flawed result.

The ISS report to PrivateBancorp stockholders is just the latest example of numerous mistake-ridden, agenda-driven proxy analyses. Institutional investors subscribing to their services should think carefully about the content of the analysis and ask themselves an important question to be sure they are fully complying with their fiduciary obligations to their clients: Is the content of, and process underlying, ISS analyses and reports consistent with the mandates of institutions focused on preserving and enhancing long term value for their clients? Whatever the answer to this question may be, independent thought and a healthy dose of skepticism of outsourced proxy advice is critical for any fiduciary making a voting decision.

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