

COMPENSATION, CORPORATE GOVERNANCE, AND DISCLOSURE as of July 2011

While the Dodd-Frank Act principally focuses on changes to the financial regulatory system, Titles IX and XV of the Dodd-Frank Act include corporate governance, compensation and disclosure provisions applicable to public companies. As a result of the Dodd-Frank Act, large public companies were required for the first time to conduct an advisory vote on executive compensation, as well as an advisory vote on the frequency of holding such votes. The SEC has begun the process of implementing rules directing securities exchanges to adopt listing standards regarding the independence of compensation committee members and compensation advisers, but has yet to propose rules regarding listing standards with regard to the recoupment of compensation when paid based on erroneous financial results. The Dodd-Frank Act requires that the SEC adopt additional disclosure requirements regarding the relationship of pay and performance, the ratio of the amount of total compensation paid to a median employee to the CEO's total compensation and policies with respect to employee and director hedging. With respect to incentive compensation arrangements at financial institutions, agencies have proposed rules to implement Dodd-Frank Act mandated restrictions and disclosures. The SEC has also proposed rules to implement "specialized corporate disclosure" provisions regarding conflict minerals, mine safety and payments by resource extraction companies.

Say-On-Pay

- The SEC adopted final rules that require companies to include a resolution in their proxy statements asking shareholders to approve, in a non-binding, advisory vote, the compensation of their executive officers disclosed in the proxy statement – the "Say-on-Pay" vote.
- A separate resolution is also required to determine whether this Say-on-Pay vote takes place every one, two, or three years - the "Say-on-Frequency" vote.
- The proxy statement must include disclosure regarding: (1) the general effect of such vote; (2) the current frequency of the Say-on-Pay vote; (3) when the next scheduled Say-on-Pay vote will occur; (4) how the company has considered the results of the most recent shareholder advisory vote on executive compensation in determining compensation policies and decisions and how that consideration has affected the issuer's compensation decisions and policies.
- If a company solicits shareholders to vote on a merger, acquisition, or similar transaction that would trigger certain golden parachute compensation, then the company must provide additional disclosure regarding the golden parachute compensation and conduct a separate non binding, advisory vote for approval of the golden parachute compensation.
- The Say-on-Pay and Say-on-Frequency vote was required for the first annual or other meeting of shareholders occurring after January 21, 2011, except that "smaller reporting companies" must comply beginning with meetings occurring on or after January 21, 2013.

Compensation Committee and Advisor Independence

- The SEC proposed rules that direct the national securities exchanges to adopt listing standards regarding the independence of the compensation committee members, as well as the independence of advisers engaged by the compensation committee. The proposed rules require:
 - that the exchanges adopt listing standards which require: (1) each member of a compensation committee to be an independent member of the board of directors, taking into account specific factors regarding independence; (2) compensation committees must have the authority to obtain or retain the advice of compensation advisers, must be directly responsible for the appointment, retention, compensation and oversight of the work of compensation advisers, and must have the appropriate funding for payment of reasonable compensation to the compensation adviser; and (3) compensation committees must consider specific independence factors when retaining a compensation adviser; and
 - disclosure of whether the compensation committee retained and obtained the advice of a compensation consultant and whether the consultant's work raised any conflicts of interest, the nature of any such conflict, and how it was addressed.
- The comment period has closed and the SEC has not adopted final rules by the July 16, 2011 deadline.

Future Corporate Governance Rulemaking

- The SEC must adopt rules requiring disclosure of the relationship of the compensation paid to executives versus the company's financial performance, the ratio of median employee total compensation to the CEO total compensation, and whether employees and directors are permitted to engage in hedging transactions, as well as rules mandating listing standards regarding compensation clawback policies.
- Broker discretionary voting has been prohibited in connection with executive compensation matters, and the SEC may specify other significant matters for which broker discretionary voting must be prohibited.

Proxy Access

- The SEC adopted rules allowing certain shareholders to include director nominees in the company's proxy materials. To be eligible to make a nomination, a shareholder, either individually or together with other shareholders, must beneficially own at least 3% of the total voting power of the company's securities that are entitled to vote on the election of directors and have held such securities for three years, and the director nominee must meet specific criteria.
- The effectiveness of the rule has been stayed due to pending litigation challenging the rule.

Specialized Disclosure Provisions

- The SEC has proposed rules requiring annual disclosure of whether any conflict minerals that are necessary to the functionality or production of a company's products originated in the Democratic Republic of Congo or an adjoining country. If so, companies are further required to provide a report describing the measures taken to exercise due diligence on the source and chain of custody of those minerals. The report must also include an independent private sector audit.
- Mining companies must disclose notices or orders from the Mine Safety and Health Administration about health and safety violations in a Form 8-K, and additional disclosure regarding such matters is required in periodic reports. This disclosure requirement is currently in effect, however the SEC has proposed implementing rules.
- The SEC has proposed rules requiring that those companies engaged in commercial development of oil, natural gas, and minerals must provide annual disclosures about any payments made by the issuer or its subsidiaries, or an entity under the control of the issuer, to the U.S. or a foreign government for the purpose of the commercial development of oil, natural gas, or minerals.
- The comment period for these proposed rules closed in March 2011, and final rules expected this year.