

### **SEC Delays Planned Adoption Date for Several Executive Compensation Provisions Under the Dodd-Frank Act**

**August 4, 2011**

On July 29, the Securities and Exchange Commission (SEC) extended its timeline for issuing rules with respect to various Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) provisions applicable to executive compensation. Prior to the recent SEC announcement, it was thought that a number of the Dodd-Frank Act requirements would become effective for the 2012 proxy season. It is now unclear which requirements, if any, will become effective in time for the 2012 proxy season.

#### **Updated SEC Timeline**

According to its updated timeline, the SEC plans to adopt the rules with respect to certain corporate governance, disclosure, and executive compensation requirements in the following time periods:

##### ***August 2011–December 2011 (planned)***

- *Section 951*: Requires disclosure by institutional investment managers with respect to how they voted on say-on-pay, say-on-frequency, and golden parachute proposals.
- *Section 952*: Requires disclosures relating to compensation consultants and any potential conflicts of interest posed by their work. The requirements include disclosures regarding whether the compensation consultant's work presents any conflicts of interest and, if so, the nature of those conflicts and how they are being addressed. Additionally, prior to selecting a compensation consultant, legal counsel, or other advisor, the compensation committee is required to consider factors relating to the advisor's independence. It also requires the SEC to direct national exchanges and national securities associations to enact listing standards that require companies to include enhanced independence requirements for compensation committees.

##### ***January 2012–June 2012 (planned)***

- *Section 953*: Requires additional disclosure with respect to pay-for-performance, which obligates companies to disclose information in proxy statements for annual meetings addressing the relationship between executive compensation paid and the financial performance of the company. It also requires an "internal pay equity" disclosure that illustrates the ratio between the CEO's total annual compensation and the median total annual compensation for all other employees (excluding the CEO).

- *Section 954*: Requires the SEC to direct national securities exchanges and national securities associations to issue listing standards that require companies to implement clawback policies. The clawback policies must require companies to recover incentive-based compensation from current or former executive officers paid during the three-year period preceding the date on which the company must restate its financials due to material noncompliance with any financial reporting requirement under the securities laws. The amount clawed back would be the excess over the amount of incentive compensation that would have been paid based on the restated financials.
- *Section 955*: Requires additional disclosure about whether directors and employees are permitted to enter into financial arrangements designed to hedge against a decrease in market value of the company's stock.
- *Section 956*: Requires that federal agencies jointly prescribe regulations or guidelines with respect to incentive-based compensation practices at "covered financial institutions" (i.e., financial institutions with more than \$1 billion in total assets). Specifically, it requires the agencies to prohibit incentive-based payment arrangements that encourage inappropriate risks that could lead to a material financial loss.

### ***July 2012–December 2012***

- *Section 952*: SEC to report to Congress on study and review of the use of compensation consultants and the effects of such use.

### ***Dates to Be Determined***

- *Section 957*: SEC to issue rules defining the term "other significant matters" with respect to executive compensation for purposes of exchange standards regarding broker voting of uninstructed shares.

If the SEC meets its revised timetable for rulemaking with respect to Section 951 and 952, these provisions will likely be in effect for the 2012 proxy season. However, the SEC's new timeline calls into question whether the requirements set forth in Sections 953 to 956 will be in effect for the 2012 proxy season.

### **Implications**

Clearly, issuance of the SEC guidance is a prerequisite for taking informed action on these issues; accordingly, companies will need to focus on relevant portions of the guidance as issued, and be prepared to take immediate action, if necessary. In the interim, however, companies can take action to facilitate the effectiveness of these provisions. For example, even though the specifics of the SEC clawback requirements have not been announced, companies should consider adding provisions to employment agreements and equity compensation arrangements subjecting them to the imposition of the company's clawback policies when such policies are determined. Companies should also remain alert as to changes in policy at Institutional Shareholder Services and other trends in these areas. Morgan Lewis will continue to monitor the SEC's implementation timeline to alert clients and friends to any further changes.

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