

Strong Disagreement with SEC Proposed Rules on Compensation Consultant Disclosure and Conflicts

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Commenters to the SEC's proposed rules on listing standards for compensation committees, including issuers, law firms, consultants and organizations like the Society of Corporate Secretaries and Governance Professionals and the Chamber of Commerce, argued vehemently for the SEC to (a) narrow the definition of "advice" given by a consultant and (b) retain existing disclosure exemptions for consultants that work only on broad-based plans and non-customized data. The SEC may be surprised to find such passion surrounding what are merely proposed amendments to existing disclosure obligations.

Disclosure would be required when a compensation committee has retained or obtained the advice of a compensation consultant, a change from the current rule which is triggered when a consultant plays a role in determining executive compensation. Commenters' discord stems from a proposed instruction indicating that "obtained the advice" could include whenever a committee or management has requested or received advice from a consultant, even in the absence of a formal engagement, a client relationship or any fees paid. The SEC suggests this change would have minimal practical impact, but commenters decried this instruction as being overly broad and captures all types of information generated by consultants, even casual conversations or materials soliciting potential clients.

The proposed rules would also eliminate a current disclosure exemption for consultants that only work on broad-based plans that do not discriminate and favor executives, and data that is not customized for a particular company and about which the consultant does not provide advice. Commenters advocated for the retention of this exemption, arguing that this type of work does not represent a conflict of interest and also may not be competitively neutral, as mandated by Dodd-Frank, since the larger consultants tend to provide this service.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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