

Corp Fin Raises Issues in Proposed Executive Compensation Rules and Disclosure Effectiveness Project

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At SEC Speaks 2016, the Staff in the Division of Corporation Finance discussed the goal of finalizing the three proposed executive compensation rulemakings remaining under the Dodd-Frank Act and the issues that have been raised during the comment process.

On the proposed rule to disclose hedging policies, concerns have been raised about the fact that the statute, and accordingly the rule, covers directors, executives and other employees. It is possible that the disclosure requirement may be different for non-executive employees. The Staff also acknowledged that the rule is not intended to cover general portfolio diversification strategies.

With respect to pay for performance, the Staff noted that the wording of the statute seems to require stock price (total shareholder return) as the performance indicator against which pay should be measured. In addition, comparability among companies was an important component of the statute.

The clawback rule is the most difficult. The Staff has received significant comments seeking board discretion but has stated repeatedly that the statutory language ("will recover") appears to mean a no-fault clawback. Also, the Staff recognizes that special expertise beyond what may be available at companies could be needed to determine a restatement's impact on stock price.

Turning to disclosure effectiveness, the Staff emphasized that the initial focus is on periodic reporting, not proxy statements or registration statements. They are currently reviewing Regulation S-K, including whether to be prescriptive or permit principle-based disclosure and the benefits and costs of standardization vs. flexibility. Just as important as determining whether there may be internal overlap within Regulation S-K and Regulation S-X is the examination of overlap with other standards such as GAAP. Another crucial focus is how information is presented and whether hyperlinks should be used, beyond the text of the reports.

In response to a comment about the need to eliminate redundancies, the Staff stated that the feedback from investors is that they want more, not less, disclosure, notwithstanding the increasing length of periodic reporting. This suggests that companies should not be looking forward to cutting back once disclosure effectiveness is implemented.

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.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

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