

## Corporate Governance Alert

### *2011 Proxy Season: SEC Announces Dodd-Frank Rulemaking Schedule and Starts the Clock on Proxy Access*

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The Securities and Exchange Commission's final proxy access rules were published in the Federal Register on September 16, 2010, which means that the rules will become effective on November 15, 2010 (60 days after their publication in the Federal Register). Under the rules, shareholders must submit nominees no later than 120 days before the anniversary date of the mailing of the company's proxy statement in the prior year. Thus, companies that mailed their 2010 proxy statements prior to March 15, 2010 will not be subject to proxy access for their 2011 shareholder meeting because shareholders would need to submit their nominees prior to November 15, 2010, the effective date of the proxy access rules. Companies that mailed their 2010 proxy statements on or after March 15, 2010 may be subject to proxy access for their 2011 shareholder meeting. Under the final rules, smaller reporting companies are exempt from the rules for three years.

In addition, on September 18, the [Securities and Exchange Commission \(SEC\) published](#) its tentative schedule for adopting rules under Dodd-Frank. While the schedule is only tentative, if the schedule is followed, the Dodd-Frank executive compensation and corporate governance provisions that require SEC rulemaking in order to be effective likely will not be effective for the 2011 proxy season for calendar year companies. Importantly, however, Dodd-Frank's say-on-pay provisions do not require SEC rulemaking and will be in effect for the 2011 proxy season for calendar year companies. The executive compensation and corporate governance provisions and the SEC's timeline for rulemaking are summarized below:

- *Shareholder vote to approve executive compensation (say-on-pay), to determine frequency of say-on-pay vote and to approve golden parachutes (Section 14A of the Exchange Act; Section 951 of Dodd-Frank).* These provisions will be effective for shareholder meetings occurring on or after January 21, 2011, irrespective of SEC rulemaking, and will, based on the statute, apply to all US public companies\*, except that Dodd-Frank authorizes the SEC to exclude an issuer or class of issuers (e.g. smaller reporting companies) from the rules. Based on the SEC's tentative schedule, proposed rules will be issued for comment between October and December 2010 and final rules will be adopted between January and March 2011. Perhaps the most important rule will be the one explaining how proxy cards must be designed to allow shareholders to choose between one-year, two-year and three-year frequencies for say-on-pay votes and the possible need for companies to revise their bylaws to allow for votes where there are three choices (and the customary standard of a majority vote is presumably inapplicable). More confounding is that under some state statutes, including New York, bylaw revisions of this nature can only be accomplished by shareholder vote.
- *Exchange listing standards regarding compensation committee independence, factors bearing on compensation adviser independence and disclosure rules regarding compensation consultant conflicts (Section 10C of the Exchange Act; Section 952 of Dodd-Frank).* Dodd-Frank directs the SEC to adopt rules by July 16, 2011. The compensation committee independence standards will, based on the statute, apply to all

listed companies other than controlled companies, limited partnerships, companies in bankruptcy proceedings, open-ended management investment companies registered under the Investment Company Act of 1940 and foreign private issuers that disclose annually to shareholders why they do not have an independent compensation committee. The compensation committee's oversight authority over compensation advisers and the factors bearing on compensation adviser independence will apply to all listed companies other than controlled companies. In both cases, Dodd-Frank authorizes the SEC to permit the exchanges to exclude a category of issuers (e.g. smaller reporting companies) from the rules. Based on the SEC's tentative schedule, proposed exchange listing standards will be issued for comment between October and December 2010 and final rules will be adopted between April and July 2011.

- *Proposed rules regarding pay-for-performance and CEO-employee pay ratios (Section 14 of the Exchange Act; Section 953 of Dodd-Frank).* Dodd-Frank directs the SEC to adopt rules, which, based on the statute, will apply to all US public companies\* and, in the case of the CEO-employee pay ratio disclosure requirement, will also apply to companies that are not publicly listed on an exchange but that have public debt or are otherwise required to file periodic reports with the SEC. Based on the SEC's tentative schedule, proposed rules will be issued for comment between April and July 2011.
- *Proposed rules regarding recovery of compensation or claw-backs (Section 10D of the Exchange Act; Section 954 of Dodd-Frank).* Dodd-Frank directs the SEC to adopt rules, which, based on the statute, will apply to all listed companies. Based on the SEC's tentative schedule, proposed rules will be issued for comment between April and July 2011.
- *Proposed disclosure rules regarding hedging by employees and directors (Section 14 of the Exchange Act; Section 955 of Dodd-Frank).* Dodd-Frank directs the SEC to adopt rules, which, based on the statute, will apply to all US public companies\*. Based on the SEC's tentative schedule, proposed rules will be issued for comment between April and July 2011.
- *Proposed rules defining "other significant matters" for which brokers will not be permitted to vote uninstructed shares (Section 6(b) of the Exchange Act; Section 957 of Dodd-Frank).* Dodd-Frank directs the SEC to adopt rules, which, based on the statute, will apply to all member brokers of national securities exchanges. Based on the SEC's tentative schedule, proposed rules will be issued for comment between April and July 2011.

\*Companies that file proxy or consent solicitation materials under the rules of the SEC.

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