

DIRECTOR ADVISORY

ETHICS AND COMPLIANCE

Are You Ready for a Slew of New SEC Rules?

By Bob Romanchek and Jeff Keckley

Under the Trump administration, a clearly articulated goal was to minimize government regulation, and as a result, the US Securities and Exchange Commission (SEC) was not busy promulgating new rules or even finalizing regulations mandated by the 2010 Dodd-Frank Act. However, under the Biden administration, the SEC has been very busy. On June 22, 2022, the agency formally announced its targeted release date for nine new rules affecting executive compensation, shareholder proposals, and proxy voting advice. Of these nine, the SEC targeted the adoption of seven final rules by October and two final rules by April 2023. Of note, the SEC is under no legal obligation to meet its self-imposed deadlines, and often does not.

Among the specified areas for final rules are vestiges of the far-reaching Dodd-Frank Act. Specifically, Dodd-Frank's mandatory incentive compensation clawback provision is arguably one of the most significant regulations to affect executive compensation in recent memory. This rule applies to all company officers, reaches back three years, and kicks in upon certain financial restatements. In 2015, the SEC issued proposed rules on this mandate. In addition to the original comment period following the release of the proposed rules, the SEC recently opened two additional comment periods to collect more input.

On Aug. 25, 2022, the SEC adopted final rules on a separate Dodd-Frank mandate, the "pay versus performance" proxy disclosure requirement. Under this rule, a public company will be required to disclose a comparative analysis between the "compensation actually paid" to the named executive officers and the company's financial performance over a five-year period. The performance measures include total shareholder return, net income, and another financial measure to be chosen by the company. The new rules are applicable to public companies with fiscal years ending after mid-December 2022.

Separately, the SEC is looking to issue final rules on Rule 10b5-1 trading plans. These plans allow executives and directors to set specific future dates for the sale of a specified number of their employer shares. The use of a trading plan provides an affirmative defense to insider trading allegations. The proposed and likely final SEC rules will impose restrictions to address perceived abuses of trading plans by a limited number of executives.

Although not expected until October, the SEC in July formally

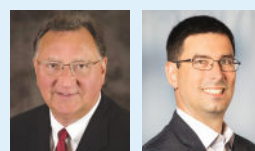
adopted amendments to its 2020 rules pertaining to proxy advisory firms' voting advice. These amendments rescinded prior conditions that proxy advisory firms must meet to be exempt from the "information and filing" proxy requirements. The impact of these amendments resulted in public companies not being able to review proxy firm reports in advance of when they are otherwise released.

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There also are a number of expected SEC rules relating to new or enhanced public disclosures. These pertain to the areas of climate-related risks and opportunities, diversity of board members and nominees, and human capital management. These very broad disclosures, if adopted by the SEC, would impact most publicly traded companies.

The remaining two expected SEC rules pertain to shareholder proposals and to disclosures about issuers' repurchases of their own equity securities, and how quickly these purchases should be publicly disclosed.

As can be seen by the above list of expected new rules from the SEC within the next few months, it may be a very busy fall and new year for boards and their companies as they assure statutory compliance should most of these rules be issued as expected. 



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