

Implementation of Several Pending Executive Compensation Provisions Under the Dodd-Frank Act Delayed

While the 2011 proxy season marked the introduction of mandatory say-on-pay resolutions for public companies in the United States as required under Section 951 of the Dodd-Frank Wall Street and Consumer Protection Act (the “Dodd-Frank Act” or the “Act”), it was recently announced that the implementation of several other anticipated executive compensation related provisions as stipulated under the Act has been delayed. The decision to delay implementation of certain provisions of the Dodd-Frank Act comes on the heels of a recent appellate court ruling overturning proxy access rules approved by the Securities and Exchange Commission (SEC) in 2010, and industry observers anticipate the SEC is likely to take additional time in implementing new regulations to mitigate the possibility of such rules also being challenged and overturned by the courts.

New Executive Compensation Rules Pushed Back to 2012

The revised Dodd-Frank Act timetable was published by the SEC on July 29, 2011. Under the revised timetable, some of the more notable executive compensation provisions previously scheduled to be adopted prior to the end of 2011 that are now anticipated to be implemented between January and June of 2012 include the following:

- Section 953 pertaining to disclosures on (a) **pay-versus-performance** describing the relationship between actual compensation amounts paid to executives vs. the financial performance of the company and (b) **internal pay equity** detailing CEO total compensation levels relative to the median total

compensation levels for all other employees;

- Section 954 pertaining to the adoption of **clawback policies**; and
- Section 955 mandating companies disclose any **employee or director hedging policies**.

It is possible that the SEC may still release preliminary draft regulations and hold open the corresponding comment period for select rules prior to the end of 2011. However, as the adoption dates for Sections 953 to 955 of the Act have been moved back to the January to June 2012 period, the rules will not be in place in time for the 2012 proxy season.

Compensation Committee and Advisor Independence Disclosure Still on Track for 2011

Although, as highlighted above, certain provisions of the Dodd-Frank Act have been pushed back until 2012, Section 952 of the Act requiring exchange listings such as the New York Stock Exchange and NASDAQ to adopt standards regarding the independence of Compensation Committees and their compensation consultants and related conflicts of interest disclosure is still on track to be finalized prior to the end of 2011. Accordingly, assuming no further changes to the SEC’s implementation schedule, it appears that Section 952 of the Act will be finalized in time for the 2012 proxy season.

Internal Pay Equity Disclosure Back on the Debate Table

Separate from the ultimate timetable for implementing the remaining provisions of the Dodd-Frank Act, one provision that is currently being revisited and debated by the United

Flash: Courts Overturn SEC Proxy Access Rules

A three-judge panel of the U.S. Court of Appeals for the District of Columbia circuit has overturned a recently-approved Securities and Exchange Commission (SEC) rule that would have given minority shareholders increased power to nominate directors to corporate boards and shape the composition of boardrooms. The ruling marks a victory for the business community in the long-running “proxy access” battle and results from a suit filed by the U.S. Chamber of Commerce and the Business Roundtable alleging the SEC failed to accurately evaluate the costs of the proxy access initiative.

Under the proxy access rules passed by the SEC in August 2010, shareholders who own 3% or more of a company’s stock for at least three years would have been able to nominate candidates for director on the annual proxy ballot, with a limit to the number of potential shareholder board nominees equal to the greater of 25% of a company’s board or one director. A key point of contention with the rule was that any costs associated with including shareholder nominated candidates on the annual proxy ballot would have been borne by the company.

In the opinion issued by the U.S. Court of Appeals on the proxy access rule, the court sided with the Chamber of Commerce and Business Roundtable and stated that the SEC acted in an “arbitrary and capricious” manner in issuing the rule and chided the SEC for not “adequately assess[ing] the economic effects” of the rule. Specifically, the court criticized the SEC for underestimating the potential costs associated with the likely increased prevalence of proxy battles and the lack of any empirical data in its analysis demonstrating that proxy

REIT Recap: First Say-On-Pay Proxy Season Has Come to an End

The 2011 proxy season has come to an end, marking the conclusion of the first proxy season in which the issuer community was required to hold shareholder votes on non-binding say-on-pay (“SOP”) and SOP frequency resolutions. With over 140 REITs having now held their 2011 annual shareholder meetings, we look back to see how the industry fared in the initial proxy season of the new SOP era.

REIT Shareholders Demonstrate Preference for Annual SOP Votes

On the matter of SOP frequency (i.e., how often future SOP votes shall be held), REIT shareholders predominantly voted in favor of an annual SOP voting frequency, with shareholders at only 17 of 147 REITs, or approximately 12%, approving a multi-year SOP vote despite nearly 50% of REITs adopting a company recommendation for a multi-year voting frequency. The preference amongst REIT shareholders for an annual SOP vote largely mirrored that of the broader markets and was in line with the recommendations of proxy advisory firms Institutional Shareholder Services (“ISS”) and Glass Lewis.

The following represents the full breakdown as to how REIT shareholders voted relative to the companies’ recommendation:

Company Recommendation		What Shareholders Approved		
		Annual	Biannual	Triennial
Annual SOP Vote	73 companies	73 (100%)	0 (0%)	0 (0%)
Biannual SOP Vote	2 companies	2 (100%)	0 (0%)	0 (0%)
Triennial SOP Vote	68 companies	53 (78%)	0 (0%)	15 (22%)
No Recommendation	4 companies	2 (50%)	0 (0%)	2 (50%)

Though the results of the SOP frequency resolution are non-binding, the majority of REITs as well as the issuer community as a whole is anticipated to adopt an SOP voting frequency in line with how shareholders voted on the matter. However, one REIT has indicated that it will be adopting an SOP voting frequency contrary to how its shareholders voted on the resolution, with Annaly Capital Management, Inc. stating that it will hold future SOP votes on a triennial basis despite a majority of its shareholders voting for an annual voting frequency.

SOP Resolutions Largely a Success

As to the SOP resolution itself, shareholders at 145 of 147 REITs have cast majority votes approving the companies’ pay practices, representing a success rate of nearly 99%. The two REITs who received no-on-pay votes from shareholders were both California-based, BioMed Realty Trust, Inc. and Kilroy Realty Corporation. The success rate within the industry fell largely in line with that of the broader market as only 8 companies in the S&P 500 had shareholders vote down their SOP resolutions, representing a success rate for the index constituents of slightly over 98%.

Aside from the ultimate results of the SOP resolutions, one noted trend that emerged during the 2011 proxy season both within the REIT industry and the broader issuer community was the marked increase in the number of companies who filed supplemental proxies and/or 8-Ks contesting the findings and voting recommendations of proxy advisory firms ISS and Glass Lewis. Examples within the REIT industry included Vornado Realty Trust, Ashford Hospitality Trust, Inc., Alexandria Real Estate Equities, First Industrial Realty Trust, Inc. and Federal Realty Investment Trust, among others. The trend is expected to continue in coming years and demonstrates both the growing influence of proxy advisory firms and the increased importance to the issuer community of ensuring shareholders properly understand the dynamics of the companies’ compensation programs and philosophy.

Compensation and Governance Ticker

Tech IPO Fever Lures Big Name Executives. The success of recent high-profile technology sector IPOs such as LinkedIn Corp. and Pandora Media, Inc. is leading to an unexpected shuffle in the C-suites of Silicon Valley companies, with several high-ranking executives at publicly-traded technology companies taking the unorthodox career route of accepting positions at smaller, privately-held start-ups with the hopes of cashing in on the current tech IPO wave. Recent departures include Mark McLaughlin, the former CEO of Nasdaq-listed VeriSign, Inc. who left to assume the top spot at closely-held Palo Alto Networks, Inc., and John Schappert, the former operations chief at gaming giant Electronic Arts who left to join the executive ranks of social gaming start-up Zynga, Inc. While executive base pay levels at privately-held start-ups are generally significantly below those of their larger, publicly-traded peers, the opportunity to take a company public and the potentially lucrative payday upon IPO has proven to be too tempting to resist for several technology sector executives.

Umpqua Shareholders File Lawsuit Alleging Excessive Compensation. Two shareholders have filed a lawsuit against top executives and the Board of Directors at Umpqua Holdings Corp., a regional commercial bank, claiming the company awarded “excessive compensation” to executives in recent years. The suit was filed shortly after shareholders voted against Umpqua’s say-on-pay resolution at the 2011 annual meeting. Umpqua has indicated that it intends to defend itself vigorously against the claims and has filed a motion to dismiss the case. The company’s compensation consultant PricewaterhouseCoopers LLP has also been named a defendant in the lawsuit.

Verizon, Schlumberger Execute Succession Plans. Effective August 1st, Verizon Communications’ Chief Operating Officer Lowell McAdam assumed the position of CEO, taking the reins from former long-time CEO Ivan Seidenberg under a previously disclosed succession plan. Mr. Seidenberg has retained his position as Chairman of the company. Likewise, oilfield services giant Schlumberger Ltd. has also announced that it has completed the execution of its previously disclosed succession plan effective August 1st. Under the recently executed plan, former CEO Andrew Gould has retired from the top spot while retaining the title of Chairman, with Chief Operating Officer Paul Kibsgaard taking over as the CEO of the French-based energy company.

Bank Merger Triggers Non-Competition Lawsuit. Capital One Financial Corp. has filed a lawsuit against BankUnited, Inc. Chairman and CEO John Kanas claiming he has violated the terms of a non-compete agreement. Mr. Kanas was previously an employee of Capital One after it had acquired North Fork Bancorp., Inc., where he served as Chairman and CEO, and entered into a non-competition agreement with Capital One in connection with the acquisition, under which he agreed not to compete with the bank in the New York market. While Capital One had no objections to Mr. Kanas’ initial decision to join BankUnited, Inc., it is claiming that BankUnited’s announcement in June 2011 to acquire New York-based Herald National Bank violates the terms of Mr. Kanas’ non-compete agreement with Capital One.

France Recommends Steps Toward Regulating Proxy Advisory Firms. While the SEC launched a public consultation in 2010 regarding the US proxy system and has examined the role of proxy advisory firms but has yet to recommend or institute any regulations on leading advisory firms such as Institutional Shareholder Services and Glass Lewis, the French regulatory body Autorite des Marches Financiers (AMF) recently went a step further and published a series of recommendations regarding the work of proxy advisory firms. Most notably, in an effort to minimize potential factual errors and/or analysis oversights, the AMF has recommended that proxy advisory firms publishing reports on French issuers should either (i) submit their research reports to the issuer for review prior to publication or (ii) disclose in the report that the issuer was not provided the opportunity to review or comment on the report or the voting recommendations prior to publication.

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States Congress is Section 953(b) relating to the disclosure of internal pay equity ratios comparing the the pay level of an issuer’s CEO to the median pay level of all other employees. In March 2011, H.R. 1062 was introduced in the House of Representatives calling for the appeal of Section 953(b) of the Act on grounds of being unnecessarily cumbersome, complex and, in the case of certain multi-national companies with operations and employees in dozens of countries, unfeasible to calculate. The bill is presently being debated by the House, with proponents of H.R. 1062 calling for the full repeal of Section 953(b) of the Dodd-Frank Act while opponents of H.R. 1062 are attempting to either keep Section 953(b) intact in its current form or modify some of its more contentious provisions in order to make potential compliance with the rule less onerous to the business community.

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access would lead to improved board performance.

However, the court did not support the plaintiffs' claims in their entirety and stopped short of decreeing proxy access rules to be fundamentally unconstitutional, thus potentially leaving open the prospect that some form of proxy access may be implemented in the future if certain of the deficiencies in the recent regulations are addressed. Likewise, the court did not address the SEC's authority in issuing the proxy access rule as stipulated under last year's Dodd-Frank Act, but rather opined that the SEC failed in appropriately drafting the rule.

Accordingly, the SEC does have the ability to reissue proxy access rules and redo the accompanying cost-benefit analysis. However, with the agency already behind schedule in finalizing a series of several new regulations under the Dodd-Frank Act and other recently-passed legislation, the issuer community should be comforted by the fact that it is unlikely the SEC will revisit the proxy access rule in time for the 2012 proxy season.

Top Performers

Top 10 REITs Based on Year-to-Date TRS Gain ⁽¹⁾			
	Company	Ticker Symbol	Year-to-Date TRS
1	Capital Trust, Inc.	CT	71.61%
2	Roberts Realty Investors, Inc.	RPI	23.30%
3	Mission West Properties, Inc.	MSW	17.31%
4	Essex Property Trust, Inc.	ESS	17.16%
5	Camden Property Trust	CPT	16.54%
6	Extra Space Storage Inc.	EXR	14.48%
7	American Campus Communities, Inc.	ACC	14.36%
8	Boston Properties, Inc.	BXP	13.95%
9	American Capital Agency Corp.	AGNC	13.92%
10	CoreSite Realty Corp.	COR	13.71%

(1) Represents TRS data as calculated by SNL Financial LC through August 9, 2011.

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