Cooley

Comp Talks

Key takeaways

Hot Topics in Recent SEC Rulemaking

At our Comp Talks session on October 4, 2023 – **Hot Topics in Recent SEC Rulemaking** – Cooley partners Ali Murata and Brad Goldberg, along with Compensia principal Mark Borges, discussed various hot-button topics that have arisen as a result of Securities and Exchange Commission (SEC) rulemaking activity in late 2022 and 2023. The three speakers shared their views on navigating the challenges of the ever-changing regulatory landscape and preparing for next steps in late 2023 and beyond. Below are some key takeaways summarized by Cooley associate Cara Buchicchio.

While the 2023 proxy season resulted in varying pay-versus-performance disclosure in substance and presentation, companies should note recently released SEC C&DIs (compliance and disclosure interpretations) and stay alert for potential weigh-in from proxy advisory firms in late 2023. The forthcoming SEC staff fall 2023 review and report, potential new interpretive guidance, and anticipated Institutional Shareholder Services (ISS) and Glass Lewis policy updates for 2024 could affect understanding of the pay-versus-performance rules, which may require changes to 2024 disclosure from a compliance perspective, as well as create new considerations (e.g., balancing stakeholder interests, making appropriate changes from disclosures made in 2023, etc.). Macroeconomic factors and third-party influences – such as stock market volatility and activist shareholder activity – can affect the level of scrutiny applied to pay-versus-performance disclosures. Companies may want to consider whether supplemental disclosure is appropriate, given their particular individual metrics results and say-on-pay context, either in the form of an expanded pay-for-performance discussion in the compensation discussion and analysis (CD&A) or supplemental explanatory disclosure in the pay-versus-performance section of the proxy statement.

Companies should ensure that their progress in implementing a Dodd-Frank compliant clawback policy is on track to meet the fast-approaching December 1, 2023, deadline. Given the number of decision points and considerations to be weighed when drafting and implementing a clawback policy, companies should be well into the process of drafting and finalizing a clawback policy with the involvement of appropriate advisers and business departments (e.g., accounting and human resources). The board/compensation committee meeting schedule currently in place may need to be changed, or a special meeting may need to be convened to provide adequate time for review and approval.

SEC rules on additional required narrative and tabular disclosure relating to companies' equity grant policies and risk of "springloaded" grants made shortly before the release of material nonpublic information (MNPI) will generally apply starting with the 2025 proxy season, and revisiting current policies in advance may be advisable. Section 402(x) of Regulation S-K requires narrative disclosure regarding how the board determines when to grant stock options or instruments with option-like features and whether and how it factors in MNPI. Tabular disclosure is required if any such awards were granted in the last completed fiscal year, to any named executive officer (NEO), within four business days before or one business day after the filing of a Form 10-Q or Form 10-K, or the filing or furnishing of a Form 8-K that contains MNPI.

In conjunction with last year's changes to Delaware General Corporate Law (DGCL) expanding board flexibility in delegating equity grant awards, now may be a good time for companies to consider any revisions to their equity grant policies that make sense in light of either or both the 402(x) disclosure requirements and the DGCL changes.

Recent amendments to Rule 10b5-1 add five new conditions to the availability of the affirmative defense under 10b5-1 plans and impose new disclosure requirements on issuers. Although the amendments brought significant changes to Rule 10b5-1, the addition of some of the new conditions, such as the minimum cooling off period and certification requirements, merely codify existing best practices in use by many listed companies. The final rules also require quarterly and annual disclosure related to the adoption, material modification and termination of 10b5-1 plans by Section 16 officers and directors. The inaugural disclosures have raised several interpretive issues – including who exactly is covered during the applicable period and how the rules apply to various sell-to-cover transactions. Companies are advised to coordinate with outside counsel to resolve these questions and stay abreast of emerging market practices.

Alessandra Murata	Brad Goldberg	Cara Buchicchio	Janice Chan
Partner	Partner	Associate	Resource Attorney
Palo Alto	New York	New York	New York