ARCHER & GREINER PC
ATTORNEYS AT LAW

Securities and Exchange Commission Reinvigorates Pay Versus Performance Proposal; Follows Restart of Executive Compensation Clawback Proposal

Client Advisories

02.08.2022

On January 27, 2022, the Securities and Exchange Commission (SEC) reopened the comment period for its pay versus performance proposal. In May 2015, the SEC proposed rules to implement Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank).

Section 953(a) of the Dodd-Frank Act requires the SEC adopt rules requiring issuers disclose in its annual meeting of shareholders proxy statement certain information that shows the relationship between executive compensation actually paid and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer.

Under the proposed rules, tabular disclosures would be required with respect to the issuer's principal executive officer (PEO) and other named executive officers (NEOs) included in the proxy statement compensation table. The required information for the prior five years include:

- Summary compensation table total for PEO;
- Compensation actually paid to PEO;
- Average summary compensation table total for non-PEO NEO;
- Average compensation actually paid to non-PEO NEO;
- Total shareholder return; and
- Peer group total shareholder return.[1]

The proposal would also require a description, in narrative or graphic form or both, of the relationship of compensation actually paid to executives compared to the issuer's total shareholder return.

The SEC proposed excepting foreign private issuers and emerging growth companies (EGCs) from these proposed new rules.

The SEC's initial proposal can be found here.

The SEC release reopening the comment period can be found here.

This action by the SEC follows the reopening on October 14, 2021 of the comment period for the SEC's proposal from July 2015 to implement the provisions of Dodd-Frank Act Section 954 requiring clawback of certain executive compensation.

This proposed rule would direct securities exchanges to require each listed issuer to develop and implement a policy providing for the recovery, under certain circumstances, of incentive-based compensation based on financial information required to be reported under the securities laws that is received by current or former executive officers. Each listed issuer must also disclose the terms of its policy.

In general, recovery would be required from the issuer's current and former executive officers, those subject to Section 16 reporting obligations, who received incentive-based compensation during the three fiscal years preceding the date on which the issuer is required to prepare an accounting restatement to correct a material error. The amount of incentive-based compensation to be recovered would be the amount received by an executive officer that exceeds the amount the executive officer would have received had the incentive-based compensation been determined based on the restated financial statements.

The reopened comment period ended November 22, 2021.

The SEC's initial clawback proposal can be found here.

The SEC release reopening the comment period can be found here.

If you have any questions, please contact James Smith in Archer's Business Counseling Group at 646-863-4301 or jsmith@archerlaw.com.

[1] Smaller reporting companies (SRCs) would not be required to include column for Peer Group Total Shareholder Return and would only be required to report for three years rather than five years.

DISCLAIMER: This client advisory is for general information purposes only. It does not constitute legal or tax advice, and may not be used and relied upon as a substitute for legal or tax advice regarding a specific issue or problem. Advice should be obtained from a qualified attorney or tax practitioner licensed to practice in the jurisdiction where that advice is sought.

Related People

James G. Smith

Partner

jsmith@archerlaw.com

646.863.4301

Related Services

- Business Counseling

© 2024 Archer & Greiner, P.C. All rights reserved.