

Market News

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A monthly review of IR developments for our clients and friends. . .

Few expect ‘Say on Pay’ requirement for 2010 proxy season

Few public companies seem to expect a *Say on Pay* requirement for the 2010 proxy season, according to a survey by compensation consultancy Pearl Meyer & Partners. Despite House approval and likely Senate action on the Corporate and Financial Institution Compensation Fairness Act, only 7 percent of 231 companies surveyed called themselves “very concerned” about Say on Pay, with another 35 percent “somewhat” concerned. Two-thirds said they’re not preparing now for such a vote. Mike Enos, PM&P managing director, said most don’t expect the requirement to take effect until the 2011 proxy season. Three-quarters say their shareholders would approve a SOP vote if held, although proxy advisory groups are not expected to recommend them in all cases.

Experts recommend “be proactive while ‘going-concerns’ are ‘growing-concerns’”

Twenty-one percent of U.S. public companies had their going-concern status questioned last year, according to Audit Analytics. That was the highest percentage of public companies having their viability in question in over a decade. There seems to be no light at the end of the tunnel, as nearly one quarter of 846 CEOs and controllers recently surveyed by Grant Thornton said they were more worried about their company’s ability to continue as a ‘going-concern’ than they were a year ago. The Financial Accounting Standards Board (FASB) strongly recommends that management take the lead by reviewing ‘going-concern’ status six months or earlier before year-end. The board points out that not utilizing the lead time puts a company at risk, because it is a complicated issue needing a lot of discussion and vetting. The FASB feels so strongly about this that it will revisit in December a proposed rule to formalize management’s duty to consider the company’s going-concern status.

IPOs making a comeback, with more mature companies prevailing

As the equity market continues to improve, we are starting to see signs of life coming back into the initial public offering arena, but it’s going to be a long journey. Bloomberg counted 11 IPOs in September, the most in one month since January 2008. In 2008 there were 43, a paltry sum compared with 2007’s 272 IPOs. Experts expect 2009 IPOs will only match the 2008 total, despite 67 in the pipeline in September (up from 29 in March), according to Renaissance Capital. The experts recall that 62 percent of IPO candidates withdrew or postpone their filings last year, with a similar number backing out in 2009, according to Ernst & Young. Stable equity markets, an improved economy and stronger consumer confidence are needed to get the IPO market back on track, according to IPO attorneys surveyed by Kreab Gavin Anderson Worldwide. Fifty-four percent of the attorneys surveyed said it is going to take as long as two years for IPOs to return to their “normal” rate, defined as 5 to 10 deals a month. With the aftershock of the market drop, Jay Ritter, Professor of Finance at the University of Florida, predicts the next round of IPOs will consist mainly of mature companies of at least \$100 million market cap — not the ambitious start-ups in the IPO market before the crash.

Schapiro describes busy year for SEC enforcement

SEC Chairman Mary Schapiro has provided a preview of the SEC's enforcement-related activities for 2009 through September. The stats show a much more energized SEC, which isn't surprising considering the corporate shenanigans of the financial meltdown. Schapiro said the SEC has issued more than twice as many formal orders, filed more than twice as many emergency actions, opened nearly 50 more (about 8 percent more) investigations and achieved orders for twice as much in disgorgements and penalties (presumably, not including its court-rejected BofA settlement), compared with the same 2008 period.

Small public companies win another stay from costly SOX section 404

After the SEC in early October pushed back Section 404 compliance for non-accelerated filers to mid-2010, action in Congress at the end of the month could tack on another year of exemption. An amendment to financial reform legislation would require separate studies by the Government Accountability Office and the SEC to evaluate costs and benefits for non-accelerated filers. The reports would be due in Congress by June 1, 2010, with no compliance requirement for non-accelerated filers before at least June 1, 2011. A final House vote on the amendment is set for this week, and experts say it's likely to pass. For those scratching their heads thinking they read this before—you have. The SEC's action was the fourth such extension since 2007. In early October, before the latest action in Congress, Chairman Mary Schapiro promised the the SEC would not issue any further extensions. She said that smaller companies affected should be working toward compliance for year-end reporting after June 15, 2010.

Evidence suggests U.S. public companies are more innovative

In the U.S., publicly traded conglomerates are at least as innovative as their private peers, according to a National Bureau of Economic Research study, but private firms and business groups in Europe are significantly more innovative than public companies. The authors, from Duke and Columbia universities, found that corporate form makes little difference in R&D investment in the U.S., where companies private and public tend to work independently on their own discoveries. Across 15 continental European countries, however, where there are fewer regulatory hurdles to the formation of joint ventures and hybrid corporate forms, such alliances tend to exist where intellectual protection of innovators is strongest and where there is "a slower and more fundamental innovation cycle." In general, innovative companies everywhere tend to organize under the form most favorable to R&D investment.

Delaware justice sets tough test for executive pay challenges

A securities-law blog, *racetothetbottom.org*, frequently reports on developments in Delaware corporate law. Noting an earlier newspaper interview of Delaware Supreme Court Chief Justice Myron Steele, the blog notes that Justice Steele suggests that shareholders unhappy about board oversight of executive compensation at Delaware-incorporated companies (the majority of the S&P 500) have recourse through claims that the companies are wasting assets. The blog authors note, however, that the justice had, in a prior opinion, determined that the test for such claims in his court was extremely high, and had never been achieved in an executive compensation case. In effect, the authors said, Justice Steele "proposed reliance on a standard that would not work in his own courts."



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