Potential Impact of Financial CHOICE Act on Corporate Governance and SEC Reporting and Disclosure Requirements

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On June 8, 2017, the House of Representatives passed, by a 233-186 vote (with all Democrats and one Republican voting against), the Financial CHOICE Act of 2017, a bill principally designed to reverse many features of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). The House Financial Services Committee majority has provided both an executive summary and a comprehensive summary of the current bill. It is unclear at this time what action the U.S. Senate will take with regard to the bill in its current form.

While the vast majority of the bill relates to the banking provisions of Dodd-Frank and other financial regulatory reforms, the bill contains a number of notable changes to the corporate governance landscape and Securities and Exchange Commission (SEC) reporting and disclosure requirements. The bill also includes a number of administrative law changes that would impact SEC and other financial regulatory agency rulemaking, including a heightened cost-benefit analysis requirement for rulemaking, new congressional review and consent requirements for rulemakings to become effective, and a less deferential standard of judicial review of agency interpretations and rulemaking. If any of these provisions become law, they could significantly impact the financial regulatory rulemaking process.

The following is a summary of the key corporate governance and SEC disclosure provisions contained in the bill as passed by the House.

Shareholder Proposals (Section 844). One of the provisions that could have a significant impact on public companies — and one that is vehemently opposed by many institutional investors — would alter the rules governing the inclusion of shareholder proposals in company proxy statements.

- *Eligibility Requirements.* The bill would require the SEC to modify the eligibility requirements for submission of shareholder proposals under Securities Exchange Act Rule 14a-8 from the current requirement that a shareholder own at least $2,000 of company stock for at least one year to requiring a shareholder to hold at least 1 percent of the company's shares (or such higher threshold as the SEC may determine) for at least three years.
- *Resubmission Thresholds.* The bill would require the SEC to raise the resubmission thresholds under Rule 14a-8 — in other words, the minimum level of support required for a proposal to be eligible for inclusion in a company's proxy statement in subsequent years — to 6 percent of the vote if the proposal was voted on once in the last five years, 15 percent if voted on twice in the last five years or 30 percent if voted on three times in the last five years (from the current thresholds of 3 percent, 6 percent and 10 percent, respectively).
- *Prohibition of Shareholder Proposals by Proxy.* The bill would amend Section 14 of the Securities Exchange Act to prohibit a company from including in its proxy materials "a shareholder proposal submitted by a person in such person's capacity as a proxy, representative, agent, or person otherwise acting on behalf of a shareholder."

Registration of Proxy Advisory Firms (Section 482). The bill contains a provision long desired by the corporate community but viewed as unnecessary by many members of the institutional investor community that would amend the Securities Exchange Act to require proxy advisory firms to register with the SEC. The registration process would require, among other things, providing financial statements and an annual report to the SEC; making disclosures relating to potential conflicts of interest, a code of ethics, adequacy of internal resources and the methodology for the formulation of proxy voting policies and voting recommendations; providing companies with a reasonable opportunity to review and comment on draft recommendations; and employing an ombudsman to address any issues raised by companies.

The bill also would require proxy advisory firms to establish, maintain and enforce policies and procedures relating to managing conflicts of interest and to disclose those policies and procedures. In addition, the bill would direct the SEC to promulgate rules to prohibit certain coercive and unfair practices, as well as rules "to prohibit, or require the management and disclosure of, any conflicts of interest" related to the provision of proxy advisory services.

Prohibition on Requiring a Single Ballot (Section 845). The bill would amend Section 14 of the Securities Exchange Act to prohibit the SEC from mandating the use of a "universal proxy" that includes both company and dissident shareholder nominees on a single card.

Frequency of Shareholder Approval of Executive Compensation (Section 843). The bill would amend the Securities Exchange Act requirement that companies hold an advisory, nonbinding shareholder vote on executive compensation (say-on-pay vote) at least once every three years to require say-on-pay votes only those years "in which there has been a material change to the compensation of executives of an issuer from the previous year." The bill also would eliminate the requirement that companies hold a "say-on-frequency" vote at least once every six years. In light of the strong shareholder support for annual say-on-pay votes reflected in the 2017 say-on-frequency voting, it is unclear whether this provision, if enacted into law, will have any practical import.

Restriction on Recovery of Erroneously Awarded Compensation (Section 849). The bill would amend the Dodd-Frank clawback provision for erroneously awarded compensation by limiting its applicability to only situations "where such executive officer had control or authority over the financial reporting that resulted in the accounting restatement."

Repeals (Sections 857, 862). The bill would repeal various other Dodd-Frank provisions relating to SEC disclosure requirements. Most notably, the bill would:

- repeal the requirement to disclose the ratio of median annual compensation of all employees and compensation of the CEO;
- repeal the requirement to disclose whether employees and directors can hedge company equity securities;
- repeal the authorization for the SEC to adopt proxy access rules;
- repeal the requirement that the SEC issue rules requiring companies to disclose and explain their chairman and CEO structures; and
- repeal the conflict minerals disclosure requirements, the resource extraction issuer disclosure requirements and the mine safety disclosure requirements.

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The various repeal provisions notwithstanding, we recommend that companies continue to comply with existing disclosure requirements and prepare to comply with upcoming disclosure requirements — such as CEO pay ratio disclosure — until any such repeals are enacted into law (if self-executing) and/or the SEC takes the necessary action to enact the necessary rule amendments or otherwise suspend the effectiveness of any rules.

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