SHEARMAN & STERLING LLP

Recent Developments in Executive Compensation

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Worldwide Employee Benefits Network

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Select Provisions Under the Dodd-Frank Act

Final Pay Ratio Rules

Background and Timing

- Adopted by the SEC on August 5, 2015, in a 3-2 vote cast along party lines.
- Emerging growth companies, smaller reporting companies, US-Canadian Multijurisdictional Disclosure System filers and foreign private issuers are exempt.
- The first reporting period will be the first full fiscal year beginning on or after January 1, 2017.
- Disclosure will be made in any filing that requires Item 402 executive compensation disclosure.
- For calendar year registrants, the first pay ratio disclosure will be made in early 2018, as part of the proxy statement for the 2018 annual meeting.

Final Pay Ratio Rules

New Item 402(u) of Regulation S-K

- Pay Ratio Disclosure:
  - Disclose the median annual total compensation of all employees of the company (except CEO);
  - Disclose the total compensation of the CEO; and
  - Provide the ratio of those two amounts (as a ratio or a multiple).
- Narrative Disclosure:
  - Describe the methodology used to identify the median employee; and
  - Provide the material assumptions, adjustments or estimates used to determine the median employee and / or annual total compensation.

Final Pay Ratio Rules

Determining the Median Employee

- The median employee must be identified at least once every three years, unless there has been a change in the employee population or compensation arrangements that would result in a significant change in the pay ratio disclosure.
  - If the median employee is no longer employed by the company, the company may use another employee with substantially similar compensation.
- A company may choose any date within the last three months of its last completed fiscal to determine the median employee.
- A registrant may use its employee population, statistical sampling or another reasonable method to determine the median employee.

Final Pay Ratio Rules

Determining the Median Employee

- Covered employees excludes independent contractors that are employed by, and receive compensation determined by, a third party.
- Covered employees excludes employees of a newly-acquired business for the fiscal year in which the business combination or acquisition becomes effective.
- Companies may annualize total compensation for a permanent employee who did not work for the entire fiscal year.
  - No full-time equivalent adjustments for part-time workers.
  - No annualizing adjustments for temporary and seasonal workers.

Final Pay Ratio Rules

Determining the Median Employee

- A company may adjust the compensation of employees located outside of the PEO's country to the cost-of-living in the PEO's country.
  - The same cost-of-living adjustment must be used when calculating the median employee's annual total compensation.
  - The median employee's annual total compensation and the pay ratio without the cost-of-living adjustment must be disclosed.
    - This will require identifying the median employee without using the cost-of-living adjustment.
  - The median employee's jurisdiction must also be disclosed.

Final Pay Ratio Rules

Determining Annual Total Compensation

- Reasonable estimates may be used in determining any element of the median employee's total compensation for the last completed fiscal year.
  - Exclude amounts relating to a government-mandated pension plan.
  - Companies are permitted to include in the employee's annual total compensation perquisites that in the aggregate are less than $10,000 and/or compensation under nondiscriminatory benefit plans.
    - Including those amounts may lower the ratio.
    - Companies that adopt this approach would be required to use the same approach in determining the CEO's total compensation for pay ratio purposes and also explain any difference between the CEO's total compensation for pay ratio purposes and the total compensation amount reflected in the summary compensation table.

Final Pay Ratio Rules

Tailored Exemptions

Data Privacy Exemption

- Companies are not required to include non-US employees if obtaining the information required to comply with the rules would cause a violation of a non-US jurisdiction's data privacy laws.
  - The registrant must make reasonable efforts to obtain the information, such as seeking an exemption or other relief.
  - The company must obtain an opinion from legal counsel opining on the company's inability to comply with the rules without violating the non-US jurisdiction's data privacy laws.

Final Pay Ratio Rules

Tailored Exemptions

De minimis Exemption

- Companies whose non-US employees make up 5% or less of their total employees may exclude all of their non-US employees. If the company chooses to exclude any of these employees, it must exclude all of them.
- Companies whose non-US employee make up more than 5% of their total employees may exclude non-US employees up to the 5% threshold. If a registrant excludes any employees in a particular jurisdiction then it must exclude all of the employees in that jurisdiction (subject to the 5% limitation).
- Non-US employees excluded under the data privacy exemption will be counted as excluded under the 5% *de minimis* exemption. As a practical matter, these exemptions allow registrants to exclude a number of non-US employees equal to the greater of 5% of total employees and the number of employees covered by the data privacy exemption.

Final Pay Ratio Rules

- Supplemental disclosure (e.g., additional discussion or ratios) is permitted, as long as it is clearly identified, not misleading and not presented with greater prominence than the required pay ratio.
- The disclosure would have to be provided in interactive data format using XBRL using block-text tagging.

Proposed Clawback Regulations

Proposed Rules Add New Rule 10D-1 to the Exchange Act of 1934

- Applies to almost all listed issuers, with only limited exceptions. Emerging growth companies, smaller reporting companies, foreign private issuers, and controlled companies are not exempt.
- Applies to an issuer regardless of the type of securities it has listed, including debt, preferred securities and ADRs, even if the issuer does not have its common equity listed.
- Requires each issuer maintain a policy mandating recovery of incentive-based compensation in the event the issuer is required to prepare a restatement to correct an error that is material to previously issued financial statements.
- Requires recovery regardless of whether misconduct was a cause of the restatement.

Proposed Clawback Regulations

Proposed Rules Add New
Rule 10D-1 to the Exchange Act of 1934

- Applies to all executive officers.
  - Definition of executive officer mirrors the definition of "officer" in Rule 16a-1(f) of the Exchange Act.
- The recoverable amount is determined on a pre-tax basis.
- Issuers are prohibited from indemnifying any executive officer or former executive officer against the loss of recovered compensation.
- Failure of an issuer to adhere to the recovery policy would cause it to be delisted from any national securities exchange or association until it is in compliance.

Proposed Clawback Regulations

Definition of Incentive-Based Compensation

- Incentive-based compensation means any compensation that is granted, earned or vested based wholly or in part upon the attainment of a financial reporting measure.
- Financial reporting measures are measures that are determined and presented in accordance with the accounting principles used in preparing the issuer's financial statements, and any measures that are derived wholly or in part from these measures, regardless of whether they need to be included in a filing with the SEC.
  - Example: Although same store sales are not disclosed in a filing with the SEC, they may be impacted by an accounting restatement for revenue recognition and therefore would be considered incentive-based compensation.

Proposed Clawback Regulations

Definition of Incentive-Based Compensation

- Stock price and total shareholder return are also considered financial reporting measures, to the extent that they are impacted by accounting-related information.
- Time-vested equity, the grant of which is not contingent upon the achievement of any financial reporting measures, would not be recoverable under the proposed rules.

Proposed Clawback Regulations

Three-Year Look-Back Period

- An issuer's recovery policy applies to any incentive-based compensation received during the three completed fiscal years immediately preceding the date that the issuer is required to prepare a restatement of its previously issued financial statements to correct a material error.
- The date on which an issuer is required to prepare an accounting restatement under the proposed rules is the earlier of:
  - The date the issuer's board of directors, or authorized officer or officers concludes, or reasonably should have concluded, that the issuer's previously issued financial statements contain a material error; or
  - The date a court, regulator or other legally authorized body directs the issuer to restate its previously issued financial statements to correct a material error.

Proposed Clawback Regulations

Company Discretion

- An issuer must recover erroneously awarded incentive-based compensation unless:
  - the direct expense paid to a third party to assist in enforcement would exceed the amount to be recovered; or
  - recovery would violate a home country law that was adopted prior to the proposed rule being published in the Federal Register.
- Issuers are permitted discretion with respect to the means of recovery so long as recovery is accomplished reasonably promptly.

Proposed Clawback Regulations

Proposed rules add a new paragraph (w) to Item 402 of Regulation S-K.

- If at any time during a fiscal year an issuer completed a restatement that required recovery of erroneously-paid incentive-based compensation, or there was an outstanding balance of excess incentive-based compensation from the application of the policy in a previous year, it must disclose in its annual proxy statement or annual report (if no proxy statement is required):
  - The date on which the issuer was required to prepare an accounting restatement;
  - The aggregate dollar amount of excess incentive-based compensation attributable to the accounting restatement, or an explanation as to the reasons why the amount has not yet been determined;
  - The estimates that were used in determining the excess incentive-based compensation attributable to the accounting restatement, if the financial reporting measure related to a stock price or total shareholder return metric; and
  - The aggregate dollar amount of excess incentive-based compensation that remained outstanding at the end of the last fiscal year.

Proposed Clawback Regulations

- Disclosure of Forgone Erroneously Awarded Compensation.
  - If an issuer decided not to pursue recovery from an individual, it must disclose the individual's name, the amount forgone, and a brief description of the reason the listed registrant decided not to pursue recovery.
- Disclosure of Outstanding Erroneously Awarded Compensation.
  - Issuers must disclose the name of any individual who, as of the end of the last fiscal year, had erroneously-paid compensation outstanding for a period of 180 days or longer since the date the issuer determined the amount owed, as well as the dollar amount of the outstanding erroneously-paid compensation.
- The disclosure would have to be provided in interactive data format using XBRL using block-text tagging.

Proposed Clawback Regulations

Proposed rules amend Item 402(c) of Regulation S-K

- Issuers must revise prior years' compensation disclosures in their current proxy to reflect amounts recovered pursuant to a recovery policy by reducing the amount reported in the applicable Summary Compensation Table column for the fiscal year in which the amount recovered initially was reported as compensation, and flagging the change in a footnote.
- Other relevant tables – including pay for performance – should be revised, as well.
- Issuers will not have to file an amended proxy for the year in which amounts were recovered.

Proposed Clawback Regulations

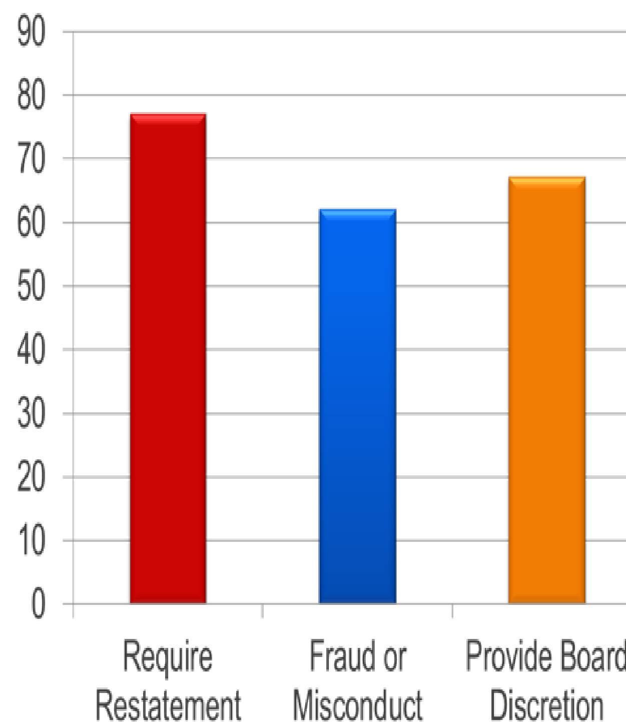
Timing

- Listing exchanges must adopt rules within 90 days of the Final SEC Rules being published in the Federal Register.
- Listing exchanges' rules must become effective within one year following Final SEC Rules.
- Issuers' clawback policies must be adopted within 60 days of exchange rules becoming final.
- Clawback would apply to all excess incentive based compensation received after the effective date of new Rule 10D-1.
- Disclosure requirements would become effective immediately on or after the date on which the stock exchange listing standards become effective.
- Although it is conceivable that issuers will not have to implement their policies until 2017, these policies will apply to all incentive-based compensation received by executive officers after the SEC's rules become effective.

S&S 2015 Corporate Governance Survey Highlights: Clawback Policies*

- 87 Top 100 Companies maintain financial-statement related clawback policies and 77 of them require a restatement to trigger recovery.
- 62 of the 87 policies require that there be fraud or misconduct in connection with the inaccurate financials.
- 67 of the policies provide the board with discretion as to whether to seek enforcement of the clawback policy.

* Shearman & Sterling's 2015 Corporate Governance Survey summarizes the corporate governance practices of the 100 largest US public, non-controlled companies with equity securities listed on the NYSE or NASDAQ.



Proposed Hedging Disclosure Regulations

Proposed rules add Paragraph (i) to Item 407 of Regulation S-K

- The proposed rules require disclosure of the purchase of financial instruments intended to offset decreases in the value of equity securities or transactions with "economic consequences" comparable to the purchase of certain specified financial instruments.
  - Examples of the types of financial instruments include: prepaid variable forward contracts, equity swaps, collars and exchange funds.
- Thus, all policies relating to transactions that establish downside protection—whether by purchasing or selling a security or derivative security or otherwise—must be disclosed.
- A pledge or loan of equity securities would not be considered a hedging transaction.

Proposed Hedging Disclosure Regulations

Proposed rules add Paragraph (i) to Item 407 of Regulation S-K

- With few exceptions, all issuers are required to make disclosures in any proxy or information statement with respect to the election of directors.
  - Emerging growth companies, smaller reporting companies and listed closed-end investment companies are not exempt.
  - Foreign private issuers and unlisted investment companies (including exchange-traded funds and mutual funds) are exempt.
- Covered employees includes officers.
- "Equity securities" means any equity securities that are issued by the issuer, its parents and subsidiaries or subsidiaries of its parents that are registered under Section 12 of the Exchange Act.

Proposed Hedging Disclosure Regulations

- Given the broad definition of covered transactions, an issuer must disclose both the categories of transactions it prohibits, as well as the categories it permits.
  - If an issuer discloses that it specifically prohibits certain categories of transactions, the issuer could then disclose that it permits all other types of transactions in lieu of providing a complete listing of specific permitted transactions, and vice versa.
  - Similarly, if an issuer either prohibits or permits all types of hedging transactions, it would not be required to describe the permitted or prohibited transactions by category.
  - To the extent it permits hedging transaction, the issuer would need to provide sufficient detail to explain the scope of any permitted transactions (e.g., only securities held for a specific period of time are permitted to be hedged).
- If the issuer's hedging policy covers some, but not all, of the categories of persons subject to the disclosure requirements, the issuer would need to disclose both the categories of those persons who are permitted to hedge and those who are not.

S&S 2015 Corporate Governance Survey Highlights

Hedging Policies

- 98 Top 100 Companies maintain hedging policies.
  - 97 companies apply the policy to executives.
  - 77 companies apply the policy to directors.
- 96 of these policies provide for an outright prohibition on hedging.
- 2 of these policies provide for prior approval of hedging transactions.

Pledging Policies

- 82 Top 100 Companies maintain pledging policies.
  - 81 companies apply the policy to executives.
  - 66 companies apply the policy to directors.
- 74 of these policies provide for an outright prohibition on pledging.
- 10 companies require prior approval of a pledging transaction (with 2 companies varying the policy based on the type of pledge).

Proposed Pay-for-Performance Regulations

Proposed rules add a new paragraph (v) to Item 402 of Regulation S-K

- Requires tabular disclosure of:
  - Compensation “actually paid” to the principal executive officer (“PEO”);
    - If more than one person served as the PEO during the covered period, aggregate amounts for all persons who served in the role of PEO.
  - An average of the compensation “actually paid” to the other named executive officers ("NEOs");
  - The PEO's “total compensation” amount as shown in the summary compensation table;
  - The average of the NEO’s “total compensation” amount as shown in the summary compensation table;
  - The cumulative total shareholder return (“TSR”) of the issuer; and
  - The cumulative TSR of the issuer’s peer group.

Proposed Pay-for-Performance Regulations

Proposed rules add a new paragraph (v) to Item 402 of Regulation S-K

- Requires a description of the relationship between:
  - The compensation "actually paid" to the PEO and the average compensation "actually paid" to the NEOs; and
  - The cumulative total shareholder return of the issuer and a peer group on an annual basis for the last five years.
- The description must also include a comparison of the issuer's cumulative TSR with the TSR of the peer group.
- The description must be in a narrative or graphical format or a combination of the two.

Proposed Pay-for-Performance Regulations

Proposed rules add a new paragraph (v) to Item 402 of Regulation S-K

- Emerging growth companies, foreign private issuers, and registered investment companies are exempt.
- Compensation “actually paid” is determined by reference to the “total compensation” measure included in the summary compensation table, with certain modifications to actuarial pension value and equity award value.
- TSR is determined in the same manner, and over the same measurement period, as under Item 201(e) of Regulation S-K.
- Subject to transition rules, the proposed rules would require registrants, other than smaller reporting companies, to provide the pay for performance disclosure for the five most recently completed fiscal years.
  - Smaller reporting companies would be only required to provide the disclosure for the three most recently completed fiscal years.

Developments in Delaware Law

Background on Delaware Fiduciary Duty Law

- The decisions of an independent compensation committee are subject to the "business judgment rule."
  - Requires that directors' decisions be made on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company.
  - Best interests of the company is usually characterized as a duty to maximize shareholder wealth.
  - A plaintiff has the burden to prove that the board of directors has not met its "duty of loyalty" or its "duty of care."
- The duty of care requires directors to act on an informed basis after due consideration of the relevant materials and appropriate deliberation.
  - A plaintiff must show directorial conduct has risen to "gross negligence."
- The duty of loyalty requires directors act in good faith and place the best interests of the corporation over self-interest.
  - Directors are subject to personal liability in the event the standard is not met.

Background on Delaware Fiduciary Duty Law

- The business judgment rule will not apply if committee members have approved their own compensation because they are "interested" in the transaction.
  - In this case, directors must prove a transaction was "entirely fair," which means objectively reasonable.
- Shareholder ratification of an "interested" transaction is an affirmative defense, and the business judgment standard will apply.

Calma v. Templeton, *114 A.3d 563 (Del. Ch. 2015)*

- Shareholder challenged awards of RSUs granted to 8 non-employee directors of Citrix Systems, Inc. in 2011, 2012 and 2013.
  - Directors received 4,000 RSUs each year.
- Awards were granted under Citrix's 2005 Equity Incentive Plan which had been approved by shareholders.
- Participants in the plan – which included employees, directors, advisors and consultants – were subject to a per person limit of 1 million shares per year.
- Based on the stock price when the complaint was filed, a grant of 1 million shares would have been worth over $55 million.

Calma v. Templeton, *114 A.3d 563 (Del. Ch. 2015)*

- Directors made a motion to dismiss under two theories:
  - Rule 23.1: Plaintiff failed to make a demand on the board prior to filing the derivative claim
  - Rule 12(b)(6): The business judgment standard of review applies and defendant failed to allege that the board's decision cannot be attributed to any rational business purpose – essentially the waste standard under Delaware law.
- Chancery Court: Ruled in favor of plaintiff under both theories.
  - Rule 23.1: Because the compensation at issue was received by a majority of the directors, those directors are "interested" and demand is futile.
  - Rule 12(b)(6): The plaintiff successfully rebutted the business judgment standard and alleged enough facts that tend to show the transaction was not "entirely fair."
    - The members of the compensation committee that approved the grants had also received some of the RSU awards and therefore they were not disinterested.
    - The directors could not use the affirmative defense of shareholder ratification.

Calma v. Templeton, *114 A.3d 563 (Del. Ch. 2015)*

- Failure of shareholder ratification: Shareholder approval of an equity incentive plan does not constitute approval of non-employee director compensation where the plan does not set forth the specific compensation, meaningful limits or a director-specific "ceiling" on the compensation that could be granted to directors.
  - Approval of the broad parameters of the plan, and the generic limits set forth therein, does not constitute approval of any action specific to director compensation.
- The directors' decision to grant RSUs will be judged using the "entire fairness" standard.
  - Defendants must establish that the decision "was the product of both fair dealing *and* fair price."
- Because plaintiff raised meaningful questions as to whether certain companies with higher market capitalization were properly included in the peer group used by Citrix, it alleged enough facts to overcome defendant's motion to dismiss.

Friedman v. Dolan, *C.A. No. 9425-VCN (Del. Ch., 2015)*

- Charles Dolan was the founder and Executive Chair of Cablevision and his son James was the CEO and a director of Cablevision.
  - Three of Charles's daughters, Kathleen, Deborah and Marianne, also served on the board of Cablevision.
- The Dolan Family held 100% of Cablevision Class B stock and approximately 73% of Cablevision's voting power.
  - They were also entitled to elect up to 75% of Cablevision's directors.
  - Cablevision identified itself as a "controlled company" under NYSE rules.
- From 2010 – 2012 the compensation committee awarded James and Charles Dolan $41.8 million and $40.27 million in compensation, respectively.
- In March 2012 each received a special one time grant of stock options valued at $6.85 million and $7.09 million, respectively.
- In 2013, James renegotiated his employment agreement and received single-trigger change-in-control severance protection.

Friedman v. Dolan, *C.A. No. 9425-VCN (Del. Ch., 2015)*

- The entire board (as opposed to the compensation committee) awarded compensation to non-employee directors including Charles's daughters.
  - All three daughters received over $300,000 in compensation in 2011 and 2012 even though they only attended half of the board meetings.
- Cablevision had a market capitalization of $4.39 billion and, out of 17 peer companies with less than $30 billion in market capitalization, only 2 paid their CEOs more than Cablevision paid James, and only 3 paid their CEOs more than Cablevision paid Charles.

Friedman v. Dolan, *C.A. No. 9425-VCN (Del. Ch., 2015)*

- Shareholders sued the compensation committee for granting compensation not "entirely fair" to the corporation.
  - They did not sue the board for breaching its fiduciary duties with respect to the compensation packages for Charles Dolan's daughters, or non-employee directors, generally.
- Chancery Court: The mere fact that a committee member was appointed by a controlling shareholder is not enough to demonstrate a lack of independence.
- In the absence of additional evidence of a conflict of interest or other loss of independence, the Court "hesitates to endorse the principle that every controlled company, regardless of the use of an independent committee, must demonstrate the entire fairness of its compensation whenever questioned by a shareholder."

Friedman v. Dolan, *C.A. No. 9425-VCN (Del. Ch., 2015)*

- There were no facts alleging the Dolan's leveraged control over the compensation committee or that they held a material informational advantage about the value of their services.
- It is not enough to observe that a director has some relation to a party benefiting from the decision.
  - A plaintiff must make provable allegations that, at a minimum, permit a reasonable inference that a relationship is material to the particular defendant whose independence is being challenged.
- The transaction is protected by the business judgment rule and defendant's motion to dismiss was granted.

Recent IRS Guidance

Section 409A

Internal Revenue Service Office of Chief Counsel Memorandum No. 201518013 (April 14, 2015)

- Executive received a retention bonus that would vest on the third anniversary of the agreement, and would become payable in equal installments on the first and second anniversaries of the vesting date.
- Agreement also provided that the company could, in its discretion, pay the full amount on the first anniversary of the vesting date.
- Ability of the company to accelerate payment constituted a violation of the time and form of payment requirements of § 409A.
- In year 3, but prior to vesting, the company amended the plan to remove the impermissible acceleration provision.
- IRS determined that this correction was not made soon enough.

Section 409A

Internal Revenue Service Office of Chief Counsel Memorandum No. 201518013 (April 14, 2015)

- IRS: If at anytime during a taxable year there is a § 409A failure, the taxpayer is required to recognize income under § 409A in the amount that remains deferred at the end of the taxable year, reduced by any amounts that remain subject to a substantial risk of forfeiture at the end of the year.
  - The fact that the failure was corrected before the amount vested is irrelevant.
- Because the full amount of the award would be vested at the end of the third year, and because there was a plan failure during that year, the executive had to include the entire deferred amount in income for year 3 (along with a 20% penalty).

Section 409A

Internal Revenue Service Office of Chief Counsel Memorandum No. 201518013 (April 14, 2015)

- This result may have been avoided if the company followed correction procedures described in Notice 2010-6. Permits a plan to remove from a plan the impermissible discretion to accelerate payments; provided that the amendment is made before discretion is exercised and before payments are made under the plan.
  - The memorandum makes no mention of Notice 2010-6.

Section 83

Proposed Revisions to Treasury Regulation 1.83-2(c)

- In July of this year, the IRS proposed regulations concerning the requirements for making an election under § 83(b) of the tax code.
- Section 83(a) generally provides that the value of property transferred to an individual in connection with the performance of services will be included in gross income (less any amount paid for the property) at the first time the transferee's rights are no longer subject to a substantial risk of forfeiture.
- Section 83(b) provides that the taxpayer can elect to include the value of the property (less any amount paid for the property) in gross income at the time of transfer.
- Currently an election under § 83(b) must be filed with the IRS within 30 days of the transfer, and a copy of the election must be included with the taxpayer's income tax return for the year in which such property was transferred.

Section 83

Proposed Revisions to Treasury Regulation 1.83-2(c)

- Proposed regulations would eliminate the need to include a copy of the election on the taxpayer's income tax return.
- Intended to make it easier for taxpayer's to file electronically since commercial software does not consistently provide a mechanism for taxpayer's to file an 83(b) election with the tax return.
- Comment period ended on October 15th and, if finalized, would apply to property transfererd on or after January 1, 2016.
- Taxpayer's however, may rely on the proposed regulations for property transferred on or after January 1, 2015.

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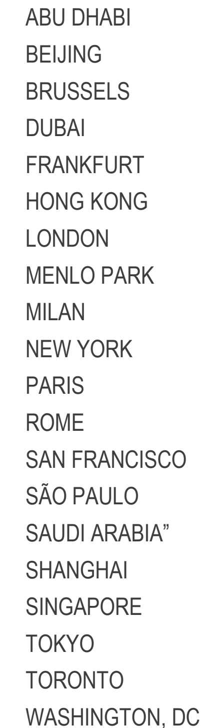

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