

Dodd-Frank Wall Street Reform and Consumer Protection Act

An Overview of the Impact on Public Companies

November 2010

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Topics Covered

- Stockholder Voting
- Management Structure Disclosure/Executive Compensation
- Other Relevant Provisions
 - Beneficial Ownership
 - Whistleblower Protection
 - Aiding and Abetting Liability Standard
 - Strengthening of SEC Enforcement Powers
 - Internal Control Requirement Exemption
 - Regulation D Eligibility
 - Accredited Investor Standard
- Proxy Access

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Stockholder Voting

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Stockholder Voting

■ Say-On-Pay (Sec. 951(a))

- Separate stockholder advisory vote required to approve compensation paid to “named executive officers” as disclosed in proxy materials pursuant to SEC rules
- Non-binding
- Required to be on agenda at least once every 3 years (Slide 4)
- Must be included on agenda of the first stockholder meeting occurring on or after January 21, 2011
- SEC rulemaking timeline – proposed rules released October 18, 2010; final rules anticipated January - March 2011

Stockholder Voting

■ Say-On-Pay (continued)

- Separate stockholder advisory vote required to determine frequency of Say-On-Pay vote - annual, biennial or triennial
- Non-binding
- Required to be part of agenda at least once every 6 years
- Must be included on agenda of the first stockholder meeting occurring on or after January 21, 2011

Stockholder Voting

- Say-On-Golden Parachutes (Sec. 951(b)) – “Say-On-Pay” in Transactional Situation
 - Requirement that any proxy or information statement of an issuer that is seeking stockholder approval of an acquisition, merger, consolidation, proposed sale or disposition of all or substantially all assets of the issuer disclose (1) any compensation (present, deferred or contingent) that is based on or otherwise relates to such business combination, *i.e.*, parachute payments, to be paid or payable to named executive officers of the issuer (or that it has with named executive officers of the acquiring issuer) and (2) aggregate amount of such payments
 - Separate stockholder advisory vote required to approve such payment, unless Say-On-Pay vote regarding such agreements already taken
 - Non-binding
 - Effective January 21, 2011

Stockholder Voting

- Say-On-Pay and Say-On-Golden Parachutes
 - SEC granted authority to exempt issuers from such requirements
 - Shall take into account whether such requirements disproportionately burden small issuers

Stockholder Voting

■ SEC proposed rules released October 18, 2010:

- Issuers would be required (1) to address in their CD&A how compensation policies and decisions have taken into account the results of past Say-On-Pay votes and (2) in their Form 10-Q or 10-K for period in which vote occurred, to state whether issuer will follow the results of stockholder vote
- Issuers would be required to disclose in proxy statements the general effect of the advisory votes, including their non-binding nature
- Smaller reporting companies would be subject to scaled Say-On-Pay requirements, but would not be exempt from Say-On-Pay or Say-On-Golden Parachutes voting requirements
- Issuers would be required to provide four choices on the frequency of Say-On-Pay votes – one year, two years, three years or abstain.
- New cause for exclusion of say-on-pay and say-on-frequency stockholder proposals under Rule 14a-8 if issuer follows plurality vote recommendation
- Issuers would be required to include tabular and narrative information on change in control payments in merger proxies with respect to Say-On-Golden Parachutes votes

Stockholder Voting

■ Broker Discretionary Voting (Sec. 957)

- Amends Exchange Act to require stock exchanges to prohibit members (*i.e.*, brokers) from voting a security in connection with a “stockholder vote” if they are not beneficial owners or have not received such owners’ approval
- Stockholder vote defined as a vote in connection with:
 - The election of the board of directors
 - Executive compensation
 - Any other significant matter as determined by the SEC (proposed timeline for SEC rulemaking is April - July 2011)

Stockholder Voting

■ Broker Discretionary Voting (continued)

□ NYSE Rule 452.11 and Listed Company Manual Section 402.08

- Adopted September 9, 2010 after approval by SEC
- Prohibits members from voting uninstructed shares (or authorizing the vote of such shares) in connection with executive compensation (Examples: Say-On-Pay or Say-On-Golden Parachute votes)
- Previously enacted rules already incorporated Exchange Act amendments

□ Nasdaq Rule 2251

- Adopted September 24, 2010 after approval by SEC
- Mirrors Exchange Act amendments

Management Structure Disclosure/ Executive Compensation

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Management Structure Disclosure

■ CEO and Chairman Disclosure (Sec. 972)

- No later than January 17, 2011, SEC shall establish rules requiring disclosure of whether and why (or why not) issuer separates CEO and Chairman positions
- However, final rule issued by SEC on December 16, 2009 and effective February 2010 already requires such disclosure
 - Additional disclosure?

Management Structure Disclosure/ Executive Compensation

■ Compensation Committee Independence (Sec. 952)

- Similar concept as Audit Committee rulemaking required by Sarbanes-Oxley Act of 2002
- SEC to issue rules requiring stock exchanges to require that its listed companies have independent compensation committees and compensation committee advisers
 - Will include reasonable opportunity to cure defects
- Rules shall require each member of the committee to be an independent member of the board
- SEC's rules shall require stock exchanges to consider the following in defining independence:
 - Director's source of compensation
 - Whether director is an affiliate of issuer

Management Structure Disclosure

■ Compensation Committee Independence (continued)

- Exempt companies
 - Controlled companies
 - Limited partnership
 - Company in bankruptcy proceedings
 - Open-ended management investment company registered under the Investment Company Act
 - Foreign private issuer that annually discloses why it lacks an independent compensation committee
- SEC's rules may permit stock exchanges to exempt requirement of independence or board membership
- SEC's proposed timeline for rulemaking – November - December 2010

Management Structure Disclosure

- Compensation Committee Adviser Independence (Sec. 952)
 - Compensation Committee will have sole discretion to hire compensation consultants and other advisers and shall be directly responsible for compensation and oversight of these advisers
 - SEC's rules shall identify factors to be considered by compensation committee including:
 - Provision of other services to the issuer by entity who employs adviser
 - Amount of fees received by adviser from the issuer, as a percentage of the total revenue received by such entity
 - Policies and procedures of adviser that are designed to prevent conflicts of interest
 - Business or personal relationships of adviser with any member of compensation committee
 - Any stock of the issuer owned by adviser

Management Structure Disclosure

- Compensation Committee Disclosure (Sec. 952)
 - Issuers shall disclose in proxy materials for stockholder meetings held on or after July 21, 2011 whether
 - The compensation committee retained or obtained advice from a compensation adviser
 - The compensation adviser’s work caused any conflict of interest, and if so, its nature and how it is being addressed
 - Disclosure requirement effective only with respect to compensation consultants, not legal counsel or other advisers

Executive Compensation

■ Pay For Performance (Sec. 953)

- SEC shall issue rule requiring disclosure in proxy materials of the relationship between executive compensation paid and issuer's financial performance

■ Comparison of Compensation (Sec. 953)

- SEC shall issue rules requiring disclosure of
 - Median of annual compensation paid to employees other than CEO (or equivalent position)
 - Annual total compensation of CEO (or equivalent position)
 - The ratio of these two amounts
- Parity disclosure required to be included in proxy statements, registration statements, periodic reports, as required
- SEC's proposed rulemaking timeline – April - July 2011

Executive Compensation

- Employee and Director Hedging (Sec. 955)
 - SEC shall issue rule requiring issuers to disclose in annual meeting proxy materials whether employees or directors are permitted to hedge against securities owned or granted to them as compensation
 - SEC's proposed rulemaking timeline – April - July 2011

Executive Compensation

- Executive Compensation Clawback (Sec. 954)
 - SEC shall issue rules requiring issuer disclosure of incentive-based compensation policies
 - Rules shall require issuer to recover erroneously awarded incentive-based compensation from current and former executive officers if issuer prepared accounting restatement due to material noncompliance with financial reporting requirements
 - 3 year look-back period from date of preparation of restatement
 - Broader than Sarbanes-Oxley clawback provisions
 - SEC's proposed rulemaking timeline – April - July 2011

Other Relevant Provisions

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Beneficial Ownership

- Amendments to Sections 13 and 16 of Exchange Act (Sec. 766(e) and 929R)
 - SEC shall issue rules amending the definition of “beneficial ownership” to include ownership of security-based swaps
 - Rules will determine the extent to which a security-based swap provides incidents of ownership comparable to direct ownership of the security
 - Elimination of the obligation to send filed Schedule 13Ds to the issuer of the security and Forms 3, 4 and 5 to the exchange where the security is traded
 - SEC authorized to issue rules accelerating the initial Schedule 13D and Form 3 filing deadlines
 - SEC’s proposed rulemaking timeline – November - December 2010

Whistleblower Protection

- Amendments to the Commodity Exchange Act and the Exchange Act (Sec. 748 and 922)
 - Provides whistleblowers with award of 10-30% of total monetary sanction (including settlements)
 - Monetary sanction must exceed \$1 million
- Protection From Employer Retaliation
 - Discharge or other discrimination against whistleblower by employer may result in awarding back pay owed, litigation and attorney fees, and reinstatement of employment
 - Statute of limitations for such actions
 - Commodity Exchange Act: No more than 2 years after date of violation
 - Exchange Act: No more than 6 years after date of violation or 3 years after date of emergence of facts material to right of action become known, and in no case more than 10 years after date of violation
- SEC proposed rules released on November 3, 2010

Aiding and Abetting Liability Standard

- Amendment to Securities Act and Investment Company Act (Sec. 929M)
 - Permits government enforcement actions against persons who “knowingly or recklessly” provide substantial assistance in violation of either act
- Amendment to Investment Advisers Act (Sec. 929N)
 - Permits government enforcement actions against persons who “knowingly or recklessly” aid, abet, counsel, command, induce or procure a violation of the act
- Amendment to Exchange Act (Sec. 929O)
 - Aiding and abetting standard also satisfied by “recklessness”

Strengthening of SEC Enforcement Powers

■ Additional Enforcement Powers (Sec. 929P)

- Authority to impose civil penalties in cease-and-desist proceedings under any of the federal securities statutes against “any person,” not just “regulated persons”
- Expands federal court jurisdiction to actions or proceedings brought by the SEC involving
 - Conduct within the U.S. constituting significant steps in furtherance of a violation of the Securities Act, Exchange Act and Investment Advisers Act, even if the transaction occurs outside the U.S. and involves only foreign investors
 - Conduct outside the U.S. that has a foreseeable substantial effect within the U.S.
- Expands scope of control liability under Section 20(a) of Exchange Act to apply to SEC Enforcement actions, in addition to private actions

Internal Control Requirement Exemption

- Exemption to Section 404(b) of Sarbanes-Oxley Act (Sec. 989G)
 - Amends Section 404(b) to exempt non-accelerated filers and smaller reporting companies from the requirement of hiring an independent accounting firm for the purpose of providing an attestation report

Regulation D Eligibility

- Disqualification of Felons and Other “Bad Actors” From Regulation D Offerings (Sec. 926)
 - Bad actors defined as a person who has been
 - Convicted of a felony or misdemeanor in connection with the purchase or sale of any security or involving a false filing with the SEC
 - Subject to a final order (within 10 years of the date of filing) based on a violation of law or regulation prohibiting fraudulent, manipulative or deceptive conduct
 - Subject to a final order prohibiting association with certain regulated entities, participation in the securities business or participation in savings association or credit union activities
 - SEC’s proposed timeline for rulemaking – January - March 2011

Accredited Investor

- Adjustment of Accredited Investor Standard (Sec. 413)
 - Standard of net worth of accredited investor amended to be in excess of \$1 million, excluding the value of one's primary residence
 - Standard shall be set for at least 4 years
 - Standard may be reviewed by SEC in its discretion, but must be reviewed no earlier than 4 years from enactment date and at least once every 4 years thereafter
 - SEC's proposed timeline for rulemaking – January - March 2011

Proxy Access

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1097830-3

Proxy Access

■ Proxy Access (Sec. 971)

- SEC may issue rules permitting stockholder use of issuer's proxy solicitation materials to nominate individuals to board of directors
- SEC adopted mandatory proxy access on August 25, 2010 (Rule 14a-11 of the Exchange Act)
 - Public companies required to allow stockholders who own at least 3% of voting stock continuously for 3 years access to proxy materials for solicitation
 - Stockholders using proxy access must certify no intent to acquire control
 - Stockholders may elect up to the greater of one member or 25% of the board
 - Stockholders may form group to reach 3% threshold
 - Effective date of November 15, 2010
- Exceptions
 - Foreign private issuers
 - Companies that only have a class of debt securities registered
 - “Smaller reporting companies” will not be subject to the rule until 3 years following rule's effective date

Proxy Access

■ Recent Litigation and Grant of Stay

- Petition filed by Business Roundtable and the Chamber of Commerce with U.S. Court of Appeals on September 29, 2010
- SEC granted stay on final rule on October 4, 2010 pending judicial review
- Proxy access not anticipated to be effective until 2012 proxy season