



STUART MOORE
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Dodd-Frank Wall Street Reform and Consumer Protection Act

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Webinar Agenda



- ★ Review of Compensation Related Legislation (50 minutes)
 - General compensation provisions
 - Corporate governance
 - Bank focused legislation

- ★ Q&A (10 minutes)

The Bottom Line

★ Enacted

- July 21, 2010

★ Focus of legislation

- All Publicly-traded companies
- Both public and private financial institutions with \$1 billion or more of assets

★ Effective

- Is now law
- Some provisions apply immediately
- Some provisions apply within 6-12 months

Summary of Legislation

- ★ All public companies:
 - Exec Comp Say-on-Pay: Non-binding vote
 - Golden parachute approval: Non-binding vote
 - CEO Pay Test: Disclosure of CEO total comp as a percentage of median of all other employees total comp
 - Pay v. Performance Exhibit: Disclosure of relationship between exec comp and company financial performance
 - Compensation committee independence

Summary of Legislation

- ★ All public companies:
 - Clawbacks: Mandatory recovery of pay based on restatement
 - Broker Voting: Prohibited in director elections
 - Proxy Access: SEC authority to permit shareholder nominees for director elections
 - Chair/CEO structure: Proxy disclosure of rationale
- ★ Financial institutions (e.g., banks) with assets > \$1 billion
 - Incentive disclosure: All incentive arrangements to regulators
 - Prohibited compensation: Prohibition of incentive-based pay that regulators determine encourages excessive risk
- ★ Residential Mortgage Lender Incentives
 - Prohibition on compensation based on terms of loan

How does this legislation apply?

- ★ Public bank with assets $>$ \$1 billion
 - The law applies to these banks
- ★ Private bank with assets $>$ \$1 billion
 - Only the bank provisions apply
- ★ Public bank with assets $<$ \$1 billion
 - It will depend upon final SEC rules and your bank's market cap
- ★ Private bank with assets much less than \$1 billion
 - The law does not apply

Provisions Affecting Public Companies



★ Shareholder Approval of Executive Compensation

- "Say-on-Pay"
 - Not less frequently than once every three years
 - Proxy to include non-binding Say-on-Pay resolution
 - Not less frequently than once every six years
 - Proxy to include separate resolution on Say-on-Pay frequency
 - Determine whether votes on resolutions required every one, two, or three years
 - Effective for proxy/meetings six months after enactment (1/21/11)
 - Not dependent on SEC rule making
 - Automatically effective

- ★ Shareholder Approval of Golden Parachute Compensation
 - Effective after 6 months and when shareholders are asked to approve merger, acquisition, consolidation, sale, or disposition of substantially all assets
 - Non-binding vote covering Named Executive Officers
 - Any compensation that may become payable with the transaction
 - Present, deferred or contingent
 - Aggregate total of all comp that may be paid
 - Conditions upon which it may become payable
 - Vote not required if previously approved in another say-on-pay vote
 - In a clear and simple form to be defined by SEC

Sec. 951: Shareholder Vote on Executive Compensation Disclosures

★ Law does not

- Overrule the decision by the board/company
- Create, add, or change fiduciary duties
- Restrict or limit shareholders' ability to make proposals related to compensation

Sec. 951: Shareholder Vote on Executive Compensation Disclosures

- ★ Institutional Investment Managers to report at least annually how it voted unless such vote is reported publicly
- ★ SEC
 - May exempt an issuer or class of issuers
 - To consider burden on small issuers

Sec. 952: Compensation Committee Independence

- ★ Independence of Compensation Committee
 - Prohibits listing of companies whose comp committees are not in compliance (independent) not later than 360 days after enactment
 - Procedures to be developed for cure process

Sec. 952: Compensation Committee Independence

- Compensation Committee
 - Members of the board
 - Independent
 - Securities exchanges to define "Independence"
 - To include factors such as
 - » Source of compensation to a director, including any consulting, advisory or other fees
 - » If director is affiliated with the issuer or any part of the issuer's organization
 - Exchanges may exempt a particular relationship taking into consideration size of issuer and other factors

Sec. 952: Compensation Committee Independence

- ★ Independence of Compensation Consultants and Other Advisors
 - Applies to:
 - Compensation Consultants
 - Independent Legal advisors
 - Other advisors
 - Explicit ability of compensation committee to select and engage comp consultants, legal counsel, and other advisors in its sole discretion
 - Company to provide appropriate funding as determined by comp committee

Sec. 952: Compensation Committee Independence

- Committee must consider factors affecting independence of a consultant/legal counsel/other advisors before selecting
 - Factors to be competitively neutral
 - Provision of other services by the consultant/advisor's firm
 - Amount of fees paid to the consultant/advisor's firm as a percentage of the firm's total revenue
 - Policies and procedures of consultant/advisor's firm designed to prevent conflicts of interest
 - Personal or business relationship of the consultant/advisor with a member of the comp committee
 - Stock of the issuer owned by the consultant/advisor

Sec. 952: Compensation Committee Independence

- Directly responsible for appointment, compensation, and oversight
- No requirement for comp committee to implement or follow the advice of a comp consultant, legal counsel and other advisors
- Does not affect ability or obligation of the comp committee to exercise its own judgment in fulfilling its duties
- Disclosure
 - Effective with proxy/solicitation one year after enactment
 - Whether comp committee retained or obtained advice of a comp consultant
 - If the comp consultant work has raised any conflict of interest
 - The nature of the conflict
 - How conflict is being addressed

Sec. 952: Compensation Committee Independence

- ★ SEC has ability to exempt a class of issuers as deemed appropriate
 - Consider burden on smaller reporting companies
- ★ Does not apply to "controlled companies"
- ★ SEC to study and review
 - Use of compensation consultants and effects
 - Submit a report to Congress within two years

Sec. 953: Executive Compensation Disclosures

- ★ Clear description in proxy/solicitation materials of any compensation required to be disclosed
 - Total compensation
- ★ Requires SEC to develop and adopt rules requiring additional disclosures
 - Relationship between executive compensation actually paid and financial performance of company
 - Including impact of any change in share value, dividends, and distributions

Sec. 953: Executive Compensation Disclosures

- CEO Pay Test
 - Median annual total comp of all employees excluding CEO
 - Total annual compensation of CEO
 - Ratio of CEO pay to median pay of all other employees

★ Comments

- Legislation does not limit compensation but requires additional disclosure
- Rules expected to be in place for 2011 proxy season

Sec. 954: Recovery of Erroneously Awarded Compensation

- ★ Recovery of Funds – commonly referred to as “Clawbacks”
- ★ SEC to adopt rules
 - Disclosure of a company's policy on incentive comp based on financial information required to be reported under securities laws
 - If an accounting restatement is required due to material noncompliance with any financial reporting requirement
 - Recover excess incentive-based comp including stock options
 - Any current or former executive
 - Three year period preceding the restatement
- ★ Non-compliance results in loss of listing on exchanges
- ★ Comment: Essentially expanded Sarbanes clawback

- ★ SEC to develop and adopt rules requiring proxy disclosure for annual meetings
 - Employees, directors, or their designees
 - If hedging transactions are permitted
 - Applies to equity grants as compensation and other equity of company they hold

Sec. 957: Voting by Brokers

- ★ National Securities Exchanges must prohibit broker voting
 - Election of directors
 - Executive compensation
 - Other significant matters to be determined by SEC
- ★ Comment
 - NYSE had already eliminated broker voting for director elections

Sec. 971: Proxy Access

- ★ SEC may prescribe rules
 - Permit shareholders to include nominees for election as directors in proxy
 - Procedures the company may follow
- ★ Comment: Eliminates debate whether SEC has authority to adopt proxy access rule. Not required but expected SEC will do so.

Sec. 972: Disclosure of Chairman and CEO Structures

- ★ SEC to adopt rules
- ★ Disclosure in annual proxy
- ★ Rationale for having same or different person serve as Chairman and CEO

Sec. 926: “Bad Actor” Disqualifications

- ★ SEC to issue rules disqualifying “Bad Actors” from Regulation D offerings
- ★ Rules for persons barred
 - Association with entities regulated by certain authorities
 - Convicted of a felony or misdemeanor connected to sale of a security
- ★ Comment:
 - Companies should consider revising annual officer and director questionnaires to solicit appropriate inquiries if 506 offerings are a likely source of corporate fund-raising



Provisions Affecting Public & Private Financial Institutions

Sec. 956: Enhanced Compensation Structure Reporting

★ Summary

- By April 21, 2011 (9 months), regulators shall prescribe regulations or guidelines
- Applies to financial institutions with assets of at least \$1 billion
- Enhanced compensation disclosure
- Prohibited compensation arrangements

Sec. 956: Enhanced Compensation Structure Reporting

- ★ Broader applicability than just banks
 - Regulators: Federal Reserve, OCC, FDIC, OTS, NCUA, SEC, Federal Housing Finance Agency
 - Covered financial institutions: FDIC insured institutions, registered broker-dealer, credit union, investment advisor, FNMA, FHLMC, any other financial institution the regulators determine jointly by rule

Sec. 956: Enhanced Compensation Structure Reporting

- ★ Enhanced compensation disclosure reporting
 - Disclose the structure of all incentive-based compensation arrangements offered sufficient to determine whether the compensation structure
 - Provides an executive officer, employee, director or principal shareholder excessive compensation, fees, or benefits
 - Could lead to a material financial loss to the institution
- ★ Prohibits types of incentive-based payment arrangements or any feature of such arrangement that regulators determine encourages inappropriate risks

Sec. 956: Enhanced Compensation Structure Reporting

- ★ Does not require the reporting of actual comp of individuals
- ★ Does not apply to institutions with no incentive-based payment arrangements
- ★ Compensation standards based upon Section 39(c) of Federal Deposit Insurance Act
- ★ Enforcement is under Section 505 of Gramm-Leach-Bliley Act

Sec. 956: Enhanced Compensation Structure Reporting

★ Comments

- Banks close to \$1 billion in assets should review requirements
- For the first time, listing of prohibited compensation arrangements
- Aligned with Final Guidance on Sound Incentive Compensation Policies

Section 1403: Prohibition on Steering Incentives

- ★ Residential Mortgage Loan Origination Standards:
 - Amends the Truth in Lending Act (Section 129B)
 - Affects mortgage lenders
 - Prohibits lenders from receiving compensation based on the terms of a loan
 - Incentives based on amount of loan principal are allowed
 - Incentives may be based on number of loans originated
 - Regulations will be forthcoming

Questions



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