

CHEAT SHEET: THE LATEST DEVELOPMENTS IN GOVERNANCE AND COMPENSATION

- **Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act” or the “Act”)**
 - Enacted on 7/21/2010. The Act includes the following important *corporate governance and compensation reforms* that relate to all public companies or, in some cases, companies listed on exchanges.
 - Say-on-Pay.^{*} For *all public companies*, the Act requires an annual shareholder advisory (non-binding) vote on compensation, effective 1/21/2011. For any shareholders meeting on or after 1/21/2011, the proxy statement shall include (1) the Say-on-Pay resolution and (2) at least once every six years, a separate resolution to determine whether Say-on-Pay votes will occur every 1, 2 or 3 years. (§951)
 - Say on Parachutes.^{*} For *all public companies*, the Act requires a shareholder advisory (non-binding) vote on golden parachute compensation in any proxy statement relating to shareholder approval of a merger, sale of assets or similar transaction, effective 1/21/2011. Any proxy statement for approval of such a transaction on or after 1/21/2011 must include disclosure of the compensation payable to executive officers based on the transaction, in accordance with SEC regulations to be adopted. (§951)
 - Proxy Access.^{*} For *all public companies*, the Act authorizes the SEC to make rules to grant to large shareholders the right to nominate directors and have the nominees included in management’s proxy statement. [See the description of the SEC’s current proposed shareholder access rules, below.] (§972)
 - Disclosure of Pay vs. Performance. For *all public companies*, the SEC must adopt rules requiring in the proxy statement a clear description of any compensation required to be disclosed under Item 402 of Regulation S-K, including information on the relationship of executive compensation to the financial performance of the issuer, which may include a chart. (§953)
 - Pay Equity-Related Disclosure. For *all public companies*, the SEC must adopt rules requiring in the proxy statement a comparison (including the ratio) of (1) the median annual total compensation of all employees, excluding the CEO, with (2) the annual total compensation of the CEO. (§953)
 - Hedging Disclosure. For *all public companies*, the SEC must adopt rules requiring in the proxy statement disclosure of whether the company permits hedging in the issuer’s equity securities by employees or directors. (§955)
 - Restriction on Broker Discretionary Voting. For shareholder votes of *all public companies*, the stock exchange rules governing brokers must prohibit the brokers from voting shares without instructions from the beneficial owner on any matter relating to executive compensation (which would include Say-on-Pay) or other significant matters determined by rule by the SEC. (§957)
 - Disclosure about Chairman/CEO Structure. For *all public companies*, the SEC must adopt rules by 1/17/2011 requiring in the proxy statement disclosure of why the company did or did not separate the positions of chair and CEO. (§972)
 - Independence Standards for Compensation Committee.^{*} For *listed companies*, the Act requires the SEC by 7/16/2011 to adopt rules directing the national securities exchanges and associations to establish stricter independence standards for compensation committee members based on specified factors. (§952)
 - Standards for Compensation Committee Advisors.^{*} For *listed companies*, the Act requires the SEC by 7/16/2011 to adopt rules directing the national securities exchanges and associations to authorize compensation committees to hire consultants and counsel, with standards for independent advisors. Listed companies must also disclose in any proxy statement for an annual meeting on or after 7/21/2011 whether the compensation committee retained a compensation consultant and whether the work of the consultant has raised any conflict of interest and, if so, how it is being addressed. (§952)
 - Clawback Policy. For *listed companies*, the Act requires the SEC to adopt rules directing the national securities exchanges and associations to require listed companies to develop and implement a policy requiring the recovery of incentive compensation (including stock options) from current and former officers during the three years before an accounting restatement, to the extent the compensation was based on erroneous financial data. (§954)

^{*} For these provisions, the SEC or national securities exchange or association is authorized under the Dodd-Frank Act to exempt a class of issuers based on size of the issuer or other factors.

- **Selected Other Provisions of the Dodd-Frank Act**
 - Whistleblower Bounty Program. In any judicial or administrative action brought by the SEC under the securities laws that results in monetary sanctions exceeding \$1 million, any person who voluntarily supplies new information to the SEC that leads to the successful enforcement of the action will be entitled to an award in the aggregate amount of 10% to 30% of collected monetary sanctions. The Act also imposes penalties for retaliation against the whistleblower. (§922)
 - Exemption From Attestation Report Requirement for Smaller Issuers. Effective immediately, any reporting company that is neither a large accelerated filer nor an accelerated filer will be exempt from the requirement under Section 404(b) of the Sarbanes-Oxley Act of 2002 to have an attestation report prepared on its internal controls. (§989G)
 - Change in Definition of Accredited Investor. Effective immediately, the Act changes the standard for accredited investors under Regulation D. An individual investor will now be considered accredited based on net worth only if he or she has a net worth greater than \$1 million, individually or jointly with his or her spouse, *excluding* the value of the individual's primary residence. Previously, the value of the principal residence could be included to determine net worth. (§413)
 - Compensation Structures of Financial Institutions. For *covered financial institutions*, U.S. regulatory agencies must jointly adopt rules by April 21, 2011 that (1) require disclosure to regulators about the structure of incentive compensation and (2) prohibit structures that encourage excessive risk-taking and provide excessive compensation or could lead to material financial loss. (§956)
- **SEC Proposed Shareholder Access Rules – Proposed Rule 14a-11 (Release No. 33-9046)**
 - The SEC on June 10, 2009 proposed rules to grant large shareholders the right to nominate directors and have the nominees included in management's proxy statement. The right would be granted to holders who have for at least one year beneficially owned at least 1%, 3% or 5% (for various sizes of companies) of the outstanding stock. The company would be required to include shareholder nominees for up to 25% of the board positions. If nominees are received above this limit, access is granted on a first-come-first-served basis.
 - The SEC is also considering a proposed amendment to Rule 14a-8 to eliminate companies' ability to exclude from their proxy materials qualifying shareholder proposals relating to shareholder access.
- **Amendments to the SEC Proxy Disclosure Rules – Final Regulations Adopted in 2009**
 - The SEC adopted enhanced proxy statement disclosure requirements on Dec. 16, 2009, applicable to companies with a fiscal year ended on or after Dec. 20, 2009, for proxy statements and Form 10-K filed on or after February 28, 2010.
 - The compensation disclosure rules were amended to (1) require disclosure of the relationship of the company's overall compensation policies to risks that are "reasonably likely to have a material adverse effect," (2) require disclosure of potential conflicts of interest of executive compensation consultants and other information about consultants, including information on fees they receive for other services (\$120K minimum), with certain exceptions and (3) change the calculation of equity compensation amounts in Summary Comp. Table – based on the fair value of awards made during the year, rather than the accounting expense in that year.
 - The proxy statement must include more information about (1) each director or nominee's background, (2) the company's leadership structure (including role of lead director, if any) and (3) whether the nominating committee considers diversity in reviewing nominees, and assessing implementation of diversity policies.
 - Companies must disclose the results of shareholder votes on Form 8-K within four business days after the vote. If final voting results are not known, file preliminary results, followed by an amended filing.
- **Amendment to NYSE Rule 452 – Broker Discretionary Voting – Final Regulations Adopted in 2009**
 - For shareholder meetings held on or after January 1, 2010, brokers cannot vote shares on election of directors without instructions from beneficial owner.

The descriptions above offer only a general overview of complex legal topics. These materials are not intended as a substitute for legal, financial or tax advice and should not be relied upon as such.

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