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The Corporate Governance and Executive Compensation Provisions — What to Do Now

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The authors examine the new reform law's provisions affecting executive compensation and governance at public companies.

Will Rogers once quipped, "Be thankful we're not getting all the government we're paying for." Now that the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Act") has been enacted into law, that is about to change. The Act and related rulemaking by the U.S. Securities and Exchange Commission ("SEC") will profoundly affect executive compensation and governance at public companies, making it essential that companies start preparing for these changes now and closely monitor SEC rulemaking.

The Act requires the SEC to issue more than 90 rules and 15 studies, many of them relating to corporate governance and executive compensation. In some cases there is no deadline set for when the SEC must issue rules, while in other cases the SEC must adopt rules not later than a certain number of days or months after enactment of the legislation. Several provisions in the Act require the SEC to issue rules directing the national securities exchanges to adopt listing standards to effectuate the rules. Listed companies that do not comply with the new requirements could be subject to delisting (although in some cases the rules adopted by the SEC must provide issuers

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with a reasonable opportunity to cure any defects that would be the basis for a delisting).

This article discusses the executive compensation and governance provisions in the Act, together with practical suggestions that companies might consider to be ready for the new requirements. Separate sections discuss executive compensation and governance provisions that relate solely to financial institutions or "nonbank financial companies" supervised by the Board of Governors of the Federal Reserve System ("Federal Reserve").

SAY-ON-PAY

New "say-on-pay" provisions give shareholders a vote on executive pay. The Act does not mandate that a "say-on-pay" vote be held annually as was originally proposed in both the Senate and House bills. Rather, public companies, at the first annual or other meeting of shareholders that occurs six months after the date of enactment, will be required to include a resolution providing shareholders with a non-binding, advisory vote on the compensation of executive officers (as disclosed under Item 402 of Regulation S-K), as well as a separate resolution to determine whether future "say-on-pay" votes should occur on an annual, biannual, or triennial basis. Companies must hold a shareholder vote no less than every six years to reconsider whether to hold the say-on-pay vote annually, biennially, or triennially. Presumably, companies may try to match shareholder votes with the objectives of their compensation programs. If, for example, a company's pay programs emphasize multiyear performance, as is generally the case, a staggered "say-on-pay" vote may be easier to justify.

A say-on-pay vote is nonbinding and does not overrule any decision made by the company or the board or otherwise change the fiduciary duties of the board. The SEC has authority to exempt small issuers from say-on-pay and say-on-golden-parachute provisions to the extent it determines that these requirements disproportionately burden small issuers, but it is not clear whether the SEC will exercise its authority to do so.

Recent say-on-pay votes demonstrate that shareholders are willing to "just say no" when voting on executive compensation. During the 2010 proxy season, Motorola, Occidental Petroleum, and Keycorp became the first three companies that failed to garner majority support for a management-sponsored "say-on-pay" vote. Although the say-on-pay vote is non-binding and advisory, RiskMetrics Group, a proxy advisory firm that provides voting recommendations to institutional shareholders and often receives delegated authority to vote their shares, is advising its institutional clients to vote against directors who ignore the outcome of shareholder say-on-pay votes. Thus, "say-on-pay" votes have an "*in terrorem*" effect on companies and their boards of directors.

Companies should consider undertaking a comprehensive review of executive compensation with a view toward gaining shareholder support. This review should include the new executive compensation requirements added by the Act (discussed below), as well as a fresh look at the executive compensation disclosures included in last year's proxy statement. Companies also should strive to make their presentation of executive compensation clearer and more persuasive, providing compelling reasons for compensation decisions and analysis in the Compensation Disclosure & Analysis ("CD&A") section of the proxy statement.

Companies may also benefit from reviewing the factors that institutional shareholders and proxy advisory firms are likely to examine in conjunction with say-on-pay votes. RiskMetrics Group, which is likely to wield even more influence as a result of the new say-on-pay requirements, adopted a policy for management "say-on-pay" proposals in 2008 and included detailed guidance in a 2009 white paper on evaluating management say-on-pay proposals.[1] The Council of Institutional Investors issued a paper on the top ten red flags that shareholders should watch for when casting advisory say-on-pay votes.[2] Reviewing the issues discussed in these papers and the recommendations of compensation consultants, and staying abreast of evolving best practices and the experience of other companies with say-on-pay votes, can help companies reduce the risk of a negative outcome. Anticipating the concerns of institutional investors and learning to communicate effectively with them can head off difficulty, both as to say-on-pay votes and with regard to other areas as well. In addition, companies should communicate effectively with retail shareholders and take steps to increase retail vote participation.

SAY ON GOLDEN PARACHUTES

The Act also requires that, in any proxy statement in which shareholders are asked to approve an acquisition, merger, consolidation, or sale of substantially all the assets of a company, the soliciting person (generally the target company or the acquiring company) disclose any agreements or understandings that such person has with any named executive officers concerning any type of compensation (present, deferred, or contingent) that is based on or relates to the business combination. The aggregate total of all such compensation that may be paid or become payable to named executive officers (including the conditions of such payments) must be disclosed. In addition, a separate non-binding shareholder resolution to approve such agreements or understandings and the compensation disclosed is required (a so-called "say on golden parachute" vote). This provision is effective for shareholder meetings occurring six months after enactment of the Act.

The Act does not require a shareholder vote on parachute agreements or understandings if they have previously been the subject of a general "say-on-pay" vote. The scope of this exception is not entirely clear, for example, in situations where a general say-on-pay vote approves potential payments to named executive officers (as seems to be contemplated by the use of the phrase "agreements or understandings") but the final arrangements or amounts that are paid in the context of a particular transaction are different. Despite this ambiguity, companies should review existing parachutes with named executive officers in employment agreements or plans to determine if they should be revised or should be put in a more definitive form so that a general say-on-pay vote is more likely to preempt the need for a later resolution in connection with a future transaction. The new say-on-golden parachute requirements may affect future negotiations on parachute payments both generally and in the context of specific transactions.

CLAWBACK OF INCENTIVE-BASED COMPENSATION

The Act requires the SEC, by rule, to direct national securities exchanges to prohibit the listing of any security of an issuer that does not develop and implement a policy to "clawback" compensation from current or former executive officers who received incentive-based compensation (including stock options) during the three-year period preceding the date of an accounting restatement, in excess of what would have been paid under the accounting restatement. The SEC must also direct the exchanges to require listed companies to develop and implement a policy providing for disclosure of the company's policy on incentive-based compensation that is based on financial information required to be reported under the securities laws. No deadline for SEC rulemaking is specified.

This provision is broader than the clawback provision in the Sarbanes-Oxley Act.[3] In addition, the Act's clawback provision applies *irrespective* of whether any misconduct occurred.[4] Even though accounting restatements do not necessarily involve wrongdoing, the Act's clawback provision can reach to executive officers who are not even aware of a problem.

Listed companies will need to adopt clawback policies that comply with any listing standards that are adopted. Many companies have existing clawback provisions but often these provisions only seek to recover compensation from CEOs and CFOs who are involved in misconduct. While consistent with Sarbanes-Oxley requirements, these policies are inconsistent with the Act's "no fault" provision. Companies also will need to consider whether existing employment agreements, compensation plans, and award agreements need to be modified. If no attempt is made to modify existing contracts and policies, a company could potentially be criticized for failing to take measures to enforce its clawback policy. A further issue to consider is whether the company's clawback policy can be enforced retroactively against employees who have contractual rights, especially in the case of former employees who do not consent to a modification.

Listed companies may wish to consider whether protective steps, such as indemnifying executives (to the extent permitted by state law) and modifying directors and officers ("D&O") liability insurance that would otherwise exclude clawback claims from coverage, can be taken to protect executives from unfair application of the provision. Companies also may decide to evaluate whether a greater proportion of executive compensation should be in the form of salary and guaranteed payments and less as incentive or equity-based compensation.

At the same time, companies should review clawback policies, agreements with executives, and plans to make sure that they protect the company and its shareholders against wrongdoing by executives. Companies should also keep an eye on evolving best practices, which could potentially go beyond the Act's requirements. It is possible that industry groups will disapprove of attempts to indemnify or insure executives from application of the Act's clawback policy on the theory that it is inconsistent with the Act or may cause an executive to be less vigilant in monitoring misconduct, or that the SEC could require additional disclosure regarding indemnification or insurance in this context.

DISCLOSURE OF THE RELATIONSHIP BETWEEN PAY AND PERFORMANCE

The SEC is required to adopt rules requiring companies to disclose in the annual proxy statement the relationship between compensation paid to executive officers and the company's financial performance, taking into account any change in the value of stock and dividends and distributions. Companies may include a graphic representation of the information required to be disclosed. No deadline is specified for adoption of SEC rules.

The "new" requirement in the Act that companies disclose in their proxy statement the relationship between executive compensation paid and the company's financial performance taking into account any change in its stock price takes us back to an "old" SEC rule that required companies to include a stock performance graph in their proxy statements. The SEC repealed this requirement in 2006, noting that stock performance information is widely available and that the executive compensation disclosure contained in CD&A is intended to encourage broader discussion than just the relationship of compensation to company performance as reflected in its stock price.[5] Currently, a performance graph is required only in the company's annual report to shareholders.[6]

DISCLOSURE OF RATIO OF MEDIAN EMPLOYEE COMPENSATION TO CEO COMPENSATION

The SEC is required to amend Item 402 of Regulation S-K to require companies to disclose: (1) the median annual total compensation of all employees, except the CEO; (2) the annual total compensation of the CEO; and (3) the ratio of the compensation of employees determined under (1) to the compensation of the CEO determined under (2). The annual total compensation of an employee is determined in accordance with Item 402 of Regulation S-K. This disclosure will be required in registration statements, annual reports to shareholders, proxy statements, and Exchange Act reports to the extent required in the forms and rules. No deadline is specified for adoption of SEC rules.

Patrick McGurn, Special Counsel to RiskMetrics' Governance Services unit, stated in May 2010 that if pay equity disclosure were enacted into law, the result could be "the most inflammatory number that's ever been in the proxy statement."[7] Companies should focus in advance on the calculation and consider the impression that pay equity disclosure will make on both employees and shareholders (particularly in light of the new say-on-pay requirement). Consideration should be given to factors that affect internal pay equity. For example, a company that outsources a higher proportion of jobs to lower paying jurisdictions may appear to have relatively better internal pay equity statistics than peers providing lower paying jobs. Companies also may wish to think about conducting a more meaningful internal pay equity analysis than that required by the Act. Additional internal pay equity calculations (such as comparing CEO pay to the pay of other named executive officers and other groups) may provide additional context for the required disclosure.

DISCLOSURE OF EMPLOYEE AND DIRECTOR HEDGING ACTIVITIES

The SEC is required to adopt rules requiring companies to disclose in their annual proxy statement whether any employee or director is permitted to purchase financial instruments (including prepaid variable forward contracts, equity swaps, collars, and exchange funds) that are designed to hedge or offset a decline in the market value of equity securities granted as part of the employee's or director's compensation or held, directly or indirectly, by the employee or director. No deadline for SEC rulemaking is specified.

Companies should review their existing policies and agreements to determine whether to include restrictions on employee and director hedging activities. Many companies already prohibit some hedging activities in insider trading policies or contractual agreements, in part because Section 16 of the Exchange Act prohibits certain activities. However, such policies may not prohibit or restrict all activities as to which a company will be required to make disclosure, and they may not cover all employees. Therefore, companies should review their policies to determine whether they wish to prohibit or further restrict hedging activities or cover additional persons. In some cases, companies and employees or directors also may want to consider undoing outstanding hedging transactions before making the required disclosure.

COMPENSATION COMMITTEES

The Act requires the SEC, by rule, to direct national securities exchanges to prohibit the listing of any security of an issuer that does not comply with requirements relating to compensation committee independence, the independence of compensation consultants and other advisers to the compensation committee, disclosure of the compensation committee's use of compensation consultants, and the authority of compensation committees to retain and fund compensation consultants and other advisers.

The SEC must issue rules not later than 360 days after enactment. The rules of the SEC must provide for appropriate procedures for an issuer to cure any defect that would be the basis for a listing prohibition. The SEC rules must permit a national securities exchange to exempt a category of issuers. In determining appropriate exemptions, the exchanges must take into account the potential impact of the requirements on smaller reporting issuers.

The provisions in the Act relating to compensation committees of listed companies and their use of consultants and advisers are discussed below.

- *Compensation Committee Independence.* Compensation committee members of listed companies will be required to satisfy heightened independence standards to be established by the national securities exchanges.[8] The definition of the term "independence" is consistent with that required of audit committee members under Rule 10A-3 of the Exchange Act. Listed companies should start reviewing whether the current members of the compensation committee meet the general provisions in the Act, and review the SEC's rules and listing standards once they are issued. To the extent that changes to the composition of the compensation committee are required, companies may need to recruit new members if they are unable to fill compensation committee positions with existing directors. Compensation committees will also need to update their charters when the final rules become available.

- *Independence of Compensation Committee Consultants and Advisers.* Compensation committees of listed companies must consider specific factors that the SEC identifies as affecting the independence of a compensation consultant, legal counsel or other adviser before selecting such person. The SEC is required to issue rules identifying the factors that affect the independence of a compensation consultant, legal counsel, or other adviser to a compensation committee of an issuer. Such factors must be competitively neutral among categories of consultants, legal counsel, or other advisers, and preserve the ability of compensation committees to retain the services of members of any such category.[9]

  The new requirements add to existing proxy disclosure requirements that were adopted in December 16, 2009, which require companies to disclose in the proxy statement whether the compensation consultant retained by the board's compensation committee or its affiliates performs other work for the company that could create a conflict of interest and related fee disclosures in certain circumstances. Compensation committees should consider whether there is a need to retain new compensation consultants, legal counsel, or other advisers, and consider adopting policies that ensure that they are satisfying the new requirements.

- *Disclosure Regarding Use of Compensation Consultants.* A listed company will be required to disclose in the proxy statement for an annual meeting occurring one year or more after enactment of the Act whether (1) the compensation committee retained or obtained the advice of a compensation consultant; and (2) any conflicts of interest arise from the consultant's work and, if so, the nature of the conflict and how it is being addressed.
- *Authority to Engage and Oversee Independent Compensation Consultants, Counsel and Other Advisers.* The compensation committee of a listed company must be granted authority, in its sole discretion, to retain or obtain the advice of a compensation consultant, independent legal counsel, and other advisers and be directly responsible for their oversight.

- *Funding of Compensation Consultants and Other Advisers.* Listed companies must provide for appropriate funding, as determined by the compensation committee, for payment of "reasonable compensation" to compensation consultants, independent legal counsel, or other advisers to the committee.

PROXY ACCESS

Despite efforts to introduce language into the legislation limiting the right of shareholders to nominate directors in a company's proxy materials to those shareholders who own at least 5 percent of the company for a minimum two-year holding period, the Act does not specify any minimum ownership threshold or holding period. The SEC is authorized to exempt issuers or classes of issuers (such as small public companies) from proxy access rules.

The Act's proxy access provision resolves the issue of whether the SEC has authority to issue proxy access rules, in anticipation of a lawsuit on the issue. With this issue out of the way, it can be anticipated that the SEC will adopt proxy access rules relatively quickly so that they will be in effect for the 2011 proxy season.[10]

EXEMPTION FROM SARBANES-OXLEY INDEPENDENT AUDITORS ATTESTATION REQUIREMENT FOR SMALL ISSUERS

The Act amends the Sarbanes-Oxley Act to exempt small SEC reporting issuers that are non-accelerated filers under Rule 12b-2 of the Exchange Act from the requirement in Section 404(b) of the Sarbanes-Oxley Act for independent auditor attestation of internal control over financial reporting. Thus, small SEC reporting companies with a public float (market value of equity securities held by non-affiliates) of less than US$75 million will not be subject to this requirement.[11] This exemption does not in any way affect a smaller issuer's obligations under Section 404(a), which requires an annual assessment of internal controls over financial reporting.

The SEC is required to conduct a study to determine how it could reduce the burden of complying with Section 404(b) for companies whose market capitalization is between US$75 million and US$250 million for the relevant reporting period. The SEC must deliver a report to Congress not later than nine months after enactment.

DISCRETIONARY VOTING BY BROKERS

The Act requires national securities exchanges to adopt rules prohibiting broker discretionary voting in connection with elections of directors, executive compensation, and any other significant matter as determined by SEC rule, unless the beneficial owner has provided voting instructions to the broker. No time period for adoption of these rules is specified.

This requirement is similar to New York Stock Exchange Rule 452, but adds voting on all executive compensation matters to the list of non-routine matters as to which a broker may not vote without instructions. It also gives the SEC authority to add to the list of items as to which a broker may not exercise discretionary voting. This could significantly affect the outcome of say-on-pay and say-on-golden parachute votes by giving institutional investors proportionately greater voting power.

DISCLOSURE REGARDING CHAIRMAN AND CEO STRUCTURE

The SEC is required to adopt rules, not later than 180 days after enactment, requiring a company to disclose in its annual proxy statement the reasons it has chosen the same person to serve as chairman of the board and CEO or different individuals to serve in these positions. Under SEC disclosure rules adopted on December 16, 2009, companies are already required to include disclosure in the proxy statement about a company's board leadership structure, including whether the company has combined or separated the chief executive officer and chairman position, and why the company believes its structure is the most appropriate for the company.

ADJUSTMENT TO THE "ACCREDITED INVESTOR" STANDARD

During the four-year period that begins on the date of enactment of the Act, the net worth standard for a natural person to qualify as an "accredited investor"[12] under the Securities Act of 1933 ("Securities Act") is US$1 million, *excluding* the value of the primary residence of the natural person.[13] Prior to enactment of the Act, individual investors could include their primary residence in the net worth calculation. This change, which is effective immediately, will make it harder for many individual investors to qualify as an accredited investor. Four years after enactment of the Act, the SEC must increase the net worth standard for individual investors to more than US$1 million. The SEC must conduct periodic reviews of the definition.[14]

CHANGES TO SECTION 13 AND 16 REPORTING

The Act gives the SEC authority to shorten the due date for filing beneficial ownership reports under Section 13(d) of the Exchange Act. Currently, the due date is within 10 days after the acquisition. It also eliminates requirements to send related notices to the issuer and exchanges. A similar accelerated time frame would be allowed for "short swing" reporting under Exchange Act Section 16.

The Act amends Sections 13(d) and 13(g) of the Exchange Act so that they apply to beneficial owners of any covered equity security upon the purchase or sale of a "security-based swap" (as defined by SEC rule).[15]

Institutional investment managers that are subject to Section 13(f) of the Exchange Act must report at least annually how they voted with regard to a shareholder vote on executive compensation or "golden parachute" compensation unless such vote is otherwise reported publicly under SEC rules.

ENHANCED DISCLOSURE AND REPORTING OF COMPENSATION ARRANGEMENTS BY COVERED FINANCIAL INSTITUTIONS WITH US$1 BILLION OR MORE IN ASSETS; PROHIBITION ON CERTAIN COMPENSATION ARRANGEMENTS

Not later than nine months after the date of enactment, appropriate federal regulators[16] must jointly prescribe regulations or guidelines that:

- Require "covered financial institutions" to disclose to the appropriate federal regulator the structures of all incentive-based compensation arrangements sufficient to determine whether the compensation structure provides an executive officer, employee, director, or principal shareholder with excessive compensation, fees, or benefits, or could lead to material financial loss to the covered financial institution; and

- Prohibit any incentive-based payment arrangement that such regulators determine encourages "inappropriate risks" by covered financial institutions, by providing an executive officer, employee, director, or principal shareholder with excessive compensation, fees, or benefits, or that could lead to material financial loss to the covered financial institution.

Reporting of the actual compensation of particular individuals is not required. "Covered financial institutions" include banks and savings associations and their respective holding companies, registered broker-dealers, credit unions, investment advisers, Fannie Mae, Freddie Mac, and any other financial institution that the appropriate federal regulators jointly determine should be treated as a covered financial institution. These requirements do not apply to covered financial institutions with assets of less than US$1 billion.

RISK COMMITTEE REQUIREMENTS FOR NONBANK FINANCIAL COMPANIES SUPERVISED BY THE FEDERAL RESERVE AND CERTAIN BANK HOLDING COMPANIES

The Federal Reserve must require each "nonbank financial company" supervised by the Federal Reserve that is a publicly traded company, and publicly traded bank holding companies with US$10 billion or more in assets, to establish a risk committee (in the case of a nonbank financial company supervised by the Federal Reserve, not later than one year after the date of receipt of a notice of final determination with respect to such nonbank financial company).[17] In addition, the Federal Reserve may require each publicly traded bank holding company that has total consolidated assets of less than US$10 billion to establish a risk committee as determined by the Federal Reserve to promote sound risk management practices. The risk committee will be responsible for the oversight of enterprise-wide risk management practices and must include such number of independent directors as the Federal Reserve may determine appropriate, and at least one risk management expert with experience in identifying, assessing and managing risk exposures of large, complex firms. The Federal Reserve must issue rules not later than one year after the "transfer date," to take effect not later than 15 months after the "transfer date." The "transfer date" means a date that is one year after enactment of the Act, but is subject to an additional six month extension.

NOTES

[1] *See* RiskMetrics Group, *Evaluating U.S. Company Management Say on Pay Proposals,* March 16, 2009, *available at:* http://www.riskmetrics.com/docs/2009EvaluatingSayOnPay (with free registration on the site).

[2] *See* Council of Institutional Shareholders, *Top Ten Red Flags to Watch for When Casting an Advisory Vote on Executive Pay*, Mar. 2010, *available at:* http://www.cii.org/UserFiles/file/resource%20center/publications/March%202010%20-%20Say%20on%20Pay%20Checklist.pdf.

[3] Section 304 of the Sarbanes-Oxley Act requires a company to clawback compensation only from the company's CEO and CFO and only covers the 12-month period following the restatement. Under the Sarbanes-Oxley Act, the CEO and CFO must reimburse the company for all incentive-based compensation that is paid during the 12-month period following the restatement, as well as any profits realized from the sale of securities of the company during that 12-month period. In addition, the Sarbanes-Oxley provision requires an issuer to recover compensation due to the material noncompliance of the issuer "as a result of misconduct." The clawback provision in the Act operates differently than the provision in the Sarbanes-Oxley Act. The Act clawbacks incentive-based compensation from any former or current executive officer "in excess of what would have been paid to the executive officer under the accounting restatement" during the three-year period preceding the restatement.

[4] In a recent decision, the Arizona district court denied a motion to dismiss the SEC's complaint in an action against the former CEO of CSK Auto Corp. under the Sarbanes-Oxley Act even though the SEC had not alleged that the CEO was involved in the securities fraud or knew that the company's financial statements were misleading. The court stated that the Sarbanes-Oxley Act requires only misconduct of the issuer, and does not require specific misconduct, or even personal awareness of financial misconduct, of the issuer's CEO or CFO. *See SEC* v. *Jenkins*, No. CV 09-1510-PHX-GMS, 2010 WL 2347020 (D. Ariz. June 9, 2010). This case is not binding in other jurisdictions and could be appealed.

[5] *See* SEC Release No. 33-8732A, Aug. 29, 2006, *available at:* http://edgar.sec.gov/rules/final/2006/33-8732a.pdf, and the related proposing release, Release No. 33-8655, Jan. 27, 2006, *available at:* http://www.sec.gov/rules/proposed/33-8655.pdf.

[6] Instructions 7 and 8 to Item 201(e) of Regulation S-K. A smaller reporting company, as defined by Rule 229.10(f)(1), is not required to provide the performance graph. Instruction 6 to Item 201(e).

[7] *See* J. Jaeger, "Early Reviews on 2010 Proxy Disclosures," *Compliance Week*, June 8, 2010.

[8] The SEC must by rule direct the national securities exchanges to prohibit the listing of any equity security of an issuer (other than an issuer that is a controlled company, limited partnership, company in bankruptcy proceedings, open-ended management investment company that is registered under the Investment Company Act of 1940, or a foreign private issuer that provides annual disclosures to shareholders of the reasons that the foreign private issuer does not have an independent compensation committee) that does not comply with the requirements for compensation committee independence.

[9] The factors that the SEC identifies in its rulemaking as affecting the independence of a compensation consultant, legal counsel or other adviser to a compensation committee must include: "(A) the provision of other services to the issuer by the person that employs the compensation consultant, legal counsel, or other adviser; (B) the amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel, or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel, or other adviser; (C) the policies and procedures of the person that employs the compensation consultant, legal counsel, or other adviser that are designed to prevent conflicts of interest; (D) any business or personal relationship of the compensation consultant, legal counsel, or other adviser with a member of the compensation committee; and (E) any stock of the issuer owned by the compensation consultant, legal counsel, or other adviser."

[10] *See, e.g.,* Kara Scannell, "SEC Enters Overdrive to Prepare for Overhaul," *Wall Street Journal*, July 12, 2010, *available at:* http://online.wsj.com/article/SB10001424052748704799604575357322407593694.html (noting that agency officials are committed to completing proxy access).

[11] The SEC had previously granted relief to smaller public companies from compliance with the independent auditor attestation requirement in Section 404(b). The most recent extension of the original exemption expired on June 15, 2010. The Act makes this exemption for smaller reporting companies permanent.

[12] The term "accredited investor," as defined in Rule 501(a) of Regulation D under the Securities Act for purposes of certain exempt offerings, includes:

- Individuals who have a net worth, or joint worth with their spouse, above US$1 million or have income above US$200,000 in each of the last two years (or joint income with their spouse above US$300,000) and a reasonable expectation of reaching the same income level in the year of investment; or are directors, executive officers or general partners of the issuer of the securities or its general partner; and

- Certain institutional investors, including: banks; savings and loan associations; registered brokers, dealers and investment companies; licensed small business investment companies; corporations, partnerships, limited liability companies and business trusts with more than US$5 million in assets; and qualified employee benefit plans and trusts with more than US$5 million in assets.

[13] The SEC has issued an interpretation that the amount of any associated mortgage or other indebtedness secured by the primary residence up to its fair market value may be excluded in determining an individual's net worth.

[14] The SEC may undertake an initial review of the definition of an "accredited investor," as the term applies to natural persons, to determine whether the definition, excluding the requirement relating to the net worth standard described above, should be adjusted or modified, and following completion of the review, may make adjustments to the definition (except as to the net worth standard requirement) after notice and comment rulemaking. The SEC is required to conduct a review, not earlier than four years after enactment and not less frequently than every four years thereafter, of the definition of "accredited investor" in its entirety as defined in Rule 215 of the Securities Act. Upon completion of this review, the SEC may make adjustments to the definition of "accredited investor" as defined in Rule 215 after notice and comment rulemaking. (The Act does not require a review of the definition of an "accredited investor" in Rule 501(a) of Regulation D every four years. Rather, this review is only required with respect to the definition of an "accredited investor" for purposes of Rule 215, which affects the Section 4(6) exemption from registration under the Securities Act.)

[15] A new subsection (o) to Section 13 states that for purposes of Section 13 and Section 16, a person will be deemed to acquire beneficial ownership of an equity security based on the purchase or sale of a security-based swap, only to the extent that the SEC, by rule, determines that the purchase or sale of the security-based swap provides incidents of ownership comparable to direct ownership of the equity security, and that it is necessary to achieve the purposes of the section that the purchase or sale of the security-based swap be deemed the acquisition of beneficial ownership of the equity security. No deadline is specified for SEC rulemaking.

[16] "Appropriate Federal regulators" include the Federal Reserve, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration Board, the SEC, and the Federal Housing Finance Agency.

[17] The term "nonbank financial company" includes companies that are "predominantly engaged in financial activities" (as defined in the bill). The Financial Stability Oversight Council can subject certain nonbank financial companies that it determines would pose a threat to U.S. financial stability in the event of their material financial distress to the supervision of the Federal Reserve. Such companies can be subject to stricter standards, such as the risk committee requirement.