

# Akerman Practice Update

CORPORATE

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## Impact of the Dodd-Frank Wall Street Reform and Consumer Protection Act

President Obama signed into law on July 21, 2010 the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank” or the “Act”). The new legislation will significantly alter the regulatory landscape for the financial services industry and includes reforms that apply broadly to participants in the financial markets. The Act will be implemented in significant part through the studies and rulemaking activities it enables.

Akerman Senterfitt is publishing a series of updates to apprise our clients of the salient features of Dodd-Frank in specific areas. This update addresses the Act’s impact on corporate governance and executive compensation practices.

### **Proxy Access**

Section 971 of the Act authorizes the Securities and Exchange Commission (the “SEC”) to promulgate rules permitting the use by a shareholder of proxy solicitation materials supplied by an issuer of securities for the purpose of nominating individuals to membership on the board of directors of the issuer, under such terms and conditions as the SEC determines are in the interests of shareholders and for the protection of investors. The SEC has undertaken several initiatives in the proxy access area and the Act puts to rest any contention that the SEC lacks rulemaking authority in this area. It is widely anticipated that the SEC will finalize its June 2009 proxy access rulemaking proposal in time for the 2011 proxy season.



### **Restriction on Discretionary Voting**

Section 957 of the Act amends Section 6(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) to require securities exchange rules to prohibit members from using discretionary authority to vote proxies in connection with the election of directors, executive compensation proposals or “any other significant matter” as determined by rules to be promulgated by the SEC. (By virtue of an amendment to NYSE Rule 452 in 2009, voting on the election of directors is already considered a “non-routine” matter and is therefore beyond the scope of permissible discretionary voting by brokers.)

### **Board Leadership Structure**

Section 972 of the Act requires the SEC to issue rules, within 180 days after enactment of the Act, requiring an issuer’s annual proxy statement to disclose the reasons why the issuer chose to combine or separate the positions of chairperson of the board and CEO (or equivalent positions). The SEC amended its disclosure rules in 2010 to require a discussion of this subject, and it is unclear whether additional disclosure rules are contemplated.

### **Sarbanes-Oxley Section 404(b) Exemption**

Section 989G of the Act permanently exempts issuers that are neither a “large accelerated filer” nor an “accelerated filer” from compliance with the internal control auditor attestation requirements of Section 404(b) of the Sarbanes-Oxley Act. Section 404(a) of the Sarbanes-Oxley Act, which requires disclosure of management’s annual assessment of internal controls effectiveness, will continue to apply to all issuers.

### **Compensation Committee and Adviser Independence**

Section 952 of the Act requires the SEC to direct stock exchanges to adopt listing standards providing that members of a listed company’s compensation committee must meet enhanced independence standards comparable to those applicable to audit committee members under the Sarbanes-Oxley Act. These enhanced independence requirements will not apply to (a) controlled companies, (b) foreign private issuers that provide annual disclosure to shareholders of the reasons that they do not have an independent compensation committee, (c) limited partnerships, (d) companies in bankruptcy proceedings, (e) certain registered investment companies and (f) companies that list only debt securities. The compensation committee must also have full authority for

the retention and compensation of compensation consultants, legal advisors and other advisors and the oversight of their work.

Section 952 of the Act also provides that when retaining any compensation consultant, legal counsel or other adviser to the compensation committee, issuers must take into account factors relevant to independence that are to be identified by the SEC through rulemaking within 360 days of the enactment of the Act. The factors are required to be competitively neutral among categories of consultants, legal counsel or other advisers and to include (i) the provision of other services to the issuer by the person that employs the compensation consultant, legal counsel, or other adviser, (ii) 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, (iii) 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, (iv) any business or personal relationship of the compensation consultant, legal counsel, or other adviser with a member of the compensation committee and (v) any stock of the issuer owned by the compensation consultant, legal counsel, or other adviser. An annual meeting proxy for a meeting occurring on or after the first anniversary of enactment of the Act must disclose in accordance with regulations to be adopted by the SEC (A) whether the compensation committee of the issuer retained or obtained the advice of a compensation consultant and (B) whether the work of the compensation consultant has raised any conflict of interest and, if so, the nature of the conflict and how the conflict is being addressed.

### **Say-on-Pay**

“Say-on-pay” refers to a non-binding advisory vote on the compensation of executive officers and related proxy disclosures. Section 951 of the Act requires that companies include a non-binding resolution in their proxy statements at least once every three years asking shareholders to approve the compensation of the named executive officers. A separate resolution will be required at least once every six years to determine whether the say-on-pay vote will take place every one, two or three years. The proxy for the first annual or other meeting of shareholders occurring at least 6-months after enactment of the Act must include a say-on-pay proposal and a separate resolution to determine the frequency with which say-on-pay proposals will be submitted to shareholders.

To the extent that any golden parachute compensation is not approved as part of a say-on-pay vote, commencing six months after enactment of the Act, a separate non-binding vote to approve the golden parachute compensation will be required at the meeting where shareholders are asked to approve the merger or other transaction giving rise to the golden parachute compensation. The Act requires the golden parachute arrangements or understandings and amounts payable to be disclosed in clear and simple form in accordance with rules to be promulgated by the SEC.

Institutional money managers subject to reporting under Section 13(f) of the Exchange Act will be required to disclose annually how they vote on say-on-pay proposals.

### **Additional Executive Compensation Disclosures**

Section 953 of the Act provides for the SEC to adopt rules mandating that companies disclose (i) in graphic or narrative form, the relationship of the compensation actually paid to their executives versus the company's financial performance, as measured by share price appreciation and dividends or distributions and (ii) the median annual total compensation of all employees (except the CEO), the annual total compensation of the CEO, and the ratio of the median employee total compensation to the CEO total compensation. Section 955 of the Act requires the SEC to issue rules requiring companies to disclose in their annual proxy statements whether any employee or director (or designee of such persons) is permitted to purchase financial instruments, such as prepaid variable forwards, equity swaps, collars and exchange funds, that are designed to hedge or offset any decrease in the market value of equity securities granted as compensation or held directly or indirectly by the employee or director.

### **Compensation Clawbacks**

Section 954 of the Act requires the SEC to issue rules prohibiting the listing on a securities exchange of a company that does not develop and implement a policy providing (i) that if the company is required to prepare an accounting restatement due to material noncompliance with any financial reporting requirement under the securities laws, the company will recover from any current or former executive officer who received incentive-based compensation (including stock options awarded as compensation) during the three-year period preceding the date the company is required to prepare an accounting

restatement, amounts based on the erroneous data in excess of what would have been paid under the accounting restatement and (ii) 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.

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The summary set forth herein is intended to be general in nature and does not constitute legal advice with respect to any particular situation. No legal or business decision should be based solely on its contents. For more information, please contact a member of our Corporate practice.

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