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PUBLIC COMPANY ALERT

Corporate Governance and Executive Compensation Provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act

July 21, 2010

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act” or the “Act”). The Act, which is largely composed of dramatic reforms to the financial regulatory system in the U.S., contains a number of significant provisions relating to corporate governance and executive compensation that will apply beyond the financial sector and will affect most public companies. This memorandum discusses those provisions, as well as the Act’s provisions related to new whistleblower protection rules.

PROVISIONS RELATED TO CORPORATE GOVERNANCE

Proxy Access.

One of the most prominent components of Mary Schapiro’s agenda since becoming Chairman of the Securities and Exchange Commission (the “SEC” or the “Commission”) in January 2009 has been so-called “proxy access”—the right or ability of shareholders to place their own nominees for the corporate board directly on the company’s proxy card at company expense. The SEC issued a proposal to mandate proxy access in June of last year, and while the proposed rulemaking has provoked considerable debate and severe criticism from corporate circles, observers have expected for some time now that the Commission will be adopting proxy access rules in 2010. The SEC’s authority to adopt such rules had been subject to some uncertainty, however, with the Chamber of Commerce, among others, threatening to bring a legal challenge to the rules on this basis should the Commission move forward.

The Dodd-Frank Act has now removed this uncertainty. Specifically, the Act amends Section 14(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) to specify that “the Commission may issue 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 Commission determines are in the interests of shareholders and for the protection of investors”. Notably, the Act authorizes but does not require that the SEC adopt any such rules. The Act’s only limitation is that it instructs the Commission, if it does adopt proxy access, to consider whether the requirement “disproportionately burdens small issuers”. It does not impose any limits or other guidelines on the scope of the Commission’s rulemaking or its authority in this area.

The SEC’s proposal from June 2009 would create a federal right of proxy access pursuant to new Rule 14a-11 under the Exchange Act. The proposed rule would give the right to nominate a director on the company’s proxy card to shareholders (or groups of shareholders) holding for at least one year at least one percent of a company’s shares (in the case of the largest U.S. companies, with higher ownership thresholds being required

for smaller companies). Access would not be available to a shareholder seeking to change control of the company, and exercise of the right would come with various disclosure and qualification requirements. Up to 25% of a board could be installed through access in any year, and to the extent there were more shareholders wanting to nominate a director than slots on the proxy available under the rule, the proposal would entitle the first eligible shareholder (or group of shareholders) to put forth a nominee.

It seems almost certain that important features of the adopted rule will differ from what was proposed by the SEC—for example, both the length and amount of share ownership required to trigger an access right may be increased—and the SEC seems to be moving toward a final rule that would grant proxy access to larger shareholders rather than those that submit their nominees first. It also seems quite likely that the Schapiro Commission will adopt some variant of proxy access this summer now that the Dodd-Frank Act has eliminated any question about the SEC's authority to move forward in this area. We also expect the Commission's new proxy access rules to be effective for the 2011 proxy season, but obviously nothing can be known for certain on this front until the SEC takes further action.

Disclosure of CEO/Board Chairman Structure.

The Dodd-Frank Act creates a new Section 14B of the Exchange Act entitled "Corporate Governance" and directs the SEC to issue rules by January 17, 2011 (within 180 days of the law's enactment) to require U.S. public companies to disclose in their annual proxy statements the reasons why the company decided to have the positions of chief executive officer and chairman of the board of directors filled by the same person or by different individuals. This provision of the Act is somewhat odd in that the SEC has already adopted rules, as part of its December 2009 "proxy disclosure enhancements" rulemaking and contained in Item 407 of Regulation S-K, covering this disclosure requirement. In light of that, it is not clear what, if any, additional rulemaking steps the SEC will take in response to this particular directive.

Limitations on Broker Discretionary Voting (Rule 452).

The New York Stock Exchange's Rule 452 allows its member brokers to cast discretionary votes for "routine" matters in corporate elections when the broker holds customer shares in street name and has not received voting instructions from its client. These "broker discretionary votes" constitute between 10% and 20% of the votes cast at most companies. Rule 452 was amended in the summer of 2009 to stipulate that director elections (whether or not contested) are never "routine", and the Act codifies this requirement through an amendment to Section 6(b) of the Exchange Act. The Act also amends Section 6(b) to require the stock exchanges, including the NYSE, to amend their rules to prohibit broker discretionary voting with regard to shareholder votes on executive compensation matters (including so-called "say-on-pay" votes discussed below) and any other "significant matter" as defined by SEC rule.

PROVISIONS RELATED TO EXECUTIVE COMPENSATION

Say-on-Pay (Shareholder Votes on Executive Compensation Matters).

The Dodd-Frank Act creates a new Section 14A of the Exchange Act, pursuant to which public companies must give their shareholders a non-binding advisory vote at least once every three years on the compensation of the company's named executive officers ("say-on-pay"). This vote will be accomplished by inclusion in the proxy for the annual meeting (or other shareholders' meeting for which the SEC's rules require compensation disclosure) of a management proposal for shareholder approval of executive compensation disclosed in that proxy statement pursuant to Item 402 of Regulation S-K. The Act does not specify any subsection of Item 402 and so presumably the vote will cover the compensation as disclosed in the summary compensation and other tables as well as in the Compensation Discussion & Analysis, or CD&A, section.

In the last few years, there have been a limited number of say-on-pay votes put forward voluntarily by management (albeit typically after a shareholder proposal requesting such a vote has received significant support in a past proxy season), as well as mandated say-on-pay votes by companies receiving funds under the Troubled Asset Relief Program ("TARP"). We are aware of only three instances—Motorola, Occidental Petroleum and KeyCorp, all earlier this year—in which the compensation described in the proxy statement has not received majority shareholder approval. The votes to date have been considered "routine" under Rule 452, and discretionary broker votes have been counted. As described above, however, discretionary broker votes will not be counted toward say-on-pay votes in the future.

The say-on-pay vote mandated by the Dodd-Frank Act must be offered initially at the first shareholder meeting that occurs after January 21, 2011 (six months following enactment of the Dodd-Frank Act). At that time, in a separate vote, shareholders must also be given an opportunity to vote on a resolution to determine if future say-on-pay votes will occur every one, two or three years. The Act mandates that shareholders be given another vote on the frequency of say-on-pay at least once every six years.

On the vote to approve compensation, management presumably will recommend approval. Management will also need to decide whether to recommend to shareholders the frequency of the say-on-pay vote (one, two or three years) or to make no recommendation at all. Several companies have already voluntarily adopted biennial (*e.g.*, Prudential Financial) and triennial (*e.g.*, Microsoft) say-on-pay votes and this topic will undoubtedly generate significant discussion, and in some instances, warrant outreach to shareholders, as each company decides on its own recommendation. Regardless of management's preference and recommendation on the frequency, we assume that shareholders must be given the choice of one, two or three years and that a plurality vote will suffice to decide the question, but this is not clear on the face of the Act.

With regard to say-on-pay votes, the SEC has been given broad exemptive authority by the Act with the instruction to consider particularly whether these provisions impose a special burden on smaller companies. It is unclear, however, whether or to what extent the SEC will exercise that exemptive authority. As a result of the Act, and absent any SEC exemptions, next year over 7,000 public companies will have say-on-pay votes. As noted above, to date only three companies have failed to receive majority approval of non-binding say-on-pay votes. Those "failures" all occurred during the past proxy season, and any company responses and related consequences have not yet been seen. Undoubtedly more companies will fail to receive majority votes for say-on-pay next year. Companies and their boards should be aware that one anticipated consequence of failed say-on-pay votes, especially if those votes are not followed by an effective corporate response that is satisfactory to shareholders, is that certain directors, particularly compensation committee members, may be the target of withhold vote campaigns, receive negative recommendations from proxy advisory firms or be challenged by proxy access nominees.

Companies should also note that absent rulemaking relief from the SEC (and the Act does not require the SEC to take any action otherwise), the inclusion of this "say-on-pay" vote in a proxy statement will necessitate the filing of a preliminary proxy with the SEC pursuant to Rule 14a-6. For TARP companies subject to mandatory say-on-pay votes pursuant to Section 111 of the Emergency Economic Stabilization Act of 2008 ("EESA"), there is an express exemption in Rule 14a-6 from the need to file a preliminary proxy statement. We anticipate that the SEC will amend the Rule to provide this same relief to all public companies.

Shareholder Votes on Golden Parachutes.

The Dodd-Frank Act also requires disclosure and a non-binding advisory shareholder vote regarding "golden parachutes" for named executive officers in any merger or acquisition transaction requiring a proxy or consent solicitation. These requirements will apply to targets and also to acquirers if shareholder approval is sought. Any agreements or understandings with any named executive officer of the target or the acquirer concerning any type of compensation (whether present, deferred or contingent) that is based on or otherwise relates to the merger or acquisition is covered. The SEC is directed to promulgate rules providing for "clear and simple" disclosure of those compensation-related understandings or agreements and the aggregate total of all compensation that may be paid or payable to any named executive officers as well as the conditions under which it may be paid or become payable. There is an exception from the vote requirement—but not the disclosure requirement—if the agreements and understandings have previously been subject to a "say-on-pay" vote discussed above. Thus, after the first round of say-on-pay votes has occurred (which presumably will cover change in control compensation arrangements already in place and described in the proxy), in most cases a separate vote will only be required if there are new named executive officers or new or modified compensation arrangements put in place in connection with a merger or acquisition transaction.

The "say-on-golden-parachutes" section of the Dodd-Frank Act is effective for any meetings held after January 21, 2011 (six months following enactment of the Act). The rulemaking required by the SEC is not subject to any express timetable in the Act.

As with say-on-pay votes, the SEC has been given broad exemptive authority by the Act with regard to say-on-golden-parachutes votes. The only instruction the Act gives the SEC in this regard is, again, to consider particularly whether these provisions impose a special burden on smaller companies.

Disclosure of Institutional Investors' Voting Records on Certain Compensation Matters.

As a corollary to the new federally mandated say-on-pay and say-on-golden-parachutes votes (and the new votes on the frequency of say-on-pay votes), every institutional investment manager subject to Section 13(f) of the Exchange Act will now be required to disclose, at least annually, how it voted on such matters. This type of transparency is already considered a best practice among the most prominent large institutional investors, and website disclosure is provided in some instances. The Act does not direct the SEC to implement this provision by rulemaking, but it also does not direct how or in what format those disclosures might be made by investment managers.

Independence of Compensation Committee Members.

Similar to the public company audit committee requirements that the Sarbanes-Oxley Act of 2002 added to Section 10A of the Exchange Act, the Dodd-Frank Act has added to the Exchange Act a new Section 10C that addresses the independence of

compensation committees.[1] Pursuant to this new requirement, each member of the compensation committee must be an independent director as defined by the relevant stock exchange. In defining independence, the listing standards must take into consideration "relevant factors" including the sources of compensation of the director (including consultancy, advisory and other fees paid to the director by the issuer) and whether the director is affiliated with the issuer, any subsidiary of the issuer or any affiliates of any subsidiaries. This definition of independence, which will depend upon the final stock exchange listing rules for its ultimate parameters, is very similar to the prescriptions laid out for audit committee independence by the Sarbanes-Oxley Act. It is important to note that directors affiliated with large shareholders (such as hedge funds and private equity funds) may not be eligible to serve on compensation committees under the new requirements since they may be deemed to be affiliated with the issuer (which does not compromise independence pursuant to current stock exchange rules). Controlled companies, limited partnerships, companies in bankruptcy and certain foreign private issuers are expressly exempted from this listing standard requirement.

Compensation Committee Consultants, Legal Counsel and Other Advisors.

The Dodd-Frank Act sets up several other requirements, also to be imposed through listing standards, for compensation committees with regard to the consultants, legal counsel and other advisors those committees may engage. The Act specifies that compensation committee may engage consultants, legal counsel and other advisors only after taking into consideration the Commission's definition of "independent" for these purposes. In crafting that definition, the Commission must consider:

- the provision of other services to the issuer by the consultant or advisor,
- how the fees received from the issuer compare to the total revenue of the consultant or advisor,
- the policies and procedures of the consultant or advisor that are designed to prevent conflicts of interest,
- any business or personal relationships between the consultant or advisor and any members of the compensation committee, and
- any stock of the issuer owned by the consultant or advisor.

The SEC's definition of independence must also be "competitively neutral" among categories of consultants, legal counsel and other advisors. The Act does not actually require that compensation committees retain independent consultants, legal counsel or other advisors—only that the Commission's rule on independence be considered. It will be interesting to see how the rule addresses this issue and how practice develops in this regard. The SEC has not been given any express timetable for the promulgation of this definition.

Along with the responsibility to consider independence, the compensation committee must have authority and discretion to retain any compensation consultant, independent legal counsel or other advisor of its choice and it must be directly responsible for the appointment, compensation and oversight of any consultant, independent legal counsel or other advisor the committee retains. The issuer must also make appropriate funding available to the compensation committee for these purposes. The Dodd-Frank Act expressly provides, however, that these provisions may not be construed as requiring a compensation committee to implement any advice received from a compensation consultant, independent legal counsel or other advisor, or otherwise as limiting the ability and obligation of a compensation committee to exercise its own judgment.

Implementation of these requirements pertaining to consultants, legal counsel and other advisors, which are codified by the Act as part of Section 10C of the Exchange Act, may occur over an extended period of time as the SEC is given until July 16, 2011 (360 days following enactment of the Act) to issue rules directing the stock exchanges to amend their listing standards to preclude the listing of any issuer that is not in compliance with these provisions, which will then obviously take additional time to accomplish.

This part of Section 10C of the Exchange Act authorizes the stock exchanges to exempt certain categories of issuers but does not make any further specifications beyond directing the exchanges to consider the potential impact on smaller companies.

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[1] Although both the NYSE and Nasdaq require that executive compensation at listed companies be determined (or recommended to the full board for determination) solely by independent directors (or a compensation committee whose members are all independent), there has not previously been an Exchange Act provision or SEC rule regarding complete compensation committee independence.

Controlled companies are explicitly exempted from these portions of new Section 10C dealing with consultants, legal counsel and other advisors.

Finally, with regard to compensation consultants (but not legal counsel and other advisors), beginning one year after enactment of the Act, issuers must provide disclosure in their proxy statements concerning whether the compensation committee engaged a compensation consultant, whether the work of the compensation consultant raised any conflicts of interest and, if so, the nature of the conflicts and how those conflicts have been addressed. This disclosure requirement is largely similar, but not identical, to the "proxy disclosure enhancements" that were adopted by the Commission in December 2009 and were in effect during the 2010 proxy season. This provision of the Act does not on its face require the Commission to take any implementing rulemaking steps, but most likely the Commission will conform its existing disclosure requirements to this provision of the Act.

Required New Disclosures about Compensation.

The Act directs the SEC to issue rules requiring three new types of disclosure about compensation matters.

Pay versus Performance: Companies will be required to disclose the relationship between "executive compensation actually paid" and the financial performance of the issuer, "taking into account any change in the value of the shares of stock and dividends of the issuer and any distributions". The definition of "executive compensation actually paid" will need to be determined and could differ from "total compensation" disclosed in the Summary Compensation Table today. The exact format of this disclosure will depend on the SEC's rule implementing this section, but the Act contemplates that a presentation in graph form might be required. At the same time, however, it is unclear how this new disclosure might interact with the performance graph already required by Item 201 of Regulation S-K. This new disclosure will be required, per the Act's language, in any "proxy or consent solicitation material for an annual meeting of shareholders".

Internal Pay Ratio: The Act also directs the SEC to amend Item 402 of Regulation S-K in order to require that companies disclose the median of the annual total compensation of all employees of the company (other than the CEO) as well as disclosing the annual total compensation of the CEO and then providing a ratio comparing those two figures. Calculation of "annual total compensation" of an employee for purposes of this provision of the Act must be determined in accordance with the rules for named executive officers in Item 402 of Regulation S-K as in effect on July 20, 2010, and no future SEC changes to Item 402 will be reflected. Several questions have already been raised about this provision, such as the scope of "all employees" for purposes of this rule. Furthermore, the Act directs the SEC to amend Item 402 to require this disclosure in any filings "described in Section 10(a)", which covers much more than proxy statements and annual reports on Form 10-K.[2] It will be interesting to see how the SEC resolves these questions through rulemakings. Whatever that outcome is, we expect that companies will face a considerable burden in calculating the compensation of their employees generally pursuant to the detailed requirements of Item 402 (as directed by the Act).

Hedging: Finally, the Act directs the SEC to issue rules requiring companies to disclose whether directors and employees are permitted to purchase financial instruments designed to "hedge or offset any decrease in the market value of equity securities", whether granted to the director or employee as compensation or held, directly or indirectly, by the director or employee. While many companies have hedging policies today with regard to certain senior employees, this requirement covers disclosure with respect to all directors and employees. Like the new "pay versus performance" disclosures, these hedging disclosures will be required in proxy and consent solicitation materials (for annual meetings).

All three of these new disclosure requirements require implementing rules from the SEC, but the Act has not specified any deadlines by which the SEC must complete those rulemakings. We anticipate that the Commission will have rules about the new compensation disclosures in place for the 2011 proxy season.

Clawbacks.

The Dodd-Frank Act also creates a new Section 10D of the Exchange Act which requires listed public companies to develop and implement policies to recapture—or "claw back"—compensation "erroneously awarded" to executives prior to a restatement of the company's financial statements. This requirement is mandatory, covers all present and former executive officers and does not require misconduct by the company or any officer as a condition to invoking the clawback. Given its broad application and relatively expansive scope, the clawback provision may be one of the most significant aspects of the Dodd-Frank Act for public

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[2] Item 10(a) of Regulation S-K directs that Regulation S-K apply to the non-financial portions of registration statements under the Securities Act of 1933, registration statements under Section 12 of the Exchange Act, "annual or other reports" under Sections 13 and 15(d) of the Exchange Act, going-private transaction statements, tender offer statements, annual reports to security holders and proxy and information statements, as well as "any other document required to be filed under the Exchange Act".

companies generally. The Act does not give the Commission or the exchanges authority to exempt smaller issuers, foreign private issuers or controlled companies from the clawback requirement.

As background, the SEC, pursuant to Section 304 of the Sarbanes-Oxley Act of 2002, is empowered to require the recovery of certain compensation from CEOs and CFOs (but not from any other officers or employees) in the case of restatements resulting from misconduct. Specifically, the SEC can pursue legal action to compel a CEO or CFO to reimburse an issuer for:

- any bonus or other incentive-based or equity-based compensation received by the CEO or CFO from the issuer during the 12-month period following the first public issuance or filing with the SEC (whichever first occurs) of the misstated financial statements, and

- any profits realized from the sale of securities of the issuer during that 12-month period.

Although there has been debate about whether Section 304 should apply only when the CEO or CFO has personally engaged in the misconduct leading to the misstatement, the SEC has recently taken the position in several enforcement actions that such individual culpability is not a condition of the statute's operation and at least one District Court, in *SEC v. Jenkins* (D. Ariz. 2010), has agreed with the SEC on this point.

As a corollary to the SEC's authority under Section 304 of the Sarbanes-Oxley Act, many public companies, often under pressure from activist shareholders, have in recent years adopted compensation clawback policies designed to recoup incentive and bonus compensation the company has paid to executives if the company subsequently has to restate its financial statements. Companies' policies vary in terms of which executives are covered, the "look back" period for which the clawback provisions apply and what, if any, level of culpability the executives must have for the restatement.

With the exception of the clawbacks required for companies receiving funds under TARP, the clawback provisions of the Dodd-Frank Act go well beyond existing law and practice. The Act requires that the stock exchanges adopt listing standards requiring that a listed company develop and implement a clawback policy that provides that in the case of an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement, the company will recover:

- from *all* present and former "executive officers" (not just the CEO and CFO as covered by the Sarbanes-Oxley Act provision and not just the named executive officers, whose compensation is subject to disclosure under the SEC's rules)

- any incentive-based compensation (including stock options) received in excess of what would have been paid under the accounting restatement

- during the three-year period preceding the date on which the company is required to prepare the restatement

- regardless of whether there was any fraud or misconduct involved (that is, the policy must apply to any accounting errors, intentional or not, resulting in a material restatement).

Although the statute still requires implementing regulations from the SEC and the stock exchanges, which are not subject to a statutory deadline, the implications appear to be significant. Most restatements do not involve misconduct, just accounting errors, and recent years have seen over 650 companies restating on an annual basis. If provisions of the Dodd-Frank Act had been in effect, each of those companies would have been required to clawback from all executive officers incentive-based compensation that would not have been earned but for the accounting misstatement.

For many companies, executive officers may number far more than just the five who are designated as named executive officers. Going forward, in the case of a restatement, compensation paid to all present and former executive officers, over a three-year period, will be subject to recovery. All of these officers may experience significant personal uncertainty with regard to pay they have received that has been tied to metrics based on accounting measures. The stress and costs of this uncertainty may even cause companies to change compensation practices so as to avoid this situation. It may also put pressure on a company's decision to restate, as the incentive to identify and report accounting errors may be deterred. This in turn may require additional focus from audit committees and compensation committees when restatement decisions are being made. If compensation was awarded based on discretion, and accounting metrics were a factor in the exercise of that discretion, it is possible that revisiting that exercise of discretion will be necessary in determining what amount should be recovered. The implementing SEC and stock exchange rulemakings should be followed carefully. In the interim, companies should review those components of executive compensation tied to accounting metrics in light of this new development.

Compensation Restrictions at Covered Financial Institutions.

Although not applicable to public companies generally, Section 956 of the Act imposes additional compensation-related requirements upon "covered financial institutions", as defined in the Act. Specifically, those institutions must disclose to the appropriate federal regulator (pursuant to rules to be adopted by April 21, 2011 (nine months after the law's enactment)) the structure of all incentive-based compensation arrangements. This is not a public disclosure obligation and does not appear to require disclosure of actual compensation (although that may be a subject of rulemaking), but rather is intended to enable the federal regulators to determine if the compensation structure "provides an executive officer, employee, director, or principal shareholder of the covered financial institution with excessive compensation" or "could lead to material financial loss to the covered financial institution". The Act also directs the "appropriate federal regulators" to adopt rules (also by April 21, 2011 (within nine months of the Act becoming law)) to prohibit any types of incentive-based payment arrangements that the regulators determine encourage inappropriate risks by covered financial institutions, either by providing the specified individuals (which is a fairly broad set that includes "employees") with excessive compensation or by potentially leading to material financial loss at the institution.

RESPONSIBILITIES OF CORPORATE BOARDS FOR DERIVATIVES TRANSACTIONS

The Dodd-Frank Act also provides for new federal regulation of the swaps market and gives the Commodity Futures Trading Commission (the "CFTC") and the SEC broad authority to regulate the market and its principal participants. As part of the new regulatory framework, many derivatives contracts will need to be cleared and traded on regulated facilities. There is an exemption available from this requirement for counterparties that are not "financial entities" (as defined by the Act) but it is subject to several conditions, including one that directly applies to corporate boards of directors. In order to take advantage of this "end-user exemption", a counterparty must be using the swaps to hedge commercial risks and must notify the CFTC or the SEC as to how it generally meets its financial obligations associated with non-cleared swaps. In the case of public companies, the decision to enter into swaps that will take advantage of the end-user exemption must also be reviewed and approved by an "appropriate" committee of the company's board of directors.

WHISTLEBLOWER PROVISIONS

The Dodd-Frank Act also includes provisions expanding federal whistleblower protections and establishing a "bounty" program at the SEC to reward those who report securities law violations.[3]

Following on the general public perception that individuals who raised warning flags at Enron, WorldCom, Tyco and other companies that committed securities fraud in the early 2000s both deserved accolades and protection and also could have perhaps done more if they had spoken up earlier, the Sarbanes-Oxley Act included several provisions designed to protect whistleblowers. These provisions made it illegal for any public company to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because the employee has been a whistleblower about securities fraud (generally speaking). Pursuant to these protections, the employee must be reinstated (with seniority commensurate with his or her position before the retaliatory employment action) and can recover back pay with interest as well as litigation expenses. The Sarbanes-Oxley Act also granted the Department of Justice jurisdiction to impose criminal penalties on companies or individuals for retaliating against whistleblowers who have raised alarms about a possible federal crime (not limited to the securities laws).

The Dodd-Frank Act repeats many of the Sarbanes-Oxley Act's prohibitions against whistleblower retaliation, but it notably allows a victim of retaliation to receive two-times the lost back pay (in addition to reinstatement with seniority protections and recovery of expenses).

The financial reform legislation also establishes a bounty program at the SEC, pursuant to which whistleblowers may be awarded between 10% to 30% of the amount the government receives in fines and penalties in any action brought by the SEC

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[3] This memorandum discusses the whistleblower provisions applicable to matters within the jurisdiction of the SEC. The Act also includes similar provisions with respect to the commodities laws and the Commodity Futures Trading Commission.

under the securities laws that results in monetary sanctions exceeding $1,000,000.[4] The precise amount of the reward is at the discretion of the SEC. These provisions may provide a substantial incentive to putative whistleblowers in at least some cases given that they might receive millions of dollars in bounty payments.[5]

The law also contains provisions protecting the confidentiality of the information received from the informant (including exempting it from coverage under the Freedom of Information Act, which allows people to obtain information from the federal government) and the identity of the informant until that information must be disclosed as part of a Commission proceeding against the defendant exposed by the whistleblower.

CONCLUSION

While Congress has passed and the President has signed the Dodd-Frank Wall Street Reform and Consumer Protection Act, the future application and implementation of the new law will be subject in many cases to regulatory measures to be adopted by various federal agencies. For those parts of the Act that apply to public companies generally, the importance of upcoming rulemakings from the SEC and the various stock exchanges is difficult to overstate. We expect many of these rulemakings to be undertaken within the next six months, and we would encourage any affected company to consider commenting on those rules as appropriate. In multiple places, the parameters of the final rules are far from certain at this time.

This memorandum relates to general information only and does not constitute legal advice. Facts and circumstances vary. We make no undertaking to advise recipients of any legal changes or developments.

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[4] The SEC has had an existing (but little publicized or used) program to pay rewards to informants in insider trading matters for over 20 years. This program, however, has paid out very few claims during that time, totaling less than $500,000.

[5] For example, the average corporate penalty assessed for FCPA violations in the past year was almost $59 million.