

Dodd-Frank Act Executive Compensation and Corporate Governance Provisions: Where Foreign Private Issuers Currently Stand

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) was signed into law by President Obama on July 21, 2010. The Dodd-Frank Act includes various executive compensation and corporate governance provisions (the “Provisions”) that are generally applicable to public companies listed in the U.S. To summarize briefly, the Provisions are:¹

- Section 951¹ - shareholder advisory votes on named executive officer compensation (“Say on Pay”), the frequency of Say on Pay votes (“Say When on Pay”), and “golden parachute” arrangements (“Say on Golden Parachutes”);
- Section 952 - listing standards relating to compensation committee independence, selection of compensation advisers, and the authority to hire, and provision of funding to hire, compensation advisers, and proxy disclosure of compensation consultant conflicts of interest;
- Section 953 - pay vs. performance and pay disparity ratio disclosure;
- Section 954 - disclosure of incentive compensation clawback policy and mandated clawback in the event of an accounting restatement;
- Section 955 - employee and director hedging disclosure;
- Section 972 - disclosure of issuer’s policy regarding separation of CEO and Chairman roles;² and
- In addition, for “covered financial institutions” (as defined in the Dodd-Frank Act), Section 956 requires disclosure of certain compensation information to regulators and substantive regulation of such compensation.

¹ Unless otherwise stated, section references in this memorandum are to the Dodd-Frank Act.

² For a discussion of the Provisions, see our Alert Memo entitled *Not Just Financial Reform: Dodd-Frank’s Executive Compensation and Governance Requirements for All Public Companies* (available at http://www.cgsh.com/not_just_financial_reform_dodd-franks_executive_compensation_and_governance_requirements_for_all_public_companies/).

The attached chart summarizes whether and how the Provisions may be applied to foreign private issuers (“FPIs”)³ based on the current state of rulemaking. Many of the Provisions will not become effective until final rules are implemented by the applicable Federal regulator (in many cases, the U.S. Securities and Exchange Commission (the “SEC”)) and/or listing standards are promulgated by the national securities exchanges (the “Exchanges”). We have indicated in the chart the anticipated release dates based upon the SEC’s projected implementation schedule, which is available at <http://www.sec.gov/spotlight/dodd-frank.shtml>.

* * * * *

Please feel free to call any of your regular contacts at the firm or any of the partners and counsel listed under Employee Benefits or Corporate Governance in the Practices section of our website (www.cgsh.com) if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

³ The term “foreign private issuer” is defined in Rule 3b-4(c) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) to mean a foreign issuer other than a foreign government, except for an issuer which meets the following conditions: (1) more than 50 percent of the issuer’s outstanding voting securities are directly or indirectly held of record by residents of the U.S.; and (2) any of the following: (i) the majority of the executive officers or directors are U.S. citizens or residents; (ii) more than 50 percent of the assets of the issuer are located in the U.S.; or (iii) the business of the issuer is administered principally in the U.S.

**APPLICABILITY OF THE COMPENSATION AND GOVERNANCE PROVISIONS OF THE
DODD-FRANK ACT TO FOREIGN PRIVATE ISSUERS**

As of April 18, 2011

Dodd-Frank Requirement	Applicability to FPIs
<p align="center">Say On Pay and Say When on Pay (Sec. 951)</p> <p align="center"><i><u>(Final rules adopted)</u></i></p>	<p>Does not apply.ⁱ</p>
<p align="center">Say on Golden Parachutes (Sec. 951)</p> <p align="center"><i><u>(Final rules adopted)</u></i></p>	<p>Does not apply.ⁱⁱ</p>
<p align="center">Independent Compensation Committee (Sec. 952)</p> <p align="center"><i><u>(SEC proposed rules on March 30, 2011; final rules anticipated August - December 2011. Final rules will be subject to implementation by the Exchanges no later than 1 year after publication in the Federal Register.)</u></i></p>	<p>Applies to an FPI unless the FPI provides annual disclosure to shareholders of the reasons that it does not have an independent compensation committee.</p> <p>Additionally, for FPIs that have a two-tier board, with one tier designated as the management board and the other tier designated as the supervisory or non-management board, the proposed rules state that the term “board of directors” means the supervisory or non-management board. The SEC is seeking comment on whether it needs to clarify this point, as proposed.</p> <p>Comment period for proposed rules ends April 29, 2011.</p>
<p align="center">Factors to Review in Selection of Compensation Advisers and Authority to Hire and Provision of Funding to Hire Compensation Advisers (Sec. 952)</p> <p align="center"><i><u>(SEC proposed rules on March 30, 2011; final rules anticipated August - December 2011. Final rules will be subject to implementation by the Exchanges no later than 1 year after publication in the Federal Register.)</u></i></p>	<p>Application to FPIs is unclear. Read literally, the statutory provision applies to FPIs and the SEC stated generally in its proposed rules under Section 952 that “[Section 952] makes no distinction between domestic and foreign issuers, other than to exempt from the independence requirements foreign private issuers that disclose in their annual reports the reasons why they do not have independent compensation committees.”</p> <p>However, the SEC notes that the Exchanges will be permitted to propose exemptions to the listing standards required by Section 952. In the past, the Exchanges have exempted FPIs from these types of requirements.ⁱⁱⁱ</p> <p>Comment period for proposed rules ends April 29, 2011.</p>
<p align="center">Proxy Disclosure of Compensation Consultant Conflicts of Interest (Sec. 952)</p> <p align="center"><i><u>(SEC proposed rules on March 30, 2011; final rules anticipated August - December 2011. Proposed rules contemplate that this requirement will apply to proxy statements for annual meetings at which directors will be elected that are filed in definitive form on or after the effective date of the final rules.)</u></i></p>	<p>Application to FPIs is unclear. Read literally, the statutory provision applies to FPIs and the SEC stated generally in its proposed rules under Section 952 that “other than the committee member independence requirements in [the proposed rule], the proposed rule and rule amendments, therefore, would apply to foreign private issuers as well as domestic issuers.”</p> <p>However, we note that the proposed rules would implement this requirement through an amendment to Item 407 of Regulation S-K, which does not apply to FPIs. On the other hand, the SEC sought comments on whether it should amend Forms 20-F and 40-F to require FPIs that are not subject to US proxy rules to provide annual disclosure of the type required by Section 952.</p> <p>Comment period for proposed rules ends April 29, 2011.</p>

Dodd-Frank Requirement	Applicability to FPIs
<p>Pay vs. Performance Disclosure and Pay Disparity Ratio^{iv} (Sec. 953)</p> <p><i>(No rules yet proposed; anticipated August - December 2011)</i></p>	<p>Does not appear to apply to FPIs because it references NEO compensation disclosure requirements under Item 402 of Regulation S-K to which FPIs are not otherwise subject.^v However, in the absence of definitive guidance from the SEC, it is not clear whether Section 953 may be applied to FPIs despite statutory cues to the contrary.</p>
<p>Compensation Clawbacks (Sec. 954)</p> <p><i>(No rules yet proposed; anticipated August - December 2011. Final rules subject to implementation by the Exchanges.)</i></p>	<p>Application to FPIs is unclear; read literally, however, this provision applies to FPIs. Guidance has not been issued yet, and, unlike certain other sections of the Dodd-Frank Act (such as Section 953), Section 954 does not reference proxy provisions to which FPIs are not otherwise subject. However, implementation is subject to the Exchanges promulgating listing standards and the Exchanges have exempted FPIs from these types of requirements in the past.^{vi}</p>
<p>Employee and Director Hedging Disclosure (Sec. 955)</p> <p><i>(No rules yet proposed; anticipated August - December 2011)</i></p>	<p>Application to FPIs is unclear; read literally, however, this requirement applies to FPIs. Although guidance has not been issued yet, the SEC has broad authority to exempt classes of persons from the requirements of the Exchange Act^{vii} and typically has exempted FPIs from its compensation disclosure requirements.^{viii}</p>
<p>Disclosure of Financial Institution Compensation Information to Regulators (Sec. 956)</p> <p><i>(Proposed rules published in the Federal Register on April 14, 2011; final rules anticipated August - December 2011)</i></p>	<p>The proposed disclosure rules^{ix} apply to any FPI (or U.S. entity within an FPI) that is a “covered financial institution” with \$1 billion or more in total consolidated assets. For FPIs, this could include U.S. branches, agencies and operations of foreign banks (including institutions treated as bank holding companies under the International Banking Act), registered broker-dealers and investment advisers.</p> <p>Comment period ends May 31, 2011. The proposed rules, if adopted, would be effective six months after publication of the final rule in the Federal Register.</p>
<p>Substantive Regulation of Financial Institution Compensation (Sec. 956)</p> <p><i>(Proposed rules published in the Federal Register on April 14, 2011; final rules anticipated August - December 2011)</i></p>	<p>The proposed rules apply to any FPI (or U.S. entity within an FPI) that is a “covered financial institution” with \$1 billion or more in total consolidated assets. For FPIs, this could include U.S. branches, agencies and operations of foreign banks (including institutions treated as bank holding companies under the International Banking Act), registered broker-dealers and investment advisers.</p> <p>Furthermore, for entities with \$50 billion or more in total consolidated assets, the proposed rules impose additional requirements regarding mandatory deferrals for executive officers and board review of incentive compensation arrangements for certain “key risk taker” employees.</p> <p>However, the proposed rules give some deference to home country regulators with respect to foreign banking organizations (“FBOs”). The proposed rules state that the policies of the FBO’s U.S. operations:</p> <ul style="list-style-type: none"> • Should be coordinated with the FBO’s group wide policies developed in coordination with FBO’s home country supervisor. • Should be consistent with FBO’s overall corporate and management structure and framework for risk management and internal controls. <p>Comment period ends May 31, 2011. The proposed rules, if adopted, would be effective six months after publication of the final rule in the Federal Register.</p>

Dodd-Frank Requirement	Applicability to FPIs
<p>Disclosure in Proxy of Policy Regarding Separation of CEO and Chairman (Sec. 972)</p> <p><i>(No rules yet proposed; SEC’s website does not list any proposed rulemaking with respect to Sec. 972 on its schedule of upcoming activity)</i></p>	<p>Application to FPIs is unclear; read literally, however, this requirement applies to FPIs. Guidance has not been issued yet, and, unlike certain other sections of the Dodd-Frank Act (such as Section 953), Section 972 does not reference proxy disclosure provisions to which FPIs are not otherwise subject.</p> <p>However, this provision is duplicative of existing proxy disclosure rules that do <u>not</u> apply to FPIs.^x In addition, even if the SEC were to issue additional rules, the SEC has broad authority to exempt classes of persons from the requirements of the Exchange Act.^{xi} Therefore, this provision ultimately may not apply to FPIs.</p>

ⁱ With respect to the Say on Pay and Say When on Pay votes, the SEC noted in the adopting release that the final rules “apply to issuers who have a class of equity securities registered under Section 12 [15 U.S.C. 78I] of the Exchange Act and are subject to our proxy rules. Foreign private issuers, as defined in Rule 3b-4(c) [17 CFR 240.3b-4(c)], are not required under Section 14A [a new Exchange Act section added by Section 951] or the rules we are adopting today to conduct a shareholder advisory vote on executive compensation nor a shareholder advisory vote on the frequency of such votes.”

ⁱⁱ With respect to the Say on Golden Parachutes vote, an instruction to the final rules provides that “the obligation to provide the information in this Item 402(t) [the Golden Parachute disclosure] shall not apply to agreements and understandings ... with senior management of foreign private issuers....”

ⁱⁱⁱ For example, FPIs are permitted to follow their home country practice in lieu of most of the corporate governance standards imposed by the New York Stock Exchange (“NYSE”), including the requirement that a listed company’s board must have a majority of independent directors, that a listed company must have a compensation committee composed entirely of independent directors, and that a listed company must adopt and disclose corporate governance guidelines (the required guidelines must address, among other things, “general principles for determining the form and amount of director compensation”). See NYSE Listed Company Manual Sections 303A.00, 303A.01, 303A.05, and 303A.09.

^{iv} We note that Representative Nan Hayworth (R-NY) introduced a bill in the House of Representatives on March 14, 2011, the Burdensome Data Collection Relief Act (H.R. 1062), which would repeal Section 953(b) (pay ratio disparity disclosure).

^v Under Item 402(a) of Regulation S-K, an FPI does not have to provide the executive compensation disclosure required by Item 402, so long as it complies with the disclosure requirements of its home jurisdiction or a market in which its securities are listed or traded.

^{vi} See note *iii* above.

^{vii} Under Section 36(a) of the Exchange Act, the SEC has general authority to exempt classes of persons from any provision or provisions of the Exchange Act and any rule or rules promulgated thereunder, “to the extent that such exemption is necessary and appropriate in the public interest, and is consistent with the protection of investors.”

^{viii} See note *v* above.

^{ix} Unlike the rules recently passed in European jurisdictions pursuant to CRD3 and those contemplated by the Basel Committee on Banking Supervision, which would require quantitative public disclosure regarding compensation, the disclosure rules proposed under Section 956 would only require annual qualitative disclosure to regulators regarding compensation practices. The reports would be due within 90 days of the end of the institution’s fiscal year.

^x See Item 407(h) of Regulation S-K.

^{xi} See note *vii* above.

New York

One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

Washington

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

Paris

12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

Brussels

Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

London

City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

Moscow

Cleary Gottlieb Steen & Hamilton LLC*
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax
* an affiliate of Cleary Gottlieb Steen & Hamilton LLP

Frankfurt

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

Cologne

Theodor-Heuss-Ring 9
50688 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

Rome

Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

Milan

Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

Hong Kong

Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

Beijing

Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax

Buenos Aires

CGSH International Legal
Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
54 11 5556 8900
54 11 5556 8999 Fax