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# *The Dodd-Frank Act: Public Companies Subject to Far-Reaching Corporate Governance Reforms*

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## Introduction

On July 15, 2010, the Senate approved, and we expect President Barack Obama shortly will sign into law, the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act or Act), which in addition to overhauling the financial services regulatory regime in the United States, advances the further federalization of corporate governance regulation. It does so by building on prior public policy embodied in the landmark Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act) enacted following the Enron and Worldcom corporate scandals. The measure's corporate governance provisions are not limited to financial services sector companies, but apply generally to public companies traded in the United States. In summary, the Dodd-Frank Act imposes far-reaching substantive requirements – many of which have been hotly debated among corporate, institutional and activist investor and corporate governance watch dog interest groups – that would:

- Provide shareholders with a periodic advisory vote on executive compensation and golden parachutes (Section 951),
- Provide shareholders with proxy access rights to include shareholder nominees in company proxy statements (Section 971),
- Add compensation committee reforms imposing enhanced independence criteria and procedural requirements relating to the retention of compensation consultants and advisors (Section 952),
- Require companies to adopt clawback policies for erroneously awarded compensation (Section 954),
- Mandate disclosure on company policies concerning employee and director hedging (Section 955),
- Require enhanced pay-for-performance and pay equity related disclosures (Section 956),
- Require companies to disclose the reasons why they have decided to separate or not to separate the position of chairman and chief executive officer (Section 972), and

- Prohibit discretionary voting in director elections and on executive compensation by brokers that are members of any stock exchange (Section 957).

In a number of instances, the Dodd-Frank Act follows a legislative technique similar to that employed in the Sarbanes-Oxley Act, and to that end directs the SEC to adopt regulations that require the stock exchanges to revise their listing standards to prohibit the listing of companies that do not comply with the SEC's implementing regulations. In other instances, the SEC is authorized or directed to adopt disclosure and other regulations that will directly apply to SEC registrants. The House-Senate conference committee did strike from the final text of the statute a provision contained in the Senate bill that would have required listed companies to implement majority voting in uncontested director elections.

We review below the corporate governance related provisions contained in the Dodd-Frank Act highlighted above and the timetable for implementation. All-in-all, the Dodd-Frank Act, when fully implemented, will represent a sea change in the relationship between public companies and their shareholders. The Congress and the Obama administration have in effect placed a say-on-pay proposal on the annual shareholder meeting ballot of every public company and otherwise have provided activist shareholders equal standing to use the company's proxy statement to include a limited number of nominees in direct opposition to the company' slate. In addition to the say-on-pay provisions, which are effective immediately, we expect other provisions will be implemented in time for the 2011 proxy season. We will continue to monitor the rulemaking activities of the SEC and where applicable the stock exchanges as the implementing rules and regulations are developed and adopted. Please visit www.paulhastings.com for information on future developments.

Certain Dodd-Frank Act provisions will apply to foreign private issuers listed on a U.S. stock exchange, which we also discuss below.

## Advisory Vote on Executive Compensation and Golden Parachutes (Say-on-Pay)

The Dodd-Frank Act ends the debate that has intermittently raged among activist and institutional investors on one side and public companies on the other side as to whether shareholders should have a say-on-pay vote on executive compensation. Section of 951 the Act amends the Securities Exchange Act of 1934, as amended (Exchange Act), to add as new Section 14A thereof a provision that requires registrants subject to the SEC's proxy rules (*e.g.*, stock exchange listed companies) at least once every three years to include in their proxy solicitations a separate resolution soliciting a shareholder vote to approve executive compensation as disclosed pursuant to Item 402 of Regulation S-K. The new provision also requires registrants at least once every six years to include a separate resolution soliciting a shareholder vote on the frequency of the say-on-pay votes, whether they will occur every one, two, or three years.

The shareholder vote required is advisory in nature. Section 951 expressly provides that the vote required shall not be binding on the issuer or its board of directors and may not be construed:

- as overruling a decision by such issuer or board of directors,
- to create or imply any change to the fiduciary duties of such issuer or board of directors,
- to create or imply any additional fiduciary duties for such issuer or board of directors, or
- to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation.

Section 951 also requires registrants to disclose in their proxy solicitation materials relating to mergers, acquisitions and sales of substantially all assets in a clear and simple form in accordance with regulations to be promulgated by the SEC any golden parachute agreements or understandings with named executive officers of such issuer (or of the acquiring issuer, if such issuer is not the acquiring issuer). Registrants must disclose any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to the acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of the issuer and the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of such executive officers and must include a separate resolution for a shareholder vote to approve any such agreements or understandings and compensation as disclosed, unless such agreements or understandings have been subject to a shareholder say-on-pay vote as described above.

The text of Section 951 leaves a number of unanswered questions. For example, the quorum and minimum vote required for approval have not been specified. With regard to the frequency of the say-on-pay resolution, should a plurality or a majority vote requirement be applied? Nor does Section 951 provide any direction as to the content of the resolution to be presented for a vote or as to whether and how the registrant may comment on or advocate a position with respect to approval or disapproval of the resolutions.

Section 951 also contains a requirement for institutional managers subject to Form 13F reporting obligations to report annually how they voted on any say-on-pay, frequency of say-on-pay or golden parachute proposals submitted to a shareholder vote pursuant to the statute (unless otherwise reported publicly pursuant to SEC regulations).

Timetable: This provision does not require SEC implementation and takes effect six months after enactment, which means that registrants will need to comply with the new requirements in connection with the 2011 proxy season. Registrants will need to include both the say-on-pay and the frequency of say-on-pay resolutions in their first proxy statement following the effective date. While Section 951 does not specifically require SEC implementation, we expect the SEC to provide guidance in the form of an interpretative release or Frequently Asked Questions given the significant questions left unanswered by the new provision. The SEC is likely to follow its previous TARP related rules with respect to the content of say-on-pay resolutions given the similarity of Section 951 to the TARP bail-out legislation say-on-pay requirements.[1]

Similarly, it is unclear as to how institutional managers are to report their votes on say-on-pay, frequency of say-on-pay and golden parachute proposals.

Observations: Companies should consider how prepared they are for the required say-on-pay vote, whether they should address hot button issues (such as performance targets, tax gross-ups, and severance pay) before the 2011 proxy season, and whether – and when – they would benefit from a dialogue with important shareholders. Through such outreach, companies can ascertain whether shareholders understand their executive compensation program and related goals, and address any concerns that may be expressed. As discussed below, the Dodd-Frank Act mandates new disclosures on the subject of pay-for-performance and therefore any such assessment should include a review of how well the company is positioned with its performance-based compensation to make the case for a favorable vote on its compensation program. Clearly, the periodic say-on-pay vote will provide a recurring platform for activist investor shareholders and to the extent a company is at risk for such

activism, it should revisit its response plans to make sure it is positioned to respond to any organized opposition to its compensation program.

As a collateral impact of the new vote requirements, we expect that the overall influence of proxy advisory firms, such as RiskMetrics Group, Inc., Glass Lewis & Co., LLC and PROXY Governance, Inc., will be enhanced as they are periodically called on to provide voting recommendations to their clients. The reports they issue on corporate governance and executive compensation practices of companies will take on more importance in the face of the new say-on-pay vote requirements and therefore they should be closely studied and understood by the affected companies. Because the proxy advisory firms have been vocal in raising hot button issues, and employ a predictable approach in evaluating executive compensation proposals, certain disclosure practices that present carefully prepared executive summaries and more detailed explanations relating to short-term versus long-term incentives may facilitate their evaluations.

## Proxy Access

The SEC has proposed new rules to implement a proxy access regime on three separate occasions, the latest of which was proposed on June 10, 2009. These proposals engendered significant controversy (the pending proposal was authorized by a 3 to 2 split vote) and there has been considerable debate as to whether the SEC had the authority to implement a proxy access regime. Section 971 of the Act amends Section 14(a) of the Exchange Act to add a provision that expands the SEC's proxy regulation rulemaking authority. Under the new authority, the SEC may require an issuer soliciting a proxy, consent or authorization to include a nominee submitted by a shareholder and adopt procedural regulations that apply to the issuer in connection with any such solicitation. Thus, the question over the SEC's rulemaking authority has been eliminated. Section 971 authorizes the SEC to exempt an issuer or a class of issuers from the proxy access requirements, and, in determining whether to create an exemption, directs the SEC to take into account, among other considerations, whether the requirements would disproportionately burden small issuers.

Under the SEC's pending proposal, the nominating shareholder or shareholder group must beneficially own at least 1%, 3% or 5% of the issuer's voting securities in the case of large accelerated filers, accelerated filers, and non-accelerated filers, respectively, and may not include nominees for more than 25% of the board of directors. For further information concerning the SEC's pending proxy access proposal, please refer to our client alert entitled, *The SEC's Proposed Proxy Access Rules, Related Delaware Law Changes, and Proposed Federal Corporate Governance Legislation* at: http://www.paulhastings.com/assets/publications/1366.pdf?wt.mc_ID=1366.pdf

Timetable: The SEC's new rulemaking authority is effective upon enactment of the Act and therefore implementation of a proxy access regime can proceed immediately. SEC Chairman Mary Shapiro has publicly declared her intention to consider final adoption of the proposed proxy access rules so that they will be in effect for the 2011 proxy season.

Observations: Proxy access will enable activist investors to pursue board representation more easily and at substantially reduced cost and as a result, the prospect of contested elections dramatically increases for all public companies. We expect the institutional investors that have vocally supported proxy access to organize themselves to take advantage of the new rules. For example, it has been recently reported that the California Public Employees' Retirement System (Calpers) has taken steps assemble a pool of qualified directors that it can nominate pursuant to the proxy access rules[2].

We expect the influence of the proxy advisory firms will be enhanced as a result of this provision as well. With the elimination of broker discretionary voting by the New York Stock Exchange (NYSE) (which is now mandated pursuant to Section 957 as discussed below), the vote represented by institutional investors (and the recommendations of the advisory firms) potentially becomes more important to director election outcomes particularly if the retail investors vote is underrepresented due to the failure of such investors to provide voting instructions to their brokers.

## Compensation Committee / Compensation Consultant Reforms

The Dodd-Frank Act contains provisions designed to strengthen the independence of compensation committees and to enhance their function, and to that end borrows from the approach taken in the Sarbanes-Oxley Act to effectuate fundamental audit committee reforms. Section 952 adds new Section 10C to the Exchange Act that requires the SEC to adopt rules that direct the stock exchanges to revise their listing standards to prohibit the listing of issuers that do not adhere to the standards for the composition and function of compensation committees adopted by the SEC. Section 952 provides enhanced independence criteria for members of the issuer's compensation committee. In setting the independence rules, the SEC must consider relevant factors, including the source of any consulting, advisory and other compensatory fee paid to the committee member and whether the member is affiliated with the issuer. This reflects a delegation of rulemaking authority that is substantially similar to the authority delegated to the SEC in the Sarbanes-Oxley Act with respect audit committees and thus the SEC may apply to compensation committees the independence criteria it previously developed for audit committees.[3]

Section 952 also specifies additional requirements relating to compensation committee advisors. A compensation committee may only engage a compensation consultant, legal counsel, or other adviser after taking into consideration competitively neutral factors identified by the SEC that affect the independence of the consultant, counsel or adviser. These factors must otherwise include:

- the provision of other services to the issuer by the person that employs the consultant, counsel or adviser;
- the amount of fees received from the issuer by the person that employs the consultant, counsel or adviser, as a percentage of the total revenue of the person that employs the consultant, counsel or adviser;
- the policies and procedures of the person that employs the consultant, counsel or other adviser that are designed to prevent conflicts of interest;
- any business or personal relationship of the consultant, counsel or adviser with a member of the compensation committee; and
- any stock of the issuer owned by the consultant, counsel or adviser.

The compensation committee must also have the authority in its own discretion to retain or obtain the advice of a compensation consultant, legal counsel or other advisor, the company must provide appropriate funding for such engagements and the committee must be directly responsible for the appointment, compensation and oversight of any such consultant, counsel or advisor. In many respects, the foregoing requirements mirror similar requirements imposed with respect to audit committees under the Sarbanes-Oxley Act.

Section 952 also requires companies to disclose in annual meeting proxy statements in accordance with SEC regulations whether the compensation committee obtained the advice of a compensation consultant and whether the work of the compensation consultant raised any conflict of interest and if so, the nature of the conflict and how the conflict is being addressed.

The compensation consulting industry will be subject to further scrutiny. Section 952 directs the SEC to conduct a study and review the use of compensation consultants and the effects of such use and to report to Congress the results of the study within two years after the date of enactment.

Timetable: The SEC is required to adopt regulations implementing the independence and other compensation committee reforms within 360 days after the date of enactment. We expect that the SEC would establish a timetable that provides for a transition period during which listed companies would be able to bring their compensation committees into compliance with the revised listing standards. The new disclosure requirements will apply to proxy statements for annual meetings occurring after the first anniversary of the date of enactment.

Observations: Many, if not most, companies have already provided for compensation committees to engage their own advisors and therefore those requirements should not impose an additional burden for such companies. However, it is unlikely that many companies have applied the enhanced independence criteria in designating members to their compensation committee, and it is possible that one or more existing members may not satisfy the new independence criteria, which would require the committee to be reconstituted. The new procedural and disclosure requirements relating to the engagement of compensation consultants and conflicts of interest suggest that compensation committees would be advised as a best practice to utilize independent compensation consultants that serve only the compensation committee. Many compensation committees have already engaged their own compensation consultants, and by doing so will avoid the prospect for potentially awkward disclosure relating to conflicts of interest and their accountability. The SEC's recent amendments to the proxy rules require substantial disclosure relating to the use of compensation consultants and thus it is unclear as to what, if any, additional disclosure will be required by the SEC.

## Employee and Director Hedging

Section 953 adds a provision to Section 14 of the Exchange Act that directs the SEC to require proxy statement disclosure as to whether any employee or director is permitted to engage in hedging transactions that hedge or offset any decrease in the market value of equity securities granted as compensation or otherwise held by the employee or director. This disclosure approach is similar to that taken in the Sarbanes-Oxley Act, which directed the SEC to adopt rules that required registrants to disclose whether they had an audit committee financial expert and a code of ethics applicable to financial officers.

Timetable: The SEC's new rulemaking authority (and obligation) is effective upon enactment of the Act, but no deadline for the adoption of implementing regulations is imposed by Section 953. It is unclear whether the SEC will move quickly to adopt the required regulations in time for the 2011 proxy season.

Observations: Many public companies have already adopted policies that prohibit employees and directors from engaging in hedging transactions absent board approval. As a matter of best practice, public companies that have not done so should formally consider whether to adopt such a policy so that it can be positioned to comply with the new disclosure requirement. Existing proxy statement disclosure rules require registrants to disclose the extent to which executive officers and directors

have pledged their shares and we believe there is a potential that the SEC may revise its rules to require similar disclosure as to the hedged positions of its executive officers and directors. Adopting a policy prohibiting employees and directors from engaging in hedging transactions would alleviate any such disclosure concern.

### Pay-for-Performance and Pay Equity

The SEC over the past few years has substantially overhauled its regulations concerning executive compensation, introducing a compensation discussion and analysis requirement and most recently, an obligation to disclose whether compensation programs create risk in the company. In many respects, these rulemakings were undertaken in response to prevailing regulatory concerns. Congress has listened to the concerns raised by organized investor groups over pay-for-performance and pay equity and in enacting Section 953 of the Act will require public companies to provide greater transparency on these subjects.

Section 953 adds to Section 14 of the Exchange Act a provision that directs the SEC to require proxy statement disclosure of the relationship between executive compensation actually paid and the financial performance of the issuer taking into account any change in share value and dividends paid (*i.e.*, shareholder returns). The provision allows the SEC to require a graphic representation of the required disclosure.

In addition, Section 953 directs the SEC to amend Item 402 of Regulation S-K to require disclosure in registration statements, annual reports and proxy statements of the median of the annual total compensation of all employees except the CEO, the annual total compensation of the CEO, and the ratio of such median employee annual total compensation to the annual total compensation of the CEO. Total annual compensation of the CEO is to be determined in accordance with the amount reported in the "Total" column of the summary compensation table required by paragraph (c)(2)(x) of Regulation S-K Item 402.

Timetable: The SEC's new rulemaking authority (and obligation) is effective upon enactment of the Act, but no deadline for the adoption of implementing regulations is imposed by Section 953. It is unclear whether the SEC will move quickly to adopt the required regulations in time for the 2011 proxy season.

Observations: Since the early 1990s, the SEC's disclosure rules have required a performance graph that shows relative share performance in terms of cumulative total shareholder return against a broad market index and peer group or industry index. The new disclosure requirements will require companies to not only present the data demonstrating the relationship of executive pay to shareholder returns, but also to re-think the extent to which their compensation programs are tied to performance or alternatively to communicate the reasons why they have implemented a program that lacks or deemphasizes such performance-based features. The pay equity disclosure is likely to draw attention from unions and other socially oriented investors. As an investor relations matter, companies should develop their message on pay equity so that they are prepared to respond to any resulting investor or media scrutiny.

### Claw Back Policies

In recent years, bowing to pressure from Riskmetrics and other good corporate governance groups, many public companies have adopted clawback policies that express an intention to recover from executive officers the after tax portion of excess compensation in cases where a financial restatement

resulted from wrongdoing on the part of the executive officers. Some companies have implemented the clawback policies by requiring executive officers to enter into binding agreements that govern the clawback of compensation.[4] Other companies have gone further – (i) by extending clawback policies to broader groups of executives, (ii) by triggering clawbacks for ill-gotten gains or for violations of post-employment noncompetition or other loyalty provisions, and/or (iii) by conditioning new awards on an application of clawback rights to some universe of prior bonuses or stock awards.

Section 954 of the Act aims to make this developing best practice for financial restatement triggered clawbacks a requirement and extend it to circumstances where the executive officers have not engaged in any wrongdoing.[5] It adds Section 10C of the Exchange Act, which requires the SEC to adopt rules that direct the stock exchanges to revise their listing standards to prohibit the listing of companies that do not develop and implement a clawback policy prescribed in the statute. The SEC's rules must require disclosure of the issuer's policy on incentive-based compensation that is based on financial information required to be reported by the issuer, and in the event there is a material accounting restatement due to the material noncompliance with any financial reporting requirement the policy must obligate the issuer to recover from any current or former executive officer who received incentive-based compensation paid during the prior 3 years, based on the erroneous data, an amount in excess of what would have been paid to the executive officer under the accounting restatement.

Timetable: The SEC's new rulemaking authority (and obligation) is effective upon enactment of the Act, but no deadline for the adoption of implementing regulations is imposed by Section 954.

Observations: Section 954 requires listed companies to implement in effect a strict liability clawback policy, triggered by a restatement without regard to an individual executive officer's wrongdoing or fault. The statute does not specify whether companies will need to embody the policy in individual agreements with the executive officers or whether companies may simply express a policy to seek recovery in the event of restatement. We expect that the SEC will clarify this point in its implementing regulations, and encourage public companies to consider how best to use clawbacks to protect their key business interests.[6]

## Separation of the Offices of Chairman and Chief Executive Officer

Whether the office of chairman and office of CEO should be separated or combined has been debated for some time. Section 972 of the Act requires public companies to publicly take a position on the subject. It adds as Section 14B of the Exchange Act a provision requiring the SEC to adopt rules obligating registrants to disclose in their proxy statements the reasons why it has chosen the same person to serve as chairman of the board and CEO or different persons to serve as chairman and CEO.

Timetable: The SEC is required to adopt implementing regulations within 180 days after the date of enactment.

Observations: The SEC's most recent amendments to the proxy disclosure rules required registrants to address their leadership structure and why it is determined to be appropriate. In complying with this disclosure requirement, many public companies have already addressed the subject of why they have combined or separated the office of chairman and CEO. Public company boards that have not formally done so should consider the subject to prepare for the new disclosure requirement.

## Prohibition on Discretionary Voting

Section 957 of the Dodd-Frank Act amends Section 6(b) of the Exchange Act to include provisions that eliminate broker discretionary voting for the election of directors and on executive compensation, except for companies registered under the Investment Company Act of 1940. In 2009, the SEC previously approved a change to New York Stock Exchange Rule 452, which eliminated such discretionary voting by its members in director elections.[7] Section 957 adds votes on executive compensation (*i.e.*, the say-on-pay and golden parachute votes added by Section 951 as discussed above) and "any other significant matter" as determined by the SEC to the list for which discretionary voting is prohibited. Section 957 applies to all stock exchanges and closes any gap that may have existed insofar as any brokers holding securities on behalf of customers are not members of the NYSE.

Timetable: The requirement imposed on stock exchanges (and the ancillary SEC rulemaking authority) is effective upon enactment of the Act.

Observations: A substantial majority of brokers (or their clearing brokers) are members of the New York Stock Exchange and therefore were subject to the prohibition on discretionary voting during the 2010 proxy season. Companies should review how the elimination of the discretionary voting impacted their annual meeting voting results. With upcoming say-on-pay votes and director elections where incumbents may potentially be challenged by shareholder nominees included in the proxy statement through proxy access, obtaining the participation of retail shareholders may become increasingly important to the outcome of the voting. Companies need to understand their shareholder base and prior voting patterns, assess how e-proxy has impacted retail investor participation and, as appropriate, may need to develop educational materials for retail shareholders, target additional get-out-the-vote mailings to shareholders, contact non-objecting beneficial owners (NOBOs) to encourage their vote and/or hire proxy solicitors, all of which will necessitate additional planning by investor relations teams in advance of the shareholder meeting.

## Application to Foreign Private Issuers

Foreign private issuers are not subject the SEC's proxy rules adopted under Section 14(a) of the Exchange Act and as a result several Dodd-Frank Act provisions to be implemented through the proxy rules will not apply to them. Foreign private issuers will not be subject to the provisions that provide for the say-on-pay and golden parachute votes, proxy access, executive compensation disclosure, hedging disclosure and separation of chairman and CEO disclosure. In contrast, the compensation committee reform provisions will be implemented through changes to stock exchange listing standards that comply with the SEC's implementing regulations. In this instance, the statute provides an exception for foreign private issuers that disclose annually the reasons why they do not have an independent compensation committee. The disclosure based exception is consistent with how the NYSE treats foreign private issuers with respect to certain of its corporate governance standards. The clawback policy provision will also be implemented through stock exchange listing standards that comply with the SEC's implementing regulations, but unlike the provisions relating to the compensation committee reforms, no explicit exception for foreign private issuers is provided in the statute. It is therefore not clear as to whether the SEC's implementing regulations will provide any exception for foreign private issuers.

*To view other thought leadership pieces on how this landmark legislation and the myriads of implementing regulations will affect your industry, please follow this link.*

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1 Item 20 of Schedule 14A requires registrants subject to the bailout legislation say-on-pay vote requirements to disclose that they are providing such a vote as required pursuant to such legislation, and briefly explain the general effect of the vote, such as whether the vote is non-binding.

2 See. *Calpers Aims Director List at Increasing Board Sway*, Wall Street Journal (June 18, 2010).

3 Rule 10A-3(b)(1) provides that "a member of an audit committee of a listed issuer . . . may not . . . (A) accept directly or indirectly any consulting, advisory, or other compensatory fee from the issuer. . . or (B) be an affiliated person of the issuer . . . . Rule 10A-3(e) provides that "[t]he term affiliate of, or a person affiliated, with a specified person, means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified . . . A person will be deemed not to be in control of a specified person . . . if the person: (1) is not the beneficial owner, directly or indirectly, of more than 10% of any class of voting equity securities of the specified person; and (2) is not an executive officer of a specified person . . . The following will be deemed affiliates: (A) an executive officer of an affiliate; (B) a director who also is an employee of an affiliate; (C) A general partner of an affiliate; and (D) a managing member of an affiliate."

4 Section 304 of the Sarbanes-Oxley Act provides for the SEC to seek a clawback from CEOs and CFOs of bonuses, other incentive- or equity-based compensation, and profits on stock sales if there is a financial restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws.

5 The SEC recently prevailed in "no fault" clawback case brought under Section 304 of the Sarbanes-Oxley Act. In *SEC v. Jenkins* (D. Ariz., No. 2:09-cv-1510-GMS), the district Court for the Southern District of New York held that the SEC can seek to clawback incentive-based compensation awarded to the CEO or CFO of a public company that restates its financial statements even when that CEO or CFO is not alleged to be involved in any misconduct associated with the restatement.

6 See "*Executive Pay and Loyalty: From Velvet Glove to Iron Fist*" (Poerio, Corporate Governance Advisor, Jan./Feb. 2010).

7 See our client alert, *The SEC Approves the Elimination of Broker Discretionary Voting in All Director Elections* http://www.paulhastings.com/assets/publications/1385.pdf?wt.mc_ID=1385.pdf