



## New Compensation Committee and Adviser Rules

*Presented By:*

Lorelei D. Cisne, Esq.  
Arnall Golden Gregory LLP  
171 17th Street, NW, Suite 2100  
Atlanta, Georgia 30363-1031  
404.873.8748  
Lorelei.cisne@agg.com

© 2013 Arnall Golden Gregory LLP. All rights reserved.



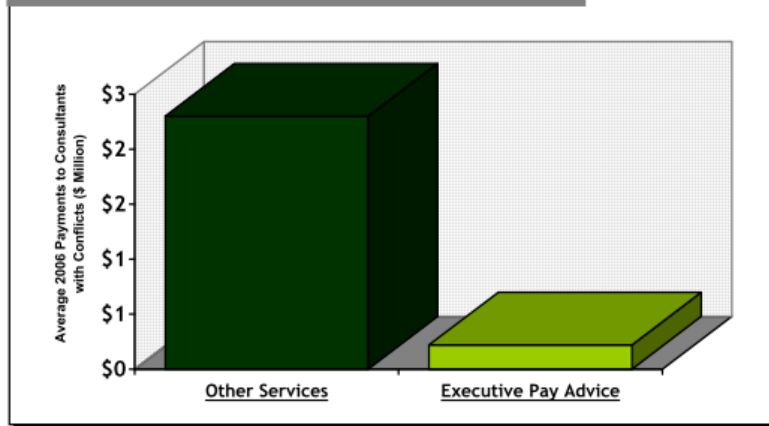
## Section 952 Dodd-Frank Act

- ❑ Section 10C of the Exchange Act
  
- ❑ Multiple requirements related to Compensation Committee and Committee Adviser Independence



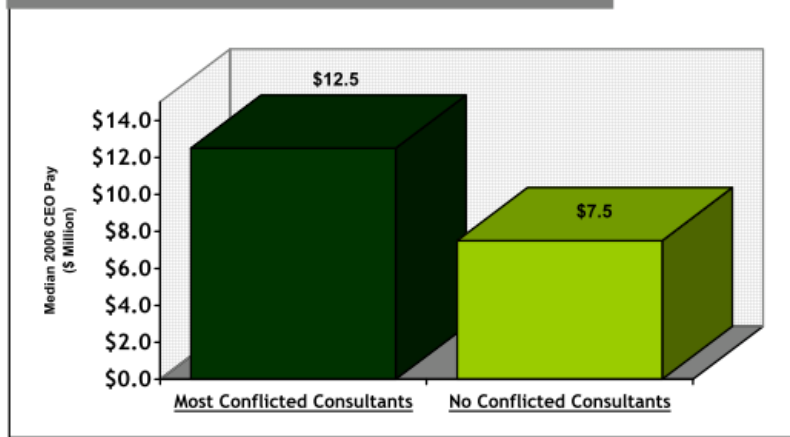
## SEC Disclosure and Compliance Developments: What You Need to Know Now

FIGURE 1: Fees for Other Services Are Much Larger Than Fees for Executive Pay Consulting Services



## SEC Disclosure and Compliance Developments: What You Need to Know Now

FIGURE 2: Use of Compensation Consultants with Large Conflicts of Interest and CEO Pay





## New Rules Regarding Compensation Committees and Compensation Advisers

- ❑ Listing standards regarding compensation committee independence and advisor retention (Rule 10C-1)
- ❑ Proxy disclosure of compensation consultant conflicts of interest (Item 407(e)(3)(iv) of Reg S-K)



## Effective Dates

- ❑ New proxy disclosure rule effective NOW
- ❑ New listing standards – some effective July 1, 2013; others effective during 2014 (probably)



## New Proxy Disclosure

- ❑ Applies to all proxies and information statements that relate to an annual meeting held on or after January 1, 2013.
- ❑ Applies to all issuers subject to proxy rules, including unlisted companies, controlled companies, smaller reporting companies



## Required Disclosure

“With regard to any compensation consultant identified in response to Item 407(e)(3)(iii) whose work has raised any conflict of interest, disclose the nature of the conflict and how the conflict is being addressed.”



## Covered Consultants

- ❑ “any compensation consultant identified in response to Item 407(e)(3)(iii)”
  
- ❑ Consultant is covered:
  - If played any role in determining or recommending the amount or form of executive and director compensation
  - Without regard to whether engaged by committee or management



## Covered Consultants (cont'd)

Consultant is NOT covered if role is limited to:

- ❑ broad-based plan that does not discriminate in favor of executives or directors, and is available to all salaried employees; or
  
- ❑ providing information non-customized, or customized using parameters not developed by consultant – as long as no advice provided



## Evaluating Conflicts

In determining whether a conflict exists, must look at 6 factors from 10C-1(b)(4):

- (i) provision of other services to the issuer;
- (ii) amount of fees as a percentage of revenue;
- (iii) consultant's policies and procedures;



## Evaluating Conflicts (cont'd)

- (iv) business or personal relationship with a member of the compensation committee;
- (v) stock of the issuer owned by the consultant; and
- (vi) business or personal relationship with an executive officer of the issuer.



## Evaluating Conflicts (cont'd):

Procedural considerations:

- Questionnaires to consultants
- Time for follow-up questions
- Added questions to D&O Questionnaires
- Usually should be done by compensation committee
- The 6 factors are non-exhaustive



## Negative Disclosures

- Disclosure not required where no conflict
- Trend is to volunteer statement that no conflicts
- Some issuers discuss factors and reasons for conclusions
- May or may not be a good idea



## ***LISTING STANDARD CHANGES CURSORY OVERVIEW***



Effective July 1, 2013 (probably):

- ❑ Independence assessment for all advisers to committee; must use 6 specified factors
  
- ❑ Committee authority, responsibility, funding for selecting, compensating, overseeing advisers





## SEC Disclosure and Compliance Developments: What You Need to Know Now

Effective earlier of first annual meeting after  
01/15/2014 or 10/31/2014:

- ❑ Heightened independence for compensation committee members
  
- ❑ For Nasdaq companies, new formal committee and written charter requirements



## SEC Disclosure and Compliance Developments: What You Need to Know Now

- ❑ Exemptions for controlled cos., others
  
- ❑ Focus on independence assessment first



## Adviser Independence

- ❑ Different from, but related to proxy disclosure conflict of interest disclosure
- ❑ Needs to happen before 07/01/13 (probably)



## Adviser Independence (cont'd)

- ❑ Covers all consultants, legal counsel (except inhouse counsel), other advisers either retained by the committee or from whom the committee receives advice
- ❑ Must be done before the advice is received



## Adviser Independence (cont'd)

- Must use the 6 factors specified in the rule (described above)
- Must also consider any other relevant factor
- OK if adviser is not independent
- Questionnaires to advisers
- Questions remain



## Other Comm. Powers and Responsibilities

- Sole discretion to retain advisers
- Direct responsibility to appoint, compensate and oversee advisers
- Issuer must provide appropriate funding (as determined by comp comm)
- Review and possible revision of charter
- Not much change for NYSE companies



## Heightened Committee Independence

Nasdaq: bright-line rule of no consulting, advisory, compensatory fees (other than for board service and certain retirement) – no look-back.

NYSE: must consider such fees, but not bright-line



## Heightened Independence (cont'd)

Both Nasdaq and NYSE:

- must consider whether director is 'affiliated' with issuer, sub, or affiliate of sub
- Not determinative
- Even substantial stock ownership often not a problem, often beneficial