CLARK CONSULTING™

October 1, 2010

Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Comments on Dodd-Frank Act Section 954 – Recovery of Erroneously Awarded Compensation by Public Companies

Dear Chairman Schapiro:

Clark Consulting, LLC ("Clark Consulting") is pleased to submit comments to the Securities and Exchange Commission (the "Commission") regarding Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). We appreciate the opportunity to comment in advance of formal rulemaking by the Commission.

Clark Consulting believes that Congress's decision in Section 954 of Dodd-Frank to require public companies to have a policy for recovering erroneously-awarded incentive compensation is appropriate. Under such a policy, a public company would recover from current and former executives incentive compensation in excess of such compensation that would have been awarded if the company's financial information had been initially accurate.

As a longtime participant in the executive benefits consulting field, Clark Consulting is pleased that Congress, in providing for the recovery of "excess" incentive compensation, has recognized the importance of incentive compensation as a component of an overall employee benefit program. Incentive compensation programs can assist companies in recruiting and retaining their best talent. We offer our comments on Section 954 with the goal of ensuring that Section 954 is interpreted in a manner that promotes effective and appropriate structuring of incentive compensation programs.

I. Avoidance of a "One Size Fits All" Approach to Recovery

Given the variety of incentive compensation arrangements that may be covered by Section 954, Clark Consulting would urge the Commission to adopt a principles-based approach in drafting regulations on this topic. We believe that a "one size fits all"

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approach mandating the specific requirements for a corporation's recovery policy would prove to be impractical. Clark Consulting would encourage the Commission to establish general principles/guidelines and then provide each corporation with the flexibility to develop a program for recovering erroneously awarded incentive compensation that meets its individual circumstances.

We would note that in the banking sector (an area where Clark Consulting has significant benefits consulting experience), a similar principles-based approach was recently adopted by the Federal Reserve, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Federal Deposit Insurance Corporation (collectively, the "Federal Banking Regulators") under their *Interagency Guidance on Sound Incentive Compensation Policies* issued on June 21, 2010.[1] The Federal Banking Regulators' guidance reflects their assessment that there is no single, universally applicable approach for incentive compensation arrangements. Clark Consulting hopes that the Commission will reach a similar conclusion in addressing the requirements for incentive compensation recovery policies.

II. Pre-Payout Recovery Mechanisms (Holdbacks/Deferrals)

Drawing on Clark Consulting's experience in assisting companies to implement nonqualified deferred compensation ("NQDC") plans, we believe that the mandatory deferral of incentive compensation into a company's NQDC plan (e.g., a "holdback plan" or "bonus bank"), or the provision of incentive compensation in the form of defined company contributions to an NQDC plan, can provide significant advantages to corporations seeking to implement effective and efficient incentive compensation recovery policies in accordance with Section 954 of Dodd-Frank. *For more details on the advantages offered by these types of arrangements, please see the attached white paper prepared by our Technical Resource Group entitled "Fortifying Your Defenses: Choosing a Multifaceted Approach to Incentive Compensation Recoupment."*

These NQDC-based structures, when coupled with the inclusion of vesting and/or forfeiture provisions applicable to the amounts deferred or contributed to the NQDC plan, can be utilized to overcome potential deficiencies associated with post-payout recovery policies (so-called "clawbacks").

For example, Clark Consulting would bring to the Commission's attention the following concerns potentially associated with post-payout recovery mechanisms:

(1) The impact that state creditor and wage protection laws may have in preventing corporate enforcement of post-payout recovery mechanisms. There is no indication that Section 954 was intended to preempt state law.

(2) The potential costs (legal and otherwise) associated with a corporation enforcing a post-payout recovery mechanisms and the associated concern that, in certain instances, such costs could exceed the amount of "excess" incentive compensation to be recovered under Section 954.

(3) The impact the financial circumstances of the executive may have on the corporation's ability to recover (i.e., are there assets available to recover against?).

In light of the above considerations, Clark Consulting would urge the Commission to:

(1) Allow a company's Board of Directors (or compensation committee) to exercise discretion in the enforcement of post-payout recovery policies when it is determined that assets are unlikely to be recovered or when it is determined to be uneconomical or impractical to enforce recovery (e.g., when costs to the company to enforce recoupment would exceed the amount sought).

(2) Specifically authorize and approve the use of pre-payout recovery policies, which rely on deferral of incentive compensation and/or defined company contributions to an NQDC plan, coupled with appropriate holdback and vesting/forfeiture provisions, to fulfill the requirements of Section 954 of Dodd-Frank.

We believe that the use of a pre-payout recovery mechanism, as described above and in the attached article, to fulfill the obligations set forth in Section 954 of Dodd-Frank represents a win-win scenario:

> A win for the covered corporation because it can develop cost-effective recoupment programs that address the deficiencies of post-payout clawbacks; and
>
> A win for the investing public because regulatory[2] and scholarly research shows that compensation deferrals (a) serve to align an executive's interest

> with the long-term interests of the employer corporation and (b) can reduce risk associated with systemically important companies (i.e., so-called "too big to fail" companies).

Our research has shown there is broad support for using compensation deferrals to align interests and reduce systemic risk.[3] We would draw the Commission's attention to the important work done by The Conference Board Inc.'s Task Force on Executive Compensation, which stated:

> "If appropriate, incentive plans may incorporate some form of bonus banking, deferred bonus, longer-term performance periods, or other tools to more closely align payouts with such risks and better measurement of true performance. … In appropriate circumstances, all or a portion of a bonus payout can be held back in a bonus account and paid out in the future …"[4]

Federal Banking Regulators found similar positive correlations. According to the Federal Banking Regulators:

> "Incentive compensation arrangements for senior executive at LBOs [large banking organizations] are likely to be better balanced if they involve deferral of a substantial portion of the executives' incentive compensation over a multi-year period …"[5]

Moreover, according to the Federal Banking Regulators, one of the four methods used to make compensation more sensitive to risk includes:

> "Deferral of Payment: The actual payout of an award to an employee is delayed significantly beyond the end of the performance period, and amounts paid are adjusted for actual losses or other aspects of performance that are realized or become better known only during the deferral period."[6]

Additionally, Clark Consulting would like to bring to the Commission's attention a scholarly work in the area of systemic risk and executive compensation: *Working Paper: Regulation of Executive Compensation in Financial Services*. This working paper was drafted by the Squam Lake Working Group on Financial Regulation (the "Squam Lake Group"), which was composed of a nonpartisan, nonaffiliated group of fifteen academics from leading universities. In this working paper, the Squam Lake Group reached some rather striking conclusions—principally, that the structure of an executive's incentive compensation arrangement has more effect on systemic risk than the amount of the executive's compensation.[7]

Perhaps even more striking was the Squam Lake Group's finding with respect to the value of compensation deferrals in preventing systemic meltdowns:

> "Employees whose compensation is held back become creditors of their firms. ***As a result, this deferred compensation reduces management's incentive to pursue risky strategies that might result in government bailouts.*** Similarly, rather than wait for a bailout during a financial crisis, the management of a troubled firm would have a powerful incentive to find a private solution, perhaps by boosting the firm's liquidity to prevent a run, raising new capital, or facilitating a takeover by another firm. ***Because taxpayer losses trigger executive losses, holdbacks better align the personal incentives of managers with the fiscal and systemic goals of taxpayers.***[8]" [Emphasis added]

Given the potential value of NQDC plans in reducing systemic risk and achieving alignment of interests between executives, their corporate employers, shareholders and taxpayers, Clark Consulting hopes the Commission will recognize that NQDC plans, subject to appropriate vesting, adjustment/holdback or "forfeiture" provisions, may be a key component of an incentive compensation recovery policy under Section 954.

III. Clarification on Measurement Period for Recovery

Consistent with comments submitted by others, Clark Consulting believes that additional guidance is needed as to when the three (3) year recovery period begins. Specifically, we would request clarification regarding how to determine (in the words of Section 954) "the date on which the issuer is required to prepare an accounting restatement …"[9]

Corporate executives subject to Section 954's mandatory recovery requirements will understandably want to know when incentive compensation will unconditionally belong to them. The absence of clear guidance from the Commission on this basic question could fundamentally undermine the use of incentive compensation as a tool to retain, recruit and reward corporate executives. Clearly, at some point, corporate executives need to know their incentive compensation is "free and clear," despite the existence of the corporation's no-fault recovery policy.

Conclusion

On behalf of Clark Consulting, I would like to thank you for your consideration of our comments. If you have any questions, please contact me at rob.kaufman@clarkconsulting.com.

Sincerely,

Robert W. Kaufman
Vice President – Legal and Technical Resource Group

Attachment: Fortifying Your Defenses: Choosing a Multifaceted Approach to Incentive Compensation Recoupment

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[1] Federal Reserve System. *Guidance on Sound Incentive Compensation Policies*. Fed. Reg. Vol 75, No. 122. June 25, 2010.

[2] See September 24, 2010 Statement of Marc Steckel, Associate Director of Division of Insurance and Research, Federal Deposit Insurance Corporation presented before the Committee on Financial Services, U.S. House of Representatives, which provides, in part, in discussing improvements that insured depository institutions ("IDIs") can take to motivate employees and better hold them accountable for the long-term risk their activities may pose:

> "Second, IDIs should require that portions of incentive compensation above certain levels be deferred at least for senior executives and designated employees who have the ability to directly influence the amount and type of risk undertaken by the institution. Such compensation, however, could be extended to other employees as appropriate. Additionally, the receipt of deferred compensation must be conditioned on the long-term results of the original justification of the award ("look-back"). Academics, international bodies, and compensation experts recognize that the full, immediate payment of an

incentive compensation award may cause an employee to disregard the longer-term consequences of his or her activities that form the basis of the award. To focus employee behavior on longer-term consequences, deferred compensation must be coupled with an effective look-back mechanism that permits the institution to reduce or rescind the compensation if the original justification for the award proves to be invalid."

http://financialservices.house.gov/Media/file/hearings/111/09242010/Steckel%209_24_10.pdf at page 14.

[3] The G-20's Financial Stability Board. *Principles for Sound Incentive Compensation Practices-Implementation Standards*. Sept. 25, 2009.

[4] The Conference Board, Inc. *The Report of the Conference Board Task Force on Executive Compensation*. 2009.

[5] Federal Reserve System. *Guidance on Sound Incentive Compensation Policies*. Fed. Reg. Vol 75, No. 122. June 25, 2010 at page 36410.

[6] *Id.* at page 36408.

[7] Shiller, Robert R., *Help Prevent a Sequel. Delay Some Pay*. New York Times. June 19, 2010 (economic view from Squam Lake Group member discussing Squam Lake Group's findings) http://www.nytimes.com/2010/06/20/business/20view.html

[8] The Squam Lake Working Group on Financial Regulation, *Working Paper: Regulation of Executive Compensation in Financial Service,* Feb. 2010. http://www.cfr.org/content/publications/attachments/Squam_Lake_Working_Paper8.pdf.

[9] The Securities Exchange Act of 1934, Section 10D.(b)(2)

CLARK CONSULTING

Fortifying Your Defenses: Choosing a Multifaceted Approach to Incentive-compensation Recoupment

A Clark Consulting Technical Resource Group White Paper
August 23, 2010

With the signing of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank*)* by President Obama on July 21, 2010, corporate incentive compensation recovery policies have once again been thrust front and center into the public discourse on executive compensation. As a result of Dodd-Frank, federal law now requires broader usage of incentive compensation recovery policies at public companies. Consequently, compensation committees at these institutions are facing the unenviable task of not only figuring out how to meet the minimum requirements of Dodd-Frank, but also how to develop an effective incentive compensation recoupment program.

No doubt the solution that compensation committees are going to hear repeatedly is "clawback," as if a clawback policy was a self-executing cure-all and the only approach to compensation recoupment. Certainly, clawback policies represent one approach to compensation recoupment, but the central questions that this white paper will attempt to answer are:

> "Compensation arrangements are critical tools in the successful management of financial institutions. These arrangements serve important and worthy objectives, including attracting skilled staff, promoting better firm and employee performance, promoting employee retention, providing retirement security to employees, and allowing a firm's personnel costs to move along with revenues."[1]
>
> Scott G. Alverez, General Counsel
> Board of Governors of the Federal Reserve System

1. Do clawback policies represent the most effective way for public companies to fulfill the Dodd-Frank mandate to recover unearned excess incentive compensation? and
2. Should a clawback policy represent a company's first and only line of defense with respect to recovering unearned excess incentive compensation?

A reasonable answer to these questions would be <u>No</u> and <u>No,</u> as clawbacks standing alone are to some extent like France's vaunted military defenses immediately prior to World War II (the so-called "Maginot Line")—good in theory, ineffective in practice.

In order to assist compensation committees in answering these questions, this white paper will first look at the specific incentive compensation recoupment requirements of Dodd-Frank, followed by a discussion of the differences between these new requirements and the compensation recovery provisions of the Sarbanes-Oxley Act of 2002 (SOX).[2] This paper will then focus on designing a more effective approach to meeting the compensation recoupment requirements of Dodd-Frank through the use of a nonqualified deferred compensation solution (what we refer to as “holdbacks”) as a key element that can be paired with traditional clawbacks.

Incentive Compensation Recoupment under Dodd-Frank

Dodd-Frank added Section 10D to the Securities Exchange Act of 1934 (Exchange Act). Section 10D of the Exchange Act now requires the SEC to adopt rules directing the US stock exchanges to modify their listing standards to prohibit the listing of any company that does not develop and implement an incentive compensation recoupment policy. Specifically, the Exchange Act now essentially requires each public company to have an incentive compensation recoupment policy which:

1. Is triggered by an accounting restatement due to material noncompliance with the company’s financial reporting requirements;
2. Covers any current or former executive officer who received incentive compensation during the 3-year period preceding the date the company was required to prepare an accounting restatement; and
3. Will recover any “excess” incentive compensation paid to an executive officer as a result of the erroneous financial data.[3]

To some extent, the provisions of Dodd-Frank could be seen as an acknowledgement that the compensation recovery provisions of SOX are inadequate with respect to limiting the payment of unearned incentive compensation. Based upon our current understanding of new Section 10D (which frankly may change once regulations are issued by the SEC[4]), the incentive compensation recoupment requirements of Section 10D differ from existing requirements under SOX in several significant respects. First, the group of executives subject to mandatory compensation recoupment has been substantially expanded from only the CEO and CFO under SOX to any current or former executive officers under Dodd-Frank.

In the absence of clear guidance from the SEC, the term "executive officer" for purposes of Dodd-Frank presumably means a company's:

1. President;
2. Any Vice President in charge of a principal business unit, division or function of the company (such as sales, administration or finance); and
3. Any other officer who performs a policy making function or any other person who performs similar policy making functions for the company.[5]

Second, Dodd-Frank does not require any executive to have committed "misconduct" to trigger the compensation recoupment obligation. In contrast, SOX not only requires misconduct to trigger the recoupment obligation, but was, until recently, interpreted by the SEC to require misconduct by the individual from whom recoupment was sought—namely, the CEO or CFO.

Statute	Triggering Event	Persons Subject to Compensation Recoupment	Recovery Period
Dodd-Frank	**Restatement due to material noncompliance with the company's financial reporting requirements**	**All current and former executive officers**	**3 years**
Sarbanes-Oxley	**Restatement of company's financials due to material noncompliance with any financial reporting requirements as a result of misconduct**	**CEO and CFO**	**1 year**

Third, Dodd-Frank expands to three years the period for which compensation may be recovered and also seems to change how the recovery period is calculated from a forward-looking period under SOX (12 months following the initial filing of the financials that are eventually restated) to a backward-looking period under Dodd-Frank (3 years preceding the date the company was required to restate the financials).[6]

Fourth, Dodd-Frank only seeks to recover incentive compensation in "excess" of what should have been paid based upon the company's restated financials—in effect merely trying to insure that the compensation was in fact fairly earned rather than attempting to punish certain executives for the company's failure to have correct financials.

Fifth, Dodd-Frank, in requiring that each company develop and implement *its own* incentive compensation recovery policy, would seem to create a private right of action for enforcement (i.e., shareholders can sue to enforce) because the recovery right would be a contractual agreement between the executive and the corporation. Under SOX, the recovery itself is mandated by federal law and not by private agreement.

Notably, the statutory requirements of Dodd-Frank do not compel the use of "clawbacks" *per se*; rather the statutory mandate is that each public company have a policy which will "recover" erroneously awarded incentive compensation. However, the reflexive answer to any federally mandated recovery policy seems to be "clawback." As with many things, the reflexive answer isn't necessarily the only answer. And in this case, it isn't even the smartest answer.

An additional solution that should be considered by compensation committees is to "holdback"—meaning the incentive compensation is not actually placed in the executive's possession until it is clear that no restatement of the company's financials will require the "recovery" of the incentive compensation. A nonqualified deferred compensation plan is a good vehicle for effectuating the "holdback" approach to incentive compensation recoupment.

> "Rather than relying on clawbacks, companies should make sure they get their compensation decisions right in the first place. It is much easier not to give awards up front than it is to take them back once paid out."[7]
>
> Hye-Won Choi, TIAA-CREF head of corporate governance.

Nonqualified Deferred Compensation Plan Basics

Prior to getting into the details of how a nonqualified deferred compensation plan can be used as a vehicle for recovering incentive compensation, it is important to have a clear understanding of just what a nonqualified deferred compensation plan is and how it functions.

In its simplest form, a nonqualified deferred compensation plan is a written agreement between an employer and one or more of its executives that provides for the deferral of the executive's base compensation (i.e., salary) and/or incentive compensation (i.e., bonuses). This deferral can be either voluntary or mandatory. Amounts deferred under a nonqualified deferred compensation plan are credited to an individual account for the executive, and the deferral account is typically credited with hypothetical earnings and/or losses on certain "measurement funds" (typically mutual funds or equivalents) from which the executive may select. These deferred amounts and hypothetical earnings and/or losses are then distributed in accordance with pre-established payment triggers, which may be a specified date, a change in control of the company, the occurrence of an unforeseen emergency or the executive's termination of employment, disability or death. Importantly, so that the executive is not currently taxed on the deferred compensation or any of the hypothetical earnings, no actual assets are transferred to the plan and the executive holds the status of a general creditor of the employer in the event of the employer's bankruptcy or insolvency.

Structure and Operation of a "Holdback" Plan

So what would a company need in order to embrace the "holdback" approach to compensation recovery?

1. A corporate policy mandating that all incentive compensation awards are required to be mandatorily deferred (in full or in part) into the company's nonqualified deferred compensation plan.
2. A nonqualified deferred compensation plan with the following two unique features:
    a. A vesting provision; and
    b. An "adjustment" provision.

Under this approach, instead of the executive receiving an annual incentive payment outright that may then need to be "clawed back," each individual subject to the mandatory deferral policy would simply receive a credit to his or her deferral account in an amount equal to the incentive amount awarded to the executive under the applicable bonus or commission program. Obviously, no credits would be made if the applicable performance metrics had not been satisfied.

Once credited to the nonqualified deferred compensation plan, the incentive compensation amount would be subject to the plan's vesting and "adjustment" provisions.

As mentioned above, in order for the nonqualified deferred compensation plan to act as a holdback plan, the plan would need to incorporate a vesting provision. This vesting provision would clearly state that the incentive compensation amount is not deemed earned or payable until the expiration of the vesting period. This structure essentially creates a mandatory holding period to guard against the possibility that the executive's incentive compensation was miscalculated as a result of an incorrect financial statement or other comparable problem. To satisfy the recoupment requirements of Dodd-Frank, corporate compensation committees should ensure that the nonqualified plan has a minimum vesting period of 3 years.[8] However, a longer vesting period may be appropriate if consistent with other corporate goals or if the compensation committee deems 3 years to be an inadequate amount of time to determine whether the performance metrics upon which the executive's incentive compensation was based have actually been met.

To satisfy the obligations of Dodd-Frank, the holdback plan would also need to have a mechanism to "recover" any excess incentive compensation credited to the executive's account as a result of the incorrect financial statements. In a holdback plan, that recovery mechanism would be the "adjustment" provision. By way of illustration only, an "adjustment" provision might provide as follows:

> "Prior to vesting, an Incentive Compensation Amount for a Plan Year, plus amounts credited or debited on such amount, shall be reduced (as necessary to reflect actual performance) in the event that it is determined by the Employer, in its absolute discretion, that the Incentive Compensation Amount for that Plan Year was incorrectly calculated as a result of (i) a misstatement of the financial results upon which the Incentive Compensation Amount was calculated and/or (ii) the failure to achieve an applicable performance metric upon which the Incentive Compensation Amount was calculated."[9]

Consequently, if during the vesting period there is a downward financial restatement such that the recoupment obligations under Dodd-Frank are triggered, the plan's "adjustment" provision would also be triggered and the executive's deferral account balance for the year the performance metric was not achieved (or underachieved) would be reduced to match the actual, achieved results—thus effectively recovering the "excess" incentive compensation in accordance with Dodd-Frank.

After the expiration of the vesting period, the incentive compensation amount would be fully vested and not subject to adjustment (other than hypothetical earnings and losses while it remains in the deferred compensation plan). Each annual credit of incentive compensation would be subject to the same vesting period.

As a result, after the first credited incentive compensation amount becomes vested, the executive could annually receive a cash distribution of the incentive compensation. However, given the tax benefits of deferral (including the accrual of "investment" earnings on a pre-tax basis), certain executives may be interested in deferring payment until a later date or until retirement.

Misplaced Faith: Reliance on Clawbacks Alone

As demonstrated above, a "holdback" plan can be structured so as to meet the objectives of the Dodd-Frank compensation recoupment provisions. But that does not answer the question: Why should a compensation committee embrace (or at least consider) a holdback approach? The short answer: Because the enforcement of clawback provisions can be problematic.

First, the executive subject to the clawback has to have the continuing financial wherewithal to pay the company back. That is, once the bonus check has been cashed, spent and taxes paid, will there be assets to recover? This is particularly problematic when recovery needs to be made from former executive officers. In contrast, under the holdback approach, the financial circumstances of the executive are not relevant, as the compensation has not yet been paid out.

Second, state creditor and wage protection issues may come into play preventing enforcement of the clawback (e.g., state wage payment laws may prohibit enforcement in certain circumstances and creditor/bankruptcy laws may protect the assets of the executive if the executive is or becomes insolvent). In contrast, the vesting provision of the holdback plan should prevent the compensation from being considered "earned" and therefore from being "wages" subject to protection.[10]

Third, clawbacks may have significant costs for enforcement, as they may require a lawsuit to enforce. In contrast, the "adjustment" mechanism which enforces the recoupment in a holdback plan requires a mere debiting of the executive's deferral account. This factor could be particularly important in circumstances where the company's policy requires the corporation to seek recoupment, but enforcement costs would likely exceed the amount of the "excess" compensation to be recovered. This situation could, in turn, open up the paradoxical possibility of the corporation being sued in a shareholder derivative suit for failing to enforce the "clawback" policy or, conversely, for enforcing it when it was uneconomical to do so.

Consequently, when compared to clawbacks alone, holdbacks should not only improve a company's likelihood of recovering the excess incentive compensation, they should also do it in a more cost-effective and efficient manner. Of course with the holdback approach, executives also can get the general benefits associated with all nonqualified deferred compensation plans: accrual of "investment" earnings on a pre-tax basis and the ability to save for retirement.

Fortifying Your Right to Recover Through a Combined Approach

Given the significant issues discussed above, a company's compensation recoupment program should be designed so that reliance on clawback enforcement alone is minimized. The primary way to do that is to not rely on a clawback policy as a stand-alone. If clawbacks are to be used, they should be used as part of a comprehensive compensation recoupment program that also includes holdbacks. Essentially, the goal should be to design a program in which the clawback policy is a mere backstop to the holdback element of the nonqualified deferred compensation plan. Accordingly, the clawback policy, as a backstop, would generally only come into play if the company's policy mandated that only a portion of the incentive compensation be mandatorily deferred into the company's nonqualified deferred compensation plan and the "excess" incentive compensation required to be recovered under Dodd-Frank exceeded this amount.

Choosing A Comprehensive Solution

While clawback policies should continue to be a part of each compensation committee's discussion of incentive compensation recoupment policies, these committees would be well served to consider developing and implementing a comprehensive compensation recoupment program that addresses both the front-end (holdbacks) and the back-end (clawbacks) in order to eliminate the corporation's reliance on a single line of defense.

This white paper is for informational purposes only; it is not intended as an offer or solicitation for the purchase or sale of any financial instrument and is not intended to present an opinion on legal, tax, accounting or investment matters.

NOTES AND CITATIONS:

[1] Alvarez, Scott. Statement to the House, Committee on Financial Services. Hearing: February 25, 2010. Available at: http://www.federalreserve.gov/newsevents/testimony/alvarez20100225a.htm

[2] Section 304 of the Sarbanes-Oxley Act of 2002 provides as follows:

If an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for-any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever first occurs) of the financial document embodying such financial reporting requirement; and any profits realized from the sale of securities of the issuer during that 12-month period.

[3] SEC. 10D. RECOVERY OF ERRONEOUSLY AWARDED COMPENSATION POLICY.

(a) LISTING STANDARDS.—The Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that does not comply with the requirements of this section.

(b) RECOVERY OF FUNDS.—The rules of the Commission under subsection (a) shall require each issuer to develop and implement a policy providing—

(1) for disclosure of the policy of the issuer on incentive-based compensation that is based on financial information required to be reported under the securities laws; and

(2) that, in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws, the issuer will recover from any current or former executive officer of the issuer who received incentive-based compensation (including stock options awarded as compensation) during the 3-year period preceding the date on which the issuer is required to prepare an accounting restatement, based on the erroneous data, in excess of what would have been paid to the executive officer under the accounting restatement.

[4] Dodd-Frank did not mandate a specific period of time for the SEC to provide rule making for Section 954. It could be possible that the regulations developed by the SEC could limit the ability of using compensation deferral as a way to satisfy the compensation recoupment provisions of Section 954 of Dodd-Frank.

[5] See Rule 3b-7 of the Securities Exchange Act of 1934.

[6]At this time, the SEC has not issued regulations addressing how the 3-year period will be calculated.

[7] Gandel, Stephen. "Can Financial Firms Get Executives to Give Back Pay?" www.time.com. January 27, 2010.

[8]At this time, the SEC has not issued regulations addressing how the 3-year period will be calculated. Consequently, it may be necessary to have a longer vesting period in order to holdback amounts for the full period under which amounts may be recoverable via a policy meeting the minimum requirements of Dodd-Frank.

[9] A company's tax and legal advisors should specifically tailor any "adjustment" provision to the company's needs. Clark Consulting cannot and does not provide legal or tax advice.

[10] As this is a matter of each state's law, a company should consult with its legal advisors on this topic. Clark Consulting cannot and does not provide legal or tax advice.

About The Technical Resource Group:

Consisting of professionals with backgrounds in law, tax and accounting, Clark Consulting's Technical Resource Group provides technical consulting services to Clark Consulting's clients, their legal counsel and other advisors, regarding the design, implementation, informal funding and ongoing administration of nonqualified plans. The Technical Resource Group also provides Clark Consulting's clients and their associates with periodic updates on legislative and regulatory developments, industry issues and trends.

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About Clark Consulting, LLC:

Clark Consulting, LLC, headquartered in Dallas, is an AEGON company. AEGON N.V. is an international life insurance, pension and investment group based in The Hague, The Netherlands, with businesses in over twenty markets in the Americas, Europe and Asia.

Clark Consulting is a leading source of strategic financing solutions such as bank-owned life insurance (BOLI) and corporate-owned life insurance (COLI) for inefficiently funded and unfunded liabilities that result from executive and employee benefit programs.

Since 1967, Clark Consulting has helped place thousands of benefit plans and serves as the record keeper for billions in assets for leading American corporations and banks.

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