Outfoxing SOX

Sarbanes-Oxley banned sweetheart loans to greedy executives. So, corporations are giving them free money instead.

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Greedy corporate executives were briefly constrained by Sarbanes-Oxley, the federal legislation passed two and a half years ago in response to massive abuses at Enron, WorldCom, and others. But wily CEOs are now devising clever new methods to circumvent one of SOX's most popular provisions: the ban on sweetheart loans to executives and directors.

In the old days, companies regularly made loans to the likes of Dennis Kozlowski, the former CEO of Tyco who's currently on trial (for the second time). He received a $61 million relocation loan pre-SOX. Bernie Ebbers, the former WorldCom chieftain who's also now on trial, owed his company just over $400 million at one point. Largely because of these abuses, Sarbanes-Oxley outlawed such favorable loans.

But now companies have realized they can avoid the ban if they give money away to their top executives instead of loaning it. The amounts aren't as eye-popping as the loans made to Ebbers et al., but hey, it's free money. These giveaways are disclosed with varying levels of clarity in the company's SEC filings and are almost always on top of the other compensation and routine perks that top executives receive. Here are some of the new strategies:

The Special Signing Bonus: Washington Mutual's new President and Chief Operating Officer Stephen Rotella received a $2.6 million "special signing bonus" when he joined the company on Jan. 10. That's in addition to a guaranteed bonus of at least $2 million for 2005 and an unspecified relocation benefit for the executive, who plans to move to Washington state from his home in New Jersey.

The Retention Bonus (you're keeping your job, so here's some extra cash): Mesa Air, a regional airline, gave two of its top executives hefty retention bonuses last year when it renewed their employment contracts. Chairman and CEO Jonathan Ornstein, who has been an executive at the company since May 1998, received a $1.8 million retention bonus, and Chief Operating Officer Michael Lotz received a $1.4 million retention bonus. Each exec's retention bonus was around six times his base salary.

The Effective Time Bonus (whatever that means): As part of its merger with Marsh & McLennan last summer, Kroll agreed to pay its CEO at the time, Michael Cherkasky, a $6.39 million "effective time bonus" and another $3 million in Marsh stock as a retention bonus. Cherkasky was very effective with his time: He was promoted to CEO of Marsh after Jeffrey Greenberg stepped down under fire in October.

The Death Retention Bonus (we love you so much, we'll pay you in the grave): Furniture Brands International gave three of its top executives what it described in a December SEC filing as a "death retention bonus." Though the filing did not specify how much the executives would collect, it did note that the executives' beneficiaries would have to show "acceptable proof of death" in order to collect.

Of course, signing bonuses and other creative sweeteners existed long before Sarbanes-Oxley. For example, former GE executive Gary Wendt famously received a $45 million signing bonus when he joined Conseco in June 2000. But the new rules that prohibit favorable-rate loans have clearly prompted more companies to dole out bonuses that aren't tied to meeting a particular sales or earnings targets. Washington Mutual SEC filings, for example, indicate that it has handed out signing bonuses only since Sarbanes-Oxley passed.

"It's just another way to provide executives with pay that isn't related to performance," says Lucian Bebchuk, a professor at Harvard Law School and co-author of the new book *Pay Without Performance*. "Most of these are basically cousins to the old loans that companies used to make before Sarbanes Oxley. They're lump sum transfers that may or may not be justified."

Companies usually say the bonuses are an important tool in being able to attract and keep talent. A spokesman for Washington Mutual declined to answer questions on how the company arrived at the $2.6 million bonus for Rotella—nearly three times his base salary of $900,000 a year—but in an e-mail said that the compensation "reflects his proven experience and abilities, and the responsibilities he will have at our company." Lynn Chipperfield, the chief administrative officer for Furniture Brands International and one of the executives set to receive the "death retention bonus," called it an "unfortunate name" for something that was basically a form of life insurance. (One of the other things that Sarbanes-Oxley essentially outlawed was "split-dollar" life insurance policies—policies that were a standard benefit in most executive suites.)

In a sense, these new payoffs are a tribute to the enduring creativity of American corporate executives. No matter how the law changes, they still manage to find a way to overpay themselves.

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