

**CHEAT SHEET: THE LATEST DEVELOPMENTS IN GOVERNANCE AND COMPENSATION**

- **Shareholder Bill of Rights Act of 2009 (the “Schumer Bill”) – Proposed Legislation**
  - Introduced by Senator Charles Schumer on May 19, 2009.
  - For *all public companies*, the bill would require:
    - Say-on-Pay – nonbinding shareholder vote on executive compensation
    - Say on severance – separate nonbinding shareholder vote on executive severance packages
    - Proxy access – 1% of outstanding stock, two-year holding requirement
  - For *listed companies*, the bill would also require:
    - Annual election of all directors (i.e., elimination of classified boards)
    - Majority vote for directors
    - Independent board chair (cannot have previously served as executive officer)
    - Risk Committee composed entirely of independent directors
  - **Status:** Referred to Committee on Banking, Housing, and Urban Affairs on May 19, 2009
  
- **Shareholder Empowerment Act of 2009 – Proposed Legislation**
  - Introduced by Rep. Gary Peters on June 12, 2009.
  - Required for *all public companies*:
    - Say-on-Pay – nonbinding shareholder vote on executive compensation
    - Proxy access – 1% of outstanding stock, two-year holding requirement
    - Elimination of broker discretionary voting for directors
    - Majority vote for directors
    - Independent board chair
    - Compensation adviser (consultant), if hired, must be independent
    - Clawbacks – companies must develop and disclose a policy for reviewing and recovering unearned compensation
    - No severance pay agreements for executives terminated for poor performance
    - Proxy must disclose specific performance targets used to determine executive compensation
  - **Status:** Referred to the House Committee on Financial Services on June 12, 2009.
  
- **Excessive Pay Shareholder Approval Act of 2009 and Excessive Pay Capped Deduction Act of 2009 – Proposed Legislation**
  - Both bills introduced by Senator Richard Durbin on May 7, 2009.
  - Shareholder Approval Act would require, for *all public companies*, that any employee’s compensation be limited to 100x average compensation of all employees of the company in that tax year, unless approved by 60% shareholder vote. Proxy materials must include specified compensation statistics.
  - Capped Deduction Act would disallow tax deduction for “excessive compensation” (total compensation exceeding 100x average compensation of all employees).
  - **Status:** Shareholder Approval Act referred to House Committee on Financial Services, June 12, 2009. Capped Deduction Act referred to House Committee on Finance on June 2, 2009.
  
- **Corporate and Financial Institution Compensation Fairness Act of 2009 – Proposed Legislation**
  - Two proposals sent to Congress by Treasury Secretary Geithner on July 16, 2009 – consistent with the White Paper issued by Secretary Geithner in June.
  - Rep. Barney Frank circulated draft legislation to House Financial Services Committee on July 17, 2009.
  - Say-on-Pay – all annual meetings after December 15, 2009 must include a non-binding shareholder vote on compensation.
    - Also, for any shareholders meeting for an M&A transaction, the proxy or consent materials must disclose parachute payments and include a non-binding shareholder vote on payments
  - Compensation committee independence and advice requirements – for *listed companies*, compensation committee members subject to same restrictive independence standards as audit committee members; committee has the right to retain independent advisors.
  - **Status:** Still not introduced

- **Amendment to NYSE Rule 452 – Broker Discretionary Voting – Final Regulations**
  - Final rule, approved by the SEC on July 1, 2009, applies to all public companies, for shareholder meetings held on or after January 1, 2010.
  - Broker can't vote shares on election of directors without instructions from beneficial owner.
  
- **Regulatory Clarification of TARP Requirements for Financial Institutions**
  - Under the stimulus bill in 2008 and the recovery bill in 2009, *financial institutions* that receive Troubled Asset Relief Program (TARP) funds are subject to Say-on-Pay, limits on executive severance benefits and denial of tax deductions over certain limits, requirements for clawbacks, compensation disclosures, etc.
    - Limitations vary depending on various factors, including whether institutions have repaid TARP funds, and whether they are regular participants or received exceptional assistance.
  - The **Treasury Department** issued an *Interim Final Rule* on June 10, 2009, that codifies the restrictions and appoints a special master to review compensation for specific companies.
    - The rules prohibit golden parachutes to certain individuals, require that bonuses be paid in restricted stock, prohibit compensation that encourages unnecessary risk, etc.
    - The rules require Say-on-Pay; clawbacks for bonuses that are based on inaccurate criteria; enhanced compensation disclosures; etc.
  - The **SEC proposed rules** on July 1, 2009 to clarify Say-on-Pay standards for TARP recipients.
  
- **Proposed Amendments to the SEC Proxy Disclosure and Solicitation Rules**
  - The SEC on July 1, 2009 proposed enhanced proxy disclosures and clarifications to the proxy solicitation rules in a 137-page release issued on July 10, 2009. If adopted, the rules would likely be effective for the 2010 proxy season.
  - The compensation disclosure rules would be amended to:
    - require disclosure of the relationship to risk of the company's overall compensation policies (which would include non-executive compensation policies)
    - require disclosure of potential conflicts of interest of compensation consultants and other extensive information about consultants, including fee information
    - change calculation of equity compensation in the Summary Compensation Table – based on fair value of awards during the year, rather than adjusted FAS 123R expense during the year
  - The proxy statement would be required to include more information about each director or nominee's background, and about the company's leadership structure (including role of lead director, if any).
  - The rules governing proxy solicitations would be clarified in several ways.
  
- **SEC Proposed Rules Requiring Shareholder Access**
  - The SEC on June 10, 2009, proposed amendments to the proxy rules to grant large shareholders the right to nominate directors and have the nominees included in management's proxy statement – public comments are due by August 17, 2009.
  - Proposed Rule 14a-11 would grant access to holders who have for at least one year beneficially owned at least the following percentages of the company's outstanding stock, depending on the size of the company: 1% for large accelerated filers, 3% for accelerated filers, or 5% for non-accelerated filers. (Non-accelerated filers have public float less than \$75 million; generally the same test as for smaller reporting companies. Large accelerated filers have public float of at least \$700 million.)
  - The company would be required to include shareholder nominees for up to 25% of the board positions (or one position, if greater) – if the company receives more nominees than this limit allows, nominees are granted access on a first-come-first-served basis.

*The descriptions above offer only a general overview of complex legal topics. These materials are not intended as a substitute for legal, financial or tax advice and should not be relied upon as such.*