

CHEAT SHEET: THE LATEST DEVELOPMENTS IN GOVERNANCE AND COMPENSATION

- **Amendments to the SEC Proxy Disclosure Rules – Final Regulations**
 - The SEC adopted enhanced proxy statement disclosure requirements on Dec. 16, 2009.
 - The amendments apply to companies with a fiscal year ended on or after Dec. 20, 2009, for proxy statements and Form 10-K filed on or after February 28, 2010.
 - The compensation disclosure rules were amended to:
 - require disclosure of the relationship of the company's overall compensation policies (not limited to executives) to risks that are "reasonably likely to have a material adverse effect" – these risk disclosures do not apply to smaller reporting companies.
 - require disclosure of potential conflicts of interest of executive compensation consultants and other extensive information about such consultants, including information on fees they receive for other services (\$120K minimum), with exceptions for consultants that perform certain limited executive compensation services, such as survey data.
 - change the calculation of equity compensation amounts in Summary Comp. Table – based on the fair value of awards made during the year, rather than the accounting expense in that year.
 - The proxy statement must 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 proxy statement must include information about whether the nominating committee considers diversity as a factor in reviewing potential nominees, and assessing the implementation of any diversity policies.
 - Companies must disclose the results of shareholder votes on Form 8-K within four business days after the vote. If final voting results are not known, file preliminary results, followed by an amended filing.
 - The companion proposed amendments to the rules governing proxy solicitations were deferred.
- **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.
- **SEC Proposed Shareholder Access Rules – Proposed Rule 14a-11 (Release No. 33-9046)**
 - 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. On Dec. 14, 2009, the SEC re-opened the public comment period; staff continues to target early 2010.
 - Right would be granted to holders who have for at least one year beneficially owned at least the following percentages of outstanding stock: 1% for large accelerated filers (public float at least \$700M), 3% for accelerated filers, or 5% for non-accelerated filers (public float less than \$75M).
 - The company would be required to include shareholder nominees for up to 25% of the board positions. If nominees received above this limit, access granted on a first-come-first-served basis.
 - The SEC is also considering a proposed amendment to Rule 14a-8 to eliminate companies' ability to exclude from their proxy materials qualifying shareholder proposals relating to shareholder access.
- **Regulatory Clarification of TARP Requirements for Financial Institutions – Final Regulations**
 - Under 2008 stimulus bill and 2009 recovery bill, TARP recipients are subject to Say-on-Pay, severance limits, denial of tax deductions over certain limits, clawbacks, disclosure requirements, 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.
 - Rules prohibit certain golden parachutes, require bonuses paid in restricted stock, prohibit compensation that encourages risk, clarify Say-on-Pay, clawback and disclosure requirements.
 - The **SEC adopted final rules** (Rule 14a-20 and Item 20 of Schedule 14A) on January 12, 2010, effective February 18, 2010, to clarify Say-on-Pay standards for TARP recipients.

- **Corporate and Financial Institution Compensation Fairness Act of 2009 (originally H.R. 3269; now included as part of the Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173)) – Proposed Legislation**
 - H.R. 4173 introduced by Rep. Barney Frank on Dec. 2, 2009 and approved by the House on Dec. 11, 2009; H.R. 3269 was previously approved by the House in July 2009; bill awaiting Senate action.
 - Say-on-Pay – for *all public companies*, all annual meetings must include a non-binding shareholder vote on compensation, effective six months after date of final SEC rules; for M&A transaction, proxy/consent materials must include a non-binding shareholder vote on parachute payments.
 - Comp. committee independence – new standards for committee and advisors for *listed companies*.
 - SEC may exempt certain companies (possibly smaller companies) from above requirements.
 - Covered financial institutions must disclose the structure of incentive compensation arrangements and cause the arrangements to conform to new regulations meant to avoid risk.
- **Shareholder Bill of Rights Act of 2009 (the “Schumer Bill”) – Proposed Legislation (S. 1074)**
 - Introduced by Senator Charles Schumer on May 19, 2009; referred to Committee 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) and majority vote for directors
 - Independent board chair (cannot have previously served as executive officer)
 - Risk Committee composed entirely of independent directors
- **Restoring American Financial Stability Act of 2009 – Draft Senate Bill (the “Dodd Bill”)**
 - Discussion draft released by Senator Christopher Dodd on November 10, 2009; provisions currently being considered by Senate Committees.
 - For *all public companies*, the draft bill would require Say-on-Pay; say on severance; and proxy access; establish standards for independent advisors to compensation committees; require additional compensation disclosures; and require a clawback policy.
 - For *listed companies*, the draft bill would eliminate classified boards without a shareholder vote; require majority voting for directors; and establish independence standards for comp. committees.
- **Shareholder Empowerment Act of 2009 – Proposed Legislation (H.R. 2861)**
 - Introduced by Rep. Gary Peters on June 12, 2009; referred to Committee on June 12, 2009.
 - Would require Say-on-Pay; require proxy access; eliminate broker discretionary voting for directors; require a majority vote for directors; require an independent board chair; require independent compensation advisors; require a clawback policy; prohibit severance agreements for executives terminated for poor performance; and require proxy disclosure of performance targets.
- **Excessive Pay Shareholder Approval Act of 2009 and Excessive Pay Capped Deduction Act of 2009 – Proposed Legislation (S. 1006 and S. 1007)**
 - Both bills introduced by Senator Richard Durbin on May 7, 2009; referred to Committee in June 2009.
 - Bills would require 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, and would disallow tax deduction for “excessive compensation” (over 100x average employee compensation).
- **Corporate Governance Reform Act of 2009 – Proposed Legislation (H.R. 3272)**
 - Introduced by Rep. Keith Ellison on July 21, 2009; referred to Committee on July 21, 2009.
 - Required for *all public companies*: Independent board chair, risk management committee and comp. committee; Say-on-Pay; study whether corporate directors should be certified by the SEC

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.