

# Akerman Practice Update

CORPORATE

September 08, 2009

## Overview of Recent Legislative Initiatives Regarding Compensation Matters and Stockholder Rights

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A wave of populist anger that surged during the economic downturn has resulted in several proposed federal legislative solutions to address what some have perceived as an issue of excessive executive compensation and risk taking. Each of these legislative proposals also includes one or more provisions that would require public companies to adopt corporate governance practices which some stockholders argue are long overdue, including stockholder access to the proxy statement and required “say-on-pay” stockholder votes. Five pieces of legislation have been filed to date. They are:

- **House Bill 3269**, the “Corporate and Financial Institution Compensation Fairness Act of 2009” (“CFICFA”), which was introduced in the House of Representatives by Representative Barney Frank (D – Massachusetts);
- **House Bill 2861**, the “Shareholder Empowerment Act of 2009” (“SEA”), which was introduced in the House of Representatives by Representatives Gary Peters (D-Michigan), John Dingell (D-Michigan), Peter Welch (D-Vermont), Rush Holt (D-New Jersey), Peter DeFazio (D-Oregon), and Michael Capuano (D-Massachusetts);

- **Senate Bill 1006**, the “Excessive Pay Shareholder Approval Act” (“EPSAA”), which was introduced in the Senate by Senator Richard Durbin (D-Illinois);
- **Senate Bill 1074**, the “Shareholder Bill of Rights Act of 2009” (“SBRA”), introduced in the Senate by Senators Charles Schumer (D-New York) and Maria Cantwell (D-Washington); and
- **the Investor Protection Act of 2009** (“IPA”), which has been presented for consideration by the Treasury Department.

These five proposed bills are in addition to certain proposed rules changes that were recently promulgated by the Securities and Exchange Commission (the “Commission”). The rules changes proposed by the Commission cover many of the issues that are dealt with in the five legislative proposals:

- **On June 10, 2009**, the Commission published proposed rules that would require that companies, under certain circumstances, include in their proxy materials nominees for director that are nominated by a stockholder or group of stockholders. The proposed rules would also require, under certain circumstances, that companies include in their proxy materials stockholder proposals to amend a company’s governing documents regarding nomination procedures or disclosures related to stockholder nominations;
- **On July 10, 2009**, the Commission published proposed rules that would require that companies that have received financial assistance under the Troubled Asset Relief Program (“TARP”) hold a separate stockholder advisory vote to approve the compensation of executives during the period in which any obligations arising from financial assistance provided under TARP remains outstanding. This proposed rule seeks to implement the requirements of the Emergency Economic Stabilization Act of 2008; and
- **On July 10, 2009**, the Commission published proposed rules that would require greater proxy disclosure rules in the areas of executive compensation and corporate governance and amend the proxy solicitation rules. Under the proposed rules, disclosure would be required as to how a company manages risk in the context of compensation, as to the company’s overall compensation approach, including incentive structures that reward short-term risk without taking into account potential long-term effects, as to potential conflicts of interest by compensation consultants, as to the experience and qualifications to serve on the board or particular committees of director nominees, and as to why the board has chosen a particular leadership structure.

The proposed legislation, as well as the Commission’s recent rules proposals, reflect a continuing and ever growing concern about corporate governance, executive compensation, leadership accountability and risk management in the wake of the financial crisis.

With the Congressional summer recess about to end, we believe that it is time to reflect on the state of play with respect to all of these legislative proposals. Many of these proposals cover similar substantive areas, and a combination of one or more of these proposals may ultimately be contained in whatever legislation is approved by the Congress and signed by the President. While the ultimate outcome of these proposals cannot be determined at this time, it is our expectation that some of these substantive proposals are likely to be adopted and that public companies will likely be required to comply with some or all of these requirements. Further, while the issue is not free from doubt, it is quite possible that the concepts contained in one or more of these proposals may become effective for the 2010 proxy season.

The following chart is an overview of the requirements of each piece of proposed legislation. A summary of each legislative proposal is set forth below the chart.

Requirement	Corporate and Financial Institution Compensation Fairness Act of 2009	Shareholder Bill of Rights Act of 2009	Excessive Pay Shareholder Approval Act	Shareholder Empowerment	Investor Protection Act of 2009
Non-binding stockholder vote on executive compensation	√	√		√	√
Non-binding stockholder vote on executive golden parachute compensation	√	√		√	√
Binding stockholder vote on executive compensation over a certain level			√		
Improved compensation committee independence standards	√			√	√
Independence standards for chairman of the board of directors		√		√	
Requires annual election of directors		√			
Requires the establishment of a “risk committee”		√		√	
Sets majority voting standards for boards of directors		√		√	
Establishes proxy access rules for stockholder director nominations		√		√	
Eliminates broker discretionary voting				√	
Requires policies for cancellation or recovery of unearned bonus payments				√	
Bans agreements awarding severance payments to senior executive officers terminated due to poor performance				√	
Requires enhanced disclosure of compensation targets				√	

### Corporate and Financial Institution Compensation Fairness Act of 2009

On July 31, 2009, the House of Representatives approved the Corporate and Financial Institution Compensation Fairness Act of 2009 (“CFICFA”). The bill has not yet been introduced in the Senate. If this bill were to become law in its current form, it would amend the Securities Exchange Act of 1934 (the “Exchange Act”) to: (i) require a non-binding stockholder vote on executive compensation in connection with annual and special meetings at which directors are elected; (ii) require a non-binding stockholder vote on “golden parachute” compensation in connection with a stockholder vote on an acquisition transaction; (iii) impose enhanced independence requirements on compensation committee members and compensation consultants; and (iv) require additional compensation disclosures by “covered financial institutions” and permit regulators of such financial institutions to prohibit compensation arrangements that pose risks to financial stability.

**Say-on-Pay**

CFICFA would require that any public company proxy or consent solicitation in connection with an annual meeting of stockholders, or a special meeting of stockholders in lieu thereof, hold a separate, non-binding stockholder vote to approve the compensation of the “named executive officers” disclosed in the company’s Compensation Discussion and Analysis (“CD&A”) and tabular disclosure included in the proxy or information statement. CFICFA would also require in connection with any proxy or consent solicitation relating to the approval of a business combination or sale of assets clear disclosure of, and a non-binding stockholder vote on, compensation of named executive officers based on or related to the transaction unless such compensation had previously been the subject of a “say-on-pay” vote in connection with a meeting to elect directors. The bill provides that these “say-on-pay” votes would not impose any new fiduciary duties on directors and would not limit the ability of stockholders to make proposals for inclusion in a public company’s proxy statement relating to executive compensation.

CFICFA would provide the Commission with the authority to

exempt or modify the application of “say-on-pay” voting requirements to particular classes of companies. The bill particularly directs the Commission to take into account in that regard the impact of these requirements on smaller public companies. The “say-on-pay” provisions would not be applicable to foreign private companies, which are exempt from the Commission’s proxy rules. CFICFA would also direct the Commission to adopt rules requiring institutional investment managers subject to Schedule 13F reporting to report, at least annually, how they voted on particular “say-on-pay” proposals.

The “say-on-pay” provisions of CFICFA would apply to stockholder meetings held at least six months after the adoption by the Commission of implementing rules, which the Commission is directed to adopt within six months after the time CFICFA is enacted.

**Compensation Committee and Compensation Consultant Requirements**

CFICFA would require the Commission to impose listing standard modifications, effective within nine months of the bill’s enactment, relating to the independence of

compensation committee members and compensation consultants. Compensation committee members would be prohibited from receiving any consulting, advisory or other compensatory fees from companies other than in their capacities as board or committee members.

Compensation consultants would be required to meet independence standards established in rules to be promulgated by the Commission. The compensation committee would have the authority, in its sole discretion, to retain an independent compensation consultant and would be directly responsible for overseeing the consultant, but the compensation committee would not be required to retain a compensation consultant or be bound by the consultant’s recommendations if one were retained. Companies would be required to fund the expense of an independent compensation consultant retained by the compensation committee.

CFICFA omits any independence requirements relating to legal advisors retained by compensation committees, but would require companies to pay for the retention of an independent legal advisor at the compensation committee’s election.

**Shareholder Bill of Rights Act of 2009**

On May 19, 2009, Senators Schumer and Cantwell introduced Senate Bill 1074, the “Shareholder Bill of Rights Act of 2009” (“SBRA”). The bill is currently before the Senate Committee on Banking, Housing, and Urban Affairs. If adopted, SBRA would amend the Exchange Act to require: (i) that companies include a separate non-binding resolution subject to a stockholder vote to approve the compensation of executives and golden parachutes at any meeting for which the rules of the Commission require compensation disclosure; (ii) the Commission to establish rules by which stockholders may access proxy statements for board nominations; (iii) national securities exchanges to prohibit the listing of any

public company not in compliance with the requirements of the bill; (iv) require that the Chairman of the board of directors of all public companies be independent, as determined in accordance with the rules of the exchange on which the securities of such public company are listed; (v) annual elections of directors; (vi) majority voting for directors in uncontested elections; and (vii) that each company establish a risk committee, comprised entirely of independent directors, which shall be responsible for the establishment and evaluation of the risk management practices of the company.

### **Say-On-Pay**

SBRA would require that, beginning one year after the bill is signed into law, any public company proxy or solicitation that requires compensation disclosure include a separate resolution to approve the compensation of executives as disclosed pursuant to the compensation disclosure rules of the Commission. This vote would be non-binding and would not be construed to overrule a decision by the board, create or imply any change to the current fiduciary duties of the board, create or imply any additional fiduciary duty of the board, or restrict or limit the ability of stockholders to make proposals for inclusion in such proxy materials related to executive compensation.

SBRA would also require, commencing one year after the bill is signed into law, a stockholder vote as to the compensation of the key executives of the company making the solicitation if the proxy statement concerns an acquisition, merger, consolidation, or proposed sale or other disposition of substantially all of the assets of the company. The proxy would be required to disclose, in a clear and simple form, any agreements or understandings that the soliciting company has with any principal executive officers

concerning any golden parachute compensation related to the acquisition, merger, sale, or other disposition and that have not been subject to a previous compensation-related stockholder votes. The vote would be non-binding and would not be construed to overrule a decision by the board, create or imply any change to the current fiduciary duties of the board, create or imply any additional fiduciary duty of the board, or restrict or limit the ability of stockholders to make proposals for inclusion in such proxy materials related to executive compensation.

### **Stockholder Access to the Company's Proxy Statement**

SBRA would require that the Commission establish rules related to the access by stockholders of proxy solicitation materials supplied by the company for the purpose of nominating individuals for membership on the board of directors. SBRA would allow the use of such proxy solicitation by any stockholder or group of stockholders who own or have owned at least 1% of the shares of the public company for at least a two-year period. Further, SBRA would expressly confirm the power of the Commission to adopt rules under the Exchange Act with respect to stockholder access to the proxy statement.

### **Corporate Governance Requirements**

SBRA would require national securities exchanges and national securities associations to prohibit the listing of any public company not in compliance with its requirements, notwithstanding any other provision of law. SBRA contemplates that such rules would allow a company the time to bring itself into compliance with and to cure any noncompliance that would be the basis for such a prohibition. The Commission would also have the ability to exempt certain companies from the such requirements or rules based on the size of the company, market capitalization, public float, number of stockholders of record, or other criteria, as the Commission may deem necessary or appropriate.

SBRA would require all public companies to have a Chairman of the board that is independent, as determined in accordance with the rules of the exchange on which the company's securities are listed. SBRA would require that the Chairman not be a previous executive officer of the company.

SBRA would require that the board of directors of all public companies be elected on an annual basis. However, nothing in the bill would limit the number of terms of office a director could serve. SBRA also provides that

in an uncontested election, directors would be elected by majority vote and in a contested election, directors would be elected by a vote of a plurality of the shares represented at any meeting and entitled to vote. If a member of a board of directors of a company did not receive a majority of the votes in an uncontested election, such director would be required under

the bill to tender his or her resignation to the board of directors. The board of directors would be required to accept such resignation, determine the effective date of such resignation, and make that date public within a reasonable period of time.

SBRA would require all public companies to establish a risk

committee of their board, comprised entirely of independent directors, that would be responsible for establishing and evaluating the risk management practices of the company.

The Commission would be required to issue new rules to enable the provisions of the statute within one-year of the bill being signed into law.

### **Excessive Pay Shareholder Approval Act**

On May 7, 2009, Senator Richard J. Durbin introduced the “Excessive Pay Shareholder Approval Act” (“EPSAA”). The bill is currently before the Senate Committee on Banking, Housing, and Urban Affairs.

EPSAA would amend the Exchange Act to require that the compensation for an employee of a public company in any single taxable year may not exceed an amount equal to 100 times the average compensation for services performed by all employees of such company, unless at least 60 percent of the stockholders of the company vote to approve such compensation. The vote may be through a proxy or consent or an authorization for an annual or other meeting of stockholders, occurring within the preceding 18 months.

Proxy materials for any vote to approve “excessive” compensation would have to include the following information: (i) the amount of compensation paid to the lowest-paid employee of the company; (ii) the amount of compensation paid to the highest paid employee of the company; (iii) the average amount of compensation paid to all employees of the company; (iv) the number of employees of the company who are paid more than 100 times the average amount of compensation for all employees of the company; and (v) the total amount of compensation paid to all employees who are paid more than 100 times the average amount of compensation for all employees of the company.

EPSAA defines “compensation” as wages, salary, fees, commission, fringe benefits, deferred compensation, retirement contributions, options, bonuses, property, and any other form of remuneration that the Commission determines is appropriate, in consultation with the Secretary of the Treasury. Part-time employees, and employees who are not employed for the full taxable year, would not be included for purposes of calculating the average compensation paid to all employees of the company.

### **Shareholder Empowerment Act of 2009**

On June 12, 2009, Representative Gary Peters introduced the “Shareholder Empowerment Act of 2009” (“SEA”). The bill is currently before the House Committee on Financial Services.

If this bill were to become law, it would modify the Exchange Act to require: (i) majority voting standards for public company boards of directors; (ii) establish procedures by which stockholders may have access to the company’s proxy statement for the purpose of nominating directors for election; (iii) eliminate broker discretionary voting; (iv) require an independent Chairman of the board of directors; (v) require that companies include a separate non-binding resolution subject to a stockholder vote to approve the compensation of executives and golden parachutes at any meeting for which the rules of the Commission require compensation disclosure; (vi) require that all compensation committee members and advisors

be independent; (vii) direct boards of directors to develop and disclose policies for reviewing unearned bonus payments awarded to executive officers that require cancellation or recovery of any unearned bonus payments; (viii) direct boards of directors to refrain from entering into agreements which award severance payments to senior executive officers terminated due to poor performance; and (ix) require enhanced disclosure of compensation targets.

## **Majority Voting for Directors**

SEA would require that companies, to the extent permitted under state law, provide in their governing documents that directors in uncontested elections shall be elected by a majority of votes cast as to each nominee, and that in contested elections, directors shall be elected by a vote of the plurality of shares represented at such meeting. SEA would also require each public company to adopt procedures by which a director not elected to a new term would tender his or her resignation. The board of directors would then determine what action should be taken as to such resignation and would be required to publicly disclose its decision and the rationale for such decision within a reasonable time after the certification of such election results.

## **Stockholder Access to the Proxy Statement**

SEA would also direct the Commission to adopt rules that would require that in proxy statements and proxies, the company identify and provide security holders with an opportunity to vote on candidates for the board of directors who have been nominated by holders of, in the aggregate, at least 1% of the company's voting securities for a two-year period. The rule would apply only when eligible security holders have nominated fewer than a majority of the directors then authorized to serve on the board of directors, and would specify procedures to be followed if

different security holders nominate candidates sufficient to constitute a majority of the board of directors. This rule would apply to proxy voting for meetings of security holders held on or after January 1, 2010.

## **Discretionary Votes**

SEA would, starting with proxy voting for meetings of security holders held on or after January 1, 2010, prohibit brokers from voting securities on an uncontested election to the board of directors of an company to the extent that the beneficial owner of those securities has not provided specific instructions to the broker. [This requirement has already been implemented by the Commission's adoption on July 1, 2009 of the New York Stock Exchange's modifications to Rule 452.]

## **Independent Chairman**

The new law would require that the Chairman of the board of directors be independent and not have previously served as an executive officer of the company. "Independence" under the SEA is defined as an individual who, during the previous five-year period, has not been employed by the company as an executive officer in any capacity, has not been an employee, director, or owner of greater than 10% of the beneficial securities of a firm that is a paid adviser or consultant to the company, has not been employed by a significant customer or supplier of the company, has not been a

party to a personal services contract with the company, the company's Chair, chief executive officer, or other senior executive officer, has not been an employee, officer or director of a foundation, university or other non-profit organization that receives the greater of \$100,000 or 1% of its total annual donations from the company, has not been a relative of an executive officer, has not been part of an interlocking directorate in which the company's chief executive officer or other executive serves on the board of another company employing that director, and has not been engaged in any other relationship with the company or its senior executives that the Commission determines would render that director not to be an independent director. The bill would require national securities exchanges to prohibit the listing of any company that does not comply with the requirements of this bill.

## **Executive Compensation Requirements**

SEA would call for a non-binding stockholder vote on executive compensation in any proxy in which a CD&A is required. Such provision would not apply to any company subject to a similar provisions under another federal law (such as TARP).

## **Independence of Advisory Firms**

SEA would require that any compensation advisor or advisory firm be independent of the company,

its executives and directors. “Independence” as to compensation advisors is not defined, but rather the Commission is directed to develop such regulation. These guidelines obligate the Commission to consider such matters as: (i) the extent to which an individual advisor or advisory firm provides services in conjunction with negotiating employment contracts or compensation agreements with the company’s executives, as compared to other services it provides to that company or executive; (ii) whether individual advisers are permitted to hold equity and do hold equity in the company; and (iii) whether an advisory firm’s incentive compensation plan links the compensation of individual advisers to the advisory firm’s provision of other services to the company.

#### **Clawbacks of Unearned Performance-Based Pay**

SEA would require a company’s board of directors to develop and disclose a policy for reviewing unearned bonus payments, incentive payments or

equity payments that were awarded to executive officers due to fraud, financial results requiring restatement, or other cause, and require cancellation of any unearned payments to the extent that it is feasible and practical to do so. The bill requires national securities exchanges to prohibit the listing of any company which is not in compliance with such requirements.

#### **Severance Agreements Tied to Performance**

SEA would prohibit a company’s board of directors from entering into agreements providing for severance payments to senior executives terminated due to poor performance as an executive, as determined by the board of directors. To the extent that an employment agreement allows for termination for “cause,” such poor performance would be considered as one such cause. SEA would implement the rule with “due regard” for contracts in existence on the date of enactment of such provision. SEA would require national securities

exchanges to prohibit the listing of any company not in compliance with these requirements.

#### **Improved Disclosure of Compensation Targets**

SEA would require the Commission, by rule, to require additional disclosure of specific performance targets used by companies to determine a senior executive officer’s eligibility for bonuses, equity, and incentive compensation. The Commission is also directed to consider methods to improve disclosure in cases where it is claimed that such disclosure would result in competitive harm to the company, including requirements that the company describe its past experience with similar target levels, disclose any inconsistencies between compensation targets and targets set in other instances, submit a request for confidential treatment under the rules of the Commission, or disclose the data at such time that such disclosure would no longer be considered competitively harmful.

### **Investor Protection Act of 2009**

The “Investor Protection Act of 2009” (“IPA”) was introduced by the Treasury Department on July 10, 2009. The IPA is the Obama administration’s proposal to restructure the regulation of the nation’s financial markets. With respect to executive compensation, if adopted the IPA would amend the Exchange Act to: (i) require an annual, non-binding vote on executive compensation; (ii) require a non-binding stockholder vote on golden parachute compensation in connection with a stockholders meeting being held to approve an acquisition transaction; and (iii) set independence and other standards for compensation committees.

#### **Stockholder Approval of Compensation**

The IPA, if adopted, would require that, at a meeting of stockholders (either an annual meeting or a special meeting held in lieu of an annual meeting) held after December 15, 2009, public companies would have

to provide for a separate stockholder vote to approve the compensation of executives as disclosed pursuant to the Commission’s compensation disclosure rules. The stockholder vote would not be binding on the board of directors, and would not create or imply any additional fiduciary duty

by the board. The vote would not be construed to restrict or limit the ability of stockholders to make proposals for inclusion in such proxy materials.

IPA would also require that, at a meeting of stockholders held after December 15, 2009 pursuant to

a proposed acquisition, merger, consolidation or sale of all or substantially all of the assets of the company, that company would be obligated to provide for a separate stockholder vote to approve any type of compensation (whether present, deferred, or contingent) based on or relating to such acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of the company, and the aggregate total of all such compensation that may be paid or become payable to or on behalf of such executive officer. The stockholder vote would not be binding on the board of directors, and would not create or imply any additional fiduciary duty by the board. The vote would not be construed to restrict or limit the ability of stockholders to make proposals for inclusion in such proxy materials.

The Commission would be required to issue rules to implement these requirements within one-year after the passage of the bill.

### **Compensation Committee Independence Standards**

IPA would set independence standards for members of the

compensation committee. Under IPA, all compensation committee members would be required to be independent. "Independence" is defined in the proposal to mean that such member of the compensation committee may not: (i) other than in his or her capacity as a member of the compensation committee, the board of directors or any other committee of the board of directors, accept any consulting, advisory, or other compensatory fee from the company, or fee from the company, or (ii) be an affiliated person of the company or any subsidiary thereof. The Commission would have authority to create exemptions from (ii) above, where appropriate.

Advisors to the compensation committee, including consultants, legal counsel, or any other advisor would be required to meet such standards of independence as the Commission may create.

The compensation committee would have the authority to retain and obtain the advice of an independent compensation consultant, and the compensation committee would be directly responsible for the appointment, compensation and

oversight of such consultant. IPA does not require the appointment of an independent compensation consultant, nor does it require that the compensation committee follow the advice of such consultant. Each company would also be required to disclose in its proxy whether the compensation committee retained such advisor, and if not, the reasons it did not do so.

The bill would require the Commission to study the use of compensation consultants, and the effects of such use. The Commission would be required, not later than two years after the bill is signed into law, to submit a report of such study to Congress.

The compensation committee would also have the right to retain independent legal counsel or other advisors. The provision would not require such retention, nor would it require that the compensation committee follow any such advice, and would not otherwise affect the compensation committee's ability or obligation to exercise its own judgment in the fulfillment of its duties. Companies would be required to provide for appropriate funding to pay for any such consultants or advisors.

### **Future Developments and Matters to Consider**

All public companies should be watching this legislative process carefully. In one fashion or another, whether because of a legislative change or a Commission rule, or a combination of both, it is likely that one or more of the provisions contained in these proposals will become applicable to public companies in the future. Further, some of these changes may become effective for the 2010 proxy season. While it is possible as market conditions improve and Congress focuses on other issues (such as healthcare reform) that the fervor that we have seen in the last few months to adopt federal legislation covering these issues may cool, we believe that it is still likely that some of these reforms will be enacted.

CFICFA is the only piece of legislation which has, to date, been voted on and approved, and it was approved only by the House of Representatives on a party-line vote. The Senate, which has historically been more averse to legislation that some see as limiting the ability of business to freely compete, has not yet taken up any of these legislative proposals. The

two pieces of legislation currently before the Senate, the EPSAA and the SBRA, have provisions that are less onerous than the legislative proposals that have come before the House of Representatives. Reading the tea leaves, it is very possible that the bill that passed the House may emerge from the reconciliation process in a weakened form.

We will keep you posted as these matters progress and are available to answer any questions you may have.

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The summary set forth herein is intended to be general in nature and does not constitute legal advice with respect to any particular situation. No legal or business decision should be based solely on its contents. If you would like further information or help in assessing how the proposed rules might affect your company, please contact your principal lawyer at the firm or one of the Akerman shareholders listed below:

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