

## U.S. Senate Passes Consumer Financial Protection Act of 2010

Gary P. Kreider, Mark A. Weiss, and F. Mark Reuter

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On May 20, 2010, the U.S. Senate passed the Consumer Financial Protection Act of 2010 under the Restoring American Financial Stability Act of 2010 (the "Senate Bill"). The Senate Bill contains numerous provisions impacting corporate governance and executive compensation, many relevant sections of which are summarized below.

The corporate governance and executive compensation provisions of the Senate Bill must be reconciled with similar provisions in the House financial reform legislation passed in December 2009 (the "House Bill"). Once reconciled, these provisions must be implemented by the SEC, the national securities exchanges and/or other appropriate regulatory agencies. We will monitor efforts to reconcile the Senate Bill and the House Bill and provide further updates as developments occur.

### **Corporate Governance Provisions**

#### Majority Voting in Uncontested Director Elections

The Senate Bill, unlike the House Bill, requires companies listed on a national securities exchange to adopt majority voting in uncontested director elections by requiring that any director who receives less than a majority vote in an uncontested election tender his or her resignation. The board may unanimously vote to decline to accept the resignation so long as the company discloses the reasons why it declined within 30 days of the vote.

#### SEC Authority to Adopt Proxy Access

The Senate Bill explicitly authorizes, but does not require, the SEC to promulgate rules requiring companies to include in the company's proxy materials director nominations submitted by shareholders (commonly known as proxy access). The House Bill would require the SEC to promulgate such rules. Given the many recent statements on proxy access by the SEC staff, it seems likely that this authorization would result in quick action by the SEC.

#### Broader Prohibition on Broker Discretionary Voting

The Senate Bill prohibits broker discretionary voting in connection with director elections (whether contested or uncontested), executive compensation or any other significant matter (as determined by the SEC) at all listed companies. This prohibition would operate in a similar fashion to new NYSE Rule 452, which prohibits broker discretionary voting in uncontested director elections.

#### CEO and Chairman of the Board Disclosure

The Senate Bill also requires companies to disclose in their proxy statements the reason why they chose to combine or separate the positions of CEO and Chairman of the Board, although the SEC's 2009 enhanced proxy disclosure rules already require such disclosure.

### **Executive Compensation Provisions**

#### Mandatory Say-on-Pay

The Senate Bill requires listed companies to include a separate, non-binding resolution for shareholders to vote on their executive compensation (also known as say-on-pay). The Senate Bill requires more robust proxy statement disclosure on the relationship between executive officer compensation and company financial performance, based on changes in stock

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price and on any dividends or other distributions paid to shareholders. The Senate Bill also requires listed companies to disclose in their Form 10-Ks or proxy statements the annual total compensation of the CEO, the median annual total compensation of all employees of the company other than the CEO, and the ratio between the two.

### Enhanced Compensation Committee Requirements and Disclosure

The Senate Bill includes several provisions applicable to compensation committees and requires additional proxy statement disclosure. The Senate Bill requires that the national securities exchanges adopt stricter rules regarding compensation committee member independence, including that all members of the compensation committee be independent. The Senate Bill also gives compensation committees the explicit authority to hire and oversee compensation consultants, legal counsel and other advisors, so long as such advisors meet certain independence requirements to be determined by the SEC.

### Disclosure of Hedging Transactions

The Senate Bill requires listed companies to disclose in their proxy statements whether employees or directors are permitted to trade in financial instruments designed to hedge against their holdings of company stock.

### Clawback

The Senate Bill, unlike the House Bill, requires that listed companies adopt and disclose a clawback policy covering incentive compensation paid to all executive officers which applies if the company engages in an accounting restatement resulting from material noncompliance with financial reporting requirements. In such event, the policy must require that the company recover from current and former executive officers any incentive compensation received (including options) during the three-year period preceding restatement in excess of what otherwise would have been paid to the officer.

### Notable Difference in House Bill: Golden Parachute Payments

The House Bill, unlike the Senate Bill, requires that change in control, or "parachute," payments must be submitted to shareholders for a non-binding vote.

If you would like additional information about the issues addressed in this Advisory, please contact:

Gary P. Kreider  
(513) 579-6411  
[gkreider@kmklaw.com](mailto:gkreider@kmklaw.com)

Mark A. Weiss  
(513) 579-6599  
[mweiss@kmklaw.com](mailto:mweiss@kmklaw.com)

F. Mark Reuter  
(513) 579-6469  
[mreuter@kmklaw.com](mailto:mreuter@kmklaw.com)

Michael J. Moeddel  
(513) 639-3962  
[mmoeddel@kmklaw.com](mailto:mmoeddel@kmklaw.com)

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Bryan A. Jacobs  
(513) 562-1456  
[bjacobs@kmklaw.com](mailto:bjacobs@kmklaw.com)

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