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July 22, 2009 | Posted By

New Draft Legislation Continues the Assault on Executive Compensation

As a part of the federal government's on-going efforts to reform executive compensation practices and to rein in excessive compensation, the Treasury Department drafted and released new legislation (known as the "Investor Protection Act of 2009") on July 16, 2009 concerning shareholder Say-on-Pay and the independence of compensation committees (see also the Treasury's fact sheets on Say-on-Pay and compensation committee independence). This legislation was expected given recent Treasury pronouncements on executive compensation (see our June 18, 2009 and July 17, 2009 blogs). Representative Barney Frank (D-MA), House Financial Services Chairman, declared his support for the legislation and circulated it to other members of the committee with the near-term objective of marking up the legislation this week.

The legislation as now written generally covers the following:

- Shareholder Annual Vote on Compensation – A separate non-binding shareholder vote at each annual shareholder meeting to approve the compensation of the named executive officers.

- Shareholder Vote on Golden Parachutes – A separate non-binding shareholder vote to approve any golden parachute arrangements/payments for executive officers, along with accompanying disclosures, when there is an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all of the assets of the corporation that would trigger golden parachute compensation.

- Independence of Compensation Committees – Heightened independence requirements which generally mirror the existing standards for the audit committee. These requirements would provide that to be a member of the compensation committee, a director may generally not, other than in his or her capacity as a committee member:

    - accept any consulting, advisory, or other compensatory fee from the company, or

    - be an affiliate of the company or any subsidiary.

- Compensation Consultants and Advisors

- Promulgation of standards by the SEC governing independence of compensation consultants and other compensation committee advisors.

- Authority of the compensation committee, in its sole discretion, to obtain the advice of a compensation consultant, legal counsel, and other advisors and to be directly responsible for the appointment, compensation, and oversight of such parties.

- Disclosure in the annual proxy statement of whether the compensation committee utilized the services of a compensation consultant and if not, why not.

- Provision of funding, as determined by the compensation committee, to pay compensation to consultants, legal counsel, and other advisors utilized by the committee.

Companies would be wise to stay abreast of the frequent and important developments in the law and regulations affecting executive compensation. As we commented in our July 17, 2009 blog, public companies should evaluate their executive compensation programs given the likely passage of some form of this legislation along with the SEC's proposed executive compensation rulemaking changes which will likely take effect in time for the 2010 proxy season. Companies will not want to be in the position of having to scramble to make needed modifications to their compensation practices and disclosures. Moreover, given the significant media attention and scrutiny that executive compensation is garnering, if there were unflattering disclosures in a company's annual proxy statement or if a company's shareholders were to reject the company's executive compensation programs (or even if there were was a significant proportion of "no" votes), then it would be quite embarrassing for a company and its directors. The remainder of 2009 represents a crucial time for companies with respect to making any desired or needed alterations to their compensation structures in order to be prepared for the likely implementation of new requirements.

If you have any questions regarding this information, please contact Greg Schick at (415) 774-2988.