Obama Administration Announces Support for Say on Pay Legislation

The legislative initiatives would require annual nonbinding "say on pay" votes on executive compensation and ensure the independence of compensation committees.

On June 10, 2009, the Obama administration announced support for two legislative initiatives to require annual non-binding "say on pay" votes on executive compensation and to ensure the independence of compensation committees.

Say on Pay. The first proposal would permit the SEC to require every public company to include in its annual proxy materials a shareholder resolution requesting approval or disapproval of the company's executive compensation decisions, including the disclosure in the Compensation Discussion and Analysis and the compensation tables. Although the details of the proposal are unclear, it may consist of at least two separate shareholder votes – one on the company's executive compensation program and one on the actual compensation of the company's named executive officers. Companies would also be required to give shareholders a non-binding vote to approve or disapprove golden parachute compensation relating to mergers or other change in control transactions. In addition, companies would be permitted to include additional resolutions asking for shareholder feedback on specific compensation decisions, including decisions related to various aspects or categories of executive pay.

This proposal is very similar to the say on pay provisions in the Shareholder Bill of Rights Act of 2009 recently proposed by Senators Charles Schumer and Maria Cantwell. However, it takes the additional steps of requiring a vote on the company's disclosure surrounding executive compensation (not just the compensation itself) and permitting additional shareholder votes on executive pay. If adopted, these new requirements could give activist shareholders the ability to mandate certain types of disclosure and push for an ever increasing number of votes on different aspects of compensation. Some analysts believe that, because a broad consensus for say on pay legislation already exists on Capitol Hill, the administration's support of such legislation will virtually guarantee its swift passage. It is possible that say on pay legislation in some form could be signed into law before the August recess and in effect for the 2010 proxy season.

Compensation Committee Independence. The second proposal would direct the SEC to impose new independence requirements (in addition to the current independence standards of the major exchanges) on compensation committee members, similar to those in place for audit committee members under the Sarbanes-Oxley Act. In addition, compensation committees would be given the responsibility and funding to hire their own consultants and outside counsel who would report directly to the committee and be required to meet new SEC independence standards.

Compensation Principles. The administration announced that its initiatives do not attempt to cap pay or establish precise prescriptions for how companies should set executive compensation. Instead, the administration outlined a series of broad-based principles that companies should consider when designing and implementing their executive compensation programs:

- Compensation plans should properly measure and reward performance;

- Compensation should be structured to account for the time horizon of risks;
- Compensation practices should be aligned with sound risk management;
- Companies should reexamine whether golden parachutes and supplemental retirement packages align the interests of executives and shareholders; and
- Companies should promote transparency and accountability in the process of setting compensation.

Appointment of Pay Czar. Also on June 10, 2009, the Obama administration named Washington attorney Kenneth Feinberg as the administration's "pay czar." Feinberg will serve as the Special Master for TARP Executive Compensation, having the power to, among other things:

- Determine salaries, bonuses and retirement packages for executive officers and highly paid employees at the seven firms that received the largest federal bailouts (AIG, Bank of America, Citigroup, Chrysler, Chrysler Financial, General Motors and GMAC);
- Set overall compensation levels for companies that received smaller federal bailouts; and
- Review bonuses, retention awards and other compensation paid by TARP recipients and, where appropriate, negotiate reimbursements to the Federal Government.

For more information regarding the legislative initiatives, please contact your regular Vorys attorney or one of the following:

Adam K. Brandt
akbrandt@vorys.com
614.464.6426

Michael A. Cline
macline@vorys.com
614.464.5416

Elizabeth T. Farrar
etfarrar@vorys.com
614.464.5607

James H. Gross
jhgross@vorys.com
614.464.6231

Jason L. Hodges
jlhodges@vorys.com
513.723.8590

Roger E. Lautzenhiser
relautzenhis@vorys.com
513.723.4091

Ronald (Rocky) A. Robins
rarobins@vorys.com
614.464.6223

John M. Saganich
jmsaganich@vorys.com
216.479.6120

J. Bret Treier
jbtreier@vorys.com
330.208.1015