

Executive Compensation Alert: House Passes Executive Compensation Bill

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On August 3, the House, led by Representative Barney Frank, passed the Corporate and Financial Institution Compensation Fairness Act of 2009 (H.R. 3269), which applies to *public* companies and would (i) give shareholders a “say on pay” by providing a nonbinding, advisory vote on the company’s pay practices for top executives (ii) give shareholders a nonbinding, advisory vote on “golden parachute” compensation in connection with a proxy filing for a change in control, (iii) provide for greater independence of compensation committees and their consultants and advisors and (iv) add additional reporting and compensation limitations to financial institutions with assets over \$1 billion. The Securities Exchange Commission (the “SEC”) could exempt certain smaller public companies from the “say on pay” provisions. The bill will now move to the Senate.

We expect that the provisions of this bill will be substantially altered before a final executive compensation bill becomes law. However, it is our expectation that the provisions described below will in some substantial part be contained in final legislation. It is unlikely that the provisions of any final legislation will be effective for the 2010 proxy season.

Say on Pay

The “say on pay” provision would allow shareholders to have an annual nonbinding vote on the executive compensation matters disclosed in the proxy statement, (including the Compensation Discussion and Analysis (“CD&A”), the compensation tables and the compensation committee report). The nonbinding shareholder vote is not intended to create additional fiduciary duty for the board (although a company that ignores the vote would need to explain the decision), or overrule the board, and should not limit the ability of shareholders to make proposals for inclusion in proxy materials. This provision would apply six months after final regulations are issued. **Golden**

Golden Parachute Compensation

The “golden parachute” compensation provision would allow shareholders to have a nonbinding vote on executive compensation that is related to a change in control (including an acquisition, merger or sale of company assets). The proxy or consent solicitation materials sent in connection with the change in control must provide a clear and simple summary of the agreements or promises to provide compensation to the executive officer upon a change in control, including the amount and type of such compensation, that have not been subject to a shareholder vote under the annual “say on pay” provision, and provide the shareholders with a *separate* nonbinding vote with respect to such payments. Again, this nonbinding vote should not create additional fiduciary duty (subject to the caveat referred to above), overrule the board, or limit shareholder proposals related to executive compensation. Previously approved arrangements will not be required to be voted on again. This provision would apply six months after final regulations are issued.

Compensation Committee and Advisor Independence

The provisions regarding compensation committee independence have several major facets for ensuring these committees are independent of management. All members of the board’s compensation committee must be “independent,” meaning they may not receive any consulting, advisory, or other compensatory fees from the company, other than in their capacity as a member of the board of directors or a member of a board committee. The compensation committee must have the authority, funding and sole discretion to retain and obtain the advice of a compensation consultant or other similar advisor.

A compensation consultant or other similar adviser to the compensation committee will be required to meet independence standards, to be established by the SEC, that are competitively neutral among categories of consultants and preserve the ability of compensation committees to retain the services of members of any such category. Note that the final House bill appears to have eliminated this independence requirement as to lawyers advising the compensation committee. The compensation committee will be required to disclose in its proxy whether it obtained the advice of an independent compensation consultant; however, the compensation committee is not required to take the advice or recommendations of any compensation consultant or other similar advisor. Note, the final House bill eliminated the requirement to specify why an independent consultant was not retained.

Financial Institution Provisions

Financial institutions with assets in excess of \$1 billion would be required to disclose to federal regulators the details of incentive-based compensation arrangements for officers and employees and would be limited in providing incentives that could result in unreasonable incentives for officers and employees to take undue risks that could threaten the soundness of the financial institutions or that could have serious adverse effects on economic conditions or financial stability.

We will keep you apprised of developments in this legislation. For more information on this, or related matters, you may wish to contact any attorney in the Executive Compensation and Employee Benefits Group:

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