May 22, 2009

Shareholder Bill of Rights Act of 2009 Introduced in Senate

On May 19, 2009, as part of the ongoing movement to promote corporate governance reform, Senator Charles Schumer introduced the Shareholder Bill of Rights Act of 2009 (S. 1074), which was referred to the Senate Committee on Banking, Housing and Urban Affairs.

The bill states that its intention is "to provide shareholders with enhanced authority over the nomination, election, and compensation of public company executives" (presumably "nomination" and "election" refer to directors). The bill includes among its findings statements that management and boards of directors at many companies failed to act in the best interest of shareholders by not ensuring that compensation policies were linked to the company's profitability and long-term health and, as a result, trillions of dollars in shareholder value was lost.

Although the fate of the bill is uncertain, we are issuing this letter now to alert readers about important provisions in legislation affecting executive compensation that may be enacted this year. We anticipate that other bills with significant executive compensation provisions will be introduced this year, and we will keep you updated on major developments such as passage of a bill by the Senate or the House of Representatives or a bill's approval by a Senate or House committee.

The bill, which applies only to public companies, has six key provisions:

1. Companies must give shareholders an annual non-binding vote on executive compensation as disclosed in the proxy statement pursuant to SEC compensation disclosure rules (i.e., "Say on Pay")
   - Say on Pay is currently required for companies that received financial assistance under the Troubled Asset Relief Program (TARP) and filed their proxy statements after February 17, 2009
   - In the prior Congress Say on Pay legislation was passed by the House of Representatives, and Say on Pay provisions were included in Senate bills introduced by then Senators Clinton and Obama
   - A number of non-TARP companies have announced voluntary adoption of Say on Pay[1]
2. Companies must give shareholders a separate non-binding vote in an acquisition, merger, or asset sale on any type of compensation for executives (e.g., severance and other special compensation) that is based on or otherwise related to the transaction (often referred to as "golden parachute compensation"), unless it has been subject to a prior Say on Pay vote

[1] For a listing of companies that have done so, refer to our letter of April 28, 2009, "Executive Compensation 2008 – the Year in Review & the Road Ahead," http://www.fwcook.com/alert_letters/04-28-09_Exec_Comp_2008-The-Year-in-Review-The-Road-Ahead.pdf; since that date Apple and Valero Energy have also agreed to hold Say on Pay votes.

3. The chairperson of the board of directors must be an independent director (i.e., the CEO would not be able to serve as chairperson)
4. The board of directors must appoint a risk committee of independent directors to be responsible for the establishment and management of the company's risk management practices
5. All directors must be elected annually by a majority of the votes cast in uncontested elections (by a plurality if there are more nominees than directors), and directors who do not receive a majority of the votes cast in an uncontested election must resign
6. The SEC is directed to establish rules relating to the use of company proxy statement materials by shareholders to nominate directors (subject to a limitation that the rules cannot provide for such use unless the shareholder or group has owned at least one percent of the company's voting stock for at least two years)

    — On May 20, 2009, the SEC voted to propose proxy statement access rules for shareholder nomination of up to 25% of a company's directors that would require ownership of between one and five percent of the company's voting stock, depending on the size of the company, for at least one year

In general, companies would have one year from the date the bill is enacted to comply with the requirements of the bill.

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This letter is intended to alert compensation professionals about developments that may affect their companies and should not be relied on as providing specific company advice. General questions about the subjects in this letter may be directed to Silvana Nuzzo at 212-299-3714 (sanuzzo@fwcook.com) or Richard Alpern at 212-299-3599 (rlalpern@fwcook.com). Copies of this letter and other published materials are available on our website at www.fwcook.com.