

**Executive Compensation  
Update Webinar  
October 18, 2011**



**AMERICAN BENEFITS**  

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**COUNCIL**

# Agenda

(times are approximate)

- 2:00 p.m.** Background/Introduction
- 2:15 p.m.** Recent litigation arising from “say on pay” and proxy statement disclosures;
- 2:30 p.m.** Implementation of the Dodd-Frank Act’s executive compensation provisions
- 2:45 p.m.** “Say on pay” and “golden parachute” shareholder vote issues
- 3:00 p.m.** Executive severance issues under Section 409A of the Internal Revenue Code
- 3:15 p.m.** Q&A

**NOTE:** These slides are also available on the front page of the Council website: <http://www.americanbenefitscouncil.org/>

# Litigation Update – Executive Compensation

- Delaware – Goldman Sachs’ directors cleared
- Georgia – Beazer Homes’ directors cleared
- Ohio – Cincinnati Bell’s directors ... not cleared
- Primary Sources for Complaints:
  - Failed Say on Pay
  - Failed Pay for Performance
  - New Plans and Code 162(m) or Other Defects in Proposal

# Dodd-Frank Update

- SEC delay of guidance on key executive compensation requirements under Dodd-Frank
- Legislation to repeal pay ratio disclosure
- "Say on pay" implementation update

# SEC Delay of Guidance on Key Executive Compensation Requirements

- SEC has proposed rules for some Dodd-Frank executive compensation provisions
- "Say on Pay" requirement applicable for the 2011 proxy season
- On July 29, 2011, SEC delayed timetable for adopting rules on certain other requirements
- New adoption dates for delayed rules pushed back to January-June 2012 period
- As result, four other key requirements likely not applicable until after the 2012 proxy season

# Pay for Performance Disclosure

- Requires information in annual proxy disclosures showing relationship between executive compensation actually paid and financial performance of company
- Must take into account any changes in value of company shares, dividends and distributions

# Clawback Policy Requirements and Disclosure

- Companies required to develop and implement "clawback" policies (and disclose policies) with respect to incentive-based compensation (including stock options) in case of accounting restatements due to material noncompliance with financial reporting requirements under securities laws during 3-year period prior to date of required restatement
- Policies will apply to all current and former executive officers (not just the named executive officers)
- Must require return of amounts in excess of what would have been paid under accounting restatement

# Hedging Policy Disclosure

- Companies required to disclose information regarding whether employees or members of board are permitted to purchase financial instruments (e.g., collars or equity swaps) designed to hedge or offset declines in market value of equity securities granted to or held by employees or directors.



# Pay Ratio Disclosure

- Companies will be required to disclose in any filing:
  - Median annual total compensation of all employees except the CEO
  - Annual total compensation of the CEO
  - Pay ratio of CEO's compensation to median compensation of all other employees
- Statute requires total annual compensation amounts to be calculated using SEC's complex proxy rules for top-5
  - Includes detailed requirements on reporting of non-cash compensation
  - Use of rules in effect on July 20, 2010

# Pay Ratio Disclosure

- Would involve enormous undertaking by each company
- SEC proxy rules calculation generally performed manually for each NEO
  - Various sources of information required
  - Different standards used to calculate non-cash compensation
- Ambiguities with respect to compensation of overseas employees
- Requirement has received significant criticism and legislation has been introduced to repeal it

# Legislation to Repeal Pay Ratio Disclosure

- In June, House Financial Services Committee approved H.R. 1062, the "Burdensome Data Collection Relief Act"
- Bill would repeal pay ratio disclosure requirement
- Four Committee Democrats joined all present Committee Republicans in voting for bill
- Ranking Democratic Committee Member Barney Frank (D-MA) voted against H.R. 1062, but offered an alternative amendment to limit ratio requirement to domestic employees and cash compensation
- Unclear when or if full House might consider H.R. 1062

# Recap: Say on Pay Season #1

- Say on Pay Advisory Votes
  - Say on Frequency
  - Insights from Voting Results
- Say on Parachute
  - Disclosures
  - Insights from Voting Results

# Section 409A Update

- Executive Severance Issues
- Corrections
- Plan Terminations and Conversions

# 409A Scope

## Arrangements Potentially Subject to 409A

- Nonqualified deferral arrangements
- SERPs
- Stock-based arrangements
- Annual and long-term bonus plans
- Severance and CIC arrangements
- Employment agreements
- Retention bonuses

# 409A Exemptions

- Exemptions from 409A coverage
  - Qualified Retirement Plans
  - Nontaxable health and welfare plans
  - Equity compensation
  - Short-term deferrals
  - Certain severance arrangements

# 409A Rules

- Deferral election rules
- Distribution requirements
  - Payable on certain events (e.g., separation from service)
  - Hard to revise original payment terms
  - Six-month delay for key employees
- Tax penalty for executive on failure
  - Immediate tax plus 20% penalty



# Executive Severance

- Fitting arrangements into 409A exemptions
  - Exemptions for involuntary plans
  - Good reason payment triggers
- If not exempt, documents need to be compliant
- Treatment of taxable medical and other post-employment benefits

# Executive Severance

- Substitution
  - Replacing amounts subject to 409A with new benefits (e.g., severance, RSUs)
  - Problem when it results in change to payment terms
- Post-termination services
  - Can jeopardize whether exec has had a “separation from service”
- Election to defer severance

# Other 409A Issues

- Corrections
- Plan Terminations and Conversions

# Questions



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