Client Alert

Shareholder Attempts to Add Clawback Provisions Fail

In a recent trend, shareholders (primarily led by union pension funds) of large public companies have been pressuring compensation committees to add clawback provisions to executives' contracts. Shareholders site previous examples of executives causing undue financial or reputational harm to their organizations as the reason for the need to add these provisions to compensation agreements.

Outcome

There have been many instances of shareholder attempts to add clawback provisions to executive contracts, the two highest profile coming from Alphabet, Inc. and Mylan N.V. In each case, the proposal was brought to a vote either in the annual shareholder meeting or via proxy cards and in each case the proposal was voted down. Prevailing wisdom says this is due to compensation committees taking responsibility for malfeasance of executives and recommending the proposals be voted down.

Solution

Under a deferred compensation arrangement, executive performance-based pay remains on the company balance sheet without the executive having access until a future date. Deferred Compensation plan documents can even be drafted to include clawback or withholding language to recoup compensation in the types of situations described in shareholder proposals above. These sorts of arrangements afford the compensation committee tremendous flexibility in deciding when and if to make cash distributions to executives, providing a device with which they can retain pay autonomy if an executive causes harm to the company.

If you would like to explore the ways in which a non-qualified plan can protect your company, Mullin Barens Sanford Financial can help navigate these complex issues. Please reach out to Nicko Burnett or Mike Pollack with any specific questions you may have.

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