THE 'PERK' THAT RESPONSIBLE COMPANIES CANNOT AFFORD TO ELIMINATE

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An interesting convergence of regulatory, political, and economic forces over the past several years has generated a recent crush of downward pressure on executive pay and benefits. One need look no further than the daily newspaper to observe that this phenomenon now infuses the environment in which public and private companies of all types and sizes must operate. While some companies nevertheless have refused to revisit the manner in which their executives are compensated, a recent surge of extraordinarily strong anti-executive sentiment and activity might finally make deep cuts to executive compensation all but inevitable for most public, and many private, companies.

Yet, there is at least one executive benefit that should not be cut, particularly in the context of today's culture of improved corporate governance, compliance, and accountability. To the contrary, this benefit—the provision of company-sponsored financial counseling services[2]—not only ought to be preserved but may be *added and expanded* by those companies seeking to ensure their shareholders, customers, and employees that they have taken all of the necessary and appropriate steps to keep their executives in compliance and focused on corporate best practices and execution.

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EXECUTIVE PAY PACKAGES UNDER SIEGE

Particularly during the past fifteen years, there has existed an intensifying siege on executive pay packages. On a regular basis, executives are vilified for receiving steep and disproportionate compensation and benefit packages—often while their companies experience conversely poor performance—and they are criticized not only by the media but also by politicians, labor unions, shareholder groups, investment professionals, competitors, and even their own employees.

In some cases this now commonplace negative sentiment is well warranted, as we recently have witnessed some of the most egregious behavior by executives in the history of corporate America.[3] In many more circumstances, however, honest, hard-working corporate executives have become the victims of a widespread hysteria.

The chorus of criticism has been accompanied by an on-

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slaught of broad-ranging regulatory initiatives. On the tax front, for example, in 1993, the federal government enacted Section 162(m) of the Internal Revenue Code, which requires public companies to obtain shareholder approval and comply with several other requirements in order to claim tax deductions for certain executive compensation in excess of $1 million per year.[4] This provision supplements the formidable arsenal of weapons now available to the Internal Revenue Service to combat potentially excessive executive pay, including "reasonable compensation" rules,[5] recently enhanced "golden parachute" regulations,[6] and new tax withholding rules.[7]

Most recently, the federal government may have outdone itself when it adopted and implemented regulations under Section 409A of the Internal Revenue Code. This new set of rules represents what some might call a sneak attack on deferred compensation and similar arrangements (which generally favor highly paid employees) with rules that are so complicated, opaque, and onerous that they often create a trap for the unwary, ensnaring companies and individuals who may not even understand their transgressions.[8]

Of course, the tax front is only one small part of the recent war on executive compensation. In a more direct assault on traditional executive benefits, Congress enacted the Sarbanes Oxley Act of 2002, which, among other things, now prohibits public companies from directly or indirectly making loans to their executives. In this way, the government quickly and effectively wiped out a previously common benefit offered to high-level executives of many public companies.[9]

On the financial accounting side, the Financial Accounting Standards Board has also entered the fray by mandating "option expensing" under FASB Statement No. 123R, which largely became effective in 2005. These rules require companies to account for the granting of stock options (and similar grants) as an immediate expense, thereby reducing their reportable net earnings. This significant departure from the prior rules has forced many companies to reconsider or even eliminate their option granting policies and, at a minimum, has had a chilling effect on the compensatory practice that created so many millionaires during the past decade.[10]

More recently, the SEC continued the effort in the form of enhanced shareholder disclosure rules. In 2006, the SEC promulgated rules that now require public companies to disclose substantial additional information with respect to their compensatory practices. These rules also require that aggregate perquisites granted to executives in excess of $10,000 must now be disclosed. Previously, there had been a significantly higher $50,000 limit in place.[11]

COMPANY-SPONSORED FINANCIAL COUNSELING

Not surprisingly, the foregoing trends have caused many companies to reconsider and ultimately reduce their executive benefit packages. Yet, while the highly charged and regulated environment described above has killed off many of the benefits previously enjoyed by executives (or has at least endangered them), it also has contributed to a large discussion of one specific type of benefit—company-sponsored financial counseling. Indeed, in part *because* of the highly charged and regulated environment, it is quite possible that the provision of this benefit could soon become a *necessity* among the country's best-run companies.

In its simplest form, company-sponsored financial counseling is the procurement by a company of financial counseling or planning advice—usually by an independent provider—for the benefit of the company's employees. Many employees already enjoy a lesser form of this benefit, as larger companies regularly arrange for employees to receive rudimentary retirement, asset allocation, and similar advice from third-party providers.

Company-sponsored financial counseling for executives and other high-level employees, however, is something entirely different—if only by virtue of its sheer magnitude and intensity. Specifically, this benefit typically involves a company paying an independent advisor to provide comprehensive, intensive, and ongoing advice and implementation services to high-level employees in all or some of the following areas:

- **Asset allocation:** creating and implementing plans for dividing investment assets into different classes, considering time horizon, income needs, long- and short-term goals, risk, and potential return
- **Investment planning:** creating, implementing, and maintaining specific investment strategies for achieving specific goals; investment plan-

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ning may also include diversification, hedging, and other strategies for dealing with highly concentrated stock positions in the context of securities law restrictions and company stock retention requirements

- **Retirement planning:** identifying retirement objectives and monitoring progress made towards achieving them
- **Income tax planning:** utilizing strategies for lawfully minimizing federal and, if applicable, state and local income taxes
- **Tax return preparation:** assisting with most aspects of tax compliance, including income and gift tax return preparation, quarterly estimated payment requirements, as well as recordkeeping assistance[12]
- **Estate planning:** developing comprehensive estate planning strategies, addressing matters such as providing for family members, charities, and other beneficiaries upon death, intergenerational planning, life insurance, the utilization of trusts and similar vehicles (e.g., family limited partnerships and GRATs), guardianship decisions, the use of durable powers of attorney and healthcare proxies, and lawful estate and gift tax reduction techniques[13]
- **Charitable gifting strategies:** identifying charitable goals and providing assistance with achieving them in a tax-efficient, strategic manner, including consideration of private foundations, donor-advised funds, charitable lead trusts, charitable remainder trusts, and outright charitable bequests
- **Employee benefit plan analysis:** analyzing all available employee benefits, including deferred compensation arrangements, and adopting strategies to maximize beneficial utilization of these plans
- **Equity incentive/stock option planning:** tax and investment planning for the exercise of stock options (including the timing and method of exercise), as well as the purchase and sale of restricted stock, restricted stock units, and other types of equity awards; in some cases, equity incentive planning may include assisting in the design and implementation of "10b-5" trading plans and ensuring compliance with internal policies and restrictions
- **Debt management:** managing and minimizing personal, business, and investment debts but also obtaining and utilizing strategic, responsible, and tax-efficient borrowing when appropriate
- **Education planning:** creating and implementing strategies for addressing educational needs of dependents and other family members
- **Risk management:** advising on the proper use of life, disability, casualty and property, excess liability, and other insurance to manage risks and working with agents and underwriters to obtain appropriate policies
- **Cash flow analysis:** analyzing and planning for long- and short-term individual and family cash needs

In most cases, a company that chooses to provide financial counseling for its executives will not procure *discretionary* investment management advice (as opposed to more general investment planning or asset allocation advice) for them. Thus, an executive generally still will have to procure his or her own implementation advice and services (*e.g.*, individual stock or bond selection). Some full-service advisors nevertheless are capable of providing these investment management services, alongside and coordinated with their offerings of financial counseling services, and will enter into separate agreements to provide these investment management services with executives who require them.

Additionally, many companies that offer their employees a financial counseling benefit will do so only through so-called "fee-only" providers that do not sell insurance, annuities, mortgages, or other financial products. In this way, a company can ensure that its executives are receiving unbiased, independent advice from an advisor whose compensation is in no way based on the sale of products and instead is based solely on the best interests of the executives.

As to the manner in which company-sponsored financial counseling is rendered, the provider generally will assign a team of financial counselors to work with each executive. The counselors first will spend significant amounts of time and resources learning not only about the company's benefit plans but also about the executive's specific, individual

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needs and objectives. They then will formulate a strategy for ensuring that each of the above-listed areas of concern is addressed in a comprehensive, coordinated, and complete manner that specifically benefits the executive. After the executive approves the strategy, the counselors usually will assume responsibility for implementation, meeting and conferring with the executive many times over the course of a year.

In general, a company that chooses to provide this benefit will do so through a single provider or through a group of providers that can deliver the benefit in a consistent manner. The company may also choose to offer varying levels of the benefit to its employees, depending on their position within the corporate hierarchy. Some companies will provide intensive individual counseling for their most senior executives, while providing a modified benefit, perhaps including group seminars, for other executives and higher-level employees.

WHY COMPANY-SPONSORED FINANCIAL COUNSELING HAS BECOME A NECESSITY

In light of the above discussion, the obvious question is how the concept of company-sponsored financial counseling could become so important in an environment that has become entirely hostile to executive compensation and benefits. The answer is multi-faceted, requiring at least five layers of observation and analysis.

1. Professionally advised executives are less likely to engage in reckless or negligent behavior that can be damaging not only to themselves but also to their companies.

If reckless behavior by executives is a symptom of the ills facing corporate America, then company-sponsored financial counseling may be the cure. Stated simply, well advised executives are far less susceptible to making mistakes—accidental or not so accidental—regarding securities, tax, corporate, and other laws.

Properly counseled executives should have a better understanding of securities law restrictions such as the insider-trading rules, the applicable filing and disclosure rules, or the myriad rules promulgated under and in conjunction with the Sarbanes Oxley Act. They should also have a better understanding of income, gift, estate, and generation-skipping transfer taxes, not to mention all of the other regulations with respect to which they are so heavily scrutinized. Fully understanding these rules is the first step toward avoiding violations that will cause serious, irreversible harm not just to the individual executives but also to their employers.

The safeguards provided by good financial counselors, however, should extend even further than mere education. Good counselors will take steps to implement, monitor, and, to the extent feasible, coordinate an executive's legal compliance plan and efforts.[14] In this manner, the executive receives not just education but also a friendly guardian who can provide regular, pragmatic guidance regarding the increasingly complex compliance rules faced by the executive.

In this regard, companies that wish to avoid the problems previously faced by companies whose executives have strayed from the path of legal compliance would do well to consider a company-sponsored financial counseling program. Yet, there is another type of destructive behavior that corporate executives often display—poor personal financial judgment—and that too can be avoided with good financial counseling. Self-destructive financial decisions made by key executives almost invariably will cause harm not just to the individual but also to the company, as the individual becomes more likely to compensate for his or her bad decisions with acts of increasing desperation or, at the very least, increasing levels of risk.

The very premise of company-sponsored financial counseling is that the company is hiring professional advisors to ensure that its executives make good personal decisions regarding their financial affairs. In turn, by making good personal decisions, an executive is less likely to engage in questionable practices, ranging from taking on excessive risk designed to create inflated short-term gains to engaging in criminal behavior such as embezzlement or insider trading.

2. Executives that have their own affairs in order are better able to focus on their jobs and on their corporate responsibilities.

Another side effect associated with a lack of sound personal financial advice is that poorly advised executives, as well as executives who receive no advice, are, by necessity, far more likely to focus a disproportionate amount of their time and efforts on their own financial affairs. In turn, they may be less focused on their efforts on behalf of the company (*i.e.*, their job), and their performance as executives may suffer.

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An executive who receives financial counseling should have to spend relatively little time managing his or her own financial affairs, as that responsibility largely will have been delegated to the counselors. Under the best counseling programs, the executive will receive personal balance sheets, cash-flow projections, retirement and education projections, and tax projections on a regular basis. The executive's investment plan, retirement plan, and estate plan will be structured with a long-term outlook and in a coordinated fashion, providing stability and avoiding the need for excessive amounts of the executive's time and attention. In most cases, once these plans have been set up, the executive spends time only on maintaining and following the plans—a much less labor-intensive and time-consuming process.

3. Independent advice can mitigate the conflicts that inherently exist when executives engage in transactions involving their companies.

Many companies do not pay sufficient attention to the fact that there are often conflicts of interest between a company and its executives. An executive's decision to exercise an option on his or her employer's stock, for example, or to sell shares of that stock may be a decision in which the executive and the employer have competing, or at least differing, interests.

Another common example of this type of conflict arises in the context of an executive's decision as to whether to make a "Section 83(b)" election with respect to company stock awards. Such an election may very well provide significant tax advantages to the executive, but it could also cost the company the loss of substantial future tax deductions for executive compensation payments.[15]

While, in the context of company-sponsored financial counseling, the advisor typically is paid by the company, the advisor's charge is to represent the individual executive. Accordingly, the advisor can provide independent advice to the executive that is intended to protect and benefit the executive. In this way, the company can avoid circumstances in which it is advocating a position that favors the company at the potential expense of the executive.

4. At a time when there is pressure to reduce executive benefits, company-sponsored financial counseling is an efficient way to maximize value bestowed upon executives.

On a relative basis, company-sponsored financial counseling is inexpensive. Fees typically vary, depending on the level of engagement, but, in most cases, they are less than the fees charged by advisors for similar services offered on an individual basis. A reason for this favorable disparity is that firms offering company-sponsored financial counseling are able to capitalize on economies of scale because they are advising several clients who share some similar circumstances. An advisor that counsels multiple employees from the same company will be familiar with the company's benefit offerings, deferred compensation arrangements, and in-house policies and restrictions and will not have to reacquaint itself with these circumstances each time it is engaged by an employee. The resulting efficiencies can be passed on to the company in the form of lower fees for company-sponsored financial counseling.

Perhaps more importantly, companies that spend significant sums of money on other benefits often do so without even realizing their full value. One of the most obvious reasons for this phenomenon is that the employee recipients of those benefits do not fully understand or utilize them. Stated simply, a company that offers financial counseling to its employees is most likely to maximize the value of its other benefits because its employees will now be in a better position to understand those benefits. Therefore, by offering a financial counseling benefit, which is itself relatively inexpensive, a company can generate an overall "goodwill effect" by ensuring that the remainder of its spending on benefits is appreciated to the maximum extent possible by its employees.

5. By offering company-sponsored financial counseling to its employees, a company is most likely to ensure that its executives are receiving effective counseling on a consistent basis.

The foregoing discussion could lead to several questions regarding company independence or neutrality with respect to its employees. If financial counseling is so effective, then could not a company just encourage its employees to seek out and find their own counselors? Why should the company get involved in the selection of counselors? If the company is serious about getting financial counseling for its executives, should it just provide stipends or allowances?

The answers to these questions will depend on the particu-

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lar company's circumstances, but it is worth making several observations at this point. First, the act of merely encouraging busy executives to find their own financial counselors is unlikely to yield successful results. For most executives, the cost of financial counseling is not an issue. The issue is one of time and energy. Most executives will not proceed with all of the research and diligence necessary to find a financial counselor because they simply do not feel that they have the time to do so. Unfortunately, this usually means that they never will receive any financial counseling.

By getting involved in the process, the company achieves at least two important objectives. First, it encourages easy engagement and participation by the executives. Second, it ensures consistency of services, quality of advice, and results.

Moreover, companies that offer stipends or allowances almost invariably end up with executives who use that money for overly expensive tax return preparation or other isolated services but who fail to capture the full benefits of comprehensive, long-term financial counseling. By involving itself in the due diligence on and choice of counselors, as well as the selection of services to be offered by the counselors, the company ensures that its employees will receive the best possible advice in a consistent and efficient manner that is beneficial not only to the employees but also to the company.

CONCLUSION

As companies continue to seek out ways to make their executives more effective, build out compliance safeguards, improve efficiencies, and function as responsible corporate citizens, they should consider utilizing company-sponsored financial counseling as a means to achieving all of those objectives. Ironically, during a time in which so much pressure exists to cut executive benefits, the most responsible companies probably will continue to offer and even expand the benefit of company-sponsored financial counseling. ■

NOTES

1. The authors are all partners or employees of The Colony Group, LLC, an SEC Registered Investment Advisor that provides financial counseling services nationally through a division of The Colony Group called Colony Wealth Management. The Colony Group also provides asset management services through a division of The Colony Group called Colony Investment Management.
2. Note the use of the term "financial counseling" throughout this article. "Financial counseling" differs from "financial planning" in that financial counseling involves the creation and long-term, regular implementation and, if necessary, modification, of a financial plan. In contrast, "financial planning" is the mere creation of a plan that may or may not be fully implemented and that may, over the course of time, become obsolete.
3. See Klinger and Sklar, "Titans of the Enron Economy: The Ten Habits of Highly Defective Corporations" (2002) (describing "the cold betrayal of employees by rapacious executives amassing personal fortunes as the company's fortunes unraveled").
4. See I.R.C. § 162(m) and Treas. Reg. § 1.162-27.
5. See I.R.C. § 162(a) and Treas. Reg. § 1.162-7 (allowing for the deductibility of compensation expenses only if the compensation is "reasonable").
6. See I.R.C. § 280G and Treas. Reg. § 1.280G-1.
7. See I.R.C. § 3402 and Treas. Reg. § 31.3402(g)-1 (providing for withholding at higher rates for "supplemental wage" payments in excess of $1 million).
8. See I.R.C. § 409A and the Treasury Regulations thereunder.
9. See H.R. Rep. No. 107-610 (2002), § 402.
10. See Statement of Financial Accounting Standards No. 123 (revised 2004).
11. See SEC Release No. 33-8732A (2006).
12. Depending on the capabilities of the advisors, tax return preparation is sometimes not included as part of the company-sponsored financial counseling benefit, in which case the financial counselors must work with the employees' outside accountants, who, in turn, will prepare the returns.
13. Note that unless an advisor is affiliated with a law firm or other group of lawyers, the actual drafting of legal documents and the performance of any legal work generally will not be included as part of the financial counseling benefit. For this reason, some companies, provide a supplemental stipend to cover the drafting of estate planning documents.
14. For example, some counselors may periodically reconcile the executive's company stock-holding records with the company's SEC Form 4 filings.
15. See I.R.C. § 83 and the Treasury Regulations thereunder.

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