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Employment, Labor & Workforce Management

ACT NOW ADVISORY

EEOC's Pay Data Collection Requirement Suspended

August 31, 2017

By Susan Gross Sholinsky, Peter M. Stein, John F. Fullerton III, and Judah L. Rosenblatt

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On August 29, 2017, the U.S. Office of Information and Regulatory Affairs ("OIRA"), a division of the U.S. Office of Management and Budget, informed the U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") that it is implementing an immediate stay and initiating a review of the effectiveness of the pay data collection aspects of the revised Equal Employer Information Report ("EEO-1 report").

Last year, as noted in our previous *Act Now* Advisory, the EEOC published regulations that amended the EEO-1 report to require federal contractors and private employers with at least 100 employees to include pay and hours worked data by race, ethnicity, and sex, grouped by occupational category, by March 31, 2018.

According to the U.S. Chamber of Commerce, OIRA cited concerns with cost, utility, and confidentiality as the basis for its decision to suspend part of the revised EEO-1 report.

OIRA's action does not completely rescind the revised EEO-1 report, but it does relieve employers of their obligation to file pay and hours worked data. The previous EEO-1 form, which collects data on race, ethnicity, and sex by occupational category, remains in effect, and employers should plan to comply with this requirement by the previously set filing date of March 31, 2018.

Despite OIRA's action, acting EEOC Chair Victoria Lipnic stressed that the EEOC's commitment to fighting wage inequality remains a high priority for the Commission. Lipnic added that the stay of last year's regulation provides the Commission with "an opportunity to address the wage gap in a holistic way."

The EEOC will be publishing further details about what actions it will be taking, as well as any future deadlines and timelines, in the *Federal Register*.

What Employers Should Do Now

- As with years past, plan to collect and file information on employees' race, ethnicity, and sex by occupational category, by the March 31, 2018, deadline (not the historical deadline of September 30).
- For 2017, use employment data from any pay period between October 1 and December 31, 2017, instead of the historical window of July 1 through September 30.
- Consider suspending any plans to collect *pay and hours worked data* by race, ethnicity, and sex but continue to monitor for updates with respect to OIRA's review.

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For more information about this Advisory, please contact:

Susan Gross Sholinsky
New York
212-351-4789
sgross@ebglaw.com

Peter M. Stein
Stamford
203-326-7420
pstein@ebglaw.com

John F. Fullerton III
New York
212-351-4580
jfullerton@ebglaw.com

Judah L. Rosenblatt
New York
212-351-4686
jrosenblatt@ebglaw.com

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New York City Is Poised to Prohibit Inquiries Into Salary History

April 7, 2017

By Susan Gross Sholinsky, Nancy L. Gunzenhauser, Ann Knuckles Mahoney, and Judah L. Rosenblatt

On April 5, 2017, the New York City Council passed a bill ("Bill") that would amend the New York City Human Rights Law ("NYCHRL") to prohibit all New York City employers[1] from (i) requesting a job applicant's salary history or (ii) using a job applicant's salary history to determine the salary, benefits, or other compensation for such applicant during the hiring process, including the negotiation of a contract. Mayor Bill de Blasio is expected to sign the Bill, which would become effective 180 days thereafter. New York City follows Philadelphia[2] and Massachusetts[3] in seeking to improve pay equity by banning inquiries into salary history on the basis that such inquiries perpetuate the wage gap based on historical pay discrimination.[4]

Prohibited Practices and Definitions

Under the Bill, it would be unlawful for an employer to inquire about the salary history of an applicant for employment. "Salary history" is defined broadly and includes wages, benefits, or other compensation. "Salary history," however, does not include any objective measure of the applicant's productivity, such as revenue, sales, or other production reports. Under the Bill, the term "to inquire" is defined broadly to mean "to communicate any question or statement to an applicant, an applicant's current or prior employer, or a current or former employee or agent of the applicant's current or prior employer, in writing or otherwise."

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[1] Since December 4, 2016, public employers in New York City have been prohibited from making such inquiries.

[2] The Chamber of Commerce for Greater Philadelphia filed a lawsuit on April 6, 2017, challenging this law, which is set to take effect on May 23, 2017.

[3] Aside from these jurisdictions, several other states, cities, and the District of Columbia have proposed similar laws. A similar law was previously proposed in the U.S. Congress and is expected to be reintroduced later this year.

[4] Indeed, Letitia "Tish" James, New York City Public Advocate and sponsor of the Bill, recently noted that "[b]eing underpaid once should not condemn you to a lifetime of inequity."

Employers would also be prohibited from conducting a search of publicly available records or reports to seek salary history. The Bill applies to private and public employers of all sizes.

Permissible Activities

Importantly, an employer may still:

- inform the applicant in writing or otherwise about the position's proposed or anticipated salary or salary range;

- engage in a discussion with the applicant about his or her *expectations* with respect to salary, benefits, and other compensation;

- inquire about unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from his or her current employer;

- consider the prior salary of a current employee who is seeking an internal transfer or promotion; and

- perform a background check, so long as:

    - the check does not include a request for, or confirmation of, prior salary history, and

    - the employer does not, if the background check does disclose such information, utilize same for purposes of determining the salary, benefits, or other compensation of the applicant.

Voluntary Disclosure

Under the Bill, if an applicant voluntarily *and without prompting* discloses salary history information to an employer, then the employer could consider salary history in determining salary, benefits, and other compensation for such applicant. The employer could also verify the applicant's voluntarily disclosed salary history. However, the employer should ensure that any disclosure of salary information is truly voluntary and unprompted.

Exemptions

The restrictions under the Bill would not apply if federal, state, or local law specifically authorizes the disclosure or verification of salary history for employment purposes, or specifically requires knowledge of salary history to determine an employee's compensation.

Enforcement

The Bill would be enforced by New York City's Commission on Human Rights ("Commission"). An employee alleging a violation of the Bill could either bring a complaint with the Commission or proceed directly to court. As with other claims brought under the NYCHRL, actions would need to be brought to the Commission within one year or filed in court within three years of the alleged violation.

Under the NYCHRL, civil penalties may be imposed for violations, with greater penalties (up to $250,000) available for willful, wanton, or malicious acts. If a claim were brought in court, the plaintiff could seek damages, including punitive damages, injunctive relief, attorneys' fees, and costs.

What New York City Employers Should Do Now

If the Bill becomes effective, New York City employers should do the following:

- Remove questions about salary history from employment applications, background check forms, and any other applicable forms or policies used during the hiring process.

- Unless an applicant has voluntarily disclosed salary history information, do not seek salary history during the background check process[5] to make sure that such information is not used in determining compensation.

- Coordinate with any outside background-checking vendors to ensure that background check forms do not request salary history and that a vendor does not request salary history when confirming prior employment.

- Confirm that external recruiters are complying with the Bill when seeking applicants for jobs in New York City.

- Train human resources staff, internal recruiters, hiring managers, and any other individuals involved in the hiring process (i.e., those conducting interviews or setting compensation levels at the organization) on the requirements of the Bill.

- Make certain that any interviewers who will inquire about an applicant's compensation expectations explicitly state that the inquiry pertains to the applicant's compensation *expectations* for the given role and does not relate to his or her current or past salary.

[5] Employers should keep in mind that the New York City Fair Chance Act prohibits employers with four or more employees from conducting criminal background checks prior to making a contingent offer of employment. For more information on this law, please see our *Act Now Advisory* titled "Now That New York City's Credit Check and "Ban the Box" Laws Are in Effect, How Do Employers Comply?"

- Ensure that any disclosure of salary history is done on a purely voluntary basis. If an applicant voluntarily discloses salary history information at any point during the hiring process, create a "memo to file" (or other internal documentation) noting that the applicant voluntarily disclosed this information and the circumstances surrounding such disclosure.

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For more information about this Advisory, please contact:

Susan Gross Sholinsky
New York
212-351-4789
sgross@ebglaw.com

Nancy L. Gunzenhauser
New York
212-351-3758
ngunzenhauser@ebglaw.com

Ann Knuckles Mahoney
New York
212-351-5521
aknuckles@ebglaw.com

Judah L. Rosenblatt
New York
212-351-4686
jrosenblatt@ebglaw.com

EMPLOYMENT, LABOR, AND WORKFORCE MANAGEMENT

EPSTEIN BECKER GREEN

TAKE 5 VIEWS YOU CAN USE

FINANCIAL SERVICES

February 2017

Five Employment Issues Under the New Administration That Financial Services Employers Should Monitor

For the latest employment, labor, and workforce management news and insights concerning the financial services industry, please visit and subscribe to Epstein Becker Green's *Financial Services Employment Law* blog.

Employers in the financial services industry should diligently monitor upcoming changes under the Trump administration. Although it is unlikely that President Donald J. Trump will "dismantle" the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), the new administration has suggested changes that could stir up the industry. The President has signed executive orders ("EOs") regarding the regulation of executive compensation and immigration that significantly affect employers nationwide. Financial services employers should continue to monitor and review current policies and procedures in place and update accordingly to remain compliant as changes develop.

This edition of Epstein Becker Green's *Take 5* addresses these important issues and what financial services employers should know about them:

1. How the Trump Administration May Impact the Oversight and Enforcement of Dodd-Frank's Whistleblower Protections

By Jason Kaufman

On the campaign trail, President Trump vowed to "dismantle" Dodd-Frank. Dodd-Frank was enacted in the wake of the 2008 financial crisis to curtail risky investment activities and stop financial fraud through increased oversight and regulation of the banking and securities industries. Among other things, it amended the Sarbanes-Oxley Act, Securities Exchange Act, and Commodity Exchange Act to include monetary incentives for individuals to blow the whistle on suspected financial fraud and stronger protections for whistleblowers against retaliation by their employers. President Trump has criticized Dodd-Frank, arguing that it is overbroad and inhibits economic growth. Now that he is in office, President Trump has the statute squarely in his crosshairs, and he is poised to impact its whistleblower protections on the legislative, administrative, and judicial fronts.

From a legislative standpoint, President Trump has wasted no time in seeking to roll back Dodd-Frank's statutory framework. Only two weeks after his inauguration, he issued an EO titled "Core Principles for Regulating the United States Financial System," which directs the Treasury Secretary to consult with the heads of financial agencies, including the Commodity Futures Trading Commission and the Securities and Exchange Commission ("SEC"), to find ways to conform U.S. financial regulations, including Dodd-Frank, to the Trump administration's "Core Principles." These "Core Principles" (detailed in the second article of this *Take 5*) are broad-sweeping and include, among other things, requiring "more rigorous regulatory impact analysis" for new laws and "mak[ing] regulation efficient, effective, and appropriately tailored." While the precise scope of these principles is undefined (perhaps intentionally so), they appear to demonstrate a clear first step toward deregulation in the financial sector and may be a shot across the bow signaling the President's intent to scale back—or at least halt any expansion of—Dodd-Frank, including its whistleblower protections.

Additionally, President Trump is well positioned to substantially affect the SEC's administrative enforcement of Dodd-Frank's whistleblower laws. Dodd-Frank created the SEC Office of the Whistleblower ("OWB") to enforce its comprehensive whistleblower program. As reported in the 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program, since the OWB was established, the SEC has (i) awarded more than $100 million in bounty awards to whistleblowers who provided information leading to successful enforcement actions, (ii) independently sued employers for retaliating against employees for reporting alleged securities violations, and (iii) made it a top priority to find and prosecute employers that use confidentiality, severance, and other agreements that impede their employees from communicating with the SEC.

The SEC's enforcement agenda could change significantly, however, under the Trump administration. Specifically, in 2017, President Trump will have the opportunity to appoint four out of the five SEC Commissioners (three seats are now vacant, and another will become vacant in June). He has nominated Jay Clayton—a corporate attorney who has spent his career representing financial services firms in business transactions and regulatory disputes—to fill one of those vacancies and serve as SEC Chair. New SEC leadership may result in the potential replacement of the sitting OWB Chief and alter the OWB's current enforcement strategies. Thus, through his administrative appointments, President Trump may attempt to temper the SEC's aggressiveness and focus when it comes to enforcement of Dodd-Frank's whistleblower protections to more closely reflect his vision for less onerous regulation of the financial sector.

The President is also uniquely situated to influence the application of Dodd-Frank in the courtroom. Indeed, President Trump has inherited more than 100 federal court vacancies that he must fill, including one on the U.S. Supreme Court, giving him the opportunity to shape how Dodd-Frank's whistleblower laws will be interpreted and applied by federal judges across the country. One of the most critical issues that hangs in the balance is whether an employee who reports an alleged securities violation only to his or her employer, and not to the SEC, is protected by Dodd-Frank's anti-whistleblower retaliation provision. At present, there is a circuit court split on this issue. In 2013, the U.S. Court of Appeals for the Fifth Circuit held in *Asadi v. G.E. Energy United States, LLC*, that an employee who only reports a suspected violation internally is not a protected whistleblower for the purposes of Dodd-Frank's anti-relation provision. In 2015, however, the Second Circuit Court of Appeals reached the opposite conclusion in *Berman v. Neo@Ogilvy LLC*. The question has since come before the Sixth Circuit Court of Appeals (which declined to rule on it) and is currently pending before the Courts of Appeals for the Ninth and Third Circuits, and it will almost certainly end up before the U.S. Supreme Court for resolution. Accordingly, President Trump's federal judicial appointments—particularly his nomination of Judge Neil Gorsuch to the U.S. Supreme Court—may play a pivotal role in establishing exactly who is protected under Dodd-Frank's proscription against whistleblower retaliation.

Ultimately, it is unlikely that President Trump will actually be in a position to completely "dismantle" Dodd-Frank. Yet, there is no question that he has at his disposal the power to greatly impact the statute at the legislative, administrative, and judicial levels, and there is little doubt that change is on the horizon.

2. Looking Ahead: Executive Compensation for Financial Services in a Trump Administration

By Gretchen Harders

A month into the Trump presidency, there have been a number of important statements from the executive branch on the regulation of executive compensation impacting the financial services industry. On February 3, 2017, President Trump issued a statement on the core principles for regulating the U.S. financial system ("Core Principles"). The statement requires the Treasury and all heads of member agencies of the Financial Stability Oversight Council to report within 120 days (by June 3, 2017) all existing laws, treaties, guidance, regulations, etc., that promote the Core Principles, and all such laws, etc., that inhibit the Core Principles. The Core Principles provide some insight into future regulation or repeal efforts by the Trump administration impacting executive compensation.

The Core Principles

The Core Principles include empowering Americans to make independent financial decisions and informed choices in the marketplace, save for retirement, and build individual wealth. This statement appears to favor a more hands-off approach to individual investment decisions. The Core Principles also require regulations that foster economic growth through more rigorous regulatory impact analysis addressing "systemic risk and market failures, such as moral hazard and information asymmetry." This would presumably require a more extensive review of the regulatory cost of compliance favoring deregulation. However, the focus on systemic risk arising from moral hazard and information asymmetry could impact executive compensation to the extent compensation practices are seen to further individual conduct that could lead to systemic risk. The Core Principles further require regulations to enable American companies to be competitive with foreign firms in domestic and foreign markets and to advance American interests in international financial regulatory negotiations and meetings. The other Core Principles include preventing taxpayer-funded bailouts; making regulations more efficient, effective, and appropriately tailored; and restoring public accountability within federal financial regulatory agencies and rationalizing the regulatory framework, arguably all in favor of deregulation or possibly regulation by stated principles rather than by strict construction.

Potential Impact on Executive Compensation

Based on review of the Core Principles and recent regulatory statements from the Trump administration, including the reduction of two regulations for every one regulation added, the re-proposed rules under Section 956 of Dodd-Frank are not likely to be approved in their final form given the scope and breadth of the regulations. Arguably, these rules would go against the Core Principles favoring deregulation and could inhibit American competitiveness with foreign firms in domestic and foreign markets as to the recruitment and retention of talent. Also, given that the re-proposed regulations were based on international executive compensation standards (particularly, regulatory guidance promulgated in Europe), adopting the re-proposed rules might not be viewed as advancing American interests in international financial regulatory negotiations.

Presumably in furtherance of these Core Principles, on February 6, 2017, the Acting Chairman of the SEC, Michael S. Piwowar, issued a statement requesting comments from the public within the next 45 days (by March 23, 2017) on the challenges that issuers are facing with compliance with the CEO pay ratio disclosure rule under Dodd-Frank. The CEO pay ratio disclosure rule requires public companies to disclose the ratio of the median of the annual total compensation of all employees to the annual total compensation of the CEO. Gathering data to prepare the calculation has been challenging for large employers with a diverse domestic and global workforce, and the ratio itself has been criticized as not providing meaningful information. Based on comments, the SEC Acting Chairman stated that SEC staff will be directed to determine whether additional relief is appropriate. As to the review of other executive compensation provisions under Dodd-Frank that are currently in effect, such as say-on-pay and clawback requirements, they likely will be subject to the overall regulatory review, but their repeal might not be first on the agenda.

The final area of interest is President Trump's pre-election criticisms of the treatment of carried interests, which generally are tax-favored partnership interests that, when sold, frequently generate profits that are paid to private equity fund managers as compensation. However, that compensation may be taxed at a long-term capital gains rate of 20 percent or less, rather than as ordinary income. Thus far under the new presidency, there have been no official statements in this area, but the discussion of carried interests could become part of the broader tax reform agenda expected from the Trump administration.

This year, financial services organizations can expect a new direction on executive compensation to take shape.

3. Recent Executive Orders Have Immediate Immigration Impacts, but Overnight Overhaul of U.S. Immigration System Is Unlikely

By Jennifer L. Taler

It is no secret that the new administration under President Trump brings with it a fundamental shift in executive attitude with respect to both legal and illegal immigration. The transitional period leading up to January's inauguration left employers and their foreign national employee populations mired in uncertainty regarding the future of former President Barack Obama's largely immigration-friendly reforms. Shortly after entering the White House, President Trump made headlines by signing a series of controversial EOs that created a travel ban on nationals "from" seven primarily Muslim countries, eliminated visa interview waiver programs, suspended refugee programs, expanded removal grounds, eliminated federal funding for "sanctuary" cities, and directed the design and build-out of a wall at the United States/Mexico border. These EOs created discord among the government agencies that are charged with executing the EOs but were largely kept out of the drafting process. In addition, the EOs left employers scrambling to identify and support their impacted employee populations and cemented notions that the Trump administration has initiated a new immigration dialogue that will focus on enforcement and the impact of immigration on U.S. workers.

On January 27, 2017, a draft EO leaked. In this currently unsigned EO titled "Executive Order on Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs," President Trump presupposes a broken immigration system that violates immigration laws and injures U.S. workers. The draft EO would therefore direct an investigation into, and a revamping of, our nation's existing immigration framework. Among other things, the draft EO would mandate Department of Homeland Security ("DHS") review of all regulations that allow foreign nationals to work in the United States, and it would call for the rescission of all such regulations that are not in the (undefined) "national interest." This draft EO, if signed, would also restrict the use of parole admissions, change how H-1B visas and immigrant numbers are allocated, expand employer site visit programs, and reform student practical training and J-1 summer work programs.

Many of the provisions of the draft EO seem directed at unraveling immigration reforms created under the Obama administration, including employment authorization for spouses of certain H-1B visa holders and recipients of benefits under Deferred Action for Childhood Arrivals (more commonly known as "DACA"). However, the draft EO could also have far-reaching impacts on financial services employers. For example, a merit-based reallocation of H-1B visa numbers based on compensation may prove beneficial to financial services companies because it would likely favor the types of highly paid professional that financial services organizations typically hire. On the other hand, a merit-based system that favors degrees in Science, Technology, Engineering, and Mathematics, the so-called "STEM" degrees, might adversely impact those financial services firms that do not have large back and middle offices of employees with this academic background. Also, proposed restrictions in F-1 practical training programs may make it more difficult for financial services employers to recruit top talent out of U.S. universities, especially MBA programs that do not qualify for STEM benefits. Finally, the draft EO's apparent crackdown on IT consultancies, which transfer relatively large numbers of foreign workers to the United States under the L-1 visa program, is also likely to have a trickle-down effect on financial services companies that rely on consultancies for project-based IT support.

Despite the sweeping rhetoric of the draft EO, employers should not expect many changes for 2017. Most of the changes delineated in the draft EO implicate existing laws and regulations that cannot be modified by an EO, and would require an expansive overhaul of our U.S. immigration system. Major programmatic changes would require congressional action that is unlikely in a fractured Congress. Any proposed regulatory changes would also require significant lead time, as they would be subject to notice and comment requirements under the Administrative Procedure Act and would likely be impacted by President Trump's January 30, 2017, EO requiring rescission of two federal regulations each time a new one is established.

Although it made many fewer headlines, it is important to note in this context that many longstanding DHS policies and practices were recently codified in an expansive set of new regulations published by U.S. Citizenship and Immigration Services ("USCIS") in November 2016, which by no coincidence took effect on January 17, 2017. These new rules, "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," were intended to modernize and improve aspects of certain visa programs and clarify and codify longstanding DHS policies and practices with respect to the American Competitiveness in the Twenty-First Century Act ("AC21"), which focuses, in large part, on H-1B and green card portability. Of particular note, the new rules:

- clarify the use and establishment of priority dates;
- expound H-1B portability and successive portability benefits;
- confirm H-1B recapture and cap-exempt status eligibility requirements;
- establish grace periods for certain job seekers;
- describe eligibility for post sixth-year H-1B extensions under AC21;
- clarify green card portability requirements and explain the purpose and use of new USCIS Form I-485 Supplement J; and
- provide automatic employment authorization document ("EAD") extensions for certain EAD holders, while eliminating USCIS's obligation to adjudicate EAD applications within 90 days.

In the coming months and years, shifts in the nation's approach to immigration policy are inevitable due to the change in administrations. Like the recent EOs, some may happen quickly and with very little notice. More substantial programmatic changes, however, will occur over time through the normal legislative and regulatory channels. In the immediate term, employers should advise their foreign national populations to take caution in all international travel and to expect delays in visa application processing and heightened screening across all inspection facilities. Employers should direct specific questions about the EOs, and questions about the impacts of the new USCIS rules and their interplay with the EOs, to their immigration counsel. In the longer term, financial services firms should expect an ongoing dialogue about the future of U.S. immigration law and, if they want the law to develop in a more positive direction, get engaged in the legislative and regulatory processes. Regardless of sentiments about how the conversation starts, these employers should recognize that opportunities exist to make the system better and more efficient. The time is therefore ripe for stakeholder advocacy.

4. Equal Pay: The Evolving Landscape

By Lauri F. Rasnick

Equal pay for equal work has been required for many years, but, as of late, this rather static requirement has become the focal point of regulators, state and local governments, and activists. In order to achieve equality in compensation, the efforts are becoming increasingly creative with new pushes for transparency, privacy, and/or disclosures. Financial services firms are often the target and should not only be aware of these innovative measures and requirements but also consider what proactive actions to put in place.

Eliminating Pay Secrecy

The National Labor Relations Board made it clear years ago that "employees" (as defined under the National Labor Relations Act) could not be restricted from discussing the terms and conditions, including compensation, of their employment, based on their rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Yet, many employers continue to have policies or agreements, or informal rules, which restrict employees from doing so. Recently, there has been a concentrated effort to prevent employers from designating employee compensation as "confidential" and/or restricting discussion of it. For example, in connection with the former administration's determination to eradicate equal pay impediments in the workplace, in a 2014 executive order, then-President Barack Obama prohibited federal contractors from retaliating against employees who talk about their salaries or other compensation information.

A number of states and localities that have been passing their own equal pay laws have been addressing pay secrecy as well. Such states include the following:

- **California:** The California Fair Pay Act, which became effective as of January 1, 2016, takes pay secrecy head on. It not only restricts policies that prevent employees from discussing their own compensation but also prevents them from prohibiting an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under the law.

- **Connecticut:** Connecticut's Act Concerning Pay Equity and Fairness ("Connecticut Act") prohibits an employer from (i) barring employees from disclosing or discussing the amount of his or her wages or the wages of another employee of such employer that have been disclosed voluntarily by such other employee, (ii) inquiring about the wages of another employee of such employer, or (iii) requiring employees to sign documents waiving their rights under the Connecticut Act or taking actions against employees. The Connecticut Act does note, however, that it will not be construed to require any employer or employee to disclose the amount of wages paid to any employee.

- **New York:** New York State recently enacted the Achieve Pay Equity Act ("APEA"), which modified the existing equal pay law in a number of respects. One particular change bars an employer from prohibiting an employee from "inquiring about, discussing, or disclosing" the employee's wages or the wages of another employee. However, the APEA specifically provides for limitations. The APEA states that employers may maintain, *in a written policy,* reasonable workplace and workday limitations on the time, place, and manner for inquiries about, discussion of, or the disclosure of wages. Also, the APEA provides that no employee is required to discuss his or her wages with another employee, and employees who have access to other employees' wage information as a result of their job duties (e.g., human resources staff) may be limited in the disclosure of such information by their employer.

Prior Compensation: Don't Ask, Don't Tell

Another focus of equal pay activists has been on employers' asking employees for their current pay information to be used in determining their pay rates. Opponents to this practice claim that it perpetuates wage gaps for women that may "follow" women from job to job. Massachusetts is the first state to take the issue head on and prohibit employers from seeking information about applicants' compensation history in the hiring process. The Massachusetts equal pay law, which becomes effective in 2018, bars employers from asking about an applicant's salary history on an application or during interviews for employment. Pursuant to the law, after an offer of employment with compensation terms has been negotiated and made, a prospective employer may seek or confirm a prospective employee's wage or salary history.

Activist Investors Turn Their Sights to Wall Street

In an effort to push for pay equality, activist investors have begun to exert pressure on large financial institutions to disclose compensation information. Such investors have already filed proposals with a number of large financial services institutions, such as Citigroup, Bank of America Corp., and Wells Fargo & Co. The investors are demanding that these institutions publish statistics about the race and gender of employees, as well as compensation information. Last year, activist investors took similar initiatives with respect to large technology firms, the majority of which complied with making public pay gap information and taking steps to close any gaps.

What Employers Should Do Now

In light of this increased focus on pay information, policies, and procedures, employers should do the following:

- Undertake pay audits to determine any disparities and the genesis of such disparities. Pay audits should be conducted with legal counsel to maintain the information in a privileged manner as much as possible.

- Thoroughly review their pay-setting policies and procedures. If you are a Massachusetts employer, take specific steps to ensure that pay information is not improperly requested through the hiring process. While most states and localities do not prohibit an employer from asking employees for their pay histories, relying solely on such information for setting starting pay may lead to pay inequities.

- Determine appropriate compensation ranges based on factors other than pay history—such as market conditions, job requirements, experience, and skills, among other things.

- When providing raises or determining bonuses, consider and document an employer's rationale for compensation decisions in order to defend against any claims of inequity based on gender or another improper reason.

- Consider training managers not to restrict (or appear to restrict) employees from discussing wages in compliance with applicable local laws. Managers may be unfamiliar with the new focus on prohibiting pay secrecy and could be improperly handling such matters.

- Review their policies and agreements as they relate to sharing pay information to make sure that they are compliant with applicable laws, contain non-retaliation provisions, and direct employees to avenues for complaints.

5. SEC Continues Aggressive Oversight of Separation and Confidentiality Agreements

By John F. Fullerton III

Last August, we reported on two significant cease-and-desist orders issued by the SEC that, for the first time, found certain language in the confidentiality and release provisions of separation agreements to violate the SEC's Rule 21F-17(a), which precludes anyone from impeding any individual (i.e., a whistleblower) from communicating directly with the agency.[1] Since then, the SEC has continued its aggressive oversight of separation and confidentiality agreements, with substantial repercussions for some employers. These orders, a select number of which we summarize here, have companies engaging in a serious review and rethinking of their confidentiality restrictions and other relevant provisions in their agreements and handbooks, and considering whether and what remedial steps to take proactively to cure any issues with the language in these key documents.

In *Anheuser-Busch InBev SA/NV* (Sept. 28, 2016), the company entered into a separation agreement in late 2012 with a specific employee after his termination and subsequent mediation of various alleged employment law claims. The separation agreement contained provisions (i) prohibiting the employee from disclosing confidential or proprietary company information, with no carve-out for reporting to government agencies; (ii) prohibiting the employee from disclosing the substance of the separation agreement; and (iii) imposing a $250,000 liquidated damages provision in the event that the employee breached the confidentiality provisions. After signing the agreement, the employee, who had been voluntarily communicating with SEC in connection with an ongoing investigation, ceased doing so.

[1] See the Epstein Becker Green *Act Now* Advisory titled "SEC Finds Certain Separation Agreement Provisions Unlawful Under Dodd-Frank Whistleblower Rule" (Aug. 18, 2016).

The cease-and-desist order—which is a negotiated resolution of the matter once the SEC determines that a company has violated its rules or regulations—did not require the company to make any additional changes to its separation agreements because, in September 2015, the company had amended separation agreements to state:

> I understand and acknowledge that notwithstanding any other provision of this Agreement, I am not prohibited or in any way restricted from reporting possible violations of law to a governmental agency of entity, and I am not required to inform the Company if I make such reports.

The order required the company to contact only *certain* former employees identified by the SEC to inform them that they were not prohibited from providing information to the SEC, rather than all employees who had signed separation agreements since the rule was implemented in August 2011, as has been required in other cases. In addition, unlike other cases, it appears that there was no separate monetary penalty against the company for violating Rule 21F-17(a).

In *NeuStar, Inc.* (Dec. 19, 2016), the company's severance agreements included a non-disparagement clause with the following language:

> Except as specifically authorized in writing by NeuStar or as may be required by law or legal process, I agree not to engage in any communication that disparages, denigrates, maligns or impugns NeuStar . . . *including but not limited to communication with . . . regulators (including but not limited to the Securities and Exchange Commission . . .*) [emphasis added].

Any breach of this clause by the employee resulted in the required forfeiture of all but $100 of the severance paid under the agreement. The SEC found that "at least one" former employee was impeded by this clause from communicating with the agency—although the SEC does not hesitate to find violations of Rule 21F-17(a) even where there is no evidence that anyone has actually been impeded.

To settle the matter, the company agreed to pay a civil penalty of $180,000 and to contact 246 former employees to inform them that the severance agreements they signed between August 12, 2011, and May 21, 2015, did not prevent them from communicating concerns about potential violations of law or regulation to the SEC. No remedial revisions to the company's template severance agreement were required because the company had voluntarily, after commencement of the investigation, removed the reference to "regulators" from the non-disparagement clause and included a more common provision that stated, "In addition, nothing herein prohibits me from communicating, without notice to or approval by NeuStar, with any federal government agency about a potential violation of a federal law or regulation."

Most recently, in *HomeStreet, Inc.* (Jan. 19, 2017), certain severance agreements used by the company had contained common waiver language used, in form and substance, by many employers:

> This release shall not prohibit Employee from filing a charge with the Equal Employment Opportunity Commission or discussing any matter relevant to Employee's employment with any government agency with jurisdiction over the Company *but shall be considered a waiver of any damages or monetary recovery therefrom* [emphasis added].

The SEC previously found that employees might interpret such waivers as applying to the agency's whistleblower monetary incentive award program and, therefore, would unlawfully impede employees from coming forward to the SEC or reporting potential violations of the securities laws. The SEC reached the same conclusion in this case.

Prior to the investigation, however, the company had voluntarily revised its standard severance agreement to substitute the following:

> Employee understands that nothing contained in this Agreement limits Employee's ability to file a charge or complaint with any federal, state or local government agency or commission ("Government Agencies"). Employee further understands that this Agreement does not limit Employee's ability to communicate with any Government Agencies or otherwise participate in any investigation or proceeding that may be commenced by any Government Agency including providing documents or other information without notice to the Company. *This Agreement does not limit the Employee's right to receive an award for information provided to any Government Agencies* [emphasis added].

Thus, the cease-and-desist order did not require further revisions to the severance agreement because the foregoing language largely tracks revised language that the SEC had required in one of the previous orders issued last summer. Notwithstanding its proactive revisions to its agreements, the company still had to agree to a $500,000 civil penalty and to contact certain former employees who had signed the agreement to provide a link to the order and inform them that severance agreements did not prevent them from reporting information to the SEC or seeking and obtaining a whistleblower award from the SEC.

The *NeuStar* and *HomeStreet* orders serve to highlight that, even when a company has revised its agreements voluntarily to comply with Rule 21F-17(a), the SEC may still impose monetary penalties and potentially burdensome and undesirable obligations to contact former employees who have signed problematic separation agreements to inform them that, notwithstanding the money they were paid in conjunction with their separation agreements, they remain free to report any company wrongdoing—real or perceived—to the SEC.

What Employers Should Do Now

Companies wishing to avoid SEC scrutiny should do the following:

- Review current separation and severance agreement templates to determine whether they are in compliance with Rule 21F-17, which would include a review of provisions such as, among others,
  - future monetary waivers,
  - non-disclosure of confidential information, and
  - non-disparagement clauses.
- If necessary, work with legal counsel to determine appropriate revisions or "carve-outs" to bring those agreement templates into compliance.
- Discuss with legal counsel whether to take affirmative steps to remedy past uses of confidentiality or waiver provisions that would be unlawful under the SEC orders.
- Review other types of confidentiality and waiver agreements with employees, in whatever form they are used, to ensure that those agreements do not similarly violate Rule 21F-17.

* * * *

For additional information about the issues discussed above, please contact the Epstein Becker Green attorney who regularly handles your legal matters or any of the authors of this *Take 5:*

John F. Fullerton III
New York
212-351-4580
jfullerton@ebglaw.com

Gretchen Harders
New York
212-351-3784
gharders@ebglaw.com

Jason Kaufman
New York
212-351-4738
jkaufman@ebglaw.com

Lauri F. Rasnick
New York
212-351-4854
lrasnick@ebglaw.com

Jennifer L. Taler
New York
212-351-4838
jtaler@ebglaw.com

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com

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Employment, Labor & Workforce Management

ACT NOW ADVISORY

NYC Mayor Signs Bill Prohibiting Inquiries Into Salary History

May 5, 2017

By Susan Gross Sholinsky, Nancy L. Gunzenhauser, and Judah L. Rosenblatt

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On May 4, 2017, Mayor Bill de Blasio signed into law a bill that amends the New York City Human Rights Law to prohibit all New York City employers from (i) requesting a job applicant's salary history or (ii) using a job applicant's salary history to determine his or her salary, benefits, or other compensation during the hiring process, including the negotiation of a contract ("Law"). The Law will take effect on October 31, 2017.

The Law makes it unlawful for an employer to inquire about the salary history of an applicant for employment. "Salary history" is defined broadly and includes wages, benefits, or other compensation. "Salary history," however, does not include any objective measure of the applicant's productivity, such as revenue, sales, or other production reports. Under the Law, the term "to inquire" is defined broadly to mean "to communicate any question or statement to an applicant, an applicant's current or prior employer, or a current or former employee or agent of the applicant's current or prior employer, in writing or otherwise." Employers are also prohibited from conducting a search of publicly available records or reports to seek salary history. The Law applies to private and public employers of all sizes.

In anticipation of the October 31, 2017, effective date, New York City employers should take the action steps that we outlined in our earlier advisory.

* * * *

For more information about this Advisory, please contact:

Susan Gross Sholinsky
New York
212-351-4789
sgross@ebglaw.com

Nancy L. Gunzenhauser
New York
212-351-3758
ngunzenhauser@ebglaw.com

Judah L. Rosenblatt
New York
212-351-4686
jrosenblatt@ebglaw.com

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Autorité fédérale de surveillance des marchés financiers FINMA
Autorità federale di vigilanza sui mercati finanziari FINMA
Swiss Financial Market Supervisory Authority FINMA

Circular 2010/1
Remuneration schemes

Minimum standards for remuneration schemes of financial institutions

Reference:	FINMA Circ. 10/1 “Remuneration schemes”
Date:	21 October 2009
Entry into force:	1 January 2010
Last amendment:	1 June 2012 [Modifications are listed at the end of the document.]
Legal framework:	FINMASA art. 7 sect. 1 lett. b BA art. 3 sect. 2 lett. a, 3b–3g ISA art. 22, 27 sect. 1, 47, 67, 68, 75, 76 SESTA art. 10 sect. 2 lett. a CISA art. 13, 14 sect. 1 lett. c and corresponding ordinance provisions

Adressees																								
BA			ISA			SESTA		CISA									AMLA			Other	
Banks	Financial groups and -congl.	Other intermediaries	Insurers	Insurance groups and -congl.	Insurance intermediaries	Stock exch. and participants	Securities dealers	Fund management companies	SICAVs	Limited partnerships for CISs	SICAFs	Custodian banks	Asset managers CISs	Distributors	Representatives of foreign CISs	Other intermediaries	SROs	DSFIs	SRO-supervised institutions	Audit firms	Rating agencies
x	x		x	x			x	x	x	x	x	x	x	x	x						

Einsteinstrasse 2, 3003 Bern
Phone +41 (0)31 327 9100, Fax +41 (0)31 327 9101
www.finma.ch

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Non-binding translation for informational purposes only

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I. Introduction

The remuneration scheme is an integral part of the organization of a financial institution and can exert considerable influence on its capital, liquidity and risk situation. In addition, remuneration creates incentives. Such incentives must not serve to incite the taking of inappropriate risks, the infringing of applicable law or regulations, internal rules or the violation of agreements. Instead, remuneration schemes at financial institutions should motivate employees to contribute to the long-term success and stability of the company. The risks taken should be considered in the remuneration. 1

This Circular defines minimum standards for the design, implementation and disclosure of remuneration schemes in financial institutions. The application of these minimum standards is subject to the principle of proportionality. In this connection, the following factors shall be taken into account: the complexity, size and risk profile of the financial institution and of its constituent units; the function, job activities and level of compensation of the persons in question. 2

For financial institutions, this Circular serves to supplement the rules contained in the Swiss Code of Obligations as well as the disclosure provisions concerning remuneration applicable under stock exchange regulations, albeit without replacing them. This Circular applies regardless of the legal form of the financial institution and whether or not said institution is publicly listed. 3

II. Scope

This Circular applies to banks, securities traders, financial groups and conglomerates, insurance companies, and insurance groups and conglomerates that are subject to Swiss financial market supervision. It also applies to persons and firms authorized under art. 13 sect. 2 and 4 of the Collective Investment Schemes Act (CISA; SR 951.31). All of the above are referred to hereinafter as “firms”. 4

This Circular is applicable to the firms’ domestic and foreign subsidiaries and branches which are mandatorily included in consolidations. If mandatory foreign regulations conflict with the application of this Circular or if a firm is seriously disadvantaged by this Circular in a foreign labour market, it shall inform FINMA. FINMA shall assess the situation and may consult foreign supervisory authorities. FINMA may exempt a firm, in part or in full, from implementing the present provisions in the foreign labour market in question. 5

For the following firms implementation of this Circular shall be mandatory:

- Banks, securities traders, financial groups and conglomerates, who in their capacity as individual firm or at the financial group or conglomerate level, are required to maintain equity capital (minimum requirements pursuant to Articles 7 ss. and Article 42 of the Capital Adequacy Ordinance [CAO; SR 952.03]) in the amount of at least CHF 2 billion; 6

- Insurance companies, insurance groups and conglomerates, which, in their capacity as insurance company, or at the insurance group or conglomerate level, are required to hold equity capital (required solvency margin pursuant to Article 22, Section 1 a, Article 199 and Article 206 of the Insurance Supervision Ordinance [ISO; SR 961.011]) in the amount of at least CHF 2 billion. 7

For the firms which do not meet the threshold values set out in margin nos. 6 and 7, implementation of the present Circular shall not be mandatory. It is, however, recommended that they take the principles of this circular into account for their remuneration schemes as best practice guidelines. 8

In justified cases, FINMA may require a firm which does not meet the threshold values set out in margin nos. 6 and 7 to implement some or all of the provisions hereof. This may be appropriate, for example, in light of the firm's risk profile, its business activities or its business relationships, or where its remuneration scheme entails inappropriate risks. 9

This Circular applies to all persons who are employed by a firm or by an affiliate of such firm and who are remunerated for work performed in respect of the firm. The circular also applies to persons entrusted with the executive management ("senior management") and to persons responsible for the overall direction, oversight and control ("Board of Directors"). It does not apply, however, to the remuneration of associates of the firm who are wholly liable in their personal capacity, nor to persons who directly or indirectly hold at least 10 percent of the firm's capital. 10

III. Definitions

Total remuneration:

The totality of any monetary value which the firm distributes to a person directly or indirectly for the work performed for the firm, e.g. in the form of cash payments, non-cash benefits, disbursements which create or increase rights to social security benefits, pensions, shares or other allocation of shareholding rights as well as the forgiving, extinguishing or renunciation of any claims or debts. 11

Variable remuneration:

Any part of the total remuneration the granting or the amount of which is at the discretion of the firm or which is contingent on fulfilment of predefined conditions. This includes remuneration contingent on performance or meeting certain targets such as brokerage fees or commissions. Sign-on payments or severance payments also fall within the scope of the definition of variable remuneration. 12

Sign-on payment:

Remuneration which is agreed on the conclusion of an employment agreement to be paid or be due once. Also deemed to constitute a sign-on payment shall be compensation for benefits foregone vis-à-vis a previous employer. 13

Severance payment:

Remuneration which is agreed in connection with the termination of an employment relationship. 14

Total pool:

The sum of all variable remuneration which a firm allocates for a given financial year, regardless of its form, the time of allocation and payment, or any conditions or restrictions to which it may be subject. It includes any such amount allocated whether or not is contractually binding, vested or non-vested. Any sign-on or severance payments provided during the financial year concerned are to be attributed to the total pool. 15

IV. Principles

Principle 1: The Board of Directors is responsible for the design and implementation of a remuneration policy and issues the rules relating thereto 16

The Board of Directors shall design the remuneration policy of the firm and, in its capacity as the organ responsible for the overall direction, supervision and control of the firm, shall be responsible for its implementation. 17

Towards this end, the Board of Directors shall issue remuneration rules that cover all persons employed by the firm and that comply with the principles and provisions set out herein. It shall review these rules regularly. 18

The Board of Directors can in principle adopt an existing group-wide remuneration scheme provided such scheme conforms to the provisions of this Circular. 19

The Board of Directors shall approve the remuneration of senior management as well as the total pool of the firm. 20

Depending on the size and structure of the firm or the complexity of its remuneration scheme, the Board of Directors shall establish a remuneration committee. Said committee shall ensure the Board of Directors has impartial and competent advice at its disposal. 21

The Board of Directors shall take all necessary steps to be kept regularly informed of the operational implementation of the remuneration rules and of how remuneration is developing at the firm. 22

Principle 2: The remuneration scheme is simple, transparent, implementable, and oriented towards the long term 23

The remuneration scheme should be understandable and justifiable. The elements of the remuneration scheme shall be clearly communicated to the persons concerned. 24

The remuneration scheme shall ensure a sufficient degree of continuity. It is to be designed in such a manner that it is acceptable irrespective of the firm's actual business performance. 25

The firm shall ensure that contractual agreements are in conformity with the requirements of this Circular and of the firm's own remuneration rules. To the extent necessary, existing agreements should be amended accordingly. 26

Principle 3: The firm's independent control functions and experts are involved in designing and applying the remuneration policy and rules 27

The design and implementation of the remuneration scheme should be carried out in an impartial and objective manner. Human resources experts and control functions (e.g. risk management or compliance) should be involved to ensure a consistent design and implementation of the remuneration scheme across all business lines of a firm. 28

The Board of Directors shall ensure, at reasonable intervals, that an impartial body, (e.g. internal audit) review whether the design and implementation of the remuneration scheme is in compliance with the Board of Director's remuneration policy and the requirements of this Circular. 29

Principle 4: The structure and level of total remuneration is aligned with the firm's risk policies and designed so as to enhance risk awareness 30

In the context of this Circular, risk is defined as any risk that the firm bears in the course of its business activities. These risks include, in particular, market, credit and liquidity risk, underwriting risk, operational risk (including legal and compliance risk) as well as reputational risk. 31

The more strategic or operational responsibility a person has, the more her/his remuneration needs to take into account the risks such persons takes or is responsible for. 32

All significant risks attributable to a person's sphere of influence must be considered in this context. This also covers risks which arise in the organizational units under her/his responsibility. 33

Risks, the size and probability of occurrence of which are difficult to assess in advance, must also be considered to the extent reasonable. 34

The relevant risk assessment should be undertaken and monitored by the units responsible for the firm's risk control. 35

Neither the nature of the remuneration nor the criteria applicable for its allocation must create any incentive for taking inappropriate risks or for violating applicable law, regulations, internal rules or agreements. 36

Risks are inappropriate, in particular, if they: 37

- are not consistent with the strategic or operational objectives and risk capacity of the firm;
- cannot be properly managed or controlled with the existing organization, procedures and employees;
- may unfairly disadvantage the firm's stakeholders, including its customers.

The remuneration instruments, the proportion of variable remuneration to total remuneration 38 and the relationship between immediate and deferred remuneration are to be designed in line with the requirements of this principle.

Principle 5: Variable remuneration is funded through the long-term economic performance of the firm 39

Variable remuneration is to be incorporated into capital and liquidity planning. It must not be allowed to jeopardize the attainment of capital targets. 40

The size of the total pool shall depend on the long-term performance of the firm. For this purpose, the profit sustainability as well as the risks borne are to be taken into account. The entirety of any capital costs, including the costs of equity capital, is to be considered in a comprehensive manner. The capital costs shall reflect the risk profile of the firm. 41

If results are poor, the total pool is to be reduced or omitted completely. 42

The models and processes which a firm uses to determine variable remuneration at the level of the firm as a whole or at the level of its units shall be in accordance with the business strategy and risk policies of the firm. 43

Principle 6: Variable remuneration shall be granted according to sustainable criteria 44

The allocation of variable remuneration to individual units and persons shall depend on sustainable and justifiable criteria that reflect the firm's business and risk policies. 45

A serious violation of internal rules or external provisions shall result in a reduction or forfeiture of variable remuneration. 46

Sign-on and severance payments are only to be granted in justified cases. They must be governed by the remuneration rules of the firm. Those payments above an amount set in the remuneration rules are to be approved by the Board of Directors. 47

Principle 7: Deferrals link remuneration with the future development of performance and risk 48

To the extent required in light of its risk profile, a firm shall defer payment of part of the remuneration. 49

Deferred remuneration is remuneration that the beneficiary is entitled to freely dispose of only after expiry of a certain time period and the value of which is subject to change during this time period. 50

Deferred remuneration is to be designed in such a way that it takes into account the business strategy and risk policies of the firm. It shall be structured in such a way so as promote optimally the risk awareness of the beneficiaries and encourage them to operate the business in a sustainable manner. 51

The time period should be based on the time horizon of the risks the beneficiary is responsible for. For members of senior management and persons with relatively high total remuneration, 52 as well as persons whose activities have a significant influence on the risk profile of the firm, the time period should last at least three years. Any definitive vesting of the remuneration within the time period in question shall take place, at most, on a pro-rata basis.

The greater the responsibility of a beneficiary and the greater her/his total remuneration, the greater the percentage of her/his remuneration that shall be deferred. For members of senior management, for persons with relatively high total remuneration and for persons whose activities have a significant influence on the risk profile of the firm, a significant percentage of remuneration is to be subject to deferred payment. A person may receive remuneration without deferral to the extent a deferral is not appropriate or reasonable in light of such person's function or amount of total remuneration. 53

Any changes in value of deferred compensation during the time period in question shall be symmetrical to the development of clearly defined and objective assessment criteria, which shall take ample account of earnings, expenditures and capital costs or shall depend on the value of the company. Negative developments of such assessment criteria must lead to a considerable reduction in value of the deferred compensation up to a total forfeiture. If positive developments of the assessment criteria lead to an increase in value of the deferred compensation, such increase must not be disproportional to the potential reduction in value or the assessment criteria themselves. 52

Where this promotes risk awareness and sustainability and is appropriate, the company should structure its compensation policy and rules so as to make it possible to cancel deferred remuneration in whole or in part where losses have been generated in the area of responsibility of the person concerned. 55

In the event of poor business performance, in particular in the case of losses recorded in the annual financial reporting, the allocation of variable remuneration which is not subject to deferral shall be reduced to a minimum. 56

Principle 8: Control functions are remunerated in a way so as to avoid conflicts of interest 57

Control functions within the meaning of this principle include all persons responsible for quantitative or qualitative risk management or risk control, legal, compliance, actuarial, internal audit or internal control systems. 58

Remuneration schemes for control functions may not create incentives that lead to conflicts of interest with the tasks of these functions. The calculation of variable remuneration of these persons must not be directly dependent on the performance of the business units, specific products, or transactions these persons monitor. 59

Total remuneration of the control functions must be sufficient in order to attract qualified and experienced persons. 60

Principle 9: The Board of Directors shall report annually on the implementation of the remuneration policy 61

As part of the annual reporting, the Board of Directors shall prepare a remuneration report. In said report it shall explain the implementation of the remuneration policy and rules. 62

The remuneration report shall address the following matters:

- the most important design characteristics and functioning of the remuneration scheme as well as responsibilities of those involved in managing and implementing the scheme and the applicable procedures; 63

- the design, assessment criteria, valuation principles and valuation of the remuneration instruments used; 64

- the following information on compensation for the financial year (excluding charges and credits that derive from remuneration for previous financial years), broken down by instrument (cash payment, shares, options, etc.):

  - the total amount of total remuneration; 65

  - the amount of the total pool and number of beneficiaries; 66

- the sum of outstanding deferred remuneration broken down by instrument (cash payment, shares, options, etc.); 67

- any charges and credits affecting net income that derive from remuneration for previous financial years; 68

- with regard to senior management as well as persons whose activities have a significant influence on the risk profile of the firm:

  - the sum of all sign-on payments made during the financial year and the number of beneficiaries; 69

  - the sum of all severance payments made during the financial year and the number of beneficiaries. 70

Disclosure of the remuneration report shall take place in accordance with the provisions governing publication of the annual report. Such disclosure shall in any event be made to FINMA. 71

Principle 10: Any deviation from these principles is permissible only in justified exceptional circumstances and must be disclosed 72

The firm must justify the facts of any deviation from these principles and disclose these in addition to those disclosures required under Principle 9. In addition to such justification, the firm must disclose, in particular, the structure, form and amount of the remuneration which is subject to deviation from these principles, as well as the business units or functions of the firm benefitting from this deviation. 73

The provisions governing reporting and disclosure (margin nos. 61 to 71) must be observed in any case. 74

V. Implementation

Each firm shall assess its implementation of this Circular and compliance therewith and shall report to FINMA by 30 April 2011 at the latest according to such instructions as FINMA shall promulgate. Such report shall be certified by the firm's external auditors. 75

FINMA reserves the right to inspect a firm in respect of compliance with the requirements of this Circular. It may do it either itself or with the assistance of third parties. Such measures shall be in lieu of a regular audit on the subject by the firm's external auditor. 76

FINMA may, in justified cases, place additional requirements on the remuneration scheme of a firm beyond those set out in this Circular. 77

FINMA may take measures against firms that derogate from the provisions of this Circular, including requiring them to maintain additional capital. 78

FINMA reserves the right to limit the variable remuneration that a firm can grant where this would clearly jeopardize the meeting of capital targets decreed or expected. 79

FINMA shall evaluate the effectiveness of this Circular, such as on the basis of the self-assessments by the firms or through additional investigations or benchmark analyses. Such evaluations shall serve for the further development of this Circular, which will also consider any policy developments on international level. 80

VI. Transitional provisions

The provisions of this Circular must be fully complied with as of 1 January 2011. 81

The disclosure requirements contained in margin nos. 65 to 71 first apply to the financial reporting for the 2010 financial year. 82

Should any existing mandatory obligations hinder a firm from complying fully with the provisions contained herein as of 1 January 2011, it shall prepare a binding time plan for implementation. 83

List of modifications

This Circular has been modified as follows:

These modifications were adopted on 1 June 2012 and will enter into force on 1 January 2013:

> *References to the Capital Adequacy Ordinance (CAO; SR 952.03) have been adapted according to the version which will enter into force on 1 January 2013.*