

Equity & Executive Compensation



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In today's economy companies need to successfully leverage their equity and executive compensation offerings to maintain a competitive edge. With heightened focus on retention and recruitment of senior executives comes added pressure on boards, from the inability to terminate executives at a reasonable cost to equity plan share depletion. These factors—coupled with the risk of incurring adverse publicity about compensation practices, and ever-changing tax and securities laws—create a complex web of challenges that can prove difficult to address even by experienced company leaders and boards of directors.

With nine US offices strategically located in regions proximate to our clients' manufacturing facilities, offices, distribution centers, and markets, Seyfarth Shaw provides coordinated, high-quality representation on equity and executive compensation issues demanding immediate attention.

The Seyfarth Difference: An Independent Approach

Seyfarth has one of the leading equity and executive compensation practices in the nation, with attorneys who understand the importance of effective plans and practices in helping businesses attract and motivate leaders, senior managers, and other key employees. Our Equity & Executive Compensation Team offers an independent approach to the representation of public companies on these complex matters. Our focus allows us to provide legal counsel that does not conflict with management representation in other areas. We also understand the sheer complexity of this area of the law. Our attorneys work closely with the client and its other advisers to approach equity and executive compensation from both a strategic and technical standpoint to help clients mitigate compliance risks while achieving business objectives.

Seyfarth Shaw Service Offerings

Executive compensation practices are receiving unprecedented attention from the media, shareholders, Congress, the Internal Revenue Service, and the Securities and Exchange Commission. With the reshaping of the regulatory landscape that occurred in 2002 by Sarbanes-Oxley, in 2004 by the American Jobs Creation Act, and in 2005 by the Financial Accounting Standards Board and the SEC, our team has remained at the forefront of helping clients effectively manage their executive compensation programs while fulfilling compliance obligations.

We offer a comprehensive approach to equity and executive compensation matters. We have found that it does not necessarily serve the best interest of clients to look at each issue in a vacuum. Many compensation issues are interrelated, so we employ a holistic approach to the assessments we make and the counsel we provide. On the following pages are some of the areas in which we work with clients to meet their equity and executive compensation goals:



Employment and Termination Agreements

In recent years boards have engaged independent compensation consultants to assist with the development of their executive compensation programs. Given the potential conflict of interest for existing outside corporate counsel or in-house lawyers to negotiate legal matters with future or current senior management, boards are increasingly finding it appropriate to also hire independent outside legal counsel for executive and equity compensation matters, particularly for employment and separation agreements. Our team works closely with boards and their non-legal advisors to craft appropriate employment and separation agreements for each client's particular situation. We give due consideration to the competing needs of quickly "closing the deal" and protecting the company against overcompensating non-productive or culturally mismatched executives.

Drawing upon our firm's strengths in the employment law field, we draft concise documents that not only clearly reflect the economic agreement of the parties but also deal with the legal "niceties" such as restrictive covenants and clawbacks for misconduct.

Equity Compensation

Vital to all companies competing for top talent, equity compensation is an important component of providing appropriate performance incentives and rewarding exceptional performance. Our attorneys design and implement broad-based and executive-level equity compensation plans, including incentive stock option and nonqualified stock option plans, restricted stock and restricted stock unit awards, performance shares, and stock appreciation rights plans, as well as employee stock ownership plans (ESOPs).

Our practitioners are also familiar with the critical accounting policies associated with equity compensation plan design and operation, including issues raised by net exercises, performance-based awards, option modifications, and repricings. We assist plan sponsors with the related compliance, disclosure, and registration requirements as well.

Cash Compensation/Incentive Compensation

Recent concerns over perceived abuses of equity compensation have fueled greater focus on cash compensation. Unlike other forms of compensation, there are relatively few legal restrictions that circumscribe the design of incentive compensation. We work closely with clients to design innovative incentive compensation programs that meet their needs. Our team can help clarify the goals for the program, define performance objectives, structure the program in light of compliance requirements under Section 162(m) for deduction of compensation in excess of \$1 million, and place appropriate limits on the benefits payable under the program.

Nonqualified Deferred Compensation

Perhaps the biggest advantage of nonqualified deferred compensation plans is the ability for executives to accumulate meaningful retirement benefits in light of restrictive limits under traditional tax-qualified profit-sharing and pension plans. These types of plans often raise important questions about the continued viability of the employer to pay plan benefits and the risk that payments might not be made upon a change in control. Plan sponsors must also be mindful of ERISA rules, which restrict who may be covered under a nonqualified deferred compensation plan.

We regularly represent clients in designing nonqualified deferred compensation programs, including make-whole plans that replace benefits not received due to tax-qualified plan limits, elective plans, supplemental executive retirement plans, and rabbi trusts. We focus on practical and legal ways to provide flexible access to nonqualified deferred compensation prior to retirement without running afoul of constructive receipt rules and expanded coverage for employees.

Code Sections 409A and 162(m) Compliance

The enactment of IRC Code Section 409A has had a profound impact on executive compensation practices, not only for traditional nonqualified pension and deferred compensation plans, but also for individual employment agreements, severance agreements, equity compensation programs, and long-term incentive arrangements. Seyfarth began tracking this legislation well before it was enacted, and was the first major law firm to provide a series of teleconference client briefings on the new rules.

We work with many publicly traded companies on the restructuring of their form of executive separation agreements and the severance provisions of executive employment agreements to avoid the onerous provisions of IRC 409A. In several cases, we redesigned the payment structure to take advantage of the “stacking” of certain exceptions to IRC 409A to avoid the “six-month delay” rule for payment of compensation to key employees of public companies upon separation from service. We also revised the definition of termination for “good reason” to fit within the involuntary separation rules under IRC 409A.

SEC Proxy Disclosure

New SEC regulations on executive compensation, especially those affecting post-employment payments and the new Compensation Discussion and Analysis (CD&A), present companies with even greater challenges when determining how to handle disclosure requirements. Seyfarth’s Equity & Executive Compensation Team works with clients to help ensure regulatory compliance without compromising the integrity of privileged information.

Change-In-Control Issues

Change-in-control transactions are full of pitfalls associated with tax, corporate governance, and disclosure and reporting requirements. Mindful of their vulnerability to scrutiny by shareholder groups, we work with clients on relevant change-in-control agreements that can be successfully managed with the goal of establishing protections for executives and maintaining compliance with golden parachute rules—without compromising other competing interests.

Compensation Committee Legal Reviews

Our attorneys help board members fulfill their fiduciary responsibilities to their companies, compensate their productive employees well, and avoid litigation and adverse publicity. Although our philosophy is to fully customize our approach for each Compensation Committee, our legal compliance review of equity and executive compensation programs usually includes several steps. Our team begins with a dialogue over the specific compensation issues currently challenging the company. We then examine the client's compensation philosophy to determine if it is aligned with the company's strategic business objectives. We also review equity grant procedures. Next, we suggest appropriate changes to compensation practices and to plan documents. Finally, we develop an education strategy for filling any knowledge gaps, which can either be short-term targeted programs or long-term educational plans, for directors and/or personnel administering the compensation programs. Our objective is not only to counsel, but to provide the Compensation Committee and those implementing its decisions with the tools necessary to make fully informed decisions regarding their equity and executive compensation challenges.

...And Any Other Equity or Executive Compensation Need

There is generally no limit to the legal areas in which our counsel may be sought. Equity and executive compensation matters on which we have advised companies include:

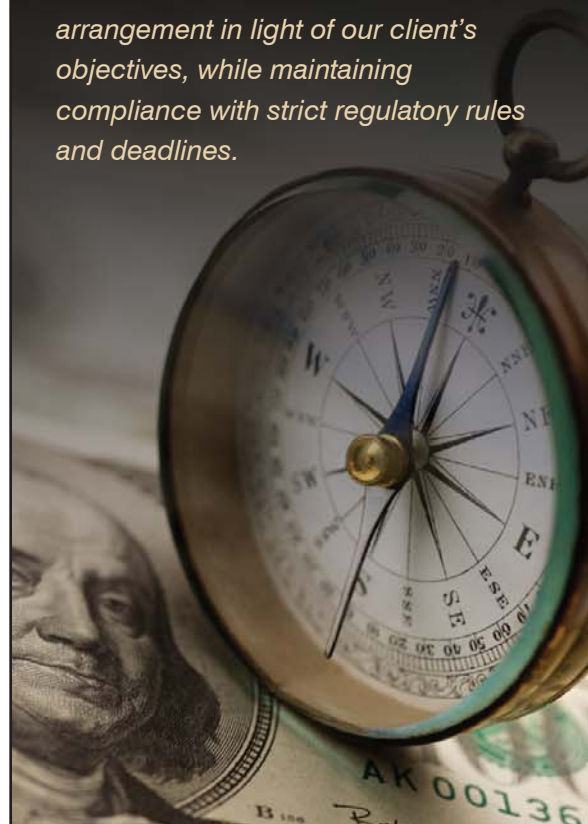
- Compensation policies and philosophies
- Tally sheets
- Compensation Committee reports
- Equity grant guidelines
- Fiduciary training (including the duties of care, loyalty, and candor as well as the business judgment rule)
- Compensation Committee structure (size, selection, charter)
- Best practices for interacting with management
- SEC reporting on Forms 4, 8-K, 10-Q, and 10-K
- Stock exchange listing requirements
- Registration statements (Form S-8)
- Risk Metrics (f/k/a ISS) and other institutional investor proxy voting guidelines
- Code Section 162(m) and Code Section 409A compliance
- Tax gross-ups
- Employment and severance arrangements
- Retention arrangements
- Noncompetes and nonsolicitations
- Clawback provisions
- Perquisites

Meeting Objectives, Maintaining Compliance

A Belgian company terminated its US operations and established a supplemental retirement scheme through severance agreements for the key executives employed in those operations. The program was funded through a trust in the Channel Islands established by an affiliated company incorporated in the British Virgin Islands. Because of the enactment of Section 409A of the IRC, looming deadlines necessitated a number of actions within a very short time frame.

- ▶ Our team was able to negotiate the termination of the offshore trust arrangement and the severance agreements, providing for lump sum distributions to the executives before the end of the year. This required coordination with the laws of each of the four jurisdictions, coordination with actuarial experts, and negotiations with the executives and their local counsel.

Result: We facilitated a satisfactory settlement of the retirement arrangement in light of our client's objectives, while maintaining compliance with strict regulatory rules and deadlines.



Striking the Appropriate Balance

A US-based international manufacturing firm needed to bring all of its executive compensation programs into compliance with IRC 409A.

- ▶ Our team analyzed a multitude of employment, severance, change-in-control, bonus, equity compensation, fringe benefits, and deferred compensation plans and agreements. We presented the board with various alternatives to restructure the arrangements so as to remedy inconsistencies in definitions of good reason and change in control, eliminate “deadwood” provisions, and achieve compliance.

Result: All of the client’s programs were brought into compliance with 409A while avoiding six-month payment delays, and the appropriate level of fairness in the terms and conditions of the agreements was restored.

Protecting Management Interests

The Board of Directors of a publicly traded real estate investment trust (REIT) needed executive compensation counsel to represent the REIT’s interests in restructuring and renegotiating a number of executive employment and executive compensation arrangements provided to its management group.

- ▶ We successfully negotiated new arrangements on behalf of the REIT for the management group. Months later, the management group approached us and, based upon the work we did on behalf of the REIT, requested that we represent their interests in the REIT’s “going private” transaction. This involved navigating a complex set of issues, including conversion of the group’s publicly traded equity ownership in the REIT into closely held partnership interests in the new entity.

Result: With our help, the management group was able to successfully weather the transition and stay focused on its business as it passed through this difficult transition.

Benefit to You

Our independent and multidisciplinary approach offers clients a unique perspective from their legal counsel. Our Equity & Executive Compensation attorneys have diverse backgrounds in related fields—from serving as in-house counsel to working in accounting firms and the consulting industry. As a result, we are uniquely positioned to provide clients with workable solutions to their equity and executive compensation issues.

Members of the Equity & Executive Compensation Team take leadership roles in organizations such as the Global Equity Organization and the National Association of Stock Plan Professionals, helping us stay ahead of the curve and on top of emerging trends.

About Seyfarth Shaw

Seyfarth Shaw was founded in 1945 by three lawyers and has grown to more than 750 lawyers across ten offices. We handle issues for our clients in all key areas including labor and employment, commercial litigation, construction, corporate and finance, employee benefits, environmental, government contracts, intellectual property, litigation, real estate, securities litigation, trade secrets, trusts and estates, and workouts and bankruptcy, among others.

Our success is the result of a constant, unrelenting focus on the needs of our clients. Our commitment to excellence and our belief in the strength of a team-based approach to the delivery of our services offers an atmosphere of creative and innovative thinking.

Our clients are our partners in business and we are committed to listening to their needs and to aligning the skills and abilities of our people to respond to those needs. Our clients range from *Fortune* 100 to midsize companies, and include publicly traded and privately held companies. We represent clients of all sizes across all industries and we are diligent in providing the same level of commitment to each client.

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