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TEAM

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WELCOME TO THE 111<sup>th</sup> CONGRESS

The 111th Session of Congress which convened on January 6th, was the first since 1993 in which the Democrats controlled both Houses of Congress as well as the White House. With increased majorities in the Senate and the House, Democrats are enthusiastic about enacting what may be the most liberal leaning agenda since 1965. Among the issues that the Democratic Leadership would like to take up early in the new Congress are the following:

- *Stimulus Package.* The Democrats would like to have a significant economic stimulus package ready for President Obama's signature on or shortly after Inauguration Day. Rather than recessing after being sworn in until the Inauguration, as is usually the case, Congress plans to stay in session and take up a package which would spend in excess of \$500 billion to generate economic activity. It is expected that the new Administration would support a package of approximately \$800 billion or more, including \$300 billion in tax cuts for individuals and businesses. Some believe such significant legislation could not be considered and passed in such a short time frame but may take additional weeks. Among the items to be included in the package are the largest expenditures on transportation infrastructure since the creation of the interstate highway system in the 1950s, aid for state and local governments, efforts to make public buildings more energy efficient, energy tax incentives, renovation of school buildings, increased spending for Medicaid and large investments in health information technology.

- *Card Check.* The Democrats would like to repay labor unions for their support in the recent elections by an early enactment of the Employee Free Choice Act. This bill would effectively eliminate secret ballot elections in union organizing elections and replace it with a system to allow workers to fill out a card to indicate their support for the union. If enacted, this measure would constitute the most significant change in the law governing union organization in 50 years.
- *Prescription Drug Price Control.* Many Democrats support legislation to give the Department of Health and Human Services the authority to negotiate with pharmaceutical companies for lower prescription drug prices for seniors who participate in the Medicare Part D program. Similar legislation passed the House in the 110th Congress but was defeated in the Senate.
- *Statute of Limitations in Workplace Discrimination Suits.* This bill would amend the 1964 Civil Rights Act to give workers more time to file suits alleging discrimination in the workplace. The legislation would amend the law in light of a recent Supreme Court decision which interpreted the Act to require that such suits be filed within six months of the alleged discrimination.
- *Omnibus Appropriations Bill.* This would fund the nine appropriation bills for FY2009 that the 110th Congress failed to pass.
- *Child Health Insurance.* The 110th Congress passed a \$35 billion expansion of the State Children's Health Insurance Program (SCHIP) but it was vetoed by President Bush. President Obama would likely sign a similar bill into law.
- *District of Columbia Voting Rights.* The Democratic Leadership supports legislation to give the Delegate from the District of Columbia a vote in the House of Representatives.
- *Mortgages in Bankruptcy.* It is possible that the Congress may take up legislation to allow for the renegotiation of the terms of a home mortgage which is subject to a bankruptcy proceeding.
- *Senate Confirmations.* Various Senate Committees will hold hearings on President-elect Obama's nominees to the Cabinet to allow for confirmation votes by the full Senate as soon as possible.

Once the Congress works its way through its initial agenda items, it is likely to continue to pursue an activist legislative course. Measures that the Democratic Leadership and the Obama Administration would like to pursue include health care reform, green energy legislation to encourage plug-in hybrids and a digital electricity grid, a cap and trade program to reduce greenhouse gas emissions, patent reform, reform of the financial regulatory system, an expansion of Trade Adjustment Assistance to assist workers and communities negatively affected by trade agreements, as well as reauthorization of the Federal Aviation Administration.

The Democratic Leadership is aware that with their increased numbers in the Senate and the House, as well as control of the White House, voters have high expectations for some significant legislative accomplishments early in the Session. The Leadership hopes to be able to meet these expectations.

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## EXECUTIVE COMPENSATION UNDER ATTACK – KEY ISSUES FOR COMPANIES TO WATCH CLOSELY

A series of corporate scandals coupled with media attention surrounding the current economic downturn have put fresh scrutiny on executive compensation practices. Senior executives of financial and industrial companies have been called before Congress, and grilled about their pay packages. As Congress and the Administration have been forced to step in to provide assistance to provide enterprises, strings have been attached that require new limitations on executive pay. These limitations are described below, as well as more wide-ranging proposals that would affect all companies regardless of whether they receive government assistance or not.

### **Emergency Economic Stabilization Act**

The Emergency Economic Stabilization Act of 2008 (EESA) enacted sweeping new executive compensation restrictions that apply to companies that participate in financial relief programs initiated under the EESA. While these restrictions apply only to companies that participate in EESA programs, these new restrictions can be expected to serve as a "roadmap" for more broadly applicable restrictions considered in the next Congress.

### **Who is affected by the EESA's new executive compensation restrictions?**

Companies that participate in the Treasury Department's relief programs created under the EESA – the Troubled Asset Auction Program, the Capital Purchase Program, or the Programs for Systemically Significant Failing Institutions – are subject to the new executive compensation restrictions. For affected companies, the new restrictions generally apply to the Chief Executive Officer, Chief Financial Officer, and the next three most highly compensated executive officers.

### **Summary of New Restrictions and Requirements**

The EESA imposes the following new restrictions and requirements on covered employees of affected companies:

- *General Standards and Criteria* – Executive compensation arrangements must exclude incentives to "take unnecessary and excessive risks that threaten the value" of the company or firm.
- *Clawbacks* – Executive compensation arrangements must include a so-called "clawback" provision for the recovery of any bonus or incentive compensation paid based on statements of earnings, gains, or other criteria that are later proven to be materially inaccurate.
- *Golden Parachute Prohibitions* – Companies are prohibited from making any golden parachute payments to covered executives during the period that the federal government holds an equity or debt position in the company. An excise tax also would be imposed on any golden parachute payments made by such companies.
- *Limitations on Deductibility of Executive Compensation* – Compensation to covered executives may not be deducted to the extent that compensation exceeds \$500,000 for the year. For these purposes, compensation is defined broadly to include both cash and non-cash (e.g., performance-based) compensation.

### **Other Legislative Proposals**

The changes made in the EESA were not the only executive compensation proposals in the 110th Congress. In fact, prior to the EESA, influential Members of Congress – including President-elect Barack Obama – had already put forth a wide array of legislative proposals that would have a direct effect on executive compensation practices and arrangements. Some of the more significant proposals include the following:

- *"Say on Pay" Legislation* – requires non-binding shareholder vote on executive pay. (H.R. 1257 (Frank); S. 1181 (Obama))
- *Tax Deductibility* – tightens deductibility limitations under Internal Revenue Code (IRC) section 162(m) to restrict compensation in excess of \$1 million per year. (S. 349 (Baucus))
- *Non-qualified Deferred Compensation* – imposes new limits and restrictions on non-qualified deferred compensation arrangements, e.g., a contribution limit on the amount of compensation that can be deferred. (S. 349 (Baucus))
- *Bankruptcy Law Changes* – limits bonuses to executives while a company is in bankruptcy; voids payments made to executives in anticipation of bankruptcy; prohibits deferred compensation when employee plans have been terminated in bankruptcy. (S. 2092 (Durbin); H.R. 3652 (Conyers))
- *Stock Option Restrictions* – restricts tax deductibility of stock options to the amount of the expense shown in corporate financial statements; also excludes stock options from the "performance-based" exception under IRC section 162(m). (S. 2116 (Levin))

- *"Clawback" Requirements* – expands section 304 of Sarbanes-Oxley by broadening the definition of "misconduct" that triggers requirements that executives reimburse companies for such misconduct. (S. 2866 (Clinton))
- *Mergers & Acquisitions/Golden Parachute Payments* – requires shareholder approval of golden parachute payments in connection with mergers and acquisitions. (S. 2866 (Clinton))
- *Compensation Consultants* – disclosure or ban on services provided by compensation consultants. (House Government Reform and Oversight Committee report and hearing; S. 2866 (Clinton); CRS Report RL33935)
- *Board of Director Elections* – increasing shareholders' role in electing Boards of Directors, e.g., allowing shareholders to nominate directors. (Senate Banking Committee hearing; CRS Report RL33935)
- *Linking Executive Pay to Non-Executive Pay* – limit executive pay that exceeds a certain ratio of non-executive pay (e.g., 25 times the lowest-paid employee). (H.R. 3260, 109th Congress; CRS Report RL33935; Institute for Policy Studies/United for a Fair Economy)
- *Government Contracting Requirements* – restrict or deny government procurement contracts to firms if executive pay exceeds a certain ratio of non-executive pay. (S. 2866 (Clinton); Institute for Policy Studies/United for a Fair Economy)

### **Conclusion**

Companies must monitor executive compensation legislation very closely – both with an eye towards influencing legislative proposals to avoid unintended consequences and to ensure that they are in compliance with any new laws. Venable's Legislative and Government Affairs practice and its Employee Benefits and Executive Compensation practice are monitoring all developments closely, and stand ready to assist companies at this critical time.

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## **VENABLE'S APPROPRIATIONS PRACTICE**

If you followed the presidential campaigns closely, you probably believe "appropriations" is a four-letter word. The appropriations process took a beating during the presidential election as both candidates used the process as a whipping boy for everything wrong with the Washington establishment.

For those unfamiliar with the mechanics of the appropriations process, it is easy to latch onto tales of pork barrel spending and believe the hype. However, despite the flak thrown at the

appropriation process by a wide variety of interest groups, the truth is that anti-earmarking arguments are rarely routed in fact.

The good news is the appropriations process survived the criticism heaped upon it by President-elect Obama and Senator McCain. Despite commitments from both political parties to limit earmarks and implement more rigorous oversight of lawmakers requesting them, the appropriations process will remain a critical path to fund the development of new and innovative technologies as well as the delivery of critical infrastructure and social services.

In addition to increased oversight, organizations seeking directed funding will face an extremely competitive environment. The appropriations process has always been highly competitive and requires detailed strategic planning coupled with flawless tactical execution to achieve success. However, as an ever-growing number of applicants vie for an ever-shrinking pool of discretionary funding, the process will be more competitive than ever. In order to secure directed funding in today's environment, organizations must secure buy-in for their carefully developed requests by building a broad base of supporters among relevant state delegations and committees. At the same time, organizations must be adept at drafting bill and report language directing funding to certain industry niches where a company is a legitimate contender for the funding.

Few organizations have the know-how, staff and experience to identify the opportunities, to take advantage of industry-directed funding, and build a coalition that can successfully support a funding request. This is where Venable can help.

The Venable team has hundreds of years of collective experience working appropriations issues. In addition, Venable, unlike many government affairs practices, has built a team that is bi-partisan, bi-cameral, and has tremendous experience working with members and staff of all the subcommittees involved in the appropriations process.

Venable's team is familiar with every step of the appropriations process, from identifying members likely to support a request, conducting briefings with members and staff, drafting of funding requests and bill/report language, and building coalitions to help smooth a request through the appropriations process.

*To learn how Venable can help guide your organization through the appropriations process, please contact Greg Gill at 202.344.4615 or by email at [GMGill@Venable.com](mailto:GMGill@Venable.com).*

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## VENABLE IN THE NEWS

The Washington Business Journal featured Venable's "Election Watch Group" in an article on the presidential election's impact on multiple industries. The Group, made up of members of Venable's legislative and regulatory team, offered commentary and projections for the industries and issues at the forefront of the 2008 Presidential elections.

Our Partner, **Jim Burnley**, was quoted in the November 10 issue of *Legal Times* on likely transportation issues in the 111th Congress. Jim also spoke at a December 2 Fortune 500 Forum on "Infrastructure: The \$3 Trillion Challenge." Jim served as the Secretary of Transportation for President Ronald Reagan.

Former Senator **Birch Bayh** was profiled in the November 26 edition of *Bisnow Legal*. The article highlighted Birch's extensive efforts campaigning for the Obama-Biden ticket in Indiana. Birch is a Partner in Venable's Legislative Practice Group and had represented Indiana in the United States Senate for 18 years.

Venable Partner **William Donovan** was quoted in the *Credit Union Times* on the likely issues facing credit unions in the new Congress.

**Ray Shepherd**, a Partner in Venable's Legislative Practice Group, was quoted in a November 25 article in *Defense Daily* on the probable level of homeland security spending in the Obama Administration.

**Tiffany Moore**, a former Assistant U.S. Trade Representative and a Senior Legislative Advisor at Venable, was quoted in an article of *Shipping Digest* on the merits of free trade agreements. Tiffany was also quoted in the January 2009 edition of *The Bottom Line* on trade relations between the United States and Canada and the North American Free Trade Agreement.

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## Capitol View

Capitol View is published by the Legislative Practice Group of the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations. Questions and comments concerning materials in the newsletter should be directed to Kevin Faley at [kofaley@Venable.com](mailto:kofaley@Venable.com). Please direct address changes to Barbara Reres at [breres@Venable.com](mailto:breres@Venable.com).