Key Takeaways

Skadden

Equal Pay Audits: Voluntary Disclosure, Activism and Litigation

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On October 4, 2018, Skadden hosted the webinar "Equal Pay: Voluntary Disclosure, Activism and Litigation." The panelists were **Marc Gerber**, partner, Mergers and Acquisitions and Corporate Governance, Skadden; **Blair Jones**, executive compensation consultant and managing director, Semler Brossy Consulting Group; **Stephen Pennacchio**, senior vice president of Total Rewards, Pfizer; and **David Schwartz**, global head of Labor and Employment Law, Skadden. **Regina Olshan**, Skadden's global head of Executive Compensation and Benefits, moderated the discussion.

Renewed Focus on Equal Pay

Ms. Olshan began by providing an overview of the previous webinar and discussing the cultural shift that has renewed societal focus on pay equity. Ms. Olshan credited the White House Equal Pay Pledge under the Obama administration and the #MeToo movement as two important factors. While the #MeToo movement is primarily focused on sexual harassment, Ms. Olshan noted its impact of a greater focus on working conditions for women more generally. To highlight a recent development, Ms. Olshan explained that California Bill 826 had been signed just four days prior to the webinar. The new law requires publicly held corporations headquartered in the state to have at least one female director by the end of 2019, and by the end of 2021, companies with five board members must have at least two female directors and those with six or more board members must have at least three female directors.

Voluntary Disclosure

Mr. Schwartz opened the discussion on voluntary disclosure with several statistics on the gender pay gap. He explained that "pay inequality" generally refers to the difference in wages men and women receive for performing equal or substantially similar work, while "gender pay gap" means the difference in pay between an average male employee and an average female employee and largely reflects the clustering of men in high-paying roles and women in low-paying roles. Pay inequality involves sex-based discrimination in the wage-setting process, but a gender pay gap does not necessarily indicate discrimination. According to the U.S. Bureau of Labor Statistics, in the first quarter of 2018, female full-time employees earned 81.1 percent of what male full-time employees earned; the median weekly earning for women was $783, while the median weekly earning for men was $965.

Ms. Jones explained that these statistics are receiving increased attention from shareholders. She noted that, despite expectations that companies that signed the Equal Pay Pledge would disclose pay data, few have actually done so. Mr. Pennacchio commented on Pfizer's disclosure practices in the U.K.; Pfizer discloses the required information and provides a supplemental disclosure on other diversity programs and efforts at the company. Pfizer releases supplemental disclosure to provide a more detailed view of gender pay and the efforts by the company to provide more high-level opportunities for women.

Next, Ms. Jones reviewed the pros and cons of voluntary disclosure. She recommended that boards and compensation committees discuss the issue of gender pay proactively, ideally before a company is targeted by a shareholder activist. Ms. Jones also noted that companies may want to consider disclosing policies and programs to support diversity and inclusion and gender pay equity, in addition to pay data. For example, companies could include information on recruiting and development programs and specific efforts such as unconscious bias training, in addition to pay data.

Mr. Gerber cautioned that an incorrect or materially misleading disclosure can increase the risk of litigation, so companies should strive to make gender pay disclosures as accurate as possible. Mr. Gerber noted that, to date, we have not seen securities lawsuits based on incorrect gender pay disclosure.

Shareholder Activism

Next, Mr. Gerber discussed recent trends in shareholder activism. Examining 2016-2018 data on gender pay proposals from shareholders, Mr. Gerber noted that a high proportion of proposals were withdrawn relative to the number submitted. He also noted that gender pay proposals received on average only 14-17 percent support from shareholders. Mr. Gerber then discussed some of the major shareholder activists, including Arjuna Capital, Pax World Funds and Zevin Asset Management, as well as industries targeted by activists, such as technology, finance and retail.

Mr. Gerber also discussed positions taken by ISS and Glass Lewis on shareholder proposals relating to gender pay disclosure. Mr. Gerber noted that, while ISS and Glass Lewis have a similar rubric for evaluating companies, the firms sometimes produce different voting recommendations. Mr. Gerber explained that ISS generally appears to focus on the company's sector when making a recommendation, while Glass Lewis appears to take a more nuanced analysis of the proposals and the company's disclosure.

Employee Litigation

In the final part of the webinar, Mr. Schwartz discussed employee litigation considerations. Mr. Schwartz stated that the renewed focus on equal pay has resulted in some increased litigation; however, this uptick does not seem to be tied directly to gender pay disclosure.

Using the U.K. as an example, Mr. Schwartz explained that new reporting regulations have not directly led to an increase in employee litigation because the regulations do not expose equal pay discrepancies. Rather, the requirement to publish gender pay data identifies the average difference between the pay of males and females in different parts of the workforce. In the U.S., Mr. Schwartz noted, it is difficult to gauge the impact of voluntary pay gap disclosure on employee litigation because many companies that signed the Equal Pay Pledge have not disclosed the results of their equal pay audits. Among those that have, most companies have indicated no gender pay gap or similar disparity; however, few have provided information about the methodology used to reach such results.