Morgan Lewis

white paper

communicate

SEIU Union Organizing Efforts at Financial Services Companies

April 2009

Introduction

As reported in a April 20, 2009 press release issued the Service Employees International Union (SEIU), SEIU Pension Plans Master Trust (SEIU Master Trust) has recently sent letters to the boards of directors of 29 major companies demanding that the boards look into how executive pay was incentivized and determine whether bonuses were paid to executives based on false presumptions or economic metrics, or financial instruments that are now worthless. The letters further demand that the boards investigate whether their companies have legitimate and reasonable claims to recover and/or prevent the payment of executive compensation that was unjustly paid or approved for payment, and threaten shareholder derivative suits if the boards fail to properly discharge what the SEIU Master Trust describes as their fiduciary duties to investigate and prosecute these potential claims within a reasonable period of time. (A copy of the SEIU April 20, 2009 press release is attached.)

The SEIU's Corporate Campaign

Although these letters were sent on behalf of the SEIU Master Trust (described below) and carefully drafted to suggest they were sent solely on behalf of the SEIU Master Trust in its capacity as a shareholder, the threatened shareholder derivative suits are no doubt part of a broader corporate campaign that the SEIU is waging against financial services companies, with the ultimate goal of organizing employees in the industry, especially those most vulnerable to such efforts such as call center and branch-based employees. A corporate campaign is a multifaceted effort by a union to put pressure on a company to accede to the union's demands. The tactics used in corporate campaigns often include, in addition to shareholder actions, public demonstrations, negative advertisements, and other publicity designed to tarnish the company's image, efforts to persuade customers to boycott the company's products, personal attacks against the company's officers and directors, and efforts to generate political, legislative, and regulatory pressure against the company. The SEIU has recently orchestrated demonstrations and other publicity events against financial services companies, such as a coordinated series of protests at banks and other financial institutions nationwide on March 19 and its "ambush" of the Financial Services Roundtable meeting in Washington, D.C. on March 27.

The SEIU's ultimate goal is not simply to deal with these companies on the executive pay issue, but rather to negotiate with the companies as the collective bargaining representative of large groups of employees in the industry. In order to achieve this goal, the SEIU will typically demand that the targeted companies enter into agreements that will facilitate and expedite the union organizing process. These agreements, commonly known as neutrality and card-check agreements, involve commitments by the company to remain neutral in any union organizing campaign (i.e., not oppose the union's organizing efforts) and to agree to recognize the union based on a check of authorization cards collected by the union, rather than using the National Labor Relations Board's secret- ballot election process. A private

This White Paper is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.

©2009 Morgan, Lewis & Bockius LLP

card-check process is all the more important for the SEIU if, as it currently seems, the card-check provisions of the proposed Employee Free Choice Act do not pass Congress this term.

The SEIU Master Trust

The SEIU Master Trust is a trust fund that holds the assets of three jointly administered, multiemployer pension funds, commonly referred to as “Taft-Hartley” funds. Taft-Hartley funds are created pursuant to collective bargaining agreements and governed by a board of trustees with equal voting power between labor and management. Many Taft-Hartley funds have accumulated substantial holdings in publicly held securities. At the behest of the Department of Labor and others, many of the trustees on these funds have been instructed that they have a fiduciary duty to vote all proxies and to use their positions as shareholders to maximize the investment returns for the trust fund. As part of this process, some funds are now seeking to use their positions as shareholders to pressure corporate boards to examine their executive pay practices and, where appropriate, to bring actions to recover “excessive” executive compensation. Actions such as that being threatened against these 29 companies and their boards—especially the initiation of litigation—would typically require the consent of both the union trustees, which include SEIU President Andy Stern, and the employer trustees.

Trustees of a Taft-Hartley fund, including the trustees of the SEIU Master Trust, owe a fiduciary duty of loyalty to plan participants and beneficiaries and must administer the fund for the "sole and exclusive benefit" of participants and beneficiaries. There is an obvious tension between the SEIU's interests as a labor organization and the union trustees' fiduciary duties to plan participants and beneficiaries, but this is a tension that the Employee Retirement Income Security Act (ERISA) largely permits within certain bounds. For instance, employers often serve as fiduciaries of their own pension plans even though there may be inherent tensions between the interests of employers and those of plan participants. Here, the SEIU's agenda is clearly to organize employees in the financial services industry, and it is using the SEIU Master Trust and fund assets (i.e., stock in targeted financial services companies owned by the pension funds) to further that union objective. While the conflict of interest may seem apparent, it could be difficult to prove a breach of fiduciary duty, especially where both union and employer trustees vote in favor of taking shareholder action and there is a potential benefit to the funds. No doubt the trustees will claim that such action will enhance shareholder value and therefore help secure the retirement benefits of participants and beneficiaries. What's more, even if a breach of fiduciary duty could be shown, the targeted companies have little if any ability to seek redress in the courts. Under ERISA, only participants, beneficiaries, fiduciaries, and the Secretary of Labor have standing to bring an action for breach of fiduciary duty, and ERISA's broad preemption provision makes it extremely difficult to mount a successful challenge under state law. There is no basis for a targeted company to bring a derivative suit on behalf of the SEIU Master Trust against the union or employer trustees.

Alleged Obligation to Pursue Possible Recovery of Executive Compensation

The SEIU Master Trust’s demand that each of the 29 companies pursue recovery of executive compensation already earned or paid is rooted in federal law but raises a host of legal and practical issues. Under Section 304 of the Sarbanes-Oxley Act, the CEO and CFO

of a publicly traded company are required to disgorge bonuses and other incentive- or equity-based compensation received during the prior 12 months in the event of violations of federal securities laws, specifically where the company is required to prepare restated financials due to material noncompliance with the SEC's financial reporting requirements. The Troubled Assets Relief Program (TARP) imposed a broader set of requirements on institutions receiving TARP funds by mandating that the CEO, CFO, and three most highly compensated senior executive officers (SEOs) return bonus or incentive compensation paid on the basis of earnings, gains, or other criteria that are later proven to be “materially inaccurate.” The American Recovery and Reinvestment Act (ARRA) took the clawback rules one step further, applying the TARP requirements to SEOs and the next 20 most highly compensated employees and adding retention bonuses to the list of compensation to be recovered. None of these statutes, however, expressly provides a private right of action, and TARP and ARRA are so new the Treasury Department has not provided clear guidance on how they apply or would be enforced. Common law causes of action, such as the “faithless servant” doctrine, may furnish an avenue for recovering compensation, though the law in this area is relatively undeveloped.

Litigation to recoup executive compensation already earned or received would also encounter potential obstacles under state law. Several states, including California, define “wages” so broadly that forfeiture of compensation that has already been earned, not to mention paid, may not be permitted. An issue that will surely arise in any such litigation is when the bonus or incentive compensation becomes wages—when it is initially earned or only after clawback conditions are satisfied. Companies are continually looking for ways to structure their executive compensation programs to permit clawbacks without running afoul of state wage payment laws.

Recommended Steps to Protect Against the SEIU's Corporate Campaign and Union Organizing Efforts

The companies that are targets of SEIU's corporate campaign should be prepared to deal with these issues both from a litigation standpoint and from employee and public relations standpoints. Based on our extensive experience helping financial institutions and other companies deal with corporate campaigns and union organizing efforts by the SEIU and other unions, including the SEIU's current union organizing efforts and corporate campaign directed at financial institutions, we recommend that executives and managers be provided training or at least guidance on how to respond to communications from the SEIU or other unions. Among other things, they need to understand that certain types of communications with union representatives and certain actions such as viewing signed union authorization cards can, in certain circumstances, create obligations and even bind a company to a relationship with the union.

If you have any questions or would like more information about what such a training program would entail, please contact one of the following attorneys:

New York

David A. McManus	212.309.6824	dmcmanus@morganlewis.com
Craig A. Bitman	212.309.7190	cbitman@morganleiws.com
Gary S. Rothstein	212.309.6360	grothstein@morganlewis.com

Philadelphia

Steven R. Wall	215.963.4928	swall@morganlewis.com

Steven D. Spencer	215.963.5714	sspencer@morganlewis.com
Doreen S. Davis	215.963.5376	dsdavis@morganlewis.com
Robert J. Lichtenstein	215.963.5726	rlichtenstein@morganlewis.com
Robert L. Abramowitz	215.963.4811	rabramowitz@morganlewis.com
Washington, D.C.		
Althea R. Day	202.739.5366	aday@morganlewis.com
Joseph E. Santucci, Jr.	202.739.5398	jsantucci@morganlewis.com
Daniel L. Hogans	202.739.5510	dhogans@morganlewis.com
Gregory L. Needles	202.739.5448	gneedles@morganlewis.com
Chicago		
Charles C. Jackson	312.324.1156	charles.jackson@morganlewis.com
Philip A. Miscimarra	312.324.1165	pmiscimarra@morganlewis.com
Princeton		
Richard G. Rosenblatt	609.919.6609	rrosenblatt@morganlewis.com
Rene M. Johnson	609.919.6607	rjohnson@morganlewis.com
San Francisco		
Daryl S. Landy	415.442.7561	dlandy@morganlewis.com
Los Angeles		
Peter J. Hurtgen	213.612.7130	phurtgen@morganlewis.com
Dallas		
Paulo B. McKeeby	214.466.4126	paulo.mckeeby@morganlewis.com
Houston		
A. John Harper II	713.890.5199	aharper@morganlewis.com

About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—more than 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.