PUBLICATION

New Rules Regarding Executive Compensation

January 28, 2011

On January 25, 2011, the Securities and Exchange Commission (SEC), by a 3-2 vote, adopted final rules regarding the non-binding executive compensation advisory votes and golden parachute disclosures required by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The final rules place new burdens on public companies with respect to the following three areas:

Say-on-Pay Voting

Public companies are now required to hold a shareholder advisory vote on the compensation of named executive officers at least once every three years. Companies must include disclosures related to this say-on-pay vote in their annual meeting proxy statements, including disclosures in the Compensation Discussion and Analysis (CD&A) as to whether and how the most recent say-on-pay vote was considered by the company. There is no specific language required for the say-on-pay vote resolution; however, the final rules include an example of a resolution meeting the applicable requirements.

Say-on-Pay Frequency Voting

Public companies are also now required to allow shareholders to vote on the frequency with which they would like to be presented with the say-on-pay vote discussed above – annually, biennially or triennially. Shareholders may also elect to abstain from this frequency vote; however, if a company's proxy service provider is unable to reprogram its system to permit four voting choices, the SEC will permit the company to exclude the abstain selection from the 2011 vote. The frequency vote is required at least once every six years. Companies must include disclosures related to this frequency vote in their annual meeting proxy statements.

The proxy rules have been revised to account for this frequency vote by permitting a company to exclude from their proxy statements shareholder proposals on say-on-pay and frequency votes on the basis that such proposals have been substantially implemented, if the company has adopted a policy that is consistent with the frequency approved by a majority of the votes cast in the last frequency vote.

Following a frequency vote, companies must file a Form 8-K that discloses the frequency with which the say-on-pay vote will be held. The Form 8-K must be filed no later than 150 calendar days after the annual shareholders' meeting in which the frequency vote was held, but absolutely no later than 60 calendar days prior to the deadline for the submission of shareholder proposals for the next annual shareholders' meeting.

Golden Parachute Voting and Disclosure Requirements

Companies are now required to include additional disclosures, in both narrative and tabular form, regarding golden parachute arrangements with respect to the named executive officers of both the acquiring and target companies in connection with mergers or similar transactions for which proxies are solicited. These disclosure requirements are only applicable to compensation that is transaction-related and exclude future employment arrangements. Companies are also required to hold a separate advisory vote to approve golden parachute arrangements that were not previously submitted to a say-on-pay vote and which satisfied the golden parachute disclosure requirements discussed above. However, even if a company is not required to hold a separate advisory vote on a particular golden parachute arrangement, this does not modify a company's disclosure obligations regarding the arrangement in the context of the transaction.

Deadlines for Compliance

The initial say-on-pay and frequency votes must be included in proxy statements relating to annual shareholders' meetings taking place on or after January 21, 2011. Companies are required to comply with requirements related to the advisory vote and disclosures regarding golden parachute arrangements in proxy statements and other schedules and forms initially filed on or after April 25, 2011.

The SEC included a temporary exemption for smaller reporting companies so that they are not required to comply with the say-on-pay and frequency votes until annual shareholders' meetings taking place on or after January 21, 2013.

The extent of the impact of these new rules on the compensation practices of public companies cannot be gauged with any certainty until the first advisory votes occur and companies are able to digest the results. To avoid potentially embarrassing negative votes, public companies should review their existing pay practices to evaluate any potential issues with a say-on-pay vote, including eliminating any unjustifiable practices. Companies should also review records of prior shareholder votes and proxy advisory recommendations on compensation matters to identify potential issues. Finally, companies should consider including an executive summary section to their CD&A in order to provide shareholders with a high-level summary of and the reasons for their compensation practices. You may review the final rules by clicking here.

If you have questions about the newly adopted rules and their effect on your company, or any other securities-related issues, please contact your Baker Donelson attorney.