Willis

EXECUTIVE RISKS
ALERT

September 2010 – Issue 50 www.willis.com

EXECUTIVE RISKS AND THE WALL STREET REFORM AND CONSUMER PROTECTION ACT

The new Financial Reform Act[1] will impact financial services firms in a multitude of ways, which are being addressed by our Financial Services Practice in a series of timely and topical *Alerts*. But there are three key areas where *all* public companies, including those who are *not* in the financial services sector, are likely to feel the changes in the area of corporate governance – something near and dear to the hearts of those interested in Executive Risks. This ER *Alert* addresses these three areas.

NO LONGER WHISTLING IN THE WIND

Under the new rules, anyone who alerts the Securities and Exchange Commission (SEC) to a violation of the securities laws resulting in SEC penalties of $1 million or more can now collect 10% to 30% of the total penalty imposed. With penalties in some of these cases now in the hundreds of millions of dollars, the potential for an enormous financial windfall is now real.[2] The fact that the whistleblowers themselves could have been involved in the underlying conduct and are *still eligible* for the new award – unless convicted of a criminal violation related to their involvement – both concerns and outrages many.

Within 48 hours of the passage of the Financial Reform Act, a law firm issued a press release announcing that it was the first firm to file a whistleblower complaint with the SEC under the new rules. That same day, another prominent plaintiffs' law firm issued a press release announcing that it was expanding its legal practice to include the representation of securities fraud whistleblowers.[3]

The Act also extends Sarbanes-Oxley's protection from retaliation for whistleblowing by employees of public companies, their subsidiaries and affiliates, to cover employees at foreign subsidiaries and affiliates.[4] Many law firms are warning their clients to be prepared for an increase in bounty hunting. Much of this concern, to date, has been speculation about what this could mean in the context of Foreign Corrupt Practices Act (FCPA) enforcement, where employees at a company's foreign operations are the ones most likely to be aware of illegal conduct, and now, are financially incentivized to share this information with the SEC.

As a result of this change, many companies both domestically and internationally, are re-reviewing their internal whistleblowing policies and procedures as well as considering the potential utility of enhancing their FCPA avoidance training.

READ MY LIPS: SAY ON PAY REGARDING EXECUTIVE COMPENSATION

At the first shareholders' meeting occurring after mid-January 2011, public company shareholders will get to vote on a resolution

providing them with a non-binding, advisory vote on compensation for executive officers.[5] Shareholders will also get to consider the timing of future say on pay votes (annual, biannual or triennial).

As mentioned, the shareholder vote on executive compensation will be advisory and not binding for the company or its board. So the board would not be legally obligated, by virtue of a shareholder vote disapproving executive compensation, to make any change in its executive compensation decisions. In fact, such votes cannot be construed to:

- Overrule a decision by the board of directors or the company
- Create or imply any changes or additions to the fiduciary duties of the board or the company
- Restrict or limit the ability of shareholders to make proposals for inclusion in company proxy statements regarding executive compensation

But presumably, few compensation committees will be happy to receive even a non-binding “no” vote. A “no” vote could also result in shareholder advocacy organizations deciding to recommend “withhold” votes for compensation committee directors who are themselves running for re-election to the board.

The good news is that many in corporate America will not be complete novices at this process, as in the 2009 proxy season there were over 400 companies with a management proposal to approve executive compensation.[6]

ACCESS BY PROXY

Substantial shareholders and shareholder groups will now be able to include their own candidates for some board seats in the company’s proxy materials.[7] For calendar-year companies, the deadline to submit shareholder nominations for inclusion in company proxy materials is likely to be around year-end, subject to the terms of advance notice bylaws (which may need to be reset when the new rules are adopted). Proxy access is considered “one of the most controversial issues in the entire bill,”[8] and the SEC is now charged with issuing proxy access rules. At this time,[9] we don’t precisely know what “substantial” means in terms of shareholder ownership, or how often this option will be available (every year, every three years?). The good news is that on July 22, the Commission, seeking comment, released its proposal on what the new rules might look like.[10]

The Commission’s proposal offers an important insight into what to expect from the final rules. Keep in mind that the SEC feels very strongly about this topic[11] and, in reviewing future options, has considered alternative systems throughout the world with the goal of setting high standards in “accuracy, reliability, transparency, accountability and integrity.”[12] Now, during this period when the Commission is seeking comments, would be the time to influence the eventual rules that your firm and all public companies will have to contend with in 2011’s proxy season and those to come.

CONTACTS

For additional information, please contact your Willis Client Advocate® or,

IN THE WILLIS EXECUTIVE RISKS PRACTICE:

Atlanta, GA
Charles Maxell
404 224 5123
charles.maxell@willis.com

Boston, MA
David Goldstein
617 351 7498
david.goldstein@willis.com

Chicago, IL
Brian Gauen
312 621 4855
brian.gauen@willis.com

Denver, CO
Jim Iacino
303 218 4039
jim.iacino@willis.com

Los Angeles, CA
Brendan Dolan
949 930 1765
brendan.dolan@willis.com

New York, NY
Steve Pincus
212 915 7940
steve.pincus@willis.com

Radnor, PA
Matt Schott
610 254 5642
matt.schott@willis.com

San Francisco, CA
Michael Mahoney
415 291 1535
mike.mahoney@willis.com

IN THE WILLIS FINANCIAL SERVICES PRACTICE:

National Practice Leader
Richard Magrann-Wells
212 915 8357
richard.magrann-wells@willis.com

For past issues of our publications on other topics of interest, please visit the **Executive Risks website**.

Executive Risks Alerts *and* Newsletters *provide a general overview and discussion on a wide range of topics. They are not intended, and should not be used, as a substitute for legal advice in any specific situation.*

---

[1] The Dodd-Frank Wall Street Reform and Consumer Protection Act enacted on July 21, 2010.
[2] Ibid. Section 922(b)(1). Whistleblowers must provide "original information" to be eligible for an award. This is information that is: (1) derived from the whistleblower's independent knowledge or analysis, (2) not known by the SEC from any source other than the whistleblower and (3) not derived exclusively from allegations made in a government hearing, investigation or report, or from the news media.
[3] This is Milberg LLP; see http://www.msnbc.msn.com /id/38349585.
[4] Under the new program, individuals discharged or otherwise discriminated against for providing information to the SEC or to a company's audit committee under § 10A(m)(4) of the Exchange Act may now bring civil actions in district court; Sarbanes-Oxley whistleblower protections had required initial retaliation claims to be filed at the adminis-trative level. Available remedies include reinstatement, double back pay and attorney's fees and court costs.
[5] A new §14A to the Securities Exchange Act of 1934 (the '34 Act). Note that while director compensation is disclosed, a vote to approve director compensation (other than directors who are named executive officers) is not required.
[6] As mentioned in "A Brief History of Say on Pay," October 1, 2009, by The Corporate Library's Senior Research Associate Paul Hodgson for the *Ivey Business Journal* as reprinted at: http://www.thecorporatelibrary.com/info.php?id=205.
[7] Interest in access is evidenced by the efforts of some institutional shareholders to create databases of potential director candidates.
[8] Thomas Quaadman of the U.S. Chamber of Commerce's Center for Capital Market Competitiveness, in *"Hot Issues Alerts – Organizations Dodd-Frank: Governance Issues Galore And Not Limited To Financial Institutions"*: http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=August&artYear=2010&EntryNo=11258.
[9] The Dodd-Frank Wall Street Reform and Consumer Protection Act enacted on July 21, 2010, Section 971.
[10] Federal Register/Vol. 75, No. 140 at http://www.sec.gov/rules/concept/2010/34-62495fr.pdf.
[11] On its subsite on the topic, it calls proxy voting, "a primary way for shareholders to learn about matters to be decided at companies in which they have invested, make their views known to company management..." http://www.sec.gov/spotlight /proxymatters.shtml.
[12] Page 3 of the Federal Register /Vol. 75, No. 140.