Garland W. Binns, Jr.
Dover Dixon Horne PLLC
Attorneys at Law
425 West Capitol, Suite 3700
Little Rock, Arkansas 72201
Telephone: (501) 375-9151
Facsimile: (501) 372-6484
Email: gbinns@ddh-ar.com
Web Site: www.GWBinns.com

JULY 2013

U P D A T E

News of Developments in the Financial Sector and Related Areas

* *IN THIS ISSUE* *

Employment and Change in Control Agreements

May Directors Vote by Proxy

Employment and Change in Control Agreements

As consolidation continues in the financial sector, banks and bank holding companies should consider the use of employment agreements and change in control agreements for key senior management. In the event a bank or bank holding company has either of these agreements in place, they need to be reviewed from time to time to determine if revisions are needed because of economic or legislative changes, including changes in tax laws.

An employment agreement is generally defined as an agreement between a company and its employee which specifies the rights and obligations of each. The term of an employment agreement will normally run for a fixed period of time or it may run for a fixed term plus rolling renewal periods. One of the advantages of a rolling renewal period in an employment agreement is that the parties do not have to renegotiate the agreement at the end of the fixed term. Besides the term, an employment agreement will normally specify such things as duties, salary, bonus, benefits, disability, death and retirement.

A change in control agreement is designed to become effective upon a change in control of the company. A few examples of events constituting a change in control are as follows:

- A third party acquires 50% or more of the outstanding voting stock of the company.
- The company is a party to a merger or consolidation which results in 50% or more of the voting stock of the company being converted into securities of another entity.
- The sale or disposition of all or substantially all of the company's assets.
- A change in the composition of the board of directors within a specific period of time, resulting in fewer than a majority of the directors continuing to serve as directors.

A change in control agreement serves at least two purposes. It assures that key management personnel will be available both prior to and following the transition in the change in control of a company. Secondly, it assures key management personnel that they will be employed and continue to have their existing authority, duties and compensation.

Employment agreements and change in control agreements generally contain provisions regarding the protection of confidential information belonging to the company, and a noncompete period prohibiting the executive from competing

with the company for a specific period of time and in a specific geographic area following the termination of employment. In addition, both agreements may address termination for cause by the company for acts of the employee, such as fraud, conviction of a felony, excessive absences without approval, use of drugs or alcohol and similar conduct. At the same time, both agreements should provide protection for the executive by allowing termination for good cause, such as reduction in salary, demotion or relocation without the executive's consent. Unlike a termination for cause by the company, a termination for good cause by the employee will generally allow the executive to receive the compensation and benefits under the remaining term of the agreement had the agreement remained in force. Because provisions in employment and change in control agreements may result in adverse tax consequences to the parties, as well as having provisions which may be unenforceable, it is best to utilize the services of a professional to make sure that the agreements comply with applicable law.

May Directors Vote by Proxy

From time to time the question arises as to whether or not a director of a corporation may vote by proxy at a meeting of the board of directors due to circumstances such as being out of town, illness or incapacity. A *proxy* is basically a written authorization directing another person to act in his or her place at a meeting.

Proxy voting by shareholders in a corporation is a well recognized practice, primarily due to geographical limitations, allowing shareholders to vote at a meeting of a corporation on such matters as the election of directors and changes in common or preferred stock. Absent statutory authority for proxy voting by directors, the general rule is that directors may not vote by proxy because they have a fiduciary duty to the corporation and its shareholders.

Once elected, directors become fiduciaries, which means that they hold a special level of trust and confidence to the corporation and its shareholders. This fiduciary duty may not be delegated to others. Directors have basically two primary duties consisting of (i) duty of care and (ii) duty of loyalty.

The duty of care means that directors must be diligent and careful in performing the duties they have undertaken on behalf of the corporation and its shareholders. This duty of care, which is sometimes referred to as due diligence, means that directors should attend and participate in board meetings in order for them to be informed about the corporation's business. In addition, this duty of care means that they must make reasonable inquiry before making a decision. This duty of care also requires them to manage corporate affairs honestly and in good faith, using the level of care that a reasonable prudent person would use under the same given circumstances.

The duty of loyalty means that directors must act in the best interest of the corporation and its shareholders at the expense of their own personal interests, thus prohibiting directors from profiting at the corporation's expense in transactions involving the corporation and its assets. Because a director has the fiduciary responsibility for acting (i) in the best interest of the corporation, (ii) as an ordinarily prudent person would act, and (iii) only after reasonable inquiry, a director may not vote by proxy. However, it has become a generally accepted practice for directors to participate and vote in a meeting by means of telephone conference, computer conference or similar communications equipment by means of which each person participating in the meeting can communicate with all others participating in the meeting.

This newsletter provides general information and should not be used or taken as legal advice for specific situations, which depend on the evaluation of precise factual circumstances. U P D A T E is a registered trademark. Copyright 2013/Garland W. Binns, Jr. All Rights