

October 20, 2010

SEC Proposes Rules on “Say-on-Pay,” “Say-When-on-Pay”
and “Golden Parachute” Voting and Reporting

On October 18, 2010, the SEC proposed [rules](#) concerning the advisory votes on executive compensation and “golden parachute” arrangements mandated by Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). These rules address the mandatory advisory vote on named executive officer (“NEO”) compensation (“say-on-pay”) and the mandatory advisory vote on the frequency of say-on-pay votes (“say-when-on-pay”). In addition, the proposed rules govern the disclosure in merger proxy statements and tender offer materials of NEO “golden parachute” arrangements, as well as the advisory vote on NEO “golden parachute” arrangements required in connection with mergers and similar transactions subject to shareholder approval.

The initial say-on-pay vote and say-when-on-pay vote must be included in the proxy statement relating to an issuer’s first annual or other meeting of shareholders occurring on or after January 21, 2011. The advisory vote and disclosure relating to “golden parachute” arrangements will not be required until the effective date of the final SEC rules implementing those provisions. The inclusion of a say-on-pay and/or say-when-on-pay vote in an issuer’s proxy statement will not, by itself, require the company to file a preliminary proxy statement with the SEC.

The proposed rules clarify a number of issues raised by Section 951 of Dodd-Frank, including the following:

- As the SEC previously has indicated, all three votes – say-on-pay, say-when-on-pay and the vote on “golden parachutes” – are non-binding.
- The say-on-pay vote covers the compensation of an issuer’s NEOs, as disclosed in accordance with Item 402 of Regulation S-K, including the Compensation Discussion and Analysis (“CD&A”), and does not cover director compensation. The proposed rules do not require companies to use specific language in say-on-pay resolutions.
- With respect to say-when-on pay voting mechanics, an issuer must, not less frequently than every six years, provide shareholders with the option to vote for one of four choices (1 year, 2 years, 3 years or abstain). A board of directors may include a vote recommendation, but the disclosure must be clear that shareholders may choose among the four alternatives, as opposed to voting for or against the board recommendation. In the event that proxy service providers are not able to reprogram their systems to provide four voting choices for the first vote, the SEC will not object if the form of proxy provides only three choices (1 year, 2 years or 3 years).
- An issuer may exclude shareholder proposals relating to say-on-pay and say-when-on-pay on the grounds that they have been “substantially implemented” if the issuer has adopted the frequency of say-on-pay votes that gained the plurality vote in the most recent say-when-on-pay vote.
- An issuer must disclose in Form 10-Q or Form 10-K, as applicable, its decision regarding the frequency of say-on-pay votes in light of the results of the say-when-on-pay vote and must address in the CD&A the extent to which its compensation policies and decisions take into account the results of previous shareholder advisory votes on executive compensation.

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- The proposed rules would require, in connection with a merger or similar transaction, disclosure in tabular format of all “golden parachute” compensation arrangements between the target or acquiror, on the one hand, and the NEOs of each company, on the other hand. While the disclosure requirements relating to “golden parachute” arrangements are more expansive than those set forth in Dodd-Frank, the shareholder advisory vote with respect to “golden parachute” arrangements would apply solely with respect to those arrangements between a soliciting party (typically the target) and its NEOs.
- If a company previously has submitted “golden parachute” arrangements to a say-on-pay vote and has not modified those arrangements, the company will not be required to submit those arrangements to the “golden parachute” say-on-pay vote so long as the company’s disclosure for the prior say-on-pay vote satisfied the tabular disclosure and other requirements applicable to “golden parachute” say-on-pay votes.
- With respect to any proxy statement that includes a vote on say-on-pay, say-when-on-pay or “golden parachute” arrangements, the proxy statement must include an explanation of the effect of the vote, such as whether the vote is non-binding.
- Issuers who conduct an annual shareholder vote to approve executive compensation under the Troubled Asset Relief Program (“TARP”) would be exempt from the new say-on-pay and say-when-on-pay votes until the first annual or other meeting of shareholders after the issuer has repaid all outstanding indebtedness under the TARP.
- Under amended stock exchange rules, brokers may not vote uninstructed shares with respect to any say-on-pay or say-when-on pay vote.
- Pursuant to separate [rules](#) proposed by the SEC, institutional investors that are subject to reporting requirements under Section 13(f) of the Securities Exchange Act must disclose how they vote with respect to company proposals regarding say-on-pay, say-when-on-pay and “golden parachute” compensation.

The proposed rules provide welcome guidance and clarify many of the ambiguities in the Dodd-Frank legislation. However, there remain many open issues, some of which the SEC has identified in its detailed request for comments. Comments on the proposed rules are due by November 18, 2010. We are monitoring developments and working with companies to plan how to implement the final rules when they are adopted.

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