

January 26, 2011

SEC Adopts Final Rules on Executive Compensation Advisory Votes

Yesterday, the SEC adopted [final rules](#) concerning the executive compensation advisory votes mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The final rules closely track the proposed rules issued on October 18, 2010, with some limited modifications.

Effective Dates. The initial say-on-pay vote and say-when-on-pay vote must be included in the proxy statement relating to a company's first annual or other meeting of shareholders occurring on or after January 21, 2011. Under the final rules, the advisory vote and disclosures relating to golden parachute arrangements will apply to initial filings made on or after April 25, 2011. Smaller reporting companies are exempt from say-on-pay and frequency votes (but not the golden parachute vote) until meetings occurring on or after January 21, 2013.

General. Consistent with the proposed rules, the final rules confirm that all three votes – say-on-pay, say-when-on-pay and the vote on golden parachutes – are non-binding. The final rules also confirm that no specific language is required for any of the vote resolutions, but do include a non-exclusive example of a say-on-pay resolution that would satisfy the requirements. In addition, the final rules clarify that the say-on-pay and say-when-on-pay vote requirements apply to annual meetings or special meetings at which proxies are solicited for directors.

Say-on-Pay. The say-on-pay vote covers the compensation of a company's named executive officers (NEOs), as disclosed in accordance with Item 402 of the proxy disclosure rules, including the Compensation Discussion and Analysis (CD&A). The final rules clarify that a company must hold the say-on-pay vote at least once every three *calendar* years.

Say-When-On-Pay. The final rules require a company, at least once every six *calendar* years, to provide shareholders with the option to vote for one of four choices (annual, biennial, triennial or abstain) with respect to the frequency of the say-on-pay vote. If proxy service providers cannot reprogram their systems to provide four voting choices, the SEC will not object if the form of proxy provides only three choices (annual, biennial or triennial) for the 2011 vote. Under the final rules, companies may vote uninstructed proxy cards in accordance with management's recommendation for the frequency vote only if the company (1) includes a recommendation for the frequency vote in the proxy statement, (2) permits abstention on the proxy card, and (3) includes language regarding how uninstructed shares will be voted in bold on the proxy card.

Effect on Shareholder Proposals. A company 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 company has adopted the frequency of say-on-pay alternative that gained a majority vote in the most recent say-when-on-pay vote. The *majority* standard represents a change from the *plurality* standard in the proposed rules, the effect of which is to raise the bar for excluding shareholder proposals.

Disclosure of Vote Results and Vote Frequency. A company must disclose on Form 8-K its decision regarding the frequency of the say-on-pay vote in light of the results of the say-when-on-pay vote. The Form 8-K filing will be required no later than 150 calendar days after the date of the applicable meeting, and in any event no later than 60 calendar days prior to the

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deadline for submission of shareholder proposals for the subsequent annual meeting. A company also must address in its CD&A whether (and if so, how) the company has considered the results of the most recent say-on-pay vote in determining compensation policies and decisions. In addition, the final rules require companies to include in their proxy materials disclosure of the current frequency of say-on-pay votes and when the next scheduled say-on-pay vote will occur.

Golden Parachute Requirements. The final rules 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 advisory vote would apply solely to those arrangements between a soliciting party and its NEOs. The final rules clarify that the golden parachute disclosure will apply only to compensation that is based on or otherwise relates to the subject transaction, and recognize that future employment arrangements are not compensation related to the subject transaction. In addition, the final rules provide that an acquiror that solicits proxies to approve *the issuance of shares* in a transaction is subject to the golden parachute disclosure rules, but not the advisory vote.

Limited Relief from Golden Parachute Voting Requirements. A company does not have to hold a golden parachute vote with respect to arrangements that it previously submitted to a say-on-pay vote that satisfied the golden parachute tabular and other disclosure requirements. However, the foregoing relief does not apply to new or modified golden parachute arrangements, nor does the relief eliminate the golden parachute *disclosure* requirements in the context of a transaction. Accordingly, the limited benefits of the relief may not justify the considerable additional burden associated with including the golden parachute say-on-pay disclosure in the annual proxy.

No Preliminary Proxy; Interplay with TARP Rules. The final rules confirm that 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. In addition, the final rules exempt companies that conduct an annual shareholder vote to approve executive compensation under the Troubled Asset Relief Program ("TARP") from the new say-on-pay and say-when-on-pay votes until the first annual or other meeting of shareholders after repayment of all outstanding indebtedness under TARP.

Michael J. Segal
Jeannemarie O'Brien
Adam J. Shapiro
Jeremy L. Goldstein
David E. Kahan