

SEC Proposes Rules Regarding Shareholder Advisory Votes on Executive Compensation and Disclosure and Advisory Votes on Golden Parachute Compensation

Author: Robert K. Morris, Partner, Philadelphia

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On October 18, 2010, the Securities and Exchange Commission ("Commission") proposed amendments to its rules to implement certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") regarding shareholder approval of executive compensation and disclosure and approval of golden parachutes. Section 951 of the Dodd-Frank Act adds Section 14A to the Securities Exchange Act of 1934. Section 14A requires a registrant to (1) conduct a non-binding shareholder vote to approve named executive officer compensation ("Say-on-Pay") (named executive officers are defined in Item 402(a)(3) of Regulation S-K), (2) conduct a separate non-binding vote to determine how often the Say-on-Pay vote will be held ("Say-on-Frequency") and (3) when soliciting votes to approve a merger or acquisition, disclose certain golden parachute compensation arrangements and, in certain cases, conduct a separate non-binding shareholder vote to approve such golden parachute compensation arrangements ("Say-on-Golden-Parachute"). Comments are due to the Commission by November 18, 2010. Regardless of the timing of the Commission's adoption of final rules, registrants must conduct Say-on-Pay and Say-on-Frequency votes for annual meetings held on or after January 21, 2011. In contrast, Say-on-Golden-Parachute disclosures and votes are required only after the Commission adopts final rules.

Say-on-Pay

Under proposed Rule 14a-21(a), a registrant must conduct, at least once every three years, an advisory Say-on-Pay vote via its proxy statement. Item 402 of Regulation S-K defines compensation for this purpose. The proposed rule does not require that registrants use specific language or a specific form of resolution for voting purposes. However, the vote must be to approve compensation, not the adequacy of disclosure of compensation or compensation policies.

Proposed Item 24 of Schedule 14A requires that a registrant disclose the Say-on-Pay vote in its proxy statement and explain the effect of the vote (i.e. that the vote is non-binding).

Proposed amendments to Item 402(b)(1) of Regulation S-K require that a registrant address in its Compensation Disclosure and Analysis whether and how its compensation-related policies and decisions reflect shareholder Say-on-Pay voting results.

Say-on-Frequency

Proposed Rule 14a-21(b) requires that a registrant provide, at least once every six years, an advisory Say-on-Frequency vote via its proxy statement. Shareholders must be given the opportunity to vote for a frequency of every one, two or three years, or to abstain. Management may make a recommendation, but must make it clear that the vote is not to approve or disapprove management's recommendation, but to express a preference among the three alternatives or to abstain.

Proposed Item 24 of Schedule 14A requires that a registrant disclose the Say-on-Frequency vote in its proxy statement and explain the effect of the vote (i.e. that the vote is non-binding).

Proposed amendments to Rule 14a-8 allow a registrant to exclude a shareholder proposal seeking a Say-on-Pay vote or relating to the frequency of Say-on-Pay votes, if the registrant has adopted a policy to hold Say-on-Pay votes at the frequency which received a plurality of votes cast in the most recent Say-on-Frequency vote.

The proposing release states that the plurality concept is utilized solely for purposes of determining the scope of the Rule 14a-8 exclusion and not for the purpose of determining whether a particular voting frequency should be considered to have been adopted or approved by shareholder vote as a matter of state law. The release notes that because the Say-on-Frequency vote is advisory, it is unnecessary to prescribe a standard for determining which frequency has been adopted by shareholders. However, registrants remain subject to Item 21 of Schedule 14A, which requires disclosure of the vote required for "approval" of each matter submitted to a shareholder vote. Registrants may wish to retain the flexibility to respond appropriately to a Say-on-Frequency vote in which the one year frequency receives a plurality vote, but where a majority of votes have been cast in the aggregate in favor of a multi-year frequency.

Proposed amendments to Item 9B of Form 10-K and proposed Item 5(c) of Part II of Form 10-Q require that a registrant disclose, in its 10-Q covering the period during which the Say-on-Frequency vote was conducted or its 10-K if the vote was conducted during the fourth quarter, how frequently it will conduct a Say-on-Pay vote given the results of the Say-on-Frequency vote.

TARP Companies

Registrants that have outstanding obligations under the Treasury Department's TARP program remain subject to the requirement of an annual say-on-pay vote under Rule 14a-20. Such registrants are not required to conduct a Say-on-Pay or Say-on-Frequency vote under proposed Rule 14a-21 until the first annual meeting of shareholders after the registrant has repaid all outstanding TARP obligations.

No Preliminary Proxy Filing

Proposed amendments to Rule 14a-6(a) add Say-on-Pay and Say-on-Frequency votes to the list of items that do not trigger a preliminary filing.

Broker Discretionary Voting

Under amended New York Stock Exchange Rules adopted pursuant to the Dodd-Frank Act, broker discretionary voting of uninstructed shares is prohibited for Say-on-Pay and Say-on-Frequency votes.

Say-on-Golden-Parachute

Proposed Item 402(t) of Regulation S-K requires, in any proxy or consent solicitation to approve an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all assets, disclosure of named executive officers' golden parachute compensation in narrative and tabular format. The disclosure applies to arrangements that the target company or the acquiring company has with the named executive officers of both the target company and the acquiring company. Item 402(t) also applies in an annual meeting proxy statement when a registrant seeks to rely on the exception for a separate Say-on-Golden-Parachute vote by including the 402(t) disclosure in its annual meeting proxy statement soliciting a Say-on-Pay vote. The proposed table includes the following columns: Name, Cash, Equity, Pension/NQDC, Perquisites/Benefits, Tax Reimbursement, Other, Total. The table reflects individual elements of compensation officers would receive that are based on or otherwise relate to the transaction, and the total for each officer. A registrant must also describe: (1) material conditions or obligations to receipt of payments or benefits, (2) specific circumstances triggering payment, (3) whether payments would be lump sum or annual and the duration of payments, (4) whom would make payments, and (5) other material factors. The registrant must separately identify amounts attributable to "single-trigger" arrangements (where termination without cause or resignation is not required) and "double-trigger" arrangements (where termination without cause or resignation is required).



Proposed Rule 14a-21(c) requires that a registrant provide a separate advisory Say-on-Golden-Parachute vote on golden parachute arrangements where shareholders are asked to approve an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all assets, unless the golden parachute compensation was the subject of a previous Say-on-Pay vote. If only the target company conducts the solicitation of shareholders, golden parachute arrangements between the acquiring company and executive officers of the target need not be subject to an advisory vote (although disclosure would be required).

Additional amendments are also proposed to various other rules, forms and schedules to implement Say-on-Golden-Parachute voting and disclosures.

If you have any questions regarding these rule proposals or would like additional information on the material covered in this Alert, please contact one of the authors or the Reed Smith lawyer with whom you regularly work.

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