Akerman Practice Update

CORPORATE

January 2011

SEC Adopts Final "Say-On-Pay" Rules – The Details

Philip Schwartz
philip.schwartz@akerman.com

Andrew Schwartz
andrew.schwartz@akerman.com

On January 25, 2010, the Securities and Exchange Commission ("Commission") published its final rules concerning the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to shareholder approval of executive compensation and "golden parachute" compensation arrangements. The principal aspects of the final rule are summarized below. Companies are required to comply with the rules regarding executive compensation for all shareholder meetings held on or after January 21, 2011, and with the rules regarding "golden parachute" compensation for all filings made on or after April 25, 2011. Companies that, as of January 21, 2011, qualify as "smaller reporting companies" will not be required to comply until January 21, 2013. To see the Commission's final rule, click here.

General

Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act created a new section of the Securities Exchange Act of 1934 (the "Exchange Act") requiring that:

- not less frequently than every three years, shareholders must be given an advisory vote on executive compensation;
- not less frequently than every six years, shareholders must be given a vote on whether the advisory vote on executive compensation be held each year, every two years or every three years; and

- in any proxy solicitation where the shareholders are called upon to approve an acquisition, merger, sale of assets, or other similar transaction, shareholders must be given an advisory vote on any "golden parachute" compensation arrangements payable upon such transaction.

The final rule clarifies that each vote set forth above is an advisory vote only and is not binding on the issuer or its board of directors.

Shareholder Approval of Executive Compensation ("Say-on-Pay")

Under newly created Rule 14a-21(a) to the Exchange Act, issuers will be required, not less frequently than once every three calendar years, to provide a separate shareholder advisory vote in proxy statements to approve executive compensation of named executive officers ("NEOs"). This requirement will apply to annual meetings of shareholders and special meetings in lieu of such annual meeting where proxies are solicited for voting for directors.

The first vote must coincide with the first annual or other meeting of shareholders occurring on or after January 21, 2011, except that smaller reporting companies will not be required to comply until January 21, 2013. The rule clarifies that it does not change the scaled disclosure requirements for smaller reporting companies and that smaller reporting companies, which are already subject to scaled disclosure requirements and are not required to include a Compensation Discussion and Analysis section in their annual meeting proxy statements, will not be required to put into their proxy statement such a section in order to comply with the rule.

The final rule does not apply to the compensation of directors. The rule also does not apply to a company's compensation policies and procedures regarding risk management, except to the extent such considerations are a material aspect of an issuer's compensation policies or decisions for its NEOs in which case the issuer is required to discuss such considerations in its Compensation Discussion and Analysis.

The final rule does not require issuers to use any specific language or form of resolution to be voted on by shareholders. However, the rule adds an instruction to note that the language from Section 14A(a)(1) of the Exchange Act stating that the advisory vote must be "to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S-K or any successor thereto," while not required, is a non-exclusive example of language that would meet the requirements under the section.

The final rule also requires that the proxy statement disclose that an issuer is providing a separate shareholder vote on executive compensation and to briefly explain the general effect of the vote, including its non-binding nature. The disclosure must also include how frequently Say-on-Pay votes are to be held and when the next vote will be held.

Under an amendment to Item 402(b)(1) of Regulation S-K, issuers must address whether and how their compensation policies and decisions have taken into account the results of the most recent shareholder vote on executive compensation. Smaller reporting companies, which are already subject to scaled disclosure requirements regarding the CD&A section, will not be required to include such a section. However, the final rule notes that pursuant to Item 402(o) of Regulation S-K, smaller reporting companies are required to provide a narrative description of any material factors necessary to an understanding of the information disclosed in the Summary Compensation Table. If the Say-on-Pay vote affects the smaller reporting company issuer's compensation policies, disclosure would still be required under Section 402(o).

Shareholder Approval of the Frequency of Shareholder Votes on Executive Compensation ("Say-When-on-Pay")

Under newly created Rule 14a-21(b) to the Exchange Act, issuers are required, not less frequently than every six years, to provide a separate shareholder advisory vote to determine the frequency of the Say-on-Pay vote. This vote must

be held not less than every six calendar years, and will ask shareholders to determine whether the shareholder vote on Say-on-Pay will occur every 1, 2, or 3 years. Similar to the Say-on-Pay vote, the Commission has declined to require a form of resolution for this vote. Unlike the Say-on-Pay vote, the Say-When-on-Pay vote will be required only in a proxy statement for an annual or other meeting of shareholders at which directors will be voted upon. Additionally, the rule requires that shareholders be given the option to vote for whether the Say-on-Pay vote will be held every year, every two years, every three years, or to abstain from voting. Issuers may vote uninstructed proxy cards only if the issuer (i) includes a recommendation for the frequency of Say-on-Pay votes in the proxy statement; (ii) permits abstention on the proxy card; and (iii) includes language regarding how uninstructed shares will be voted in bold on the proxy card.

Issuers will be required to disclose that they are providing a shareholder advisory vote on the frequency of Say-on-Pay votes, and must generally explain the effect of the vote, including its non-binding nature.

Shareholder Proposals

The Commission has amended Rule 14a-8(i)(10) under the Exchange Act to clarify that an issuer may exclude subsequent shareholder proposals that seek a vote on the same matters on the Say-on-Pay and Say-When-on-Pay votes. This exclusion is permitted only when one choice in the Say-When-on-Pay vote receives a vote of the majority of shareholder votes cast, and the Company has adopted a policy consistent with that choice.

Amendment to Form 8-K

The final rule requires that issuers disclose their determination regarding the frequency of Say-on-Pay votes under Item 5.07 of Form 8-K. This will be filed as an amendment to the issuer's prior Form 8-K filing that disclosed the result of the shareholder vote on Say-When-on-Pay. The amended 8-K will be due no more than 150 days after the end of the annual or other meeting where the Say-When-on-Pay vote took place but in no event later than 60 calendar days prior to the deadline for the submission of shareholder proposals for the subsequent annual meeting under Rule 14a-8.

Broker Discretionary Voting and Preliminary Proxies

The final rule prohibits broker discretionary voting on matters regarding executive compensation, and the national securities exchanges have begun to implement this requirement. The final rule also clarifies that inclusion of a Say-on-Pay or Say-When-on-Pay advisory vote alone will not require an issuer to file a preliminary proxy statement with the Commission.

Troubled Asset Relief Program

Under the terms of the Troubled Asset Relief Program ("TARP"), issuers that have received and are paying back TARP funds have been required to provide their shareholders with annual shareholder votes to approve executive compensation. The final rule exempts issuers repaying TARP funds to the extent they remain in the program. Such issuers will be required to start compliance with the Say-on-Pay and Say-When-on-Pay rules starting with the first annual or other meeting after all remaining TARP funds have been repaid.

Disclosure of Golden Parachute Arrangements and Shareholder Approval of Golden Parachute Arrangements

The Commission has adopted Item 402(t) of Regulation S-K to require disclosure of golden parachute arrangements of NEOs in both tabular and narrative formats. The table presents disclosure of the elements of compensation an executive would receive that are based upon or relate to the merger or sale transaction, whether the agreement is with the issuer or with the target company, and whether the compensation relates to a written agreement or an unwritten arrangement. Disclosure is required only if the subject transaction would result in payment of the described compensation.

Item 402(t) disclosure is not required in annual meeting proxy statements; however, issuers may voluntarily provide Item 402(t) disclosure in their annual meeting proxy statements if they believe it will assist shareholders in their understanding of their compensation

program. However, in such a case, disclosure will still be required on a proxy statement soliciting votes on a merger or sale transaction.

Item 402(t) disclosure is also required in:

- information statements filed under Regulation 14C;
- proxy or consent solicitations requiring the disclosure of information under Item 14 of Schedule 14A;
- registration statements on Forms S-4 and F-4 containing disclosure relating to mergers or other similar transactions;
- going private transactions on Schedule 13E-3; and
- third-party tender offers on Schedule TO and Schedule 14D-9 solicitation/recommendation statements, except that bidders in third-party tender offers are not required to provide such disclosure.

Rule 14a-21(c) requires a separate shareholder advisory vote in proxy statements where shareholders are asked to approve an acquisition, merger, proposed sale of substantially all of the issuer's assets, or other similar transaction. This vote is only required if shareholders are voting to approve the transaction. Similar to the Say-on-Pay and Say-When-on-Pay votes, this vote is non-binding upon the board of directors of the issuer.

Issuers who include the information required in Item 402(t) of Regulation S-K in a proxy statement that solicits a Say-on-Pay vote will be exempt from having to hold a new vote on such golden parachute disclosure. However, a vote will still be required if golden parachute disclosure changes, except that changes that result only in a reduction in value of the golden parachute compensation will not require a new vote.

Conclusion

The new rules will immediately affect all public companies (other than "smaller reporting companies") that hold their annual meetings on or after January 21, 2011. As a result, public companies that will hold their annual meetings over the next few months will need to quickly focus on how they will deal with these rules. Since each company's executive compensation and board and shareholder dynamics are different, how this rule will affect each company will potentially be different. Further, the decisions made in this first year in which the new rule is effective on certain of the matters contained in the new rule (such as the frequency of "say-on-pay advisory votes) could have longer term consequences. As a result, public companies should carefully consider the new rules in light of their particular situation.

For further information or for help in assessing how the new rules affect your company, please contact your principal lawyer at the firm or one of the lawyers listed below.

Jonathan L. Awner	305.982.5615	jonathan.awner@akerman.com
Kenneth G. Alberstadt	212.880.3817	kenneth.alberstadt@akerman.com
David M. Doney	813.209.5070	david.doney@akerman.com
Michael T. Francis	305.982.5581	michael.francis@akerman.com
Esther L. Moreno	305.982.5519	esther.moreno@akerman.com
Philip B. Schwartz	305.982.5604	philip.schwartz@akerman.com

Akerman is ranked among the top 100 law firms in the U.S. by *The National Law Journal NLJ 250* (2010) in number of lawyers and is the leading Florida firm. With 500 lawyers and government affairs professionals, Akerman serves clients throughout the U.S. and overseas from Florida, New York, Washington, D.C., California, Virginia, Colorado, Nevada, and Texas.

Akerman