

Small Business Securities Bulletin

A periodic bulletin keeping small businesses informed about current developments in securities law and related matters

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SEC's Proposed Say on Pay Rules

Last month the Securities and Exchange Commission (SEC) issued proposed rules to implement the say-on-pay and say-on-golden parachute provisions of Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act), available at www.sec.gov/rules/proposed/2010/33-9153.pdf. As required by the Act, the proposed rules would require SEC reporting companies to provide their stockholders with a non-binding vote “to approve the compensation of its named executive officers, as disclosed pursuant to” the SEC’s compensation disclosure requirements. Consistent with the Act, the proposed rules require companies to provide for this vote at least once every three years with respect to solicitations relating to an annual meeting of stockholders or any other meeting for which compensation disclosure is required.

Also as required by the Act, the proposed rules would require companies to provide their stockholders with a separate vote, at least once every six years, as to whether the say-on-pay vote should occur every year, once every two years, or once every three years. This vote would also be non-binding, meaning the company could choose to provide the say-on-pay vote on a different schedule than that chosen by stockholders. If a company implements the frequency schedule approved by a plurality of the votes cast in the most recent frequency vote, however, then it would be able to exclude from its proxy statement as “substantially implemented” any stockholder proposal calling for a more or less frequent say on pay vote than that the company has implemented.

Under the proposed rules companies would be required to disclose, in their quarterly reports on Form 10-Q for the period during which the applicable meeting took place (or their annual reports on Form 10-K for a fourth quarter meeting), the company's decision, in light of the frequency vote, as to how often it will include the say-on-pay vote for the six years following the meeting. Companies would also be required to discuss in the Compensation Discussion and Analysis (CD&A) section of their proxy statement whether and how the results of the stockholder advisory vote have been taken into consideration in their compensation decisions, and if so how; smaller reporting companies (those with a public float below \$75 million) are not required to have a CD&A and so will not be required to provide this disclosure.

The SEC also proposed to amend its proxy rules to permit the proxy card to include the four necessary choices for the say-on-pay vote (1 year, 2 years, 3 years, abstain) instead of the currently required choices ("For," "Against" and "Abstain") for all proposals other than the election of directors. In addition, under the amended rules the inclusion of the say-on-pay and say-on-frequency votes would not trigger the need to file a preliminary proxy statement.

As with the say-on-pay rules for companies with an existing obligation under the Troubled Asset Relief Program (TARP), the proposed rules would not mandate a particular form of say-on-pay proposal. Because the proposed say-on-pay vote is "effectively the same" as the current say-on-pay requirement for companies with a TARP obligation, such companies would not have a separate say-on-pay obligation under the proposed rules. In addition, because such companies are required to conduct an annual say-on-pay vote, they would be exempt from the say-on-frequency vote requirement until they were no longer subject to the TARP say-on-pay voting provisions.

Also, under the proposed rules, SEC reporting companies would be required to provide a non-binding "say-on-golden parachute" vote, similar to the say-on-pay vote, in connection with any proxy or consent solicitation seeking stockholder approval of an acquisition, merger, consolidation or sale or other disposition of all or substantially all of the company's assets. This vote would also be non-binding.

The proposed rules would require certain prescribed tabular and narrative disclosure with respect to any arrangements or understandings the acquirer or target company has with the named executive officers of either company concerning any type of compensation that is based on or otherwise related to the transaction. These arrangements as disclosed, except between the acquiring company and the target company's named executive officers where the target is the "issuer" company, would be subject to the advisory stockholder vote. The say-on-golden parachute vote would not be required with respect to any such arrangements or understandings that were

previously subject to a stockholder vote in connection with an annual meeting, even if not approved by the stockholders, although the related disclosure would still be required.

Under the proposed rules, the required golden parachute disclosure would also be required in any consent solicitation with respect to a merger or similar transaction, and in connection with issuer going private transactions and tender offers, even though there would be no stockholder vote in connection with these transactions.

Finally, under the proposed rules companies would be required to explain in the applicable proxy statement or consent document that they are providing the applicable votes as required under Section 14A of the Securities Exchange Act of 1934 and the general effect of the vote, including whether the vote is non-binding.

The say-on-pay and say-on-frequency provisions of the Act apply to any stockholder meeting occurring on or after January 21, 2011, regardless of whether the proposed rules are effective (this is not true with respect to say-on-golden parachute). The proposed rules provide a good framework for any company that has to comply with these provisions of the Act prior to the effectiveness of the proposed rules.

About Me

I am a former SEC attorney who also has prior “big firm” experience. I assist public as well as private companies with compliance with federal and state securities laws, including assisting public companies with their reporting obligations under the Securities Exchange Act of 1934, at competitive billing rates. Please contact me if you would like more information about my practice or to discuss how I can be of assistance to you. Visit my bio at www.ober.com/attorneys/penny-somer-greif.

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This Bulletin contains only a general overview of the proposed say-on-pay, say-on-frequency and say-on-golden parachute rules and should not be construed as providing legal advice. If you have any questions about the information in this Bulletin or would like additional information with respect to these matters, please contact me at 410-347-7341 or via e-mail at psomergreif@ober.com.

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