



SEC Finalizes Rules On Say-on-Pay, Say-When-On-Pay and Say-On-Golden Parachutes Votes Under Dodd-Frank

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On January 25, 2011, the Securities and Exchange Commission ("SEC") adopted final rules to implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") that require shareholder advisory votes on certain executive compensation matters. The final rules generally adopt, but in certain cases, modify, proposed rules issued by the SEC on October 18, 2010. Click [here](#) for our October 2010 Client Memorandum on the proposed rules.

Background

The Act, signed into law by President Obama on July 21, 2010, contains a number of significant new executive compensation and corporate governance requirements for publicly traded companies, or issuers, in the United States (these provisions generally do not apply to companies that are not subject to SEC's proxy rules, such as foreign private issuers). The SEC subsequently issued proposed rules (October 2010) to implement the Say-On-Pay, Say-When-On-Pay and Say-On-Golden Parachutes voting requirements under the new executive compensation disclosure regime. The proposed rules covered three separate shareholder advisory votes on whether to:

- approve the compensation of certain named executive officers ("Say-On-Pay");
- hold the Say-On-Pay vote every one, two or three years ("Say-When-On-Pay"); and
- approve golden parachute compensation arrangements in connection with any acquisition, merger, consolidation, sale or other disposition of all or substantially all of the assets of an issuer (a "Corporate Transaction") ("Say-On-Golden Parachutes").

After receiving and considering over 70 comment letters in response to the proposed rules, the SEC issued final rules governing these executive compensation disclosure requirements.

Final Rules

The final rules generally clarify the provisions contained in the proposed rules, with a few additions or other revisions. Among the new provisions added by the final rules is a delayed implementation of the rules requiring Say-On-Pay and Say-When-On-Pay votes for smaller reporting companies (public float of less than \$75 million). Smaller reporting companies will not need to hold the Say-On-Pay and Say-When-On-Pay votes for any meeting held prior to January 21, 2013; however, smaller reporting companies are not exempt from conducting a Say-On-Golden Parachutes vote in connection with a Corporate Transaction as soon as those votes are required for all companies.

We highlight below some of the more notable changes contained in the final rules:

Additional Say-On-Pay Disclosure; Only the Most Recent

In general, issuers subject to the Act are required to provide its shareholders with an advisory vote on executive compensation. Such Say-On-Pay vote is

Key Issues

Background

Final Rules

Effective Date

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required at least once every three years beginning with the first annual shareholders' meeting occurring on or after January 21, 2011.

According to the final rules, issuers must provide disclosure in the annual meeting proxy statement regarding the Say-On-Pay vote, including an explanation of the effect of the vote. The final rules also require additional disclosure in the Compensation Discussion and Analysis ("CD&A") after the initial year for which such a vote is required regarding whether, and if so, how, the issuer has considered the results of previous shareholder votes on executive compensation in determining its compensation policies and decisions. The final rules limit this consideration to "the most recent Say-On-Pay vote." However, the SEC also noted that, consistent with the principles-based nature of CD&A, issuers should address their consideration of the results of earlier Say-On-Pay votes to the extent such consideration is material to the compensation policies and decisions discussed.

No Specific Language Required for Say-On-Pay Resolution

The final rules do not require issuers to use any specific language or form of resolution to be voted on by shareholders. As the SEC noted in the proposing release, however, the Say-On-Pay vote must relate to all executive compensation disclosure disclosed pursuant to Item 402 of Regulation S-K. Section 14A(a)(1) of the Securities Exchange Act of 1934 (the "Exchange Act") requires that the Say-On-Pay vote must be "to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S-K or any successor thereto." The SEC added an instruction to Rule 14a-21(a) to indicate that this language from Section 14A(a)(1) should be included in an issuer's resolution for the Say-On-Pay vote. The SEC also provided a non-exclusive example of a resolution that would satisfy the applicable requirements, as follows:

"RESOLVED, that the compensation paid to the company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion is hereby APPROVED."

The SEC also has noted that issuers may also seek advisory votes on a range of compensation matters in order to obtain more specific feedback on compensation policies and programs.

Say-When-On-Pay Disclosure—Enhanced

Under the Act, issuers must allow shareholders to vote on how often they would like to be presented with the Say-On-Pay vote: every one, two or three years. This frequency vote is required to occur at least once every six years beginning with the first annual shareholders' meeting taking place on or after January 21, 2011.

Pursuant to the final rules, issuers must disclose the Say-When-On-Pay vote in the annual meeting proxy statement, including a brief explanation of the effect of the vote. Additionally, the proxy statement must disclose the current frequency of the Say-On-Pay vote and when the next scheduled Say-On-Pay vote will occur.

To help implement the Say-When-On-Pay voting requirement, the final rules revise the proxy rules to allow for the three choices (e.g., one, two or three years) on the proxy card. The final rules also provide guidance regarding the impact of these new requirements on shareholder proposals (under Rule 14a-8) relating to Say-On-Pay or Say-When-On-Pay votes.

New Form 8-K Disclosure Requirement

Under the final rules, the SEC adopts an amendment to Form 8-K to require the disclosure of the issuer's decision on the Say-When-On-Pay vote. In particular, because the vote itself is non-binding, Form 8-K will now require disclosure following a Say-When-On-Pay vote of the issuer's decision regarding how frequently it will conduct Say-On-Pay votes. This Form 8-K is required no later than 150 calendar days after the date of the annual meeting in which the vote took place, but in any event no later than 60 calendar days prior to the deadline for submission of Rule 14a-8 shareholder proposals for the subsequent annual meeting. The issuer must still report the preliminary results on the Say-When-On-Pay vote pursuant to Item 5.07(b) within four days from the date of the meeting.

Voting of Uninstructed Proxy Cards

Issuers may vote uninstructed proxy cards in accordance with management's recommendation for the Say-When-On-Pay only if the issuer follows the existing requirements of Rule 14a-4 to (i) include a recommendation for the Say-When-On-Pay

vote in the proxy statement, (ii) permit abstention on the proxy card, and (iii) include language regarding how uninstructed shares will be voted in bold on the proxy card.

Say-On-Golden Parachutes Disclosure

Consistent with the Exchange Act and the proposed rules, issuers will not be required to include in a merger proxy a separate shareholder vote on the golden parachute compensation if required disclosure of that compensation had been included in the executive compensation disclosure that was subject to a prior Say-On-Pay vote by shareholders. However, in order for issuers to take advantage of this exception, the executive compensation disclosure subject to the prior shareholder vote must have included Item 402(t) disclosure of the same golden parachute arrangements. This exception will only be available to the extent the same golden parachute arrangements previously subject to an annual meeting shareholder vote remain in effect, and the terms of those arrangements have not been modified subsequent to such Say-On-Pay vote.

Under both the proposed and final rules, if the disclosure pursuant to Item 402(t) has been updated to change only the value of the items in the "Golden Parachute Compensation Table" to reflect price movements in the issuer's securities, no new shareholder advisory vote will be required. However, the SEC noted that any change that would result in a tax gross-up becoming payable under Section 280G of the Internal Revenue Code would be a change in terms triggering a separate vote. Such would be the case even if such tax gross-up becomes payable only because of an increase in the issuer's share price.

Similarly, the SEC stated that changes in compensation because of a new named executive officer, additional grants of equity compensation in the ordinary course, and increases in salary, are significant changes to the golden parachute compensation disclosure and should be subject to a shareholder vote. Because a shareholder vote would already have been obtained on portions of the arrangements, however, only the new arrangements and revised terms of the arrangements previously subject to a shareholder vote will be subject to the merger proxy separate shareholder vote. Under the final rules, issuers will be required to comply with the Say-On-Golden Parachutes vote and disclosure requirements in proxy statements and other schedules and forms filed on or after April 25, 2011.

Effective Date

The final rules will become effective 60 days following publication in the Federal Register.

This client memorandum does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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