

October 22, 2010

## SEC Proposes Say-on-Pay Rules

On October 18, 2010, the Securities and Exchange Commission (SEC) announced [proposed rules](#) for the implementation of Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which relates to shareholder approval of executive compensation and "golden parachute" compensation arrangements. Comments on the proposed rules are due by November 18, 2010.

### Section 951 of the Dodd-Frank Act

Section 951 of the Dodd-Frank Act requires SEC-reporting companies to obtain a non-binding shareholder vote on (i) executive compensation (at least once every three years), (ii) the frequency of the shareholder votes on executive compensation (at least once every six years), and (iii) golden parachute arrangements. Section 951 provides that any such shareholder vote is advisory only and "shall not be binding on the issuer or the board of directors of the issuer."

Both the initial advisory votes on executive compensation and the frequency of votes on executive compensation must be included in proxy statements for the first annual or other meeting of the shareholders occurring on or after January 21, 2011, whether or not implementing rules have been adopted. Disclosures and votes relating to golden parachute arrangements, however, need only be made for proxy statements issued after the effective date of the final SEC rules.

### SEC's Proposed Rules

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

Proposed Rule 14a-21(a).<sup>1</sup> Shareholders will have the opportunity to give an advisory vote to approve the compensation of the company's named executive officers as such compensation is disclosed in accordance with Item 402 of Regulation S-K. This would include the Compensation Discussion and Analysis (CD&A), the compensation tables and other narrative executive compensation disclosures required by Item 402. The SEC would not require any specific language or form of resolution to be voted on by shareholders as long as the shareholder vote relates to all executive compensation disclosed pursuant to Item 402. For example, a vote on compensation policies and procedures would be insufficient. Director compensation would not be subject to the vote.

Proposed Item 24 to Schedule 14A. A proxy statement for an annual meeting (or other shareholder meeting which requires executive compensation disclosure) would have to disclose that the company is providing a separate shareholder vote on executive compensation pursuant to the Exchange Act and

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<sup>1</sup> All references herein to proposed or amended rules or items relate to rules and items pursuant to the Securities Exchange Act of 1934, as amended (Exchange Act).

explain the general effect of the vote, such as that the vote is non-binding. However, companies would not be required to state what action they would plan to take in response to any say-on-pay vote.

Proposed Amendments to Item 402(b) of Regulation S-K. Companies would be required to address in the CD&A whether and, if so, how their compensation policies and decisions have taken into account the results of shareholder advisory votes on executive compensation. While smaller reporting companies subject to scaled disclosure requirements in Item 402 would not be required to include a CD&A, if consideration of prior executive compensation advisory votes is a material factor necessary to an understanding of the information disclosed in the Summary Compensation Table, smaller reporting companies will be required to provide a narrative description of such factors pursuant to Item 402(o).

### **Shareholder Approval of the Frequency of Shareholder Votes on Executive Compensation**

Proposed Rule 14a-21(b). A separate shareholder advisory vote on the frequency of shareholder votes on executive compensation would be required in a proxy statement solicited for an annual or other meeting of shareholders for which SEC rules require compensation disclosure. This vote would be required not less frequently than once every six years starting on the first annual or other such meeting of shareholders occurring on or after January 21, 2011.

Proposed Item 24 of Schedule 14A. Companies would be required to disclose that a separate shareholder vote is being provided pursuant to the Exchange Act on the frequency of the say-on-pay vote and explain the general effect of the vote, such as that the vote is non-binding.

Proposed Amendment to Rule 14a-4. The proxy card should make clear that each shareholder has four choices regarding the frequency of voting on executive compensation: every one, two or three years, or abstain; and that shareholders are not voting to approve or disapprove the company's recommendation. Initially, if a proxy service provider has a program that can only register up to three votes (for, against, abstain), companies may for the first required frequency vote include only three choices on their proxy for the frequency of the say-on-pay vote: one, two or three years. Shareholders who return proxy cards without selecting a choice among one, two or three years will remain non-voted on this issue.

Proposed Amendment to Rule 14a-8. A company would be permitted to exclude from proxy materials a shareholder proposal that seeks a say-on-pay vote or that relates to the frequency of say-on-pay votes, provided the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the plurality of votes cast in the most recent vote, and the company provides a vote on frequency at least every six years as required by the Dodd-Frank Act.

Proposed Amendments to Form 10-K and Form 10-Q. Companies would be required to disclose in the quarterly report on Form 10-Q covering the period during which the shareholder advisory vote occurs, or in the annual report on Form 10-K if the shareholder advisory vote occurs during the company's fourth quarter, its decision regarding how frequently it will conduct shareholder advisory votes on executive compensation in light of the results of the shareholder vote on frequency.

### **Issues Relating to Both Say-on-Pay Votes and the Frequency of Say-on-Pay Votes**

Proposed Amendments to Rule 14a-6. A proxy statement that includes a solicitation with respect to either the say-on-pay vote or the frequency of say-on-pay votes would not trigger a requirement that the

company file the proxy statement in preliminary form, so long as any other matters to which the solicitation relates include only matters that also do not trigger a preliminary filing.

Broker Discretionary Voting. Broker discretionary voting of uninstructed shares would not be permitted for a say-on-pay vote or the frequency of say-on-pay votes.

TARP Companies. Because companies with outstanding indebtedness under the Troubled Asset Relief Program (TARP) have existing obligations to conduct a separate annual shareholder vote to approve executive compensation, such companies are exempt from the new rules for holding an additional say-on-pay or frequency of say-on-pay vote until they have repaid all outstanding indebtedness under the TARP.

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

Proposed Item 402(t) of Regulation S-K. Companies would be required to include in any proxy or solicitation material to approve an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all of its assets a tabular disclosure separately quantifying for each named executive officer the value of:

- cash severance payments,
- accelerated stock awards, in-the-money option awards for which vesting would be accelerated, and payments in cancellation of stock and option awards,
- pension and nonqualified deferred compensation benefit enhancements,
- perquisites and other personal benefits and health and welfare benefits,
- tax reimbursements,
- any other benefits (including benefits pursuant to arrangements that are available generally to all salaried employees and do not discriminate in scope, terms or operation in favor of the named executive officers), and
- the total amount of all such payments and benefits.

Companies would be required to footnote the table showing amounts that are triggered by the covered transaction (single trigger) and amounts that are contingent upon additional conditions, such as termination of employment (double trigger). Companies would also be required to provide a narrative describing (i) any material conditions or obligations applicable to such payments, (ii) whether the payments would or could be lump sum, or annual, and their duration, (iii) by whom the payments would be provided, and (iv) any material factors regarding each agreement relating to the compensation or a material condition of such compensation (e.g., non-compete, non-solicitation, non-disparagement or confidentiality agreements). Disclosure would not be required of previously vested equity awards, information already disclosed in the proxy statement Pension Benefits and Non-Qualified Deferred Compensation Table or compensation payable under post-transaction employment agreements to be entered into in connection with the transaction (although such post-transaction employment agreements may be required to be disclosed pursuant to Item 5 of Schedule 14A).

Proposed Amendments to Schedule 14A, Schedule 14C, Schedule 14D-9, Schedule 13E-3, and Item 1011 of Regulation M-A. Although not specifically required by the Dodd-Frank Act, the SEC has proposed that disclosures set forth in Item 402(t) of Regulation S-K, as described above, would be required to be included in (i) information statements filed pursuant to Regulation 14C, (ii) proxy or consent solicitations that do not contain merger proposals but require disclosure of information under Item 14 of Schedule 14A pursuant to Note A of Schedule 14A, (iii) registration statements on Forms S-4 and F-4 containing disclosure relating to mergers and similar transactions, (iv) going private transactions on Schedule 13E-3, and (v) third party tender offers on Schedule TO and Schedule 14D-9 solicitation/recommendation statements. A bidder in a third party tender offer would be required to disclose in its Schedule TO the target's golden parachute arrangements only to the extent the bidder has knowledge about such arrangements after reasonable inquiry. Certain exceptions also apply to foreign private issuers.

Proposed Rule 14a-21(c). Companies would be required to make disclosures responsive to Item 402(t) relating to any golden parachute arrangements in proxy statements for meetings at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all of its assets. In addition, shareholders would have a separate advisory vote on the golden parachute arrangements. As proposed, this vote would only need to cover arrangements between the company seeking the shareholder vote and its named executive officers, even though Item 402(t) would require more extensive disclosure, including arrangements between both the acquiring company or the target company and the named executive officers of either company. Companies would not be required to include in the merger proxy a separate shareholder vote on the golden parachute compensation if that compensation had been included in the executive compensation disclosure that was subject to a prior say-on-pay vote, so long as such previous disclosure complied with Item 402(t) and the same golden parachute arrangements remain in effect. New golden parachute arrangements and any revisions to golden parachute arrangements would be subject to the separate merger proxy shareholder advisory vote requirements of Rule 14a-21(c).

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