



SEC Adopts Rule on Say-On-Pay and Golden Parachute Shareholder Advisory Votes

By: Charlie A. Roberts, Jr.

On January 25, a divided Securities and Exchange Commission voted 3-2 to adopt new rule amendments to implement provisions concerning shareholder advisory votes on executive compensation and “golden parachute” compensation arrangements as required under the Dodd-Frank Wall Street Reform and Consumer Protection Act (See our “Corporate and Securities News” issue dated July 21, 2010).

Background

Section 951 of the Dodd-Frank Act requires companies subject to federal proxy rules to provide their shareholders with an advisory vote on: (i) executive compensation, generally known as “say-on-pay” votes; (ii) the desired frequency of say-on-pay votes, also known as the “frequency” vote; and (iii) compensation arrangements and understandings in connection with merger transactions, known as “golden parachute” arrangements, which would need to be disclosed in merger proxy statements.

Say-on-Pay, the Frequency Vote and Additional Disclosure Requirements

Under the final rule amendments adopted by the SEC, companies subject to federal proxy rules are required to provide shareholders with an advisory vote on executive compensation at least once every three years beginning with the first annual shareholders’ meeting taking place on or after January 21, 2011. As a result, the new rules will apply to this upcoming proxy season.

The rule amendments require companies to provide disclosure in the annual meeting proxy statement regarding the say-on-pay vote, including whether the vote is non-binding. While no specific language is mandated, the new rules do provide a sample resolution that may be used. Companies must also disclose in their Compensation Discussion and Analysis whether, and if so how, they have considered the results of the most recent say-on-pay vote, which was not mandated under Dodd-Frank.

Under the new rules, companies are also required to 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, which also is a non-binding advisory vote, is required at least once every six years beginning with the first annual meeting taking place on or after January 21, 2011. In order to implement the requirement for such a “frequency” vote, the proxy rules are revised to require four voting choices on the proxy card—one year, two years, three years or abstain. A special exception is permitted until December 31, 2011 for situations where proxy vote tabulators are unable to accommodate four voting choices. The new rules provide that if the board makes a recommendation as to the frequency vote proposal, unmarked proxies may be voted in accordance with that recommendation.

Like disclosure requirements for the say-on-pay vote, the rules require companies to disclose the frequency vote in the annual meeting proxy statement, including whether the vote is non-binding. Companies will also be required to report in their proxy statements when the next say-on-pay vote will occur. The rules also revise the shareholder proposal rule (Rule 14a-8) to provide guidance regarding the impact of these new requirements on shareholder proposals relating to say-on-pay or frequency votes.

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February 2011

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In order to allow shareholders to learn how often a company will provide the say-on-pay vote, the rule amendments also revise the current report on Form 8-K, which now requires disclosure following a frequency vote regarding the company's decision as to how often 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.

To allow smaller reporting companies (public float of less than \$75 million) to observe how the rules operate for other companies and to allow them to better prepare to implement the rules, the SEC also adopted a temporary exemption so that smaller reporting companies are not required to conduct say-on-pay and frequency votes until annual meetings occurring on or after January 21, 2013.

Shareholder Approval and Disclosure of Golden Parachute Arrangements

Under the rules, companies are required to provide additional disclosure regarding compensation arrangements with executive officers in connection with merger transactions, known as "golden parachute" arrangements. Disclosure is required of all agreements and understandings that the acquiring and target companies have with the named executive officers of both companies. The rule requires this disclosure in both narrative and tabular formats.

The rules require companies to provide a separate shareholder advisory vote to approve certain "golden parachute" compensation arrangements in connection with a merger, acquisition, consolidation, proposed sale or other disposition of all or substantially all assets. Companies are required to comply with the golden parachute compensation shareholder advisory vote and disclosure requirements in proxy statements and other schedules and forms initially filed on or after April 25, 2011.

The rules provide that the votes described above are non-binding and do not create or imply any change to the fiduciary duties of the board. Furthermore, the SEC clarified that these votes alone will not trigger a requirement to file a preliminary proxy statement.

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