

Securities and Exchange Commission Adopts Say-on-Pay

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On January 25, 2011, the Securities and Exchange Commission ("SEC") adopted final "Shareholder Approval of Executive Compensation and Golden Parachute Compensation" rules, which are effective for annual meetings of shareholders conducted on or after January 21, 2011. Also known as "Say-on-Pay," the final rules address three separate shareholder votes mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act and several proxy disclosures surrounding these votes.

Each of the three votes, (1) Say-on-Pay, (2) Say-on-Frequency and (3) Say-on-Parachutes, is non-binding, advisory and applies to all U.S. public companies, although there is a temporary exemption for smaller reporting companies (companies having a public float of less than \$75 million) with respect to the Say-on-Pay and Say-on-Frequency votes such that they do not have to conduct a Say-on-Pay or Say-on-Frequency vote until their first annual meetings occurring on or after January 21, 2013. While companies may elect to make any of the three votes binding, all companies have to explain any effects of the vote. Neither the Say-on-Pay vote nor the Say-on-Frequency vote requires companies to file preliminary proxy materials with the SEC.

The Say-on-Parachutes vote applies to proxy statements and other schedules and forms initially filed on or after April 25, 2011 with respect to meetings where shareholders are asked to approve a merger or other extraordinary transaction. Smaller reporting companies are also required to conduct a Say-on-Parachutes vote as of this April 25, 2011 date.

Say-on-Pay

The final rules require companies to conduct a non-binding shareholder vote to approve the compensation of executives. Companies are required to conduct this vote at their first annual meetings held on or after January 21, 2011 (2013 for smaller reporting companies). The compensation to be approved is that which is disclosed in the Compensation Discussion and Analysis (for all companies except smaller reporting companies), compensation tables, and other executive compensation disclosures in the company's proxy materials pursuant to Item 402 of Regulation S-K. The final rules also include an example of a resolution that would meet the applicable requirements, which is 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."

Companies (other than smaller reporting companies) must disclose in the Compensation Discussion and Analysis whether, and if so, how they have considered the results of the most recent Say-on-Pay vote in determining compensation policies and decisions and the effect that this has had on such policies and decisions. The final rules also instruct companies to address their consideration of the results of earlier Say-on-Pay votes to the extent material to such policies and decisions.

Say-on-Frequency

The final rules also require companies to allow shareholders to vote on how often they would like to cast a Say-on-Pay vote, namely: every year, every other year, or once every three years. Companies are required to conduct this Say-on-Frequency vote at their first annual meetings held on or after January 21, 2011 (2013 for smaller reporting

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companies) and at least once every six years thereafter. Companies are permitted to include their recommendation with respect to frequency in their proxy materials. Unlike with the Say-on-Pay vote, the final rules do not include an example of a resolution for the Say-on-Frequency vote.

Following this Say-on-Frequency vote, companies must disclose on Form 8-K how often they will hold future Say-on-Pay votes by filing an amendment to their previously filed Form 8-K reporting the results of voting on all matters at the annual meeting. The amendment is required no later than 150 calendar days after the date of the annual meeting at which the vote took place, but not later than 60 calendar days prior to the deadline for submitting Rule 14a-8 shareholder proposals for the next year's annual meeting. In the amendment, companies must disclose their determinations regarding the frequency of future Say-on-Pay votes.

After companies have made an initial determination with respect to the frequency of future Say-on-Pay votes, they will be required to disclose in each year's proxy statement the frequency that is currently in place and when the next Say-on-Pay vote is scheduled to occur.

Say-on-Parachutes

In connection with the Say-on-Parachutes vote, companies must include in the merger proxy materials narrative and tabular disclosure regarding all transaction-related compensation arrangements between the target and acquiring corporations and their named executive officers. This disclosure is also required in connection with certain other transactions, including going-private transactions and third-party tender offers.

Companies that have previously disclosed such arrangements in their annual proxy materials are not required to hold a Say-on-Parachutes vote so long as their previous disclosure in connection with the Say-on-Pay vote meets all of the new disclosure requirements for the Say-on-Parachutes vote. These requirements are substantially more detailed than the existing compensation disclosure requirements with respect to potential payments upon termination or change-in-control. The exception is only available to the extent the same golden parachute arrangements that were previously subject to the Say-on-Pay vote remain in effect and have not been modified subsequent to that Say-on-Pay vote.

While changes in the value of certain compensation arrangements resulting from price movements in a company's securities will not require a new Say-on-Parachutes vote, changes in compensation because of a new named executive officer, additional equity compensation grants and salary increases will. In this case, only the new arrangements will be subject to a Say-on-Parachutes vote.

Grounds to Exclude Similar Shareholder Proposals

The final rules permit companies to exclude a Say-on-Pay or Say-on-Frequency shareholder vote if they have adopted a Say-on-Pay or Say-on-Frequency policy consistent with what was favored by a majority of the votes cast in the most recent Say-on-Pay or Say-on-Frequency vote. This differs from the proposed rules, which would have permitted companies to exclude such shareholder proposals if the policy were favored by a plurality of the votes cast.

Voting of Uninstructed Shares

Because each of Say-on-Pay and Say-on-Parachutes is considered an executive compensation matter, brokers will not be able to cast discretionary votes on these items. However, with respect to the Say-on-Frequency vote, companies may vote uninstructed proxy cards in accordance with management's recommendation if the recommendation is disclosed in the

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proxy statement and if the proxy card contains language, in bold, on how uninstructed shares will be voted and provides for abstentions.

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