January 31, 2011

Final Say-on-Pay and Say-on-Golden Parachute Rules

Benefits of Voluntary Annual Golden Parachute Disclosure Continue to Be Limited

Minor Changes from the Proposal Include Giving Companies More Time to Make Frequency Determination, Limiting Exclusion of Say-on-Pay or Frequency Shareholder Proposals, No Golden Parachute Disclosure in Third-Party Tenders, and Two-Year Say-on-Pay Delay for Smaller Reporting Companies

SUMMARY

The SEC, by a 3-2 vote, has adopted final rules implementing non-binding "say-on-pay" votes, say-on-pay frequency votes and votes on "golden parachutes." The new rules were adopted largely as proposed in October, with relatively minor changes in response to public comments. In particular, the SEC declined to make modifications that would have provided issuers with an incentive to make voluntary annual golden parachute disclosure. Instead, the SEC confirmed that it views ordinary course salary increases and equity grants as the type of changes that would require a separate vote as part of a business combination, notwithstanding prior golden parachute disclosure as part of a say-on-pay vote. Similarly, the SEC will view a change that results in a change-in-control tax gross-up becoming payable as triggering the requirement for a separate vote, even if the gross-up becomes payable only because of an increase in share price following the last say-on-pay vote.

Some of the more notable changes affecting the drafting of 2011 annual proxy statements are:

- ***Two-year say-on-pay delay for smaller reporting companies; continued exemption for foreign private issuers.*** The final rules provide for a two-year exemption from the say-on-pay and say-on-pay frequency vote requirements for smaller reporting companies. Importantly, this temporary exemption does not apply to the separate golden parachute vote.

The final rules also confirm that foreign private issuers are not required to conduct say-on-pay or say-on-pay frequency votes.

- ***Sample say-on-pay resolution.*** The final rules add a non-exclusive example of a say-on-pay resolution that satisfies the applicable requirements. The final rules did not add a similar example for the say-on-pay frequency resolution.
- ***Mandatory CD&A disclosure of most recent required say-on-pay vote.*** Discussion of whether and how the issuer's compensation decisions have been affected by the results of the most recent required say-on-pay vote (including any vote required of TARP recipients) continues to be a mandatory CD&A item, whether or not it was a material factor. The proposed rules, however, potentially called for discussion of multiple years' say-on-pay votes.
- ***Voting of uninstructed proxy cards in say-on-pay frequency vote.*** The SEC confirmed that issuers may vote proxy cards that are returned signed but unmarked in accordance with management's recommendation for the say-on-pay frequency vote if the requirements of Rule 14a-4 are followed (including permitting abstention). Both say-on-pay and say-on-frequency votes continue to be matters on which brokers are not permitted to exercise discretion to vote absent instructions from the beneficial owner.
- ***No preliminary proxy required due to advisory vote on executive compensation.*** No preliminary proxy statement filing is triggered by the inclusion of *any* shareholder advisory vote on executive compensation. This is broader than the proposed rules, which covered only the required votes. The adopting release indicates that companies may comply with this policy immediately, even in advance of the technical effective date of the rules.
- ***Disclosure of say-on-pay frequency determination on Amended Form 8-K.*** Issuers must disclose their decision regarding the frequency of say-on-pay votes in an amendment to their post-meeting Form 8-K, to be filed no later than 150 calendar days after the date of the meeting at which the say-on-pay frequency 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 next annual meeting. The proposed rules provided for disclosure in the Form 10-Q for the quarter in which the frequency vote occurred.
- ***No grace period for initial public offerings.*** New issuers continue to be required to include the say-on-pay and say-on-pay frequency votes in the proxy statement for their first annual meeting after an IPO.

Some of the changes that will affect future annual proxy statements include:

- ***New disclosure in future proxy statements on say-on-pay frequency policy.*** The final rules require disclosure of the current frequency of say-on-pay votes and when the next scheduled say-on-pay vote will occur (though not for the first year in which the votes occur).
- ***Majority vote threshold for Rule 14a-8 exclusions.*** An issuer may exclude Rule 14a-8 shareholder proposals on say-on-pay votes or frequency of say-on-pay votes only if it has adopted a frequency policy that is consistent with a *majority* of votes cast in the last frequency vote. The proposed rules would have allowed exclusion based on a plurality threshold.

Some of the more notable changes affecting the golden parachute vote are:

- ***Use of deal price for golden parachute disclosure in a business combination.*** In connection with a business combination, quantitative disclosure of golden parachute arrangements based on issuer stock price will be calculated based on the transaction consideration per share, if this value is a fixed dollar amount, or otherwise on the average closing price per share over the first five business days following the first public announcement of the transaction. The proposed rules would have based these calculations on the issuer's share price as of the latest practicable date.

- ***No golden parachute vote for third-party bidders.*** Bidders in third-party tender offers are not required to provide information in their Schedule TO about a target's golden parachute arrangements, unless the third-party tender offer is also a Rule 13e-3 going-private transaction.

In accordance with the transition provisions in the proposed rules, the say-on-pay and say-on-pay frequency votes are required in proxy materials for annual meetings held on or after January 21, 2011. Issuers are required to comply with the golden parachute vote and related disclosure requirements for proxy statements and other schedules and forms initially filed on or after April 25, 2011. Smaller reporting companies are not required to conduct say-on-pay or say-on-pay frequency votes until the first meeting at which directors will be elected occurring on or after January 21, 2013.

BACKGROUND

On October 18, 2010, the SEC issued proposed rules[1] to implement Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which added a new Section 14A to the Securities Exchange Act of 1934. New Section 14A requires public companies to provide their shareholders with (a) a non-binding say-on-pay vote to approve the compensation of the named executive officers at least once every three years, (b) a non-binding vote, at least once every six years, to determine whether the say-on-pay vote will occur every one, two or three years and (c) in connection with shareholder approval of a merger or similar transaction, (i) proxy statement disclosure of so-called "golden parachute" compensation arrangements (payments to a named executive officer upon a change in control) and (ii) a separate non-binding vote to approve golden parachute compensation arrangements that had not previously been subject to a say-on-pay vote. Section 14A provides that these advisory votes are non-binding on the issuer and its board and will not create or imply any additional fiduciary duties or change in fiduciary duties. On January 25, 2011, the SEC adopted and published its final rules.[2]

SHAREHOLDER ADVISORY VOTES ON EXECUTIVE COMPENSATION

"Say-on-Pay" Vote. New Rule 14a-21(a) requires issuers to hold a separate non-binding shareholder vote on the compensation of the named executive officers at least once every three calendar years beginning with the first annual or other meeting of shareholders occurring on or after January 21, 2011. The final rule clarifies that the say-on-pay vote is required only with respect to an annual or other meeting

1 *See* Release Nos. 33-9153; 34-63124 (Oct. 18, 2010), 75 Fed. Reg. 66,590 (Oct. 28, 2010), available at http://www.sec.gov/rules/proposed/2010/33-9153.pdf. Further discussion of the proposed rules may be found in our Memorandum to Clients, dated October 22, 2010, entitled "SEC Proposes Say-on-Pay and Golden Parachute Rules for Proxy Statements."

2 *See* Release Nos. 33-9178; 34-63768 (Jan. 25, 2011), available at http://www.sec.gov/rules/final/2011/33-9178.pdf.

of shareholders for which proxies will be solicited for the election of directors. The final rule also clarifies that a say-on-pay vote is required at least once every three *calendar* years, to accommodate changes in the date of the annual meeting.

Shareholders must be permitted to vote to approve the compensation disclosed in Item 402 of Regulation S-K, including the Compensation Discussion and Analysis ("CD&A"), the compensation tables and other narrative executive compensation disclosures but excluding director compensation and the company's separate risk-related disclosure under Item 402(s). The final rule does not require issuers to use any specific language or form of say-on-pay resolution to be voted on by shareholders. However, Section 14A(a)(1) requires that the shareholder advisory vote be "to approve the compensation of executives, as disclosed pursuant to [Item 402 of Regulation S-K] or any successor thereto," and the SEC added an instruction to Rule 14a-21(a) to indicate that similar language should be included in an issuer's resolution for the say-on-pay vote. The instruction also includes a non-exclusive example of a resolution that would satisfy the applicable requirements.[3]

Issuers must briefly explain the non-binding nature of the vote. The final rules also require disclosure of an issuer's current policy on frequency of say-on-pay votes and when the next say-on-pay vote will occur, though this disclosure is not required in proxy materials for the meeting where an issuer initially conducts the say-on-pay and frequency votes.

Foreign private issuers are not required to conduct say-on-pay or say-on-pay frequency votes.

CD&A Disclosure of Most Recent Say-on-Pay Vote. The final rules amend Item 402(b)(1) of Regulation S-K to require CD&A disclosure as to whether and, if so, how an issuer has considered the results of the most recent say-on-pay vote in determining compensation policies and decisions and, if so, how that consideration has affected the issuer's executive compensation policies and decisions. The final rules clarify that the mandated discussion relates only to the most recent required vote, not *all* prior votes. The SEC did not adopt an approach suggested by a number of commenters, including our firm, to require discussion in the CD&A only if the earlier vote was a material element of the issuer's compensation decisions under the particular facts and circumstances.

As further described below under "Relationship between Dodd-Frank Say-on-Pay and TARP Say-on-Pay Votes," companies with outstanding indebtedness under the U.S. Department of the Treasury's Troubled Asset Relief Program, or TARP, must conduct annual say-on-pay votes pursuant to existing Rule 14a-20. The SEC's amendment to Item 402(b)(1) requires an issuer to address its consideration of the results of its most recent say-on-pay vote required by Section 14A *or* Rule 14a-20. Accordingly, it appears that any

3 The example 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."

issuer that held a TARP-related say-on-pay vote in 2009 or 2010 must address its consideration of the most recent of such votes in the proxy statement for its next meeting at which directors are elected.

Say-on-Pay Frequency Vote. Under new Rule 14a-21(b), issuers must hold a separate non-binding shareholder vote on the frequency of say-on-pay votes at least once every six calendar years beginning with the first annual or other meeting of shareholders occurring on or after January 21, 2011 at which directors will be elected. Shareholders must be permitted to vote on whether the say-on-pay vote should be held every one, two or three years or to indicate that they are abstaining.[4] The SEC did not provide a sample resolution for the say-on-pay frequency vote.

1. No Grace Period for New Public Companies

The SEC had solicited comments on whether a new issuer that discloses the frequency of its say-on-pay votes in its IPO registration statement should be exempt from conducting further say-on-pay and say-on-pay frequency votes until the year disclosed. However, the SEC declined to adopt such an exemption and, accordingly, a new issuer must include the say-on-pay and say-on-pay frequency votes in the proxy statement for its first annual meeting after its IPO.

2. Treatment of Uninstructed Proxy Cards

As noted above, the SEC has amended Rule 14a-4 so that shareholders will be given four choices as to the frequency of a say-on-pay vote – shareholders may choose to have the say-on-pay vote occur every one, two, or three years, or to abstain from voting on the matter.[5] In response to our firm's comment, the SEC has confirmed that issuers may vote proxy cards that are submitted unmarked in accordance with management's recommendation for the say-on-pay frequency vote if the issuer includes a recommendation for the frequency vote in the proxy statement, permits abstention on the proxy card and includes language regarding how uninstructed shares will be voted in bold on the proxy card.

Amendment to Rule 14a-8. The SEC proposed adding a new note to Rule 14a-8(i)(10) (which addresses when an issuer can exclude a shareholder proposal as "substantially implemented") to permit the exclusion of a shareholder proposal that would provide a say-on-pay vote, seeks future say-on-pay votes or relates to the frequency of say-on-pay votes, if the issuer 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 say-on-pay frequency vote. The final rules, however, change the threshold for exclusion from a plurality to a *majority*

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[4] Because of a concern as to the technical ability of all proxy service providers to provide for four choices, the SEC indicated that materials for meetings held during 2011 may omit the choice to abstain, though the issuer would then not have the ability to vote unmarked cards in its discretion as described under "Treatment of Uninstructed Proxy Cards" below.

[5] Because of the number of choices, it is possible that no choice will receive the requisite vote needed under the company's governing documents or state law for a matter to be adopted or approved by shareholders. However, because the vote is non-binding anyway, this would not seem to present any issues.

of votes cast.[6] Therefore, if no choice receives a majority of votes cast in the say-on-pay frequency vote, it will be impossible for an issuer to avail itself of the exclusion provision.

New 8-K Reporting Requirement. The SEC has amended Item 5.07 of Form 8-K to require disclosure of the issuer's decision regarding how frequently it will conduct say-on-pay votes. The proposal would have required such disclosure in the Form 10-Q covering the quarter during which the shareholder vote occurred, or in the Form 10-K if the vote occurred during the issuer's fourth quarter. Under current rules, an issuer must file a Form 8-K under Item 5.07 within four business days of the meeting to disclose the results of the meeting, including the say-on-pay frequency vote. Under the new rules, the issuer must then file an amended Form 8-K no later than 150 calendar days after the date of the end of the meeting at which the frequency vote occurred, but no later than 60 calendar days prior to the deadline for the submission of shareholder proposals under Rule 14a-8 for the issuer's next annual meeting.

No Preliminary Proxy Needed. The final rules add any shareholder advisory vote on executive compensation, whether or not required by Section 14A, to the list of matters that do not trigger a preliminary proxy statement filing under Rule 14a-6(a). This is broader than the proposed amendment, in that it covers voluntary say-on-pay votes, not just the required votes.

Relationship between Dodd-Frank Say-on-Pay and TARP Say-on-Pay Votes. In accordance with the proposed rules, issuers that still have outstanding obligations under TARP – and therefore must already hold an annual say-on-pay vote under Rule 14a-20 – are not required to conduct a separate say-on-pay or say-on-pay frequency vote under Rule 14a-21. These issuers are, however, required to include a separate say-on-pay and say-on-pay frequency vote under Rule 14a-21 for the first annual meeting of shareholders after the issuer has repaid all outstanding indebtedness under TARP. As noted above, the CD&A disclosure requirement with respect to consideration of the most recent say-on-pay vote applies to TARP-related votes.

Two-Year Delay for Smaller Reporting Companies. Under the final rules, "smaller reporting companies"[7] are not required to conduct either a say-on-pay vote or a say-on-pay frequency vote until the first meeting of shareholders occurring on or after January 21, 2013 at which directors will be elected. This temporary exemption does not apply to the separate golden parachute vote described below.

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[6] For purposes of this analysis, an abstention does not count as a vote cast. Accordingly, exclusion of an applicable shareholder proposal is permitted only if a single frequency (i.e., one, two or three years) received a majority of the votes cast in the most recent frequency vote and the issuer has adopted a policy consistent with that choice.

[7] "Smaller reporting companies" are generally issuers with a public float of less than $75 million.

DISCLOSURE AND SHAREHOLDER ADVISORY VOTE ON "GOLDEN PARACHUTE" COMPENSATION IN BUSINESS COMBINATIONS

Existing Disclosure Requirements. Under existing rules, target companies soliciting shareholder approval of a business combination are required to describe briefly any substantial interest of any person who has been an executive officer or director since the beginning of the last fiscal year in the matter to be acted upon. In addition, existing rules require companies to include in annual meeting proxy statements detailed information about payments that may be made to named executive officers upon termination of employment or in connection with a change in control in accordance with Item 402(j) of Regulation S-K.

New Item 402(t) of Regulation S-K. To implement the disclosure requirements of Section 14A(b)(1), the SEC has adopted new Item 402(t) of Regulation S-K substantially as proposed. New Item 402(t) requires disclosure with respect to golden parachute compensation arrangements in proxy or consent solicitations (whether by the acquirer or the target) in connection with an acquisition, merger, consolidation, or sale or other disposition of all or substantially all assets (and in certain other documents, as described under "Disclosure in Other Documents" below). The disclosure covers arrangements that the target company *or* the acquiring company has with the named executive officers of *each* of the target company and the acquiring company.

Item 402(t) requires disclosure of named executive officers' golden parachute arrangements in a new table, as well as in narrative form. This is the case regardless of which company is making the solicitation. The table must present quantitative disclosure of the individual elements of compensation that an executive would receive that are based on or otherwise relate to the subject transaction, separately quantified based on specified categories, and the aggregate total of such compensation for each named executive officer. The table requires separate footnote identification of amounts attributable to "single-trigger" arrangements (i.e., triggered solely by the transaction) and amounts attributable to "double-trigger" arrangements (i.e., triggered by a termination or resignation within a specified time following the transaction). In response to requests from commenters for greater flexibility in drafting the table, the final rules clarify that issuers may add additional columns or rows to the table, such as to disclose cash severance separately from other cash compensation or to distinguish single-trigger and double-trigger arrangements, so long as the disclosure is not misleading.

The tabular disclosure required by Item 402(t) requires quantification of any agreements or understandings between each named executive officer and the acquiring company or the target company, in respect of any type of compensation, whether present, deferred or contingent, that is based on or otherwise relates to an acquisition, merger, consolidation, sale or other disposition of all or substantially all assets. Item 402(t) requires issuers to describe any material conditions or obligations applicable to the receipt of payment including, but not limited to, non-compete, non-solicitation, non-disparagement or confidentiality agreements, their duration, and provisions regarding waiver or breach. In addition, the rule requires a description of the specific circumstances that trigger payment, the form of payment (lump sum or installment payments) and their duration, the payor and any other material factors regarding each agreement.

Item 402(t) does not require separate disclosure or quantification with respect to:

- compensation disclosed in the Pension Benefits Table or the Nonqualified Deferred Compensation Table;
- previously vested equity awards; or
- *bona fide* post-transaction employment agreements to be entered into in connection with the merger or acquisition transaction.

However, unlike Item 402(j), Item 402(t) does *not* exclude *de minimis* perquisites and other personal benefits or non-discriminatory, generally available arrangements. Accordingly, issuers will need to disclose and quantify these arrangements for the first time.

1. Share Price for Item 402(t) Disclosure

In a revision to the proposal, the final rules provide that for purposes of the tabular quantification, dollar amounts based on issuer stock price will be calculated based on the consideration per share, if this value is a fixed dollar amount, or otherwise on the average closing price per share over the first five business days following the first public announcement of the transaction. The proposed rules would have based these calculations on the issuer's share price as of the latest practicable date. As proposed and adopted, where Item 402(t) disclosure is voluntarily included in an annual meeting proxy statement,[8] these amounts will be calculated based on closing price per share as of the last business day of the issuer's last completed fiscal year.

2. Disclosure in Other Documents

In addition to business combination proxy statements, the final rules, like the proposal, extend the disclosure required by Item 402(t)[9] to similar transactions, such as:

- information statements filed pursuant to Regulation 14C;
- registration statements on Forms S-4 and F-4 containing disclosure relating to mergers and similar transactions;

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8 As discussed below, a company may choose to include disclosure regarding golden parachute compensation arrangements in its annual meeting proxy statement so that the arrangement is subjected to a say-on-pay vote and therefore may benefit from the exemption from the separate golden parachute vote described below at the time of a business combination. Even if a company satisfies this exception from the vote requirement, Item 402(t) *disclosure* is still required in the proxy or consent solicitation to approve the business combination.

9 Although these transactions require golden parachute *disclosure* pursuant to Item 402(t), the golden parachute *vote* required by Section 14A(b)(2) does not extend beyond proxy statements to approve business combinations.

- going private transactions on Schedule 13E-3;
- third-party tender offers on Schedule TO and Schedule 14D-9 solicitation/recommendation statements; and
- proxy or consent solicitations that do not contain merger proposals but require disclosure of information under Item 14 of Schedule 14A (for example, a proxy solicitation to authorize additional securities to be used for an acquisition).

The final rules, unlike the proposal, provide that bidders in third-party tender offers need not provide information in their Schedule TO about a target's golden parachute arrangements unless the third-party tender offer is also a Rule 13e-3 going-private transaction. Consistent with the proposal, the SEC has adopted an exception to the disclosure requirement under Item 1011(b) for both bidders and targets in third-party tender offers and filing persons in Rule 13e-3 going-private transactions where the target or subject company is a foreign private issuer. Similarly, the SEC has provided an exception to the Item 402(t) disclosure obligation with respect to agreements and understandings with senior management of foreign private issuers where the target or acquirer is a foreign private issuer.

Golden Parachute Advisory Vote. The SEC adopted Rule 14a-21(c), which implements Section 14A(b)(2), substantially as proposed. Under new Rule 14a-21(c), an issuer must provide for a separate non-binding shareholder vote on golden parachute compensation arrangements in proxy statements for meetings at which that issuer's shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all assets.

The golden parachute vote may, in some cases, be on a narrower set of arrangements than are required to be disclosed under proposed Item 402(t). In particular, if only the target company conducts a proxy or consent solicitation to approve the business combination (which is the most common situation), golden parachute arrangements between the *acquiring company* and the named executive officers of the target would *not* be voted on by shareholders, since the statutory language only requires a vote on arrangements with the "soliciting person." Item 402(t) will nevertheless require disclosure of such arrangements. The final rule does not provide any specific language or form of resolution to be voted on by shareholders.

This separate advisory vote is not required if disclosure of the relevant compensation consistent with Item 402(t) has been subjected to an earlier say-on-pay vote (whether or not it was approved by shareholders) and if the arrangements have not been subsequently revised. The SEC did not adopt an approach suggested by a number of commenters, including our firm, to provide an exemption from a separate vote in a business transaction proxy if the only changes since the say-on-pay vote were ordinary course changes to compensation arrangements. Accordingly, both new golden parachute arrangements and revisions to golden parachute arrangements that were subject to a prior say-on-pay vote are subject to the separate shareholder vote requirement of Rule 14a-21(c). The adopting release expressly identifies changes in compensation due to a new named executive officer, additional grants of equity compensation in the ordinary course and increases in salary as significant changes to the golden parachute disclosure triggering a separate vote, but notes that changes that result only in a reduction in value of the total compensation should not require a new shareholder vote. Where a shareholder vote has already been obtained on portions of the arrangements, an issuer may determine to submit for the separate vote only the new arrangements and revised terms of the arrangements that were subject to a prior say-on-pay vote, and in that case a second table must be included that discloses only the golden parachute arrangements that are being voted on.

As proposed and adopted, if the Item 402(t) disclosure 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 under Section 14A(b)(2) will be required. However, the SEC will view any change that would result in an Internal Revenue Code Section 280G tax gross-up becoming payable as a change in terms triggering the requirement for a separate vote, even if the tax gross-up becomes payable only because of an increase in the issuer's share price.

Issuers are required to comply with the golden parachute vote and related disclosure requirements for proxy statements and other schedules and forms initially filed on or after April 25, 2011.

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