

SEC Adopts Say-on-Pay Rules

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On January 25, 2011, the Securities and Exchange Commission (the "SEC") adopted final rules to implement Section 14A of the Securities Exchange Act of 1934 (the "Exchange Act"), which requires public companies to conduct non-binding shareholder advisory votes on executive compensation ("say-on-pay"), the frequency of the say-on-pay vote ("say-on-frequency"), and compensation arrangements in connection with certain merger or acquisition transactions ("say-on-golden parachutes"). Section 14A was added to the Exchange Act by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

Although the rules are not effective until April 4, 2011, the say-on-pay and say-on-frequency votes are required for shareholder meetings at which directors will be elected that occur on or after January 21, 2011. Smaller reporting companies (generally, companies with a public float less than \$75 million) are exempt from holding say-on-pay and say-on-frequency votes until the first shareholder meeting at which directors will be elected that is held on or after January 21, 2013.

Say-on-Pay

Pursuant to the newly adopted Rule 14a-21(a), an issuer's proxy statement must include a resolution for a shareholder advisory vote on executive compensation of the issuer's named executive officers. The first such say-on-pay vote must take place in connection with the first annual or other meeting of shareholders occurring on or after January 21, 2011 at which directors will be elected. An issuer must include such a say-on-pay vote at least once every three years.

In proxy statements soliciting a say-on-pay vote, the issuer is required to explain the general effects of the say-on-pay vote, such as whether the vote is nonbinding. Further, the issuer must discuss in its Compensation Discussion & Analysis whether, and if so how, the results of the most recent say-on-pay vote affected the issuer's executive compensation policies and decisions.

The SEC declined to mandate specific language for the say-on-pay resolution. However, the SEC did provide an example of a form of resolution that would satisfy the rule requirements.

Say-on-Frequency

The SEC also adopted Rule 14a-21(b) requiring issuers, not less frequently than once every 6 years, to provide a separate shareholder advisory vote in its proxy statement to determine whether the say-on-pay vote will occur every 1, 2, or 3 years. The first such "say-on-frequency" vote must also take place in connection with the first annual or other meeting of shareholders occurring on or after January 21, 2011 at which directors will be elected.

The newly adopted rules require issuers to provide a brief explanation of the effect of the say-on-frequency vote, such as whether the vote is nonbinding, as well as the current frequency of say-on-pay votes and when the next say-on-pay vote will occur. In addition, each issuer must disclose in a Form 8-K filing the frequency of the say-on-pay vote that it intends to implement, and whether the issuer followed the result of the shareholder vote. The issuer may include such information in the Form 8-K disclosing the voting results of the annual meeting, or in an amendment to such filing within the earlier of 150 days of the shareholder vote or 60 days prior to the deadline for submission of shareholder proposals for the subsequent annual meeting of shareholders.

Under the new rules, the proxy solicitation card for the annual meeting must include four voting choices regarding how often the say-on-pay vote should be held – 1, 2, or 3 years, or abstain from voting. In addition, issuers may vote uninstructed proxies according to the board of director's recommendation if (i) the proxy actually includes such a recommendation, (ii) the proxy card contains the required abstention option, and (iii) the proxy card contains bolded language describing how the uninstructed shares will be voted.

Unlike the say-on-pay vote, the SEC did not provide any examples of a resolution that would meet the requirements of the say-on-frequency rule.

Golden Parachutes

The SEC also adopted Rule 14a-21(c), which requires issuers to provide a non-binding shareholder advisory vote to approve any golden parachute arrangements in proxy statements for meetings at which shareholders are asked to approve certain business combinations, including mergers, acquisitions, going-private transactions and tender offers. Issuers must provide specific tabular and narrative disclosure of golden parachute arrangements dealing with any type of compensation relating to the merger (or other significant transaction) among the target and acquiring issuers and the named executive officers of such target and acquiring issuers. These disclosures are also required in the proxy statements of acquiring companies that are seeking shareholder approval for an issuance of shares or a reverse stock split in order to conduct a merger transaction.

Issuers may be exempt from including this say-on-golden parachute advisory vote if the required disclosures were previously included in a proxy statement that was subject to a say-on-pay vote. In addition, although disclosure is required for golden parachute arrangements between an acquiring company and the named executive officers of a target corporation seeking approval of the transaction, a say-on-golden parachute vote is not required for such arrangements.

Similar to the say-on-frequency vote, the SEC did not propose specific language or a form of resolution to be voted on by the shareholders. The golden parachute disclosure and advisory vote requirements are required for all initial filings on or after April 25, 2011, including filings by smaller reporting companies.

Exclusion of Say-on-Pay Shareholder Proposals

In certain circumstances, issuers may exclude shareholder proposals that would (i) require a say-on-pay vote; (ii) seek future say-on-pay votes; or (iii) relate to the frequency of the say-on-pay vote. An issuer may exclude such proposals if (i) a majority of votes were previously cast in favor of one of the frequency intervals, and (ii) the company adopts a policy that is consistent that majority vote. A company cannot exclude a shareholder proposal for a say-on-pay vote or a say-on-frequency vote if none of the frequency intervals (1, 2 or 3 years) received a majority of votes cast.

Preliminary Proxy Filing

Rule 14a-6(a) generally requires issuers to file a preliminary proxy statement unless the items submitted to the shareholders for a vote are limited to certain specified items. This rule is amended to add the say-on-pay and say-on-frequency votes to the list of items that do not trigger the requirement to file a preliminary proxy statement.

Broker Discretionary Voting

Section 957 of the Dodd-Frank Act requires the national securities exchanges to adopt rules prohibiting broker discretionary voting in certain matters. Under the newly adopted rules, for issuers listed on a national exchange, broker discretionary voting of uninstructed shares is not permitted for say-on-pay, say-on-frequency, or say-on-golden parachutes votes.

TARP Recipients

Under previously existing rules, issuers receiving assistance under the Troubled Asset Relief Program ("TARP") under the Emergency Economic Stabilization Act of 2008 are already required to conduct say-on-pay voting. Under Rule 14a-21(b), such issuers are exempt from the say-on-pay and say-on-frequency requirements until the issuers have repaid all of their TARP funds.

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