LUSE GORMAN October 21, 2010

LEGAL UPDATES AND NEWS

SEC Proposes New Rules on Say on Pay and Other Shareholder Advisory Votes

On October 18, 2010, the Securities and Exchange Commission (SEC) proposed new rules implementing the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") allowing shareholders to cast advisory votes on executive compensation and "golden parachute" arrangements. The rules will be generally effective with respect to proxy statements relating to meetings of shareholders occurring on or after January 21, 2011. Set forth below is a summary of the proposed rules:

SAY-ON-PAY RULES

- Proposed Exchange Act Rule 14a-21(a) sets forth the general requirement for a shareholder advisory vote on executive compensation to be held no less frequently than once every three years. The vote would be based on the executive compensation disclosure required for the proxy statement, including the Compensation Discussion and Analysis (CD&A), compensation tables and related narrative disclosure. The SEC release makes clear that no vote is necessary on director compensation.

  Note: Smaller reporting companies will be subject to the say-on-pay vote on the basis of scaled executive compensation disclosure requirements and will not be required to include a CD&A.

  Note: The proposed rules do not dictate any specific form of resolution or language to include.

- Companies will be required to disclose in their proxy statements that they are conducting a shareholder advisory vote on executive compensation and briefly explain the effects of the vote on their compensation polices and practices.

  Note: Smaller reporting companies will not be required to include this disclosure, unless they conclude that it is a material factor necessary to an understanding of the information disclosed.

- Under the proposed rules, a company will be required to disclose whether and how their compensation policies and decisions have taken into account the results of shareholder advisory votes on executive compensation.

- Disclosure on compensation policies and practices as they relate to risk management and risk-taking incentives is not subject to the shareholder vote to the extent that it relates to compensation for employees generally. However, to the extent that risk considerations are a material aspect of the company's polices or decisions for named executive officers (NEOs), such considerations must be discussed in the CD&A and would be subject to the advisory vote.

SHAREHOLDER APPROVAL OF FREQUENCY OF SHAREHOLDER VOTES ON EXECUTIVE COMPENSATION

- The proposed rules mandate a shareholder advisory vote on how frequently the shareholder vote on executive compensation will be held (i.e., once every one, two or three years). This vote (referred to as the "frequency vote") must first be taken in 2011 and thereafter, at least once every six years.

  Note: The "say-on-pay vote" must be taken at least once every three years while the "frequency vote" is only required to be held once every six years.

- Companies will be required to disclose in their proxy statements for annual meetings (or other meetings for which executive compensation disclosure is required) that they are conducting a shareholder advisory vote with respect to the frequency of shareholder votes and will be further required to explain the effects of such vote, e.g., that it is non-binding.

- With respect to the frequency vote, a company is required to give shareholders four options: i.e., to hold the vote once every year, every two years or every three years, or to abstain from voting. Companies may recommend a frequency to shareholders, but must make clear that shareholders are not voting to approve a recommendation.

- The shareholder frequency vote is also non-binding. However, the SEC has proposed amendments to Forms 10-K and 10-Q to require disclosure about whether and how a company will implement the results of the shareholder advisory vote on the frequency of executive compensation votes.

- The SEC has made clear that if, in response to a say-on-pay vote or frequency vote, a company adopts a policy that is consistent with the greatest number of votes cast in the most recent vote, it may exclude separate shareholder proposals on the basis that such shareholder proposal has already been substantially implemented.

Issues Relating to Both Say-on-Pay and Frequency Votes

- The SEC has determined that the say-on-pay and frequency vote will not trigger the need to file of a preliminary proxy statement.

- Both the say-on-pay and frequency vote will be considered "executive compensation matters" on which brokers will not be entitled to vote shares for which they receive no voting instructions.

- Companies with outstanding financial assistance under the Troubled Asset Relief Program (TARP) are required to conduct a shareholder vote to approve executive compensation under the Emergency Economic Stabilization Act of 2008 (EESA). These companies will not be required to conduct a separate shareholder vote under SEC rules (e.g., either as to say-on-pay or frequency) until they have repaid all indebtedness under TARP.

SHAREHOLDER APPROVAL OF "GOLDEN PARACHUTE" ARRANGEMENTS.

- The Dodd-Frank Act requires a shareholder advisory vote on "golden parachute arrangements" when shareholders are requested to approve a merger or other extraordinary corporate transaction. New Item 402(t) of Regulation S-K sets forth disclosure requirements for this vote and will cover all "golden parachute" compensation relating to such a transaction among not only the target but also the acquiring corporation and the named executive officers of each entity.

- Current CD&A disclosure for "Potential Payments Upon Termination or Change in Control" are set forth in Item 402(j) of Reg. S-K. According to the SEC, this Item 402(j) disclosure does not satisfy the Dodd-Frank Act statutory requirements. Companies can choose whether to apply the rules of Item 402(j) or Item 402(t) to potential payments on a change in control that are required to be disclosed in annual proxy statements.

  Note: Companies that provide in their annual proxy statements the more detailed disclosure of golden parachute arrangements required under Item 402(t) that has been subject to a say-on-pay vote will not be required to include the advisory vote at the time of the merger or other extraordinary corporate transaction. However, to utilize this exception, the terms of the golden parachute arrangements previously subject to a shareholder vote must remain the same.

- To the extent that the terms have changed or new arrangements have been implemented, the SEC has proposed that only the new arrangements or changed terms must be subject to a merger proxy separate vote. In such instances, two separate tables under Item 402(t) would be included in the merger proxy statement:

  - the first would disclose all golden parachute compensation, including both arrangements previously disclosed and the new arrangements or revised terms, and

  - the second would disclose only the new arrangement or revised terms so that the shareholders can see what is subject to the new shareholder vote.

- The Item 402(t) disclosure must be in both narrative and tabular form and include columns for the following types of compensation: cash, equity, pension and nonqualified deferred compensation, perquisites and other personal benefits, tax reimbursements and other items.

  Note: Perquisites in an amount less than $10,000, which are permitted to be excluded from the Summary Compensation Table, must be disclosed.

- For companies electing to include Item 402(t) disclosure in their annual proxy statements, Item 402(j) would continue to apply to disclosure of compensation that is to be received due to severance under other circumstances, such as termination of employment absent a change in control.

- Smaller reporting companies would be subject to the new requirements regarding quantification of golden parachute arrangements in merger proxies, despite the fact that they are not subject to disclosure requirements with respect to termination payments in their annual proxy statements. Smaller reporting companies can elect to provide the Item 402(t) disclosure in the annual proxy statement in order to qualify for the exception for a shareholder vote on golden parachute compensation in a later merger transaction.

First Year Transition Issues

- The SEC has made clear that any proxy statement, whether in preliminary or definitive form, even if filed prior to January 21, 2011, for meetings taking place after January 21, 2011, must include the separate resolutions for shareholders to approve executive compensation and the frequency of say-on-pay votes.

- The SEC has indicated that it will not require the filing of preliminary proxy materials prior to the time it takes final action on the proposal.

- The SEC has indicated flexibility around the frequency vote requirement so long as the spirit of the new rules is complied with. For example, it has stated that if proxy service providers are not able to reprogram their systems to enable shareholders to vote among four choices in time, the SEC will not object if the form of vote provides the choice among 1, 2 or 3 years, provided that proxies not voted on the frequency of shareholder votes will be treated as having abstained.

INSTITUTIONAL INVESTMENT MANAGERS REPORTING OF VOTES

In a related SEC release, the SEC also proposed new rule 14Ad-1, which would require institutional investment managers to annually disclose with the SEC their votes as to say-on-pay, frequency of say-on-pay votes, and "golden parachute" arrangements. The proposed rule would apply to every institutional investment manager that manages certain equity securities having an aggregate fair market value of at least $100 million.* Managers would be required to disclose:

- the securities voted
- general information about the executive compensation matters voted on
- the number of shares over which such manager held voting power and the number of shares voted
- how the shares were voted

Investment managers would be required to report their votes during each twelve month period ended June 30 on Form N-PX not later than August 31.

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* Specifically, the rule would apply to any person that is an institutional investment manager as defined in Section 13(f)(6)(A) of the Exchange Act and that is required to file reports under Section 13(f) of the Exchange Act.

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