
LEGAL UPDATES AND NEWS

SEC Finalizes Say-on-Pay Rules Smaller Reporting Companies Exempt until 2013

On January 25, 2011, the Securities and Exchange Commission (SEC) adopted final rules governing the non-binding shareholder vote on executive compensation and “golden parachute” compensation arrangements as required under Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). Specifically, Dodd-Frank requires public reporting companies to provide its shareholders with a non-binding advisory vote on: (1) executive compensation (“say-on-pay”) at least once every three years beginning with the first shareholders’ meeting for the election of directors taking place on or after January 21, 2011; and (2) whether the say-on-pay vote will occur every one, two or three years (the “frequency vote”). In addition, Dodd-Frank requires both tabular and narrative disclosure of named executive officers’ golden parachute arrangements in the proxy materials for a meeting of shareholders to approve a change in control of the company (“golden parachute disclosure”), and a separate non-binding shareholder advisory vote on such golden parachute arrangements (“say-on-parachute vote”). The golden parachute disclosure and say-on-parachute vote are not required with respect to routine annual meeting proxy statements.

The final rules largely followed the SEC’s proposed rules issued on October 18, 2010, with a few notable exceptions as highlighted below. *For a more detailed description of the proposed rules, please see our newsletter dated October 21, 2010, which is available on our website at www.luselaw.com.*

Smaller Reporting Companies. The SEC announced a temporary exemption from say-on-pay disclosure for smaller reporting companies (i.e., companies having a public float of less than \$75 million) until annual meetings occurring on or after January 21, 2013 (i.e., a two-year exemption). This exemption does not extend to golden parachute disclosure and say-on-parachute vote requirements in connection with a change in control.

Say-on-Pay Vote

- The final rules clarify that the separate say-on-pay vote is only required with respect to an annual meeting of the shareholders at which proxies will be solicited for the election of directors, or a special meeting in lieu of such annual meeting. The say-on-pay vote is not applicable to any other shareholder meeting.
- The final rules require additional disclosure in the Compensation Discussion and Analysis (CD&A) section of the proxy statement regarding whether, and if so how, the company has considered the results of the most recent say-on-pay vote. This disclosure is not required for smaller reporting companies that are not required to prepare a CD&A.

Frequency Vote

- The final rules specify that the frequency vote is required to occur at least once during the six-calendar-year period following the prior frequency vote.
- The final rules require a company to disclose in its proxy materials the current frequency of the say-on-pay vote and when the next scheduled say-on-pay vote will occur. Such disclosure is not required in the proxy materials for the meeting at which the company conducts its initial say-on-pay and frequency votes.

- The final rules require a company to present the choice of one, two or three years, or abstain on its proxy cards with respect to the frequency vote. Alternative formulations of the frequency vote are not permitted under the final rules.
- A company will only be able to exclude shareholder proposals relating to the frequency vote if a frequency option (one, two or three years) receives majority support and the company has adopted a policy on the frequency of say-on-pay votes consistent with the majority vote. The proposed rules would have allowed exclusion of the frequency vote whenever the company's policy is consistent with the plurality of the votes cast.
- The final rules create a new Form 8-K reporting requirement for disclosure about the company's decision regarding how frequently it will conduct say-on-pay votes. The Form 8-K must be filed with the SEC no later than 150 calendar days after the date of the annual meeting at which the frequency vote takes place, but in no event later than 60 calendar days prior to the deadline for submission of Rule 14a-8 shareholder proposals for the subsequent annual meeting. The proposed rules required that this disclosure be made in the next Form 10-Q filed following the frequency vote (or Form 10-K if the vote occurs in the company's fourth quarter).

Golden Parachute Disclosure and Say-on-Parachute Vote

- The final rules expand the types of covered transactions for purposes of the golden parachute disclosure requirements (but not for purposes of the say-on-parachute vote) to include going-private transactions, tender offers and any transactions for which a proxy statement or similar form is required to include disclosure of information under federal securities laws related to mergers and acquisitions. Bidders in third-party tender offers, however, are not required to provide the golden parachute disclosures.
- The requirements with respect to the golden parachute disclosure and say-on-parachute vote apply to proxy materials and other schedules and forms initially filed on or after April 25, 2011 with respect to shareholder meetings called for the purpose of approving a change in control.

No Specific Language Required for Shareholder Vote. The final rules do not require any specific language or form of resolution to be voted on by shareholders related to the say-on-pay, frequency, and say-on-parachute votes.

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