

## **SEC Adopts Final Rules on Shareholder Approval of Executive Compensation and Golden Parachutes**

On January 25, 2011, the SEC adopted Rule 14a-21 and amendments to existing rules and forms to implement Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), requiring issuers to hold non-binding shareholder advisory votes to approve executive compensation, to approve the frequency of such votes on compensation, and to approve golden parachute compensation arrangements in connection with certain extraordinary business transactions. The rule and amendments were adopted substantially as first proposed on October 18, 2010, with some modifications, and affect proxy statements for this year’s annual meetings.

### **Say-on-Pay and Frequency Vote**

The new rules require that, at least once every three calendar years, a proxy solicitation by a company relating to an annual or other meeting of shareholders for the election of directors for which the proxy solicitation rules require compensation disclosure must include a separate resolution subject to shareholder vote to approve the compensation of named executive officers as disclosed pursuant to Item 402 of Regulation S-K (“say-on-pay”). This shareholder vote is not binding on the company or its board of directors.

In addition, the new rules also require that, at least once every six years, a proxy solicitation by a company relating to an annual or other meeting of shareholders for the election of directors for which the proxy solicitation rules require compensation disclosure shall include a separate resolution subject to shareholder vote to determine whether the shareholder vote to approve the compensation of executives will occur every one, two or three years (“frequency vote”). This shareholder vote is also not binding on the company or its board of directors.

The final rules include certain changes from and clarifications to the proposed rules, including:

- a clarification that the say-on-pay vote and the frequency vote are required at an annual or special meeting where directors are being elected;
- the exemption of smaller reporting companies from the say-on-pay and frequency votes until January 21, 2013;
- the rules do not apply to foreign private issuers;
- broker discretionary voting is not permitted for a say-on-pay or frequency vote;
- the final rules do not require any specific language for the say-on-pay resolution, but do provide an example of such a resolution;
- a company may exclude a shareholder proposal on a say-on-pay vote or frequency vote if the company adopts the frequency interval approved by shareholders, if such frequency was approved by a majority (as opposed to a plurality) of votes cast in the most recent frequency vote;
- in subsequent years, a company will have to disclose in its proxy statement the current frequency of say-on-pay votes and when the next say-on-pay vote will occur;
- a company will be required to disclose in its Compensation Discussion & Analysis in subsequent proxy statements whether and, if so, how their compensation policies and decisions have taken into account the results of the most recent say-on-pay vote; and

- a company must disclose its decision on how frequently it will conduct a say-on-pay vote following each frequency vote by filing an amendment to its Form 8-K that disclosed the results of such frequency vote. This amendment must be filed no later than 150 days after the date of the meeting and no later than 60 days prior to the deadline for submission of shareholder proposals for the next annual meeting.

### Golden Parachute Disclosure and Approval

The new rules also require that, in any proxy or consent solicitation material for a meeting of shareholders at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of an issuer, the person making such solicitation shall disclose in the proxy or consent solicitation material, in a clear and simple form, any agreements or understandings between the acquiring company or the target company and any named executive officers of either company concerning any type of compensation (“golden parachute” payments) that is based on or otherwise relates to the proposed transaction. The disclosure must include the aggregate total of all such compensation that may be paid or become payable to or on behalf of such named executive officer, and the conditions upon which it may be paid or become payable. The final rules require tabular and narrative disclosure with respect to golden parachutes without a *de minimis* exception, and with footnote disclosure of whether such arrangements are “single trigger” or “double trigger.”

Unless such agreements or understandings have been subject to a previous say-on-pay vote consistent with golden parachute payment disclosure rules, a separate shareholder vote to approve such agreements or understandings and compensation (“golden parachute vote”) is also required. The golden parachute vote by the target company’s shareholders is not required to cover agreements or understandings between the acquiring company and the named executive officers of the target company. As with the say-on-pay vote and the frequency vote, the golden parachute vote is not binding on the company or its directors.

The golden parachute disclosure and approval rules do not apply to foreign private issuers. Smaller reporting companies are required to comply with the golden parachute disclosure and approval rules from the initial effective date of the rules, as the SEC did not adopt a similar exemption to that adopted with regard to the say-on-pay and frequency votes.

### Effective Date of the Rules

Although the SEC rules on say-on-pay and the frequency vote do not become effective until 60 days after they are published in the *Federal Register*, the Dodd-Frank Act requires the say-on-pay and frequency vote resolutions to be included in proxy statements relating to an issuer’s first annual or other meeting of shareholders occurring on or after January 21, 2011. The requirements relating to golden parachutes will be required to be included in initial filings made on or after April 25, 2011.

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