

## SEC Proposes “Say on Pay” and “Golden Parachute” Rules

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On October 18, 2010, the Securities and Exchange Commission (“SEC”) issued proposed rules addressing the “say on pay” and “golden parachute” advisory votes required by Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).

The Dodd-Frank Act added new Section 14A to the Securities Exchange Act of 1934, as amended (the “Exchange Act”) requiring that each public company subject to the SEC’s proxy rules include in its proxy solicitation materials:

- A non-binding shareholder resolution to approve the compensation of its named executive officers (a “say on pay” vote) at least once every three years;
- A non-binding shareholder resolution to determine the frequency with which a say on pay vote will occur (a “frequency vote”) at least once every six years; and
- If shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all of the company’s assets:
  - (1) disclosure of all agreements or understandings with any named executive officer of either the target company or the acquiring company concerning any compensation that is based on or relates to the transaction and
  - (2) unless previously the subject of the periodic say on pay vote, a non-binding shareholder resolution to approve such compensation payable to any named executive officer of the soliciting company (a “golden parachute vote”).

Any proxy statement filed with respect to a shareholder meeting occurring on or after January 21, 2011 must permit both a say on pay vote and a frequency vote; however, no golden parachute vote will be required until the proposed rules are finalized.

### ***Say on Pay Vote***

New Section 14A(a)(1) of the Exchange Act and proposed Rule 14a-21(a) would require that each company permit a say on pay vote in 2011 and at least once every three years thereafter.

No specific form of resolution or specific language is required; however, the vote must be to approve the compensation of the named executive officers as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis (“CD&A”), the compensation tables and other narrative executive compensation disclosures required by Item 402.

The say on pay vote would not apply to the compensation of directors or to any policies or practices relating to risk-taking incentives or risk management, except to the extent that such policies or practices are a material aspect of the compensation policies and decisions for named executive officers and warrant disclosure in the CD&A.

The SEC also is proposing that a brief description of the effect of the say on pay vote, including whether it is non-binding, be included in the proxy materials and that the CD&A address whether the results of any previous say on pay votes were considered in determining compensation policies and decisions and, if so, how that consideration has affected those policies and decisions.

### ***Frequency Vote***

New Section 14A(a)(2) of the Exchange Act and proposed Rule 14a-21(a)(2) would require that each company permit its shareholders to determine the frequency with which a say on pay vote is to occur in 2011 and at least once every six years thereafter.

No specific form of resolution or specific language is required; however, shareholders must be permitted to elect that the say on pay vote occur every 1, 2 or 3 years, or abstain from voting on the matter. Proxy cards may include a recommended alternative, but must provide shareholders with an opportunity to select from among all four alternatives rather than simply approve or disapprove of a recommended alternative.

The SEC also is proposing that a brief description of the general effect of the vote, including whether it is non-binding, be included in the proxy materials and that the results of the frequency vote be disclosed in the company's Form 10-Q or Form 10-K (if the frequency vote occurs during the company's fourth quarter).

Companies that adopt a policy on the frequency of say on pay votes consistent with the plurality of votes cast in the most recent frequency vote may exclude, as substantially implemented, any shareholder proposal providing for a say on pay vote or a frequency vote.

### ***Common Issues Relating to Say on Pay Vote and Frequency Votes***

Neither the say on pay vote nor the frequency vote would require the filing of preliminary proxy materials (including for proxy statements filed before the proposed rules are finalized).

Broker discretionary voting of uninstructed shares is not permitted with respect to a say on pay vote or a frequency vote.

Companies already required to conduct a say on pay vote as a result of participation in the Troubled Assets Relief Program ("TARP") under the Emergency Economic Stabilization Act of 2008, as amended, are exempt from requiring either a separate say on pay vote or a frequency vote under proposed Rules 14a-21(a)(1) or (2) until the company is no longer subject to the TARP annual say on pay voting requirement.

### ***Golden Parachute Vote***

New Section 14A(b)(1) of the Exchange Act and proposed Rule 14a-21(c) would require that proxy materials seeking shareholder approval of an acquisition, merger, consolidation, or proposed sale or disposition of all or substantially all of the company's assets both:

- Provide a "clear and simple" disclosure of all agreements or understandings with any named executive officer of either the target company or the acquiring company concerning compensation that is based on otherwise relates to the transaction (each, a "golden parachute"); and
- Permit a golden parachute vote.

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### **Requirements for Disclosure**

The clear and simple disclosure would be provided in both tabular and narrative formats under proposed new Item 402(t) to Regulation S-K.

The required tabular disclosure would (1) separately identify each element of the golden parachute compensation (e.g., cash severance payments; equity awards that are accelerated or cashed out; pension and nonqualified deferred compensation enhancement; perquisites, other personal benefits and health and welfare benefits; tax reimbursements; and other items), (2) provide an aggregate total of all payments, and (3) differentiate by footnote amounts attributable to “single trigger” arrangements and “double trigger” arrangements.

Disclosure would be required only with respect to payments that are based on or otherwise relate to the transaction. As a result, no separate disclosure would be required with respect to previously vested equity awards, compensation that is already disclosed in the Pension Benefits Table and Nonqualified Deferred Compensation Table of the company’s annual proxy statement, or compensation from bona fide post-transaction employment agreements.

The required narrative disclosure would describe the material conditions or obligations applicable to the receipt of payment, including: (1) non-competition, non-solicitation, non-disparagement or confidentiality agreements; their duration; and provisions regarding waiver or breach, and (2) the specific circumstances triggering payment; the form of payment (i.e., lump sum or installments); the duration of payment; and the identity of the person making payment.

Disclosure would be required for golden parachute arrangements that the target company or the acquiring company have with the named executive officers of each of the target company and the acquiring company.

### **Requirements as to the Golden Parachute Vote**

No specific form of resolution or specific language would be required for the golden parachute vote; however, shareholders must be provided with the Item 402(t) disclosures and be permitted to vote on the golden parachute compensation payable to named executive officers of the soliciting company.

Companies should note that, in some cases, the proposed rules would require disclosure of golden parachute arrangements that are not subject to a golden parachute vote. This is because, while disclosure would be required for golden parachute arrangements maintained by both the target company and the acquiring company for their named executive officers, a golden parachute vote is required only for golden parachute arrangements of the “soliciting person”. As a result, if only the target company conducts a proxy solicitation, only the target company’s golden parachute arrangements would be subject to a golden parachute vote.

No golden parachute vote would be required if the golden parachute arrangements were previously subject to a say on pay vote, provided that the shareholders were provided with all of the Item 402(t) disclosures as part of a say on pay vote. To the extent that a new golden parachute arrangement is implemented after a say on pay vote or an existing golden parachute arrangement is modified after the most recent say on pay vote, a separate golden parachute vote would be required. In such event, a second table would be included in the proxy materials that includes only the golden parachute arrangements that are subject to the golden parachute vote.

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