

SEC BULLETIN

JANUARY 25, 2011

FINAL RULES REGARDING SAY-ON-PAY AND GOLDEN PARACHUTES

The SEC has today adopted rules implementing the say-on-pay provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Dodd-Frank Act amended the Securities Exchange Act of 1934 by adding Section 14A, which requires (i) companies to conduct a separate shareholder advisory vote to approve the compensation of certain executives, (ii) companies to conduct a separate shareholder advisory vote to determine how often an issuer will conduct a shareholder advisory vote on executive compensation and (iii) companies soliciting votes to approve merger or acquisition transactions to provide disclosure of certain “golden parachute” compensation arrangements and, in certain circumstances, to conduct a separate shareholder advisory vote to approve the golden parachute compensation arrangements.

Say-on-Pay Vote

Under the SEC’s final rules, companies are required, not less than once every three years, to include in their proxy statements for an annual or other meeting at which directors are elected a vote by the shareholders approving the compensation of a company’s named executive officers, as such compensation is disclosed in the proxy statement. Companies also are required to disclose the general effect of the vote, such as whether the vote is advisory in nature. In addition, the rules require the compensation discussion to address how compensation policies and decisions will take or have taken into account the results of such votes. The rules apply beginning with the first annual or other meeting of shareholders occurring on or after January 21, 2011.

Vote on Frequency of Say-on-Pay Vote

The final rules also require companies to include a separate shareholder advisory vote regarding the frequency of the above say-on-pay vote, specifically whether the say-on-pay vote “will occur every 1, 2 or 3 years.” Similar to the say-on-pay vote, companies must (i) disclose the effect of the vote, such as whether it is advisory in nature, and (ii) include this vote in the first annual or other meeting of shareholders at which directors are elected occurring on or after January 21, 2011. As previously noted in our SEC Bulletin dated November 23, 2010, Institutional Shareholder Services Inc. (a.k.a., Risk Metrics), a corporate governance advisory to the financial community, recommends that shareholders vote for say-on-pay votes on an annual basis.

The final rules require the disclosure on Form 8-K of the company’s decision on how frequently it will conduct the say-on-pay vote in light of the results of the advisory shareholder vote on frequency. Such disclosure must be made within four business days of the company’s decision, but in any event no later than 150 days after the annual or other meeting at which the frequency vote was had.

Companies are required to ask shareholders no less frequently than once every six years, whether the say-on-pay vote “will occur every 1, 2 or 3 years.”

Golden Parachute Vote and Disclosure

Lastly, the final rules require companies to provide a shareholder advisory vote to approve certain “golden parachute” compensation arrangements in merger proxy statements. To this end, the rules require companies seeking shareholder approval of an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all assets to provide specific disclosure regarding any agreements and understandings the soliciting person has with its named executive officers (or those of the acquiring or target company, as the case may be) concerning compensation that is based on or otherwise relates to the transaction. The proxy statement disclosure rules have been amended to include specific disclosure requirements relating to golden parachute arrangements.

The golden parachute disclosure requirements also are applicable to information statements on Schedule 14C, registration statements on Form S-4, going-private transactions on Schedule 13E-3 and third-party tender offers on Schedule TO. Bidders in third-party tender offers are exempt from the golden parachute disclosure requirements in light of the possible difficulty such bidders may have in obtaining the required information from the target company, but the target companies in such third-party tender offers will be required to disclose any golden parachute arrangements when making the necessary disclosures in response to third-party tender offers.

The foregoing golden parachute vote and disclosure requirements apply to all initial merger proxy statements and other filings filed on or after April 25, 2011.

Temporary Exemption for Smaller Reporting Companies

The final rules temporarily exempt smaller reporting companies from the requirements of having the say-on-pay and frequency on say-on-pay votes until their first annual or other meeting at which directors are elected occurring after January 21, 2013. In this respect, the related amendments to the compensation discussion and analysis do not apply to smaller reporting companies, as smaller reporting companies are not required to provide compensation discussion and analysis. Smaller reporting companies, however, are subject to the golden parachute vote and disclosure requirements in the same respect as other companies. Smaller reporting companies are generally companies with a public float of less than \$75 million as of the last business day of their most recently completed second fiscal quarter.

If you have any questions, please contact any of the following Dow Lohnes attorneys:

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