

Service

Securities &
Corporate
Governance

Professional

KIRSTIN P. SALZMAN
KANSAS CITY:
816.983.8316
KIRSTIN.SALZMAN@
HUSCHBLACKWELL.COM

SEC Adopts FINAL Rules on Shareholder Advisory Votes for Say-on-Pay and Golden Parachutes

On January 25, 2011, the Securities and Exchange Commission (SEC) adopted final rules implementing shareholder advisory votes on executive compensation and golden parachute arrangements as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The final rules are largely consistent with those proposed by the SEC on October 18, 2010. The following summary highlights several important aspects of the new rules that public companies should note as they prepare for their annual meetings.

When Do the Final Rules Take Effect?

Public companies are required to conduct the initial say-on-pay and say-on-frequency vote at their first annual or special meeting, at which directors are elected on or after January 21, 2011. Public companies must comply with the golden parachute disclosure and voting requirements in filings initially made on or after April 25, 2011. Smaller reporting companies (generally, companies with a public float of less than \$75 million) are exempt from the say-on-pay and say-on-frequency voting requirements, but not the golden parachute vote, until January 21, 2013. Additionally, companies participating in the Troubled Asset Relief Program (TARP) that already conduct an annual shareholder advisory vote on executive compensation are exempt from the final rules until the TARP obligations are fully repaid.

Say-on-Pay

Companies must hold a non-binding shareholder vote on the compensation of their named executive officers at least once every three calendar years. The vote must relate to all executive compensation disclosed in accordance with Item 402 of Regulation S-K, including the CD&A, the compensation tables and

the narrative disclosures. Although commentators had suggested that prescribed language be provided, the final rules do not require companies to use any specific language or form of resolution. The final rules do, however, provide a non-exclusive sample resolution that would satisfy the regulatory requirements. The final rules also require that companies disclose in their CD&A whether (and if so, how) they have considered the results of the most recent say-on-pay vote in determining compensation policies and procedures. Note, the final rules confirm that the inclusion of the say-on-pay and say-on-frequency votes will not, by itself, require the company to file a preliminary proxy statement.

Say-on-Frequency

At least once every six calendar years, companies must hold a non-binding shareholder vote on the frequency of the say-on-pay vote to give shareholders the opportunity to indicate whether the say-on-pay vote should occur every one, two or three years. The SEC clarified in the final rules that there must be four choices (one year, two years, three years and abstain) on a proxy card in connection with the say-on-frequency vote. Before this clarification, shareholders generally could only vote "for", "against" or "abstain" on any matter. However, the final rules provide that if the systems of proxy service providers cannot accommodate four choices, then the SEC will not object to proxies filed for meetings held in 2011 that only provide for three choices (one year, two years or three years).

The final rules also clarify that companies may vote uninstructed proxy cards in accordance with management's recommendation on the say-on-frequency vote only if (1) management includes a recommendation, (2) the proxy card permits abstentions, and (3) the company includes language in bold on the proxy card indicating how uninstructed shares will be voted. In the proposed rules, the SEC had suggested that if a company adopted the frequency of the say-on-pay vote that was approved by a *plurality* of the votes cast, then the company could exclude shareholder proposals related to a say-on-pay vote or say-on-frequency vote under Rule 14a-8. However, the final rules changed this threshold from a *plurality* to a *majority*. Given that shareholders will have four choices, it is unlikely that any choice will get majority approval, and thus companies will not be able to exclude further shareholder proposals related to say-on-pay and say-on-frequency.

Companies are required to disclose under Item 5.07 of Form 8-K, the results of the say-on-pay and say-on-frequency vote, along with the other results of their annual meetings, within four business days of the meeting. The SEC had proposed that a company's decision regarding the frequency of the say-on-pay vote be disclosed in its Form 10-K or Form 10-Q covering the period in which the meeting occurred. However, in response to concerns that such disclosure would not give companies and their boards sufficient time to fully consider the results of the vote before disclosure was required, the SEC revised the final rules to require companies to amend the Form 8-K, reporting the results of the annual meetings to disclose their decision regarding the frequency of the say-on-pay vote no later

than 150 calendar days after the meeting (but at least 60 calendar days before the deadline for submitting shareholder proposals for the subsequent annual meeting).

In addition, companies are required to disclose in their proxy statement the current frequency of the say-on-pay vote and when the next say-on-pay vote is scheduled to occur.

Golden Parachute Arrangements

The final rules require that a company disclose, in tabular format, all golden parachute compensation arrangements in connection with an acquisition, merger, tender offer or similar transaction. The disclosure must include any golden parachute compensation arrangements that the acquiring or target companies have with the named executive officers of both companies, but the advisory vote only relates to those arrangements between the issuer soliciting the proxies to approve the transaction and its named executive officers. The final rules clarify that only compensation that is based on and otherwise relates to the transaction must be disclosed and that future employment arrangements are not compensation related to the subject transactions. Finally, the rules clarify that if the acquirer is required to obtain shareholder approval for the issuance of shares in a transaction, it only has to make the requisite disclosures regarding the golden parachute payments and does not have to seek a shareholder advisory vote.

What This Means to You

All public companies (except smaller reporting companies) that hold their annual meetings after January 21, 2011 are subject to the SEC's final rules on say-on-pay and say-on-frequency advisory voting. Therefore, these companies should carefully review the final rules to ensure that their proxy statements comply with them.

Contact Info

If you have any questions about these rules or any other issues related to corporate governance, please contact your Husch Blackwell attorney.

Husch Blackwell LLP regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please contact us if you would like to receive updates and newsletters, or request a printed copy.

Husch Blackwell encourages you to reprint this material. Please include the statement, "Reprinted with permission from Husch Blackwell LLP, copyright 2011, www.huschblackwell.com" at the end of any reprints. Please also email info@huschblackwell.com to tell us of your reprint.

This information is intended only to provide general information in summary form on legal and business topics of the day. The contents hereof do not constitute legal advice and should not be relied on as such. Specific legal advice should be sought in particular matters.