

Clients & Friends Memo

SEC Finalizes Rules Regarding Shareholder Approval of Executive Compensation and Golden Parachute Arrangements

March 1, 2011

On January 25, 2011, the Securities and Exchange Commission (the “SEC”) adopted final rules (the “Final Rules”) to implement the provisions of Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires publicly traded companies to provide for non-binding shareholder votes on executive compensation (“say-on-pay votes”), the frequency of say-on-pay votes (“say-when-on-pay votes”), and golden parachute packages of named executive officers (“say-on-golden-parachute votes”).¹ The Final Rules become effective on April 4, 2011 and are largely similar to proposed rules (the “Proposed Rules”) that the SEC issued on October 18, 2010, discussed [here](#).² This Clients & Friends Memo supplements our previous discussion of the Proposed Rules by summarizing some of the substantive differences between the Proposed and Final Rules.

Because say-on-pay votes are generally required for the upcoming proxy season, companies should review their executive compensation arrangements and Compensation Discussion and Analysis (“CD&A”) disclosures to identify any issues that might be seen as controversial and determine in consultation with their counsel and compensation advisors how best to comply with the mandated say-on-pay votes in their proxies, including determining whether an annual, biennial or triennial say-on-pay vote best fits with their overall executive compensation program, and whether the determined frequency will be recommended to shareholders in their proxies.

Say-on-pay and say-when-on-pay voting. Under both the Final and Proposed Rules, public companies must generally provide shareholders with say-on-pay and say-when-on-pay votes with respect to the first annual (or other) shareholder meeting occurring on or after January 21, 2011.

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- ¹ Cadwalader prepared a summary of the Act and a series of memoranda focused on the Act's application to specific industries, entities and transactions. To see these memoranda, please see [Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act](#) (Appendix A links to the various topic-focused memoranda) or visit our website at http://www.cadwalader.com/list_client_friend.php.
- ² See http://www.cadwalader.com/assets/client_friend/112910SECProposesNewRulesReExecComp.pdf. A copy of the final rules can be found at <http://www.sec.gov/rules/final/2011/33-9178.pdf>. A copy of the Proposed Rules can be found at <http://www.sec.gov/rules/proposed/2010/33-9153.pdf>.

The following are some of the key substantive differences between the Proposed and Final Rules with respect to say-on-pay and say-when-on-pay voting:

- Companies with a public float of less than \$75 million do not have to comply with the say-on-pay and say-when-on-pay voting requirements until January 21, 2013. This exemption does not apply to the rules applicable to golden parachute packages.
- The Final Rules permit an issuer to exclude a shareholder proposal that would provide a say-on-pay vote or seek future say-on-pay votes, or relates to the frequency of say-on-pay votes, provided the issuer has adopted a policy on the frequency of say-on-pay votes that is consistent with the majority of votes cast in the most recent say-when-on-pay vote (without giving effect to abstentions). This “majority standard” adopted by the Final Rules is more stringent than the Proposed Rules’ “plurality standard” and, because a say-when-on-pay vote provides for three substantive choices (*i.e.*, a voting frequency of one, two or three years), it is possible that no choice will receive a majority of votes and that an issuer will not be able to exclude shareholder proposals relating to say-on-pay or say-when-on-pay votes.
- The Final Rules retain the requirement that an issuer disclose its decision regarding how frequently it will conduct say-on-pay advisory votes in light of the results of the say-when-on-pay vote, but effect this disclosure requirement through an amendment to Form 8-K instead of Forms 10-Q and 10-K. To comply with the disclosure requirement, an issuer must file an amendment to its prior Form 8-K under Item 5.07 that discloses the preliminary and final results of the say-when-on-pay vote. The amendment will be due no later than 150 calendar days after the date of the end of the shareholder meeting at which the say-when-on-pay vote occurred, but in no event later than 60 calendar days prior to the deadline for submitting shareholder proposals for the next annual meeting.
- Clarifying the requirement in the Proposed Rules that publicly traded companies provide for a non-binding say-on-pay vote at least once every three years, and a non-binding say-when-on-pay vote at least every six years, the Final Rules provide that these votes are only required with respect to an annual shareholder meeting, or a special meeting in lieu of the annual meeting, at which proxies are solicited for the election of directors, and must occur at least once every three or six calendar years (as appropriate) following the last say-on-pay or say-when-on-pay vote.

- Like the Proposed Rules, the Final Rules do not require issuers to use any specific language or form of resolution for say-on-pay votes, but do, however, provide a non-exclusive example of a satisfactory say-on-pay resolution.³
- The Final Rules clarify the Proposed Rules' general requirement that issuers address in their Compensation Discussion and Analysis ("CD&A") disclosures whether and, if so, how their compensation policies and decisions have taken into account the results of shareholder advisory votes on executive compensation. This mandatory topic relates only to an issuer's consideration of the most recent say-on-pay vote. The Final Rules do not add an analogous requirement for smaller reporting companies that are not required to include a CD&A.

Disclosure of golden parachutes. Consistent with the Proposed Rules, the Final Rules generally require disclosure of named executive officers' golden parachute arrangements in both tabular and narrative formats in proxy or consent solicitations in connection with an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all assets, beginning April 25, 2011. The following are some of the key substantive differences between the Proposed and Final Rules with respect to the disclosure of golden parachute arrangements:

- The Final Rules require that the disclosure separately identify amounts attributable to "single-trigger" arrangements (for example, amounts payable upon consummation of the transaction) and "double-trigger" arrangements (for example, amounts payable upon a qualifying termination of employment within a specified period of time following consummation of the transaction).
- The Final Rules provide that the tabular and narrative disclosure requirement applies only to compensation that is based on or otherwise relates to the subject transaction.
- The Final Rules permit issuers to include additional named executive officers and additional columns or rows to the tabular disclosure (e.g., to distinguish between cash severance and other cash compensation, or between "single-trigger" and "double-trigger" arrangements), so long as the disclosure is not misleading.
- Instead of measuring an issuer's stock price based on its closing price per share as of the latest practicable date, as the Proposed Rules required for a merger or

³ The example reads as follows: "RESOLVED, that the compensation paid to the company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion, is hereby APPROVED." See Instruction to Rule 14a-21(a).

similar transaction, the Final Rules require the measurement to be based on the consideration per share to be paid with respect to the transaction, if this value is a fixed dollar amount, or otherwise on the average closing price per share over the first five business days following the first public announcement of the transaction.

- The Final Rules eliminate any requirement that a bidder in a third-party tender offer provide information in its Schedule TO about a target's golden parachute arrangements, which the Proposed Rules required if the bidder had knowledge of the arrangements. However, the Final Rules continue to require a bidder in a going-private transaction to disclose this information on its Schedule 13E-3.

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If you have any questions regarding this memorandum, please contact the individuals listed below or any other member of the [Cadwalader Tax Department](#).

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