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SEC Final Rules on Say on Pay and SEC Timing Updates

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On January 25, 2011, the Securities and Exchange Commission (SEC) adopted rules for the implementation of the Say on Pay and Say on Golden Parachutes provisions of Section 951 of the "Dodd-Frank Wall Street Reform and Consumer Protection Act". As adopted, the rules are largely consistent with the proposed rules provided by the SEC on October 18, 2010, with minor modifications.

In addition, the SEC has provided an updated timeline for implementation of other key aspects of the Dodd-Frank legislation related to executive compensation, likely providing companies with additional time to comply with some of the potentially challenging aspects of the legislation.

Highlights of the Final Rules on Say on Pay and Say on Golden Parachutes

Under the Final Rules, the Effective Date for compliance with Say on Pay and the Say on Pay Frequency vote is listed as 60 days following publication in the Federal Register; however, companies that have not yet filed their 2011 proxy statements should comply with the Final Rules.

Advisory Vote on Say on Pay

As in the proposed rules, the final rules require companies to have a Say on Pay Vote in any proxy for an annual meeting after January 21, 2011 and to have additional votes at least once every three years. A key change in the final rules is that ***smaller issuers (i.e., public companies with less than $75 million in public equity float) have been provided with a two-year exemption*** from the Say on Pay and Say on Pay frequency votes. Consistent with the Proposed Rules, companies operating under TARP do not need to conduct the Say on Pay frequency vote until they have repaid TARP funds.

The Proposed Rules indicated that in future CD&A disclosure, companies would need to discuss how their compensation policies and decisions have been influenced by past Say on Pay votes. In the Final Rules, this has been clarified to specify that the ***mandatory disclosure is only for the most recent Say on Pay vote*** and that disclosure on earlier Say on Pay votes is only necessary to the extent material.

Aside from the above changes, most of the other changes from the Proposed Rules to the Final Rules are technical clarifications (e.g., clarify that the requirement is to have a vote once every three calendar years vs. by the third anniversary of the most recent Say on Pay vote). In addition, the ***SEC confirmed in the Final Rules that the Say on Pay Proposal and the Say on Pay Frequency Proposal do not trigger a preliminary proxy filing***.

Vote on Frequency of Say on Pay Votes

The Final rules on the frequency of Say on Pay votes confirm that shareholders will have to be provided with four choices on frequency:

- Every year
- Every two years
- Every three years
- Abstain

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Under the Proposed Rules, companies were required to disclose the frequency with which the company expects to conduct future Say on Pay votes and how it relates to the results of the shareholder vote in the 10-Q or 10-K covering the period in which the shareholder advisory vote occurred. The Final Rules have made a modification to provide companies with more time. ***Instead of disclosure in a 10-Q or 10-K, they will be required to disclose the frequency of future Say on Pay votes in a new required 8-K disclosure*** (as an amendment to the prior 8-K filings disclosing the preliminary and final results of the shareholder votes on frequency). ***The new 8-K will be due no later than 150 calendar days after the date of the vote and no later than 60 days before its next annual proxy meeting filing is due.***

In the Proposed Rules, separate shareholder proposals on Say on Pay or Say on Pay frequency could be excluded from the proxy statement provided that the company's policy was consistent with ***plurality*** of votes cast in the most recent vote. The Final Rules strengthened the standard to allow ***separate Say on Pay or Say on Pay Frequency proposals to be excluded only if the company adopts a Say on Pay frequency consistent with the majority of shareholders***. As a result, in cases where no majority emerges in the Say on Pay Frequency vote, separate proposals on Say on Pay and Say on Pay Frequency will not be able to be excluded.

Finally, consistent with the Proposed Rules, companies participating in TARP (which are required to conduct a Say on Pay vote annually) will not be required to conduct a vote on the frequency of the Say on Pay vote until the shareholder meeting immediately following the repayment of TARP funds.

Highlights of the Guidance on Say on Parachutes

The SEC's Final Rules for new enhanced disclosure of golden parachute payments and an advisory vote on parachute payments closely comply with the Proposed Rules. One key change in the Final Rules is that the ***effective date is established for merger filings on or after April 25, 2011.*** It should also be noted that there is no small company exception for the disclosure of golden parachute payments and advisory vote on parachute payments.

Disclosure of Golden Parachute Payments

Consistent with the Proposed Rules, the Final Rules will require tabular disclosure of the following elements related to Golden Parachute payments for each Named Executive Officer:

- Cash severance payments
- Dollar value of accelerated stock awards, in-the-money value of options accelerated, and payments to cancel stock or options
- Pension and deferred compensation enhancements
- Perks and benefits
- Tax reimbursement and gross-up payments
- Other
- Total

A change from the Proposed Rules is that in the Final Rules, ***for elements that are based on the transaction stock price, the value will be based on the consideration per share in the transaction (where applicable) or the average closing day price for the 5 days immediately following the announcement of the transaction***.

Say on Golden Parachute Payments

Consistent with the Proposed Rules, the Final Rules require a separate non-binding shareholder advisory vote on golden parachute compensation, to the extent not previously subject to a prior general Say on Pay vote. In order to ensure that parachute payments are subject to the general Say on Pay vote, companies will have to disclose golden parachute compensation in their proxy statements with the new tabular disclosure and enhanced narrative disclosure of golden parachute payments. In addition, if any changes are made to the golden parachute payments following the most recent vote, the company will have to hold a subsequent vote on golden parachutes. It should be noted that in the Final Rules, the SEC has specified that ***an ad-***

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***ditional vote will not be required if the changes to golden parachute payments decrease the value of the parachute payments*.**

SEC Timing Updates

In order to fully implement Dodd-Frank, the SEC needs to develop rules governing several aspects of the legislation impacting executive compensation. Based on a recent status update from the SEC, the anticipated timing of when rules will be issued has been pushed back in many cases. The table below provides a summary of the current status.

	Proposed Rules	Adopt Final Rules
Compensation Committee and Advisor Independence	January-March, 2011	April – July, 2011
Disclosure of pay-for-performance, pay ratios, and hedging by employees and directors	August – December, 2011	TBD
Clawbacks	August – December, 2011	TBD

Based on the updated schedule, it is not clear that many of these items will be implemented in time for the 2012 proxy statements for calendar fiscal year end companies.

Conclusion

The Final Rules are largely consistent with the Proposed Rules. Most companies are already well on their way in the process of putting together their Say on Pay proposals and Say on Pay frequency recommendations and the Final Rules should not have much of an impact on their decision making.

The Final Rules covering increased disclosure of Golden Parachute Payments and Say on Golden Parachutes are largely consistent with the Proposed Rules. We expect that most companies will not adopt the enhanced disclosure of Golden Parachute Payments, as they are likely to have to conduct an additional shareholder vote on Golden Parachute Payments at the time of a transaction that triggers payments in any case.

The delay in the SEC's schedule will likely be welcomed by companies, so long as it results in a delay for implementation beyond the 2012 proxy season for the new pay-for-performance and pay ratio disclosure. Given the potential challenges in implementing the these aspects of Dodd-Frank, we expect that it would be very difficult for calendar year companies to comply in their 2012 proxy statements, unless final rules were provided before the end of 2011.

Please contact us at (212) 921-9350 if you have any questions about the issues discussed above or would like to discuss your own executive compensation issues. You can access our website at www.capartners.com for more information on executive compensation.