

SEC Proposes “Say on Pay” Rules

The Securities and Exchange Commission has proposed rules to implement the various shareholder advisory votes required by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Largely procedural in nature, the proposed rules address a number of questions about how companies are to conduct the new advisory vote to approve the compensation of their executive officers (the “Say-on-Pay Vote”) and the advisory vote to determine whether subsequent Say-on-Pay Votes will be held annually, biennially, or triennially (the “Frequency Vote”), both of which must be included in the proxy materials for annual meetings of shareholders that occur on or after January 21, 2011.

In addition, the proposed rules cover the shareholder advisory vote on executive change-in-control arrangements (the “Change-in-Control Compensation Vote”) and related

disclosure that are required when companies seek shareholder approval of a merger or acquisition.

Comments on the proposed rules must be submitted to the SEC by November 18, 2010. It is expected that the SEC will adopt final rules during the January – March 2011 time frame.

This article summarizes the key features of the proposed rules.

Shareholder Advisory Vote on Executive Compensation

The Dodd-Frank Act requires companies to conduct, at least once every three years, a shareholder advisory vote to approve the compensation of their executive officers, as disclosed in their proxy materials, at their annual meeting

Preparing Your Disclosure for Say on Pay

A Timely Teleconference to Help You Prepare for the New Shareholder Advisory Vote on Executive Compensation

JOIN US ON TUESDAY, NOVEMBER 9, 2010 from 1:00–2:00 p.m. (PT) for a discussion of how to prepare your executive compensation disclosure for next year’s initial shareholder advisory vote on your executive compensation program.

This one-hour program will cover the following topics:

- ▶ Drafting an effective –and concise – Executive Summary for your CD&A
- ▶ Highlighting your program strengths, and explaining your weaknesses
- ▶ Discussing your incentive compensation arrangements and equity awards – what’s important (and what’s not)
- ▶ Streamlining your CD&A – how to say more with less
- ▶ Preparing clear compensation tables
- ▶ Explaining post-employment compensation – how to take advantage of the exception to the shareholder advisory vote on change-in-control arrangements
- ▶ The frequency of the Say on Pay vote – what should you recommend to your shareholders?

Numerous disclosure examples will be provided, as well as our new Say on Pay disclosure checklist

[For further information »](#)

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of shareholders. The proposed rules would provide the following guidance in connection with the Say-on-Pay Vote:

- Companies would not be required to file a preliminary proxy statement if the only matters that would require a preliminary filing are the Say-on-Pay Vote and the Frequency Vote.
- The Say-on-Pay Vote would be based on a company's Compensation Discussion and Analysis, the compensation tables, and the narrative disclosure accompanying the compensation tables.
- Companies would not be required to use any specific language or form of resolution to conduct the Say-on-Pay Vote.
- Companies would be required to explain in their proxy materials the general effect of the Say-on-Pay Vote, including that the vote is non-binding.
- Companies would be required to address in their CD&As whether and, if so, how their compensation policies and decisions have taken into account the results of Say-on-Pay Votes.
- Companies' director compensation arrangements and compensation-related risk disclosure (unless addressed in the CD&A) would not be subject to the Say-on-Pay Vote.

The SEC also confirms that, under Section 957 of the Dodd-Frank Act, brokers will not be permitted to vote uninstructed shares in a Say-on-Pay Vote.

Shareholder Advisory Vote on Frequency of Say-on-Pay Vote

The Dodd-Frank Act also requires companies to conduct, at least once every six years, a shareholder advisory vote at their annual meeting of shareholders to determine whether Say-on-Pay Votes will be held annually, biennially, or triennially. The proposed rules would provide the following guidance in connection with the Frequency Vote:

- Companies would not be required to file a preliminary proxy statement if the only matters that would require a preliminary filing are the Say-on-Pay Vote and the Frequency Vote.
- Companies would be required to give shareholders the opportunity to specify whether to hold the Say-on-Pay Vote every year, every two years, every three

years, or to abstain. In addition, companies would be permitted to include their own recommendation as to how shareholders should vote, but must make clear that shareholders are not voting on the company's recommendation.

- Companies would be required to explain in their proxy materials the general effect of the Frequency Vote, including that the vote is non-binding.
- Since the Frequency Vote is non-binding on a company and its board of directors, the company is not obligated to follow the results of the vote. However:
 - ▶ A company would be required to disclose in its quarterly report on Form 10-Q or annual report on Form 10-K whether it intends to follow the results of the most recent Frequency Vote or conduct the Say-on-Pay Vote on a different schedule.
 - ▶ Further, to the extent that a company follows the results of the Frequency Vote, it may exclude shareholder proposals that purport to propose a Say-on-Pay Vote or the frequency of such votes.

The SEC also confirms that, under Section 957 of the Dodd-Frank Act, brokers will not be permitted to vote uninstructed shares in a Frequency Vote.

Shareholder Advisory Vote on Change-in-Control Arrangements

Finally, the Dodd-Frank Act requires companies, in connection with any meeting of shareholders at which shareholders are asked to approve a merger or acquisition, to:

- disclose in their proxy materials any agreements or understandings that the company has with any named executive officer concerning any compensation that is based on or relates to the merger or acquisition, as well as the aggregate total compensation that may be paid to each named executive officer under such agreements or understandings; and
- conduct a shareholder advisory vote to approve the agreements and understandings and compensation totals, unless such agreements and understandings have been subject to a Say-on-Pay Vote.

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Proposed Disclosure Requirements

The proposed rules would require narrative and tabular disclosure of any change-in-control compensation arrangements among the target and acquiring companies in a merger or other acquisition and the named executive officers of each company. In the case of the aggregate total compensation to be paid to any named executive officer under these arrangements, the proposed rules would introduce a new disclosure table to quantify cash severance, equity awards that are either accelerated or cashed out, pension and nonqualified deferred compensation enhancements, perquisites, and tax reimbursements as shown in the table below.

Other notable features of the table would be as follows:

- Disclosure would cover only compensation that is based on or otherwise relates to the proposed transaction (in other words, it would not require disclosure of “walk-away” numbers).
- Companies would be required to separately identify (by footnote) amounts attributable to “single-trigger” arrangements and amounts attributable to “double-trigger” arrangements.
- The quantification of payments based on a company’s stock price would be based on the closing price per share as of the latest practicable date.

Proposed Advisory Vote Requirements

The proposed rules would provide the following guidance in connection with a Change-in-Control Compensation Vote:

- Companies would not be required to use any specific language or form of resolution to conduct the Change-in-Control Compensation Vote.
- As provided in the Dodd-Frank Act, companies would not be required to conduct a Change-in-Control Compensation Vote on their change-in-control arrangements if the disclosure described above (including the presentation of the new disclosure table) has previously been included in the executive compensation disclosure subject to a prior Say-on-Pay Vote.
- This exception would apply only to the extent that the change-in-control arrangements subject to the Say-on-Pay Vote have not been subsequently modified. New change-in-control arrangements, and revisions to arrangements that were previously subject to a Say-on-Pay Vote, would be subject to a new Change-in-Control Compensation Vote.

Effective Date

Even though the Dodd-Frank Act contemplates that the Change-in-Control Compensation Vote applies to meetings of shareholders to approve a merger or acquisition held on or after January 21, 2011, because the statute also states that

Golden Parachute Compensation

Name (a)	Cash (\$) (b)	Equity (\$) (c)	Pension/ NQDC (\$) (d)	Perquisites/ Benefits (\$) (e)	Tax Reimbursement (\$) (f)	Other (\$) (g)	Total (\$) (h)
PEO							
PFO							
A							
B							
C							

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the disclosure requirement is subject to SEC rulemaking, the Commission is taking the position that neither the disclosure requirement or the Change-in-Control Compensation Vote requirement will be effective until it has adopted its final rules, which may not take place until March 2011.

Transition Issues

Given the SEC’s rulemaking schedule, companies with September, October, and (possibly) November fiscal year-ends may be required to file proxy materials for and conduct shareholder advisory votes at their annual meetings of shareholders (if the meeting takes place on or after January 21, 2011) before the SEC has adopted final rules. To address this dilemma, the SEC has provided the following transition guidance:

- It will not object if a company does not file a preliminary proxy statement if the only matters that would require a preliminary filing are the Say-on-Pay Vote and the Frequency Vote; and

- In the case of the Frequency Vote, it will not object if a company provides shareholders the opportunity to specify whether to hold the Say-on-Pay Vote every year, every two years, every three years, or to abstain.

Need Assistance?

Compensia has extensive experience in helping companies draft the executive compensation disclosure in the proxy materials for their annual meetings of shareholders and analyze the potential impact on the Dodd-Frank Act executive compensation provisions on their pay programs. If you would like assistance in preparing your executive compensation disclosure for the new required shareholder advisory vote on executive compensation, or if you have any questions on the subjects addressed in this Thoughtful Pay Alert, please feel free to contact Mark A. Borges. ■

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