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FINAL RULES ON SAY-ON-PAY, FREQUENCY ON SAY-ON-PAY AND GOLDEN PARACHUTE ADVISORY VOTES UNDER THE DODD-FRANK ACT

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On January 25, 2011, the SEC adopted final rules on shareholder approval of executive compensation and golden parachute compensation under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The final rules clarified several comments raised with the proposed rules, but also made some important changes. The following are a few of the main changes and clarifications regarding the advisory votes from the proposed rules.

1. **Temporary Exemption for Smaller Reporting Companies:** The final rules provide a two year exemption for smaller reporting companies from the say-on-pay and frequency of say-on-pay advisory votes. Specifically, smaller reporting companies will be required to comply for the first annual or other shareholder meeting at which directors will be elected occurring on or after January 21, 2013.

   However, this exemption does not extend to what is referred to as the golden parachute advisory vote, and all reporting companies are required to comply with the golden parachute compensation advisory vote and disclosure requirements in merger proxy statements initially filed on or after April 25, 2011.

2. **Say-on-Pay Example Shareholder Resolution:** The final rules include instructions on how to draft the shareholder resolution regarding say-on-pay and provide the following example:

   > "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."

   As the final rules make clear they do not change the scaled back disclosure requirements for smaller reporting companies, including that smaller reporting companies are not required to provide a CD&A section, it appears that smaller reporting companies would be able to remove the reference to the CD&A in the resolution and still comply with the new instructions.

On a side note, the final rules continued to provide that companies may also solicit shareholder advisory votes on a range of compensation matters to obtain more specific feedback on the issuer's compensation policies and programs. However, if a company breaks down the vote into more than one advisory vote in order to cover various compensation issues, the company will need to make sure that the advisory votes taken together cover all the compensation matters required to be voted on.

The final rules do not include a sample resolution regarding the frequency vote, but the instructions require a company to present its shareholders with four choices – every 1, 2, or 3 years or abstain.

3. **Ability to Vote Uninstructed Proxy Cards:** The final rules give companies the right to vote uninstructed proxy cards regarding the frequency vote, and then only in accordance with the board's recommendation as provided in the proxy statement. However, in order to vote such uninstructed proxy cards, the company must have done the following:

    - Included a recommendation for the frequency vote in the proxy statement,
    - Permit abstention for the frequency vote on the proxy card and
    - Included language regarding how uninstructed shares will be voted **IN BOLD** on the proxy card.

    This does not extend to uninstructed proxy cards on a say-on-pay vote.

4. **Shareholder Proposals on Say-On-Pay and Frequency:** The final rules permit the exclusion of a shareholder proposal relating to say-on-pay or frequency advisory votes if the company has adopted a policy on the frequency on say-on-pay that is consistent with the majority of the votes cast in the most recent frequency vote. The proposed rules provided for only a plurality, so this new threshold will be more difficult to achieve as no one frequency may receive a majority of the votes cast.

5. **Form 8-K Disclosure Regarding Frequency:** The final rules amend Item 5.07 of 8-K to require companies to disclose their decision regarding how frequently they will conduct shareholder advisory votes on executive compensation following each frequency vote. As a company may need additional time to consider the results of the frequency vote, including through board deliberations and shareholder consultations, a company will be permitted to amend the 8-K which covered the results of the shareholder meeting to include such decision.

    The amendment must be filed no later than 150 calendar days after the date of the meeting but in no event later than 60 calendar days prior to the deadline for the submission of shareholder proposals as disclosed in the company's proxy statement. The reason this is tied to the deadline for shareholder proposals is because the SEC wanted to permit shareholders time to consider whether to submit a shareholder proposal regarding say-on-pay or frequency votes depending on the company's decision on frequency.

    Note: failure to timely file such amendment would cause a company to lose its Form S-3 eligibility.

    In the proposed rules, the SEC was going to require such disclosure in the following 10-Q or 10-K.

6. **Future CD&A Disclosure Requirements:** The final rules clarify that the new disclosures required to be addressed in the CD&A – whether and, if so, how a company's compensation policies and decisions have taken into account the results of the advisory vote on executive compensation – relate only to the most recent shareholder advisory vote.

   As smaller reporting companies are not required to provide a CD&A, smaller reporting companies would not be required to include such disclosures in their future proxy statements unless the prior say-on-pay votes played a role in determining the compensation required to be disclosed in the Summary Compensation Table. If so, then the smaller reporting company would be required to include such disclosure in its narrative description of the table.

About Joy S. Newborg

Joy Newborg focuses her practice primarily in the areas of corporate securities and finance, general corporate law and mergers and acquisitions. Joy has extensive experience in providing legal counsel to companies in the real estate, finance, banking, and medical device/health sciences industries that range from start-up companies to large, publicly held corporations.

Joy is also developing the entertainment law practice at the firm, focusing on providing general corporate, contracts and corporate securities services to businesses and individuals in the entertainment industry, specifically in film, television, music and publishing. She is an experienced lawyer who enjoys helping clients by identifying and handling the legal issues so that clients are free to develop their business and be creative.

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