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SEC's Proposed New Reporting Rules for Institutional Investment Managers

On October 18, 2010, the Securities and Exchange Commission ("SEC") released proposed rules that would implement additional disclosure requirements for certain institutional investment managers to report, at least annually, how they voted on the following executive compensation matters: (i) say-on-executive-pay, (ii) frequency of say-on-executive-pay, and (iii) say on golden parachute arrangements. The proposed rules are required by Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). This blogpost sets forth the background of the proposed new rules, the investment managers that would be subject to the new rules, how the proposed disclosure obligations expand existing disclosure obligations, whether confidential treatment can be obtained, when the changes will become effective and next steps.

Background

The SEC released these proposed rules in conjunction with the Dodd-Frank Act's so-called "Say-on-Pay" provisions, which would require issuers to provide for separate non-binding shareholder advisory votes in proxy statements to approve the compensation of named executive officers and to determine the frequency with which shareholders will need to approve executive compensation (every year, every other year, or every three years). While the say-on-executive-pay and frequency of say-on-executive-pay votes must be included in any proxy statement for an annual meeting taking place on or after January 21, 2011 (regardless of when the SEC's final rules become effective), the say on golden parachute arrangements requirement is not triggered until the SEC's final rules become effective. (For further information regarding the "Say-on-Pay" provisions, see our blog postings from October 21, 2010 "Time to Get Ready for Say-on-Pay as SEC Releases Proposed Rules" and July 26, 2010 "The Regulatory March to Reform Executive Compensation Practices Takes Another Step Forward".)

Who is obligated to report under the proposed rule?

Generally, under the proposed rules, institutional investment managers that manage certain equity securities having an aggregate fair market value of at least $100 million would be required to report how they voted on certain executive compensation matters. Specifically, the proposed rules apply to any person who is:

- an institutional investment manager, as defined in Section 13(f) of the Securities Exchange Act of 1934 (the "Exchange Act") to include "any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person"; and

- required to file reports under Section 13(f) of the Exchange Act (an institutional investment manager is required to file reports under Section 13(f) if it exercises investment discretion over certain classes of equity securities,

including U.S. public company equity securities, having an aggregate fair value on the last trading day of any of the preceding 12 months of at least $100 million).

How is the information required by the proposed rules different from the information required by Form 13F currently?

An institutional investment manager subject to the proposed rules must report on Form N-PX its proxy voting record in respect of securities voted on the three "Say-on-Pay" executive compensation matters if the investment manager, directly or indirectly, had or shared the power to vote, or direct the voting of, such securities. Disclosure on Form 13F is required where an investment manager has "investment discretion" over the securities. Therefore, securities reported on Form 13F may not be reported on Form N-PX if the investment manager had only "investment discretion", and not "voting power", with respect to such securities.

What happens next?

Assuming the proposed rules are adopted in substantially the version proposed, institutional investment managers covered by the rules would be required to report on Form N-PX such investment manager's proxy voting record on:

- the approval of executive compensation;
- the frequency of votes on executive compensation (i.e., whether approval of executive compensation should be put to stockholder vote every year, every other year, or every three years); and
- the approval of executive compensation as it relates to an acquisition, merger sale or other disposition, commonly referred to as "golden parachute" arrangements.

In addition, the proposed rules require disclosure on Form N-PX of the following details in the following standardized order (in order to facilitate comparisons of voting records among investment managers):

- the issuer, exchange ticker symbol, and CUSIP number of the security;
- the shareholder meeting date;
- a brief identification of the matter(s) voted on (using the following standardized descriptions, "14A Executive Compensation", "14A Executive Compensation Vote Frequency", and "14A Extraordinary Transaction Executive Compensation");
- for reports filed by funds (but not by institutional investment managers), whether the matter was proposed by the issuer or by a security holder;

- the number of shares over which the investment manager held or shared voting power;
- the number of shares that were voted;
- how the shares were voted, and if the votes were both for and against the proposal, the number of shares voted in each such manner;
- whether the investment manager voted for or against management's recommendation; and
- identification of each institutional investment manager on whose behalf the Form N-PX report is filed.

Can investment managers request confidential treatment of the information set forth in the Form N-PX reports?

The proposed rules indicate that confidential treatment would generally not be appropriate in respect of information set forth in the Form N-PX reports. Confidential treatment could be appropriate only in a narrow circumstance where the institutional investment manager has filed a confidential treatment request for information reported on Form 13F that is pending or has been granted and where the same information is set forth in the Form N-PX so that confidential treatment is appropriate in order to protect information that is the subject of the Form 13F confidential treatment request. However, because fund portfolio holdings information is generally publicly available apart from the Form N-PX, the SEC is not aware of any situation in which confidential information would be appropriate for information filed by funds on Form N-PX.

When will the changes occur?

If adopted, the proposed rules would require subject institutional investment managers to file their first reports no later than August 31, 2011 for shareholder meetings that occur between January 21, 2011 and June 30, 2011, and thereafter by August 31 of each year for the twelve-month period ended June 30. Institutional investment managers are not required to file a Form N-PX report for the twelve-month period ending June 30 of the calendar year in which such manager's initial filing on Form 13F is due. In addition, an institutional investment manager would not be required to file a report on Form N-PX with respect to any shareholder vote at a meeting that occurs after September 30 of the calendar year for which such manager's final filing on Form 13F is due.

What if you have questions?

For any questions or more information on these or any related matters, please contact one of our Securities and Corporate Finance Partners.

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