

Small Business Securities Bulletin

A periodic bulletin keeping small businesses informed about current developments in securities law and related matters

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SEC Adopts Say-on-Pay and Related Rules; Two-Year Temporary Exemption for Smaller Reporting Companies Included

On January 25, 2011 the Securities and Exchange Commission (SEC) adopted final rules to implement the say-on-pay and say-on-golden parachute provisions of Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; the adopting release is available at www.sec.gov/rules/final/2011/33-9178.pdf. The final rules, which are generally consistent with the rules the SEC proposed in October, require SEC reporting companies to provide their stockholders, at least once every three years, with a non-binding vote “to approve the compensation of its named executive officers, as disclosed pursuant to” the SEC’s compensation disclosure requirements, also known as say-on-pay.

The final rules clarify that a say-on-pay vote is required with respect to a solicitation for an annual meeting at which directors will be elected or a special meeting in lieu thereof, for which the SEC’s rules require compensation disclosure. Unlike the proposed rules, the final rules make clear that the say-on-pay vote is not required with respect to a stockholder meeting if directors are not being elected at such meeting, even if compensation disclosure in the related proxy statement is required under SEC rules. The final rules also clarify that such vote is required at least once every three calendar years, as opposed to within three years of the most recent vote, and that the rules do not change the scaled disclosure requirements for smaller reporting companies

(SEC reporting companies with a public float below \$75 million). In other words, smaller reporting companies will not, as a result of the new rules, be required to provide in their proxy statements a Compensation Discussion and Analysis (CD&A) or the other disclosure items in Item 402 of Regulation S-K that they are not currently required to provide.

While the final rules do not mandate a particular form of say-on-pay resolution to be voted on by stockholders, unlike the proposed rules they do clarify that the resolution must include language to the effect that the vote is to “approve the compensation of the [company’s] named executive officers as disclosed pursuant to Item 402 of Regulation S-K,” and include an example that would satisfy the requirements of the rule.

The final rules also require companies to provide their stockholders with a separate advisory vote, at least once every six calendar years, as to whether the say-on-pay vote should occur every year, once every two years, or once every three years (known as say-on-frequency). This vote will also be non-binding, meaning the company could choose to provide the say-on-pay vote on a different schedule than that chosen by stockholders. If a company implements the frequency schedule approved by a majority (as opposed to the proposed plurality standard) of the votes cast in the most recent frequency vote, however, then it will be able to exclude from its proxy statements any stockholder proposal relating to say-on-pay or say-on-frequency. The final rules’ majority approval requirement may make taking advantage of this provision more difficult than under the proposed plurality standard, however, since it is possible that none of the three frequency choices will receive a majority vote.

The final rules include a two-year exemption for smaller reporting companies. Smaller reporting companies will not have to provide the say-on-pay and say-on-frequency votes until their first annual or other meeting occurring on or after January 21, 2013. All other companies are required to provide these votes at their first such meeting occurring on or after January 21, 2011.

Companies (including companies providing the say-on-pay vote as a result of their participation in the Troubled Asset Relief Program) are also required to discuss in their CD&A whether and how the results of the most recent stockholder advisory vote (and, if material, earlier votes) have been taken into consideration in their compensation policies and decisions. Smaller reporting companies, who are not required to include a CD&A, need provide this disclosure only if, consistent with current disclosure rules, its consideration of the say-on-pay votes is material to an understanding of any of the information presented in the summary compensation table. The SEC also, as proposed, amended its proxy rules to permit the proxy card to include the required choices of one, two or three years, or abstain, for the say-on-frequency vote.

The SEC did not adopt its proposed amendments to Forms 10-Q and 10-K to require disclosure of a company's decision as to how often it will hold the say-on-pay vote following a say-on-frequency vote. Instead, companies will be required to report this information on Form 8-K.

The final rules also require a non-binding, advisory stockholder vote on compensation to be paid to a company's named executive officers (and the named executive officers of the acquiring company, if applicable) in connection with an acquisition, merger, consolidation or sale or other disposition of all or substantially all of the company's assets (known as say-on-golden parachutes). Companies will be required to provide tabular and narrative disclosure as to any such compensation (and related agreements or arrangements) to be paid by either party to the transaction to its named executive officers as well as the named executive officers of the other party. Similar disclosure will also be required in connection with tender offers and issuer going private transactions. Finally, the final rules require companies to disclose in their proxy statements that they are providing the say-on-pay, say-on-frequency and say-on-golden parachute votes as required by the applicable provisions of the Securities Exchange Act of 1934 and the general effect of these votes, such as whether they are non-binding, as well as the current frequency of say-on-pay votes and when the next such vote will occur.

About Me

I am a former SEC attorney who also has prior "big firm" experience. I assist public as well as private companies with compliance with federal and state securities laws, including assisting public companies with their reporting obligations under the Securities Exchange Act of 1934, at competitive billing rates. Please contact me if you would like more information about my practice or to discuss how I can be of assistance to you. Visit my bio at www.ober.com/attorneys/penny-somer-greif.

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