WILMERHALE

SEC Finalizes Rules for Say-on-Compensation Votes

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Today, on a 3-2 vote, the SEC adopted final rules governing say-on-pay, say-on-frequency and say-on-parachutes votes. Section 951 of the Dodd-Frank Act already requires say-on-pay and say-on-frequency votes at the first meeting of shareholders occurring on or after January 21, 2011. The SEC's final rules will provide additional guidance about say-on-pay and say-on-frequency votes and will implement requirements for say-on-parachutes votes.

The following description is based solely on comments made at today's open meeting and the SEC's fact sheet for the meeting, and remains subject to clarifications that may be contained in the adopting release and the actual text of the final rules.

Overview

The SEC's final rules govern the three advisory votes required by Section 951 of the Dodd-Frank Act for companies subject to the SEC's proxy rules:

- Say-on-Pay — To approve the compensation of named executive officers, as disclosed pursuant to the SEC's compensation disclosure rules, at least once every three years beginning with the first shareholders' meeting at which directors are elected taking place on or after January 21, 2011.

- Say-on-Frequency — To determine whether future say-on-pay votes will occur every one, two or three years. Companies are required to hold a "frequency" vote at least once every six years in order to allow shareholders to decide how often they would like to be presented with the say-on-pay vote.

- Say-on-Parachutes — To approve certain "golden parachute" compensation arrangements in connection with a merger, acquisition, consolidation, proposed sale or other disposition of all or substantially all of a company's assets.

Highlights of Today's Announcement

Based on comments made at today's open meeting and the SEC's fact sheet, additional highlights of the final rules include:

- *Timing of Implementation of Say-on-Parachutes Rules.* The say-on-parachutes vote will be required in proxy statements and other schedules and forms in connection with merger transactions initially filed on or after April 25, 2011. Disclosure will be required of all agreements and understandings that the acquiring and target companies have with the named executive officers of both companies, in both narrative and tabular formats.

- *Delayed Application of Say-on-Pay and Say-on-Frequency Votes for Smaller Reporting Companies.* The say-on-pay and say-on-frequency votes will not be required for smaller reporting companies until the first shareholders' meeting at which directors are elected taking place on or after January 21, 2013. However, as with other issuers, smaller reporting companies will be required to conduct the say-on-parachutes vote upon effectiveness of the final rules.

- *New 8-K Requirement for Frequency Vote.* The final rules will create a new Form 8-K Item 5.07 requirement for disclosure about the company's decision regarding say-on-pay frequency following the say-on-frequency vote. The proposing release had proposed that this disclosure be made in Form 10-Q. This Form 8-K will instead be required no later than 150 calendar days after the date of the annual meeting at which the vote took place, but in any event no later than 60 calendar days prior to the deadline for submission of Rule 14a-8 shareholder proposals for the subsequent annual meeting.

- *Additional Proxy Disclosures.* The final rules will require additional disclosure in the CD&A regarding whether, and if so, how companies have considered the results of the most recent say-on-pay vote.

- *Exclusion of Shareholder Proposals.* Under Rule 14a-8, companies will only be able to exclude shareholder proposals relating to the frequency of say-on-pay votes if a frequency option (one, two or three years) receives majority support <u>and</u> the company has adopted a policy on the frequency of say-on-pay votes consistent with the majority vote. The proposing release would have allowed exclusion of shareholder say-on-pay frequency proposals whenever the company's policy was consistent with the plurality of votes cast.

- *No Exemption for Recent IPO Companies.* The SEC has not granted newly public companies an exemption from say-on-pay and say-on-frequency votes.

Dissenting Views

Commissioners Casey and Paredes voted against adoption of the new rules, citing concerns about the effect of the rules on smaller companies and newly public companies and the potential burdens on capital formation.

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