To: Our Clients and Friends January 27, 2011

SEC Issues Final "Say-on-Pay" and "Golden Parachute" Rules

On January 25, 2011, the Securities and Exchange Commission released its final "say-on-pay" and related golden parachute rules to implement the provisions of Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which are now set forth in Section 14A of the Securities Exchange Act of 1934. (The adopting release can be accessed **here**. A copy of our prior Dodd-Frank client alert can be found **here**.)

Effectiveness

Section 14A requires public companies to seek non-binding advisory "say-on-pay" votes and non-binding advisory "frequency" votes at annual shareholder meetings held after January 21, 2011. The Commission's new rules will be effective 60 days following publication in the Federal Register. Nevertheless, because the statutory requirement is already effective, companies should look to these rules, as well as the Commission's previously issued transition guidance, in complying with the new requirements now.

Smaller reporting companies were exempted from the say-on-pay and frequency votes (but not the golden parachute rules) for two years, until the first annual or other meeting of shareholders on or after January 21, 2013.

Issuers must generally comply with the golden parachute disclosure and advisory vote requirements and related rules for merger proxies and other covered transaction documents filed on or after April 25, 2011.

Changes from Proposed Rules

The final rules substantially adopt the Commission' proposed say-on-pay rules. (The proposing release can be accessed **here**. A copy of our prior client alert on the proposed rules can be found **here**.) Among the Commission's changes from the proposed rules are the following, which are discussed in more detail below:

- Companies generally will have 150 days from the date of the vote to report on Form 8-K their decisions as to how frequently they will hold future say-on-pay votes, instead of on the next filed Form 10-Q or Form 10-K as proposed.

- Smaller reporting companies were exempted from the say-on-pay voting requirements for two years.

- CD&A disclosure will be limited to discussion of the most recent say-on-pay vote.

- The Commission approved a non-exclusive form of say-on-pay resolution.

- Companies can exclude say-on-pay shareholder proposals under Rule 14a-8 if, among other things, they adopt a frequency vote policy consistent with a majority vote, instead of a plurality vote as originally proposed.

Final Rules

New Rule 14a-21 addresses the statutory requirement of a separate shareholder advisory vote to approve compensation for named executive officers ("say-on-pay"), a separate advisory vote with respect to the frequency of the say-on-pay vote (a "frequency" vote) and a separate shareholder advisory vote to approve golden parachute compensation arrangements in connection with mergers and acquisitions. The Commission also adopted new golden parachute compensation disclosures not only in connection with mergers and acquisitions as required by Dodd-Frank, but also in connection with going private transactions, certain tender offers and similar situations. Finally, the SEC adopted amendments to existing proxy and disclosure rules to implement new Section 14A.

"Say-on-Pay" Advisory Vote

Limited to Proxies for Election of Directors. Rule 14a-21(a) provides that the separate vote on executive compensation is required only when proxies are solicited for an annual or other meeting of shareholders at which directors will be elected and for which disclosure of executive compensation pursuant to Item 402 of Regulation S-K is required. The Rule generally tracks the statute in requiring this separate shareholder vote for the first annual or other such meeting of shareholders occurring on or after January 21, 2011, and then no later than the annual (or other) meeting of shareholders held in the third calendar year after the immediately preceding say-on-pay vote.

Vote Must Cover All Item 402 Compensation Disclosed for NEOs. The advisory vote must cover all compensation as disclosed pursuant to Item 402 of Regulation S-K. The release states that this means shareholder approval would relate to all compensation disclosed, including that in the Compensation Discussion and Analysis ("CD&A"), the compensation tables and any other narrative executive compensation disclosures required by Item 402. The release notes that any other vote - such as a vote to approve "compensation policies and procedures" – would not satisfy the statute or the new rule. The rule does not require separate votes on the different forms of compensation, but in the release, the SEC states that issuers “are not limited” from seeking “more specific feedback” on the issuer’s compensation plans and programs.

The release confirms that the advisory vote does not extend to the compensation of directors. In addition, if an issuer includes disclosure about its compensation policies and practices as they relate to risk management and risk taking incentives, these policies and practices are not subject to the shareholder advisory vote as they relate to the issuer’s compensation for employees generally. To the extent that the risk considerations are a material aspect of an issuer’s compensation policies or decisions for named executive officers and are thus discussed in CD&A, however, the disclosure would be considered by shareholders when voting on executive compensation under the new Rule.

Form of Resolution. The final rules do not address whether the say-on-pay proposal must be stated specifically in the form of a formal resolution (e.g., “Resolved”), and the Commission did not adopt any required specific language. The Commission, however, did provide a “non-exclusive example of a resolution that would satisfy the requirements” as follows:

> 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.

Supporting Statement Not Required. As in the proposing release, the Commission does not require or prohibit issuers from making a separate supporting statement in favor of the say-on-pay vote. In any event, we expect many issuers will continue to include enhanced disclosure in CD&A in light of the say-on-pay vote.

Advisory Vote on the Frequency of “Say-on-Pay” Voting

Rule 14a-21(b) provides that issuers must allow shareholders to vote on how often to have the shareholder say-on-pay vote – every one, two or three years. This shareholder vote, also non-binding, must be taken at least once every six years beginning with the first annual meeting on or after January 21, 2011.

Limited to Proxies for Election of Directors. Like the say-on-pay vote, Rule 14a-21(b) clarifies that this frequency vote is required only in proxy statements for meetings of shareholders for the election of directors and only once every six years.

Frequency Votes Require Four Alternatives. The statute requires issuers to give shareholders four choices on the frequency vote: every year, every two years, every three years, or abstain. The Commission has taken the position that the statute will not permit alternative formulations of the vote – such as a vote on a board recommendation that the vote be held every two years, or a vote on an alternative choice that the vote be held every year or less frequently. As with the say-on-pay vote, issuers can make a recommendation, but shareholders must vote for one of the four options, not for or against the issuer’s recommendation. An issuer "recommendation" generally would be required for an issuer to take advantage of discretionary voting authority. The release did not set forth a separate "form of" resolution for the frequency vote.

The Commission amended Rule 14a-4 to provide for the four alternatives for frequency votes. As transition guidance, the SEC indicated that it will not object if issuers use proxy cards with the four choices prior to effectiveness of the new rules, or, for meetings before December 31, 2011, if issuers omit the "abstain" choice in the event Broadridge (and other proxy firms) are unable to reprogram voting systems in time.

Proposals Related to Both Say-on-Pay and Frequency Votes

No Preliminary Proxy Filing Required. The release confirms that the say-on-pay vote, the frequency vote and "any other shareholder advisory vote on executive compensation" will not necessitate a preliminary proxy filing. As transition guidance, the SEC clarified that until final rules are in effect, it will not object if issuers do not file preliminary proxy material in respect of say-on-pay and frequency votes.

Amendments to Items 402(b) and Item 24. The new rules include a change to Item 402(b) to require disclosure in the CD&A as to whether and how the issuer has considered the results of the most recent say-on-pay vote in determining its executive compensation decisions and policies. The release notes that issuers should address their consideration of such votes to the extent that such consideration is material to the compensation decisions and policies discussed. Changes to Item 24 of Schedule 14A would also require disclosure of the effect of the vote, such as whether the vote is non-binding and, when applicable, disclosure of the current frequency of shareholder advisory votes and when the next such vote will occur.

Amendments to Form 8-K. Issuers are already required to report the results of shareholder votes on Form 8-K within four business days of the shareholder meeting. The release amends Form 8-K to require issuers to disclose, in light of the outcome of the frequency vote, its decision as to how frequently it will conduct the say-on-pay vote until the next required frequency vote. Issuers are not required to disclose the company's decision with respect to the frequency vote in the same Form 8-K reporting the results of the meeting. Instead, the rule specifies that issuers are to make the disclosure by amendment to the Form 8-K reporting the results of the shareholders meeting no later than 150 calendar days after the meeting at which the frequency vote was held, but in no event later than 60 calendar days prior to the deadline for submission of shareholder proposals under Rule 14a-8 as disclosed in the issuer's most recent proxy statement.

The Commission originally proposed reporting that decision in the issuer's next Form 10-Q or Form 10-K. In response to comments, the Commission determined that this might not allow sufficient time for issuers to fully consider the results of the vote, including board deliberations and consultations with shareholders.

Two Year Exemption for Smaller Reporting Companies. Rule 14a-21 provides that smaller reporting companies are not required to comply with say-on-pay or frequency votes until their first meeting of shareholders on or after January 21, 2013. The Commission noted that the additional time may allow for adjustments to the rules applicable to smaller reporting companies. Smaller reporting companies who take advantage of the scaled disclosure requirements available to them would not be required to provide a CD&A in order to comply with Rule 14a-21(a). (Smaller reporting companies are not exempt from the golden parachute requirements.) As transition guidance, the Commission noted that it will not object if smaller reporting companies do not conduct a say-on-pay or frequency vote under the statute prior to the effectiveness of the new rules.

TARP Issuers Exempt. An issuer subject to the requirements imposed under the Troubled Asset Relief Program ("TARP") to obtain annual shareholder approval of executive compensation will not be subject to the say-on-pay advisory vote requirements of Rule 14a-21(a) because the advisory vote requirements are effectively the same as those required as a result of participating in TARP. Moreover, because the frequency vote would serve little purpose, the Commission has exempted TARP issuers from that vote. Once a TARP issuer has repaid all TARP obligations, such issuer would be required to comply with the requirements of Rule 14a-21(a) and (b) in connection with soliciting proxies for the first annual meeting of shareholders after the TARP repayment.

As transition guidance, prior to effectiveness of the new rules, the SEC will not object if a TARP issuer does not conduct a frequency vote, provided that the issuer complies with its say-on-pay obligations.

Effect of Rule 14a-21 on Rule 14a-8 Shareholder Proposals

The adopting release also includes an amendment to Rule 14a-8 to clarify how issuers should address shareholder proposals that seek a say-on-pay or frequency vote. In the release, the SEC takes the position that if the issuer has adopted a policy on frequency of say-on-pay votes that is consistent with the policy approved by a <u>majority</u> of the votes cast in the most recent frequency vote (e.g., one, two or three years), then the issuer may exclude a shareholder proposal related to a vote on executive compensation or frequency. Accordingly, an issuer would be able to exclude such a shareholder proposal if the issuer discloses that it has a policy of submitting say-on-pay votes at the frequency voted upon by the majority of the votes cast, the issuer follows such policy, and the issuer provides a vote on frequency at least every six years as required by Section 14A(a)(2). The SEC had previously proposed a plurality threshold. As a result of this change, there may be issuers that adopt frequency voting polices consistent with a plurality, but less than a majority, of the votes that cannot take advantage of the exclusion of subsequent say-on-pay proposals.

Golden Parachute Arrangements

New Section 14A(b)(1) of the Exchange Act requires all persons making a proxy or consent solicitation seeking shareholder approval of an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all of an issuer's assets to provide disclosure of agreements or understandings with the issuer's named executive officers involving compensation based on or relating to the transaction – "golden parachute" arrangements. The new law also requires disclosure in those solicitations of similar agreements or understandings that an acquiring issuer has with its named executive officers and with the named executive officers of the target.

The Commission's current disclosure requirements relating to change-in-control agreements and related golden parachutes in Item 402(j) of Regulation S-K do not include all of the disclosure contemplated by Dodd-Frank and they do not typically apply to merger proxies.

Accordingly, the Commission adopted amendments to Schedule 14A to require this disclosure in these proxy or consent solicitations, all in accordance with a new proposed Item 402(t) of Regulation S-K. Although not required by Dodd-Frank, the Commission amended the disclosure requirements of other forms (Schedule 14C, Schedule 14D-9, Schedule 13E-3 and Item 1011 of Regulation M-A) in an effort to require comparable golden parachute disclosure in connection with other transactions such as going private and certain tender offer transactions. In the proposing release, the Commission noted that extending the disclosure requirements to these other transactions "furthers the purposes of Section 14A(b)" and will "minimize regulatory disparity." The Commission did adopt an amendment which clarifies that Item 402(t) disclosure is not required in third party tender offer statements, so long as the transactions are not also Rule 13e-3 going private transactions.

New Item 402(t) Golden Parachute Table. New Item 402(t) requires disclosure of golden parachute arrangements of named executive officers in both tabular and narrative formats.

The tabular disclosure would require quantification with respect to any agreements or understandings (written or unwritten) between each named executive officer and the acquiring company or the target company concerning any type of compensation – whether present, deferred or contingent – that is based on or otherwise related to the transaction.

The proposed table:

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							

Elements of change-in-control compensation that would be separately quantified, disclosed and included in the total would be:

- All cash severance payments (e.g. base salary, bonus, pro-rata cash incentive plan payment);
- The dollar value of accelerated options and stock awards and payments in cancellation of stock and option awards;
- Pension and nonqualified deferred compensation benefit enhancements;
- Perquisites and other personal benefits and health and welfare benefits (even if available to all employees); and
- Tax reimbursements (including 280G tax gross ups).

The table would require separate footnote identification of amounts attributable to "single-trigger" and "double-trigger" arrangements. Changes to Item 402(a) and Item 402(m) clarify that information regarding group plans that do not discriminate in scope, terms or operation in favor of executive officers and are generally available to all salaried employees must still be included in the disclosure required under proposed Item 402(t).

New Item 402(t) Narrative Disclosure Requirements. In addition to the above table, Item 402(t)(3) requires issuers to describe any material conditions or obligations applicable to the receipt of payment – non-competes, non-solicitation covenants, non-disparagement or confidentiality agreements – and their duration, and provisions regarding waiver or breach. The SEC also adopted a requirement to provide a description of the specific circumstances that would trigger payment and how the payment would be made.

Separate Advisory Vote on Issuer Golden Parachute Payments Only. Under Rule 14a-21(c), issuers would be required to provide a separate shareholder advisory vote in proxy statements for meetings at which shareholders are asked to approve an acquisition, merger, consolidation or proposed sale or other disposition of all or substantially all of the issuer's assets. The advisory vote would apply to the golden parachute payments required to be disclosed by Section 14A(b)(1) as disclosed pursuant to proposed Item 402(t). Because Section 14A(b)(1) includes only agreements and arrangements between the *soliciting person* and any named executive officer of the issuer, when the target issuer conducts the proxy solicitation to approve the transaction, only agreements and arrangements between the target issuer and its named executive officers are subject to the shareholder advisory vote.

No Advisory Vote Required if the Subject of Prior Say-on-Pay Vote. Under the provisions of the Dodd-Frank statutory changes, issuers are not required to include in the merger proxy a separate shareholder vote on golden parachute compensation if those compensation arrangements were subject to a prior shareholder advisory vote in connection with an annual meeting. If Item 402(t) disclosure of that compensation was included in the executive compensation disclosure that was subject to a prior say-on-pay vote under Rule 14a-21(a), then no vote is required in the merger proxy solicitation.

Because Item 402(t) requires more extensive tabular and narrative disclosure than otherwise required in an annual proxy statement pursuant to Item 402(j), issuers wishing to avail themselves of the exception for prior voting would need to include the more extensive Item 402(t) disclosures in their annual proxy statements. The exception would apply only to the extent the same golden parachute arrangements previously in place and disclosed in connection with the prior vote were in effect and unmodified in connection with the proposed transaction. If there had been changes, those would need to be disclosed and two tables provided (one table disclosing the arrangements previously disclosed and subject to a say-on-pay vote and one table disclosing the new arrangements or revised terms subject to the new vote).

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