

To: Our Clients and Friends

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SEC Issues Proposed “Say-on-Pay” and “Golden Parachute” Rules

The Securities and Exchange Commission has released its proposed “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 new Section 14A of the Securities Exchange Act of 1934. (A copy of our prior Dodd-Frank client alert can be found [here](#).) The comment period will close on November 18, 2010 and the SEC plans to issue final rules on these issues in early 2011. Shareholder advisory say-on-pay votes are required for annual shareholder meetings held after January 21, 2011, regardless of whether the Commission has adopted final rules to implement the statute.

Proposed Rule 14a-21 addresses the statutory requirement of a separate shareholder advisory, or “say-on-pay”, vote to approve compensation for named executive officers, a separate advisory vote with respect to the frequency of the say-on-pay vote and a separate shareholder advisory vote to approve golden parachute compensation arrangements in connection with mergers and acquisitions. The Commission is also proposing new golden parachute compensation disclosures not only in connection with the mergers and acquisitions covered by Dodd-Frank, but also with going private transactions, third party tender offers and similar situations. Finally, the proposal includes various amendments to existing proxy rules and disclosure requirements to implement the new Section 14A. The proposing release, Release No. 33-9153, 34-63124 (Oct. 18, 2010), can be accessed [here](#).

“Say-on-Pay” Advisory Vote

Limited to Proxies for Election of Directors. As proposed, Rule 14a-21(a) would specify that the separate vote on executive compensation is required only when proxies are solicited for an annual or other meeting of shareholders for which disclosure of executive compensation pursuant to Item 402 of Regulation S-K is required. In a footnote, the Commission makes clear that this means an annual or special meeting for the election of directors. Release, note 16. The proposed Rule 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 less frequently than once every three years thereafter. As a practical matter, this means many non-calendar year end companies will be mailing proxies which must include the say-on-pay voting matters without benefit of the Commission's final rules. The SEC is specifically seeking comment on whether transitional or phase-in timing provisions should be included in the final rules.

Vote Must Cover All Item 402 Compensation Disclosed for NEOs. The proposed Rule provides that the shareholder approval must cover all compensation of the issuer's named executive officers as disclosed pursuant to Item 402 of Regulation S-K. The proposing 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 proposed Rule does not require separate votes on the different forms of compensation, but in a footnote, the SEC states that the rules "would not preclude" an issuer from seeking "more specific shareholder opinion through separate votes". Release, note 39.

The proposing 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.

Applies to Smaller Reporting Companies. Smaller reporting companies who take advantage of the scaled disclosure requirements available to them would not be required to provide CD&A in order to comply with Rule 14a-21(a). Smaller issuers are not otherwise exempt from the say-on-pay advisory vote.

TARP Issuers Exempt for Now. On the other hand, 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 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. Once a TARP issuer has repaid all TARP obligations, such issuer would be required to comply with the requirements of Rule 14a-21(a) in connection with soliciting proxies for the first annual meeting of shareholders after the TARP repayment.

No Specific Required Form or Approval Format. Although the Commission is not proposing any specific language or form of resolution, the proposing release quotes new Section 14A(a)(1) that the vote must be "to approve the compensation of executives, as disclosed pursuant to [Item 402 of Regulation S-K] or any successor thereto" and states that any other vote - such as a vote to approve "compensation policies and procedures" - would not satisfy the new statute or the proposed Rule.

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

Proposed 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 proposed Rule for say-on-pay, the proposed Rule 14a-21(b) would clarify that this frequency vote would be required only in a proxy statement solicited for an annual or other meeting of shareholders for the election of directors and only once every six years.

TARP Issuers Exempt for Now. As proposed, TARP issuers, who are required to obtain annual shareholder approval of executive compensation, will not be subject to this frequency vote until the first annual meeting of shareholders after that issuer has repaid all TARP obligations.

Related Amendment to Rule 14a-4 for Form of Proxy. The proposing release notes that the statute specifically requires issuers to give shareholders four choices: whether the shareholder vote on executive compensation will occur every one, two or three years, or to abstain from voting. The Commission is taking 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. Accordingly, the Commission's proposing release includes an amendment to Rule 14a-4 to reflect what it perceives as a statutory requirement that shareholders be given the opportunity to cast an advisory vote on whether the shareholder vote will occur every one, two or three years or to abstain from voting on the matter. As transition guidance, the SEC indicated that it will not object if issuers use proxy cards with the four choices prior to adoption of final rules, or 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 proposing release includes amendments to Rule 14a-6(a) to add to the list of matters not necessitating a preliminary proxy filing the shareholder votes on say-on-pay and on frequency of say-on-pay. As transition guidance, the SEC clarified that until final rules are adopted, it will not object if issuers do not file preliminary proxy material in respect of say-on-pay.

Proposed Amendments to Items 402(b) and Item 24. The proposals include a change to Item 402(b) to require disclosure in the CD&A as to whether and how the issuer's compensation policies and decisions take into account the results of the say-on-pay votes. Changes to Item 24 of Schedule 14A would require disclosure of how the issuer intends to treat the say-on-pay and frequency votes - as binding or merely advisory.

Amendments to Form 10-K and Form 10-Q. The proposing release includes amendments to Form 10-K and Form 10-Q to include items that will require the issuer to disclose, in light of the outcome of the frequency vote, how frequently it will conduct the shareholder vote on executive compensation. Issuers will still be required to report the results of shareholder votes - including those on executive compensation - on Item 5.07 of Form 8-K within four business days of the shareholder meeting.

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

The proposing release also includes an amendment to Rule 14a-8 to clarify how issuers should address shareholder proposals that seek an advisory shareholder vote on executive compensation or the frequency of shareholder votes on executive compensation. In the proposing 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 plurality of the votes cast in the most recent frequency vote, 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 plurality 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).

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 is proposing 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 is also proposing to amend 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 tender offer transactions. In the proposing release, the Commission states that extending the disclosure requirements to these other transactions "furthers the purposes of Section 14A(b)" and will "minimize regulatory disparity."

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

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.

New Item 402(t) Narrative Disclosure Requirements. In addition to the above table, Item 402(t)(3) would require 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 has also proposed 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 the proposed 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. The proposing release leaves to the issuer's choice whether to include arrangements between its named executive officers and the acquiror 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 be 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. Under the proposed rules, 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 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).

Reporting of Proxy Votes on Executive Compensation and Other Matters by Institutional Investment Managers

Also on October 18, 2010, in a separate release, (Release No. 34-63123, available [here](#)) the SEC proposed rules requiring certain institutional investment managers to report annually how they voted proxies related to the approval of executive compensation matters and golden parachute compensation arrangements. The proposed rules would apply to institutional investment managers subject to Section 13(f) of the Securities Exchange Act. Upon the adoption of the proposed rules, an institutional investment manager would be required to

report its Section 14A votes annually on Form N-PX if such institutional investment manager had sole or shared voting power over the voted security. The Form N-PX would be due on August 31 of each year, which is consistent with the existing schedule for fund reporting of other voting records. Comments on these proposed rules must be submitted to the SEC by November 18, 2010.

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