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Final Say-On-Pay Rules Delay Requirements for Smaller Reporting Companies and TARP Participants

On January 25, 2011, the Securities and Exchange Commission (the "SEC") released its final rules relating to shareholder approval of executive compensation arrangements. These rules implement Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). While these new rules apply to all public companies, smaller reporting companies are exempt from compliance until 2013, and companies that received financial assistance under the Troubled Asset Relief Program ("TARP") are exempt from compliance until the outstanding TARP funds are repaid.

Shareholder Approval of Executive Compensation and Golden Parachute Payments

Beginning in 2011 and subject to the exceptions described below, a public company must include in its proxy statement for its annual shareholders meeting a non-binding advisory proposal to approve the compensation of its named executive officers at least once every three years. This non-binding advisory shareholder vote is commonly referred to as "say-on-pay." In addition, once every six years, a company must include a separate non-binding proposal in its proxy statement allowing its shareholders to vote on the frequency of the say-on-pay vote (i.e., whether the vote should occur every one, two or three years). The say-on-pay vote is required for all public companies when proxies are solicited for an annual or other meeting of shareholders for which the disclosure of executive compensation is required. Companies are not required to file a preliminary proxy statement in connection with the say-on-pay and frequency vote proposals.

The rules also require that in any proxy materials for a meeting of shareholders to approve an acquisition or merger, the company must disclose any agreements or understandings it has with any named executive officers concerning any type of compensation to be paid to such executive officers that is based on the transaction. These compensation arrangements are commonly referred to as "golden parachute" payments. In addition to approving the acquisition or merger, the new rules require a separate advisory vote to approve any golden parachute payments.

Phase-in for Smaller Reporting Companies

Recognizing the potential burden these new rules may place on small public companies, the SEC adopted a temporary two-year phase-in for companies meeting the definition of a smaller reporting company.[1] These companies will not be required to conduct either a say-on-pay vote or a frequency vote until the first annual or other meeting of shareholders occurring on or after January 21, 2013.[2] This temporary delay does not, however, apply to the requirement to include a vote on golden parachute payments in connection with a merger, acquisition or other extraordinary transaction.

Delay for TARP Participants

Pursuant to the Emergency Economic Stabilization Act of 2008 and TARP, companies that received and have not repaid TARP funds are required to provide shareholders with an annual non-binding say-on-pay vote. Accordingly, TARP participants are not required to conduct a separate say-on-pay vote under the SEC's new rules, nor are they required to conduct a frequency vote so long as their TARP funds remain outstanding.[3] The SEC's new say-on-pay and frequency vote rules will apply to a TARP participant for its first annual meeting of shareholders after repayment of all outstanding TARP funds.

If you have specific questions regarding the new say-on-pay rules or would like to discuss this bulletin further, please contact any of the attorneys listed below.

1 Generally, a smaller reporting company is a company with a public float of less than $75 million, as determined annually in accordance with SEC rules.

2 With respect to proxy statements filed before the April 4, 2011 effectiveness of the phase-in rules, the SEC has advised that smaller reporting companies will not need to include the say-on-pay and frequency votes, which otherwise would have been required under the Dodd-Frank Act.

3 TARP prohibits golden parachute payments to senior executive officers during the period TARP assistance is outstanding.

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