

# Executive Compensation Group Advisory

January 2011

## SEC ADOPTS FINAL “SAY-ON-PAY” RULES

On January 25, 2011, the Securities and Exchange Commission (“SEC”) adopted final rules (“Final Rules”) on non-binding shareholder advisory votes on a company’s executive compensation and golden parachute compensation arrangements (“Say-on-Pay” or “SOP”) implementing Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). The basic SOP rules are effective January 21, 2011 and thus will apply to most proxy statements filed this year; the golden parachute SOP rules are effective April 25, 2011. The Final Rules are fairly consistent with the SOP rules proposed by the SEC on October 18, 2010 (“Proposed Rules”). Below is a brief summary of the Final Rules, including some of the changes made to the Proposed Rules.

- **SOP VOTE AND FREQUENCY OF VOTE:** The Final Rules provide that a SOP vote (“SOP Vote”) and a vote on the frequency of the SOP Vote (“Frequency Vote”) are both non-binding and generally required only at a meeting in which directors will be elected. The Frequency Vote, which has to occur at least every six calendar years, must offer the following four choices on the frequency of the SOP Vote: (1) every calendar year, (2) every two calendar years, (3) every three calendar years, and (4) abstain. If companies follow a majority Frequency Vote, then shareholders will not be allowed to submit shareholder proposals to change the frequency of the SOP Vote (note that the Proposed Rules had used a plurality standard). Under the Final Rules, if the Frequency Vote does not receive a majority of the votes, the company may be subjected to shareholder proposals for SOP Votes or Frequency Votes in years when the company is not otherwise conducting those votes.
- **CD&A TO DISCUSS MOST RECENT SOP VOTE:** The Proposed Rules required that after the company’s first SOP Vote, the Compensation Discussion and Analysis (“CD&A”) must include a discussion relating to the company’s consideration of the results of the SOP Vote. The Final Rules clarify that only the most recent SOP Vote needs to be discussed in the CD&A.
- **SOP RESOLUTION:** The Final Rules do not mandate any specific form or language to implement the SOP Vote. They do, however, provide the following sample form of resolution: “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.” It is expected that many companies will use this form resolution. No sample resolution was provided for the Frequency Vote.
- **DISCLOSURE OF DECISION ON FREQUENCY:** Under the Proposed Rules, the results of the SOP Vote and Frequency Vote were to be reported in Form 8-K filed within four days after the shareholder meeting. Companies were also to report in its next Form 10-Q or Form 10-K the company’s decision on the frequency of future SOP Votes. The Final Rules continue the four day requirement to report the actual vote totals; however, to give a company more time to consider the non-binding Frequency Vote, the decision on frequency is now required to be reported in a Form 8-K within 150 days of the meeting.
- **NO PRELIMINARY PROXY STATEMENT REQUIRED:** The Final Rules make it clear that a SOP Vote does not trigger the filing of a preliminary proxy statement. The Final Rules also expand this preliminary-filing exemption to any advisory vote on executive compensation, including where the advisory vote is not required.
- **NO BROKER DISCRETIONARY VOTING:** Consistent with Dodd-Frank and the Proposed Rules, the Final Rules do not allow broker discretionary voting with respect to the SOP Vote and the Frequency Vote.
- **TARP COMPANIES:** The Final Rules provide that a TARP company will continue to follow the TARP SOP rules until it is no longer subject to TARP. Because TARP companies have a SOP Vote every year, they do not have to hold a Frequency Vote. A TARP company will have to discuss in its CD&A last year’s SOP Vote. Once TARP is repaid, the company will then become subject to the Final Rules.
- **VOTE ON GOLDEN PARACHUTE ARRANGEMENTS:** Consistent with Dodd-Frank, the Final Rules require a separate shareholder vote on golden parachute arrangements in connection with certain corporate transactions. To effectuate this, the Final Rules amend Item 402 under Regulation S-K by adding new Item 402(t) that requires both a tabular and narrative disclosure of golden parachute arrangements generally for named executive officers of both the acquiring and target companies. This disclosure is not required in annual proxy statements.
- **DIRECTOR COMPENSATION EXEMPTION:** The Final Rules make it clear that compensation paid to a company’s directors is not subject to the SOP Vote.
- **SMALL COMPANY EXEMPTION:** Small companies (those with a public float of less than \$75 million) are not subject to Dodd-Frank and the Final Rules until the first annual (or other) meeting occurring after January 21, 2013.

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