Schulte Roth&Zabel

Alert

SEC Adopts Final Advisory Vote Rules

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On Jan. 25, 2011, the SEC adopted final rules relating to "say on pay" and "say on golden parachute" advisory votes. These rules require most domestic public companies to (i) submit named executive officer compensation to a non-binding "say on pay" vote at least once every three years, (ii) take a non-binding shareholder vote at least once every six years on the frequency of the SOP vote and (iii) in connection with soliciting shareholder approval of a merger, acquisition or similar transaction, take a non-binding vote on and provide enhanced disclosure concerning golden parachute arrangements. As discussed below, the final rules include two significant changes from the proposed rules, which were proposed on Oct. 18, 2010. This *Alert* describes these changes, as well as additional changes included in the final rules.

SRCs Provided with Two Year Exemption from "Say on Pay" and "Say on Frequency"
In a widely unexpected move, the SEC provided smaller reporting companies with a two year reprieve from having to hold SOP and SOF votes. A SRC will be subject to these requirements beginning with annual meetings held on or after Jan. 21, 2013. SRCs are, however, required to comply with the SOGP rules on the same timetable as other issuers.

Exclusion of Shareholder Proposals Relating to SOP and SOF Narrowed
As originally proposed, if the SOP frequency adopted by a company was consistent with the plurality of the votes cast, it would have been permitted to exclude a Rule 14a-8 shareholder proposal relating to SOP or SOF. The final rules change this standard to a majority of votes cast. To the extent that a single frequency does not receive a majority of the votes cast, the company would not be able to exclude a Rule 14a-8 proposal relating to SOP or SOF, even if the SOP frequency adopted is consistent with the plurality vote.

Example of SOP Resolution Provided
Consistent with the proposed rules, a SOP resolution is not required to follow a specific form. However, in the final rules, the SEC added a non-exclusive example of a resolution that would satisfy the SOP approval requirement:

> "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."

Frequency Disclosure Enhanced Slightly
The proposed rules contained a requirement that companies disclose in the annual meeting proxy statement the general effect of the SOF vote, such as whether the vote is non-binding. In addition to this requirement, the final rules require companies to indicate the current frequency of SOP votes and when the next scheduled SOP vote will occur.

Disclosure of Frequency Determination Moved to Form 8-K
The proposed rules would have required disclosure in the Form 10-Q or Form 10-K following a SOF vote of the SOP frequency adopted by the company. Under the final rules, this disclosure requirement has been shifted to Form 8-K. The SOP frequency determination must be disclosed in an amendment to the Item 5.07 Form 8-K disclosing the voting results of the annual meeting (a current requirement). The amendment must be filed within 150 days after the annual meeting, but no later than 60 days prior to the deadline for submission of Rule 14a-8 proposals for the subsequent annual meeting.

Effective Date of "Say on Golden Parachute" Rules Set
The SOGP vote, and the related enhanced disclosure, is required in applicable proxy statements filed on or after April 25, 2011.

For a discussion of the proposed rules and additional 2011 annual meeting guidance, please see our prior *Alert*.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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