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## New Say-on-Pay Rules

### Overview

The Securities and Exchange Commission has adopted new rules to require companies (i) to seek a shareholder advisory vote to approve compensation for executives disclosed pursuant to Item 402 of Regulation S-K; (ii) to conduct a separate shareholder advisory vote on how frequently the company will seek the shareholder vote on such compensation; and (iii) to disclose "golden parachute" compensation arrangements and, under certain circumstances, conduct a separate shareholder advisory vote to approve golden parachute compensation. The rules are intended to implement new Section 14A of the Securities Exchange Act of 1934 enacted pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.

### Shareholder Approval of Executive Compensation - Rule 14a-21(a)

In general, Rule 14a-21(a) requires companies to seek a separate shareholder vote on Item 402 compensation at least once every three calendar years. This vote is advisory. This requirement will apply to the first annual meeting of shareholders at which proxies will be solicited for the election of directors (or special meeting in lieu thereof) occurring on or after January 21, 2011. The shareholders will vote on the compensation information disclosed pursuant to Item 402, including the CD&A, compensation tables and narrative disclosures. However, disclosure pursuant to Items 402(k) and 402(r) (director compensation) and Item 402(s) (how compensation policies relate to risk management) will not be subject to the voting requirement. Smaller reporting companies are exempt from this requirement until their first annual meeting at which proxies will be solicited for the election of directors (or special meeting in lieu thereof) held on or after January 21, 2013.

Rule 14a-21(a) includes a non-exclusive example of a resolution that would satisfy the voting requirement 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.

Disclosure (other than for small reporting companies which are not required to provide CD&As) as to whether, and if so how, the Board or compensation committee has considered the results of the advisory vote is required in the CD&A. Item 402(b) has been amended to reflect this.

### Shareholder Approval of Frequency of Shareholder Voting on Executive Compensation

New Rule 14a-21(b) will require issuers, at least once every six calendar years, to seek a separate advisory shareholder vote on whether the shareholder advisory vote should occur every one, two or three years. The shareholders must be given the opportunity to cast an advisory vote on whether the shareholder vote on executive compensation will occur every one, two or three years, or to abstain from voting on the matter. Issuers may vote uninstructed proxy cards in accordance with management's recommendation for the frequency vote only if the issuer (1) includes a recommendation for the say-on-pay votes in the proxy statement, (2) permits abstention on the proxy card and (3) includes language regarding how uninstructed shares will be voted in bold on the proxy card. This vote on frequency is required only in a proxy statement for an annual meeting (or other meeting of shareholders at which directors will be elected) and applies to the first such meeting occurring on or after January 21, 2011. The vote is non-binding. Smaller reporting companies are exempt from this requirement until meetings held on or after January 21, 2013.

### Effect on Certain Rule 14a-8 Proposals

New Rule 14a-8(i)(10) permits the exclusion of a shareholder proposal providing for a say-on-pay or relating to frequency of say-on-pay votes if the issuer has adopted a policy on the frequency of say-on-pay votes that is consistent with and has been approved by a majority of the votes cast on the matter. However, if the frequency of vote is approved only by a plurality, the exclusion of say-on-pay and frequency of say-on-pay votes provided by Rule 14a-8(i)(10) is not available.

### Form 8-K

In addition to reporting results of votes on Form 8-K within four days of the shareholder meeting, pursuant to Item 5.07(b) of Form 8-K, issuers are now required to file an amendment to the previously Filed Form

8-K within 150 calendar days after the meeting (but not later than 60 calendar days prior to the deadline for submission of shareholder proposals under Rule 14a-8) in which issuers must disclose their determination as to how frequently they will conduct shareholder advisory votes on executive compensation. Technical amendments to Item 5.07(b) of Form 8-K address how to disclose the results of the frequency vote.

### **Non-Binding Nature of Votes**

The separate votes on executive compensation and frequency of such votes are advisory. New Item 24 of Schedule 14A requires disclosure as to the effect of the shareholder advisory votes, such as whether the votes are non-binding.

### **No Preliminary Proxy Statement Filing**

Rule 14a-6(a) has been amended to add votes on executive compensation and frequency of such votes as items for which preliminary proxy statements need not be filed, whether or not the disclosure provided and vote sought are pursuant to Section 14A.

### **No Discretionary Broker Voting**

Section 6(b) of the Exchange Act was amended by the Dodd-Frank Act to direct national exchanges to amend their rules to prohibit broker discretionary voting of uninstructed shares on shareholder votes in executive compensation or the frequency of such votes.

### **TARP**

If an issuer is still subject to TARP say-on-pay requirements, it will not also need to comply with say-on-pay or frequency vote requirements described above until its first annual (or special meeting in lieu thereof) meeting after all of its TARP debt has been repaid.

### **Golden Parachute Disclosure Requirements**

Pursuant to Section 14A(b) enacted pursuant to the Dodd-Frank Act, the Commission has amended Schedule 14A to expand the disclosure requirements for golden parachute payments in connection with solicitations for shareholder approval of acquisitions, mergers, consolidations, or sales of all or substantially all of the issuer's assets. New Item 402(t) of Regulation S-K requires disclosure of all golden parachute arrangements with respect to the named executive officers of the target and the acquiring company. The disclosure requires a new "Golden Parachute Compensation" table to present quantitative information about the individual components of the parachute compensation based on the consideration per share, if a fixed dollar amount, or, if there is no fixed dollar amount, on the average closing price per share over the first five business days following the first public announcement of the transaction.<sup>1</sup> Item 402(t) requires all parachute compensation to be disclosed whether or not it discriminates in favor of the NEOs or is *de minimis* in amount.<sup>2</sup>

Parachute payments are compensation that is based on or otherwise relates to an acquisition, merger, consolidation, sale or other disposition of all or substantially all of the assets of the issuer. The staff notes that equity awards that have vested without regard to the transaction or bona fide post-transaction employment arrangements would not be considered to relate to the transaction and, therefore, not subject to the disclosure.

Narrative descriptions of triggers, conditions to payment, how payments are made, who would make payments and how long payments are made are also required.

Disclosure of the golden parachute information is required in proxy statements, tender offer statements, information statements, registration statements on Form S-4 or F-4, going private filings on Schedule 13E, and situations requiring Item 14 of Schedule 14A disclosure. Certain exceptions and limitations for foreign private issuers and third party tender offers apply.

### **Advisory Vote on Golden Parachute Compensation**

Generally, Section 14A(h)(2) requires a shareholder vote on certain parachute arrangements. This vote is non-binding. New Rule 14a-21(c) implements and expands this requirement.

No vote is required if Item 402(t) information (discussed above) has been included in the executive compensation disclosure that was subject to a prior vote under Section 14A(a)(l) and Rule 14a-21(a), whether or not approved. Issuers should consider this alternative to streamline acquisition disclosures. However, generally changes in existing arrangements or addition of new arrangements after the prior vote would trigger the disclosure for the modified or new arrangements in the transaction disclosure proxy statement. In such case, only the new arrangements would be subject to a vote. The disclosure would include a table of all parachute compensation as well as a table showing only the new arrangement.

The Commission decided not to exempt smaller reporting companies from shareholder advisory votes on golden parachute payments.

We will issue a more detailed discussion of the golden parachute vote requirements shortly.

## Effective Date

The new rules relating to say-on-pay and frequency of votes will be effective 60 days after publication in the *Federal Register*. Compliance with the new rules relating to golden parachute disclosure and votes will be required for initial filings on and after April 25, 2011.

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1. Where 402(t) disclosure is included in an annual meeting proxy statement (discussed below), the price per share amount will be calculated based on the closing market price per share of the issuer's securities on the last business day of the issuer's last completed fiscal year.

2. Disclosure as to whether double or single triggers apply is also required.

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If you have any questions about the new Say-on-Pay rules, please contact a member of Venable's **Corporate Finance & Securities** group.

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