RADFORD ALERT

SEC Issues Proposed Rules for Shareholder Say on Pay

By Edward J. Speidel and Ram Kumar

The Securities Exchange Commission (SEC) released on October 18 its proposed rules for implementing Dodd-Frank legislation that deals with shareholder votes on executive compensation. Specifically, the proposed rules cover shareholder Say on Pay votes, the frequency of those votes and shareholder say on Golden Parachute payments related to merger and acquisition transactions.

By virtue of the Dodd-Frank legislation, the first Say on Pay vote will be required at annual meetings beginning January 21, 2011.

This relatively short timeframe necessitates a brief window for public comment (it closes November 18) for these proposals. Subsequent to the close of the comment period, the SEC will release final regulations, which is expected just after the close of the year, if not before. At that time, Radford will release a full analysis of the new rules and what they mean for companies and their Boards.

In the meantime, the following outlines the highlights of the SEC's proposals:

Proposed Rule	Highlights
Say on Pay	> Non-binding advisory vote; results of vote must be disclosed in 8K > Applies to executive compensation as disclosed in the CD&A narrative and compensation tables, including any material compensation risk (as identified in the CD&A) > Future CD&As must include discussion of how Say on Pay votes impact executive compensation decision-making
Say on Vote Frequency	> Non-binding advisory vote; results of vote must be disclosed in 8K and 10Q/10K > Shareholders to be given vote every six years on Say on Pay vote frequency > Four choices: annual, bi-annual, every three years, abstain

Say on Golden Parachute Payments	> Non-binding advisory vote taken in the proxy required for approving a change in control transaction > Disclosure required to be done in both tabular and narrative form > Exception if agreements were subject to earlier Say on Pay vote

The SEC also issued proposed rules governing the disclosure of golden parachute compensation. Specifically, disclosure would be required for the compensation each of the named executive officers (NEOs) would receive as a result of the transaction, including breakouts of compensation triggered solely by the transaction (single-trigger), and that triggered by termination in connection with the transaction (double-trigger). The SEC is also proposing that the terms of the compensation be disclosed, so that shareholders understand where the compensation will come from, how will it be paid, and what if any conditions are associated with it.

Radford Perspective

The most potentially controversial aspect to the above relates to single-trigger compensation; however, technology and life sciences industries have already gradually moved away from single-trigger payouts over the past several years. For those that have not, the likely implementation of these disclosure and voting rules will add fresh impetus for reconsideration of the practice.

As noted, companies can avoid a vote on change of control compensation at the time of the transaction by subjecting these arrangements to the regular Say on Pay vote. We anticipate some companies will consider this in 2011 in part to avoid the possibility of a negative vote at the time of a transaction, even though the vote is non-biding. If ISS elects to link its vote on the transaction itself, we expect a significant number of companies will have CIC compensation approved earlier.

More generally, much of the detail in these proposed rules was anticipated, and we expect little change in the final regulations. However, we do anticipate some internal discussion, if not debate, within companies related to the Say on Pay frequency. Beyond the administrative implications of the various vote periods, Boards will need to consider the recommendation they put in front of shareholders with respect to vote frequency.

As we noted in earlier Alerts, there are two schools of thoughts. One school says that more frequent votes will help to establish stronger relationships with shareholders that in turn will serve Boards and management when they need to seek approval for seemingly “off-spec” compensation proposals. The other school says that longer voting periods more closely reflect the nature of executive compensation, which is designed to reward sustained performance over time.

More Information

We encourage you to forward this Alert to your board members. And as always, we encourage you to contact us if you have questions. For more information, contact:

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