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Shareholder Approval of Executive Compensation and Golden Parachute Compensation; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 240 and 249

[Release Nos. 33–9178; 34–63768; File No. S7–31–10]

RIN 3235–AK68

Shareholder Approval of Executive Compensation and Golden Parachute Compensation

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to our rules to implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to shareholder approval of executive compensation and "golden parachute" compensation arrangements. Section 951 of the Dodd-Frank Act amends the Securities Exchange Act of 1934 by adding Section 14A, which requires companies to conduct a separate shareholder advisory vote to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S–K or any successor to Item 402. Section 14A also requires companies to conduct a separate shareholder advisory vote to determine how often an issuer will conduct a shareholder advisory vote on executive compensation. In addition, Section 14A requires companies soliciting votes to approve merger or acquisition transactions to provide disclosure of certain "golden parachute" compensation arrangements and, in certain circumstances, to conduct a separate shareholder advisory vote to approve the golden parachute compensation arrangements.

DATES: *Effective Date:* April 4, 2011.

Compliance Date: April 4, 2011, except that issuers must comply with Exchange Act Section 14A(b) and Rule 14a–21(c) and the amendments to Item 5 of Schedule 14A, Item 3 of Schedule 14C, Item 1011 of Regulation M–A, Item 11 of Schedule TO, Item 15 of Schedule 13E–3, and Item 8 of Schedule 14D–9 for initial preliminary proxy and information statements, Schedules TO, 13E–3, and 14D–9 and Forms S–4 and F–4 filed on or after April 25, 2011.

Companies that qualify as "smaller reporting companies" (as defined in 17 CFR 240.12b–2) as of January 21, 2011, including newly public companies that qualify as smaller reporting companies after January 21, 2011, will not be subject to Exchange Act Section 14A(a) and Rule 14a–21(a) and (b) until the first annual or other meeting of shareholders at which directors will be elected and for which the rules of the Commission require executive compensation disclosure pursuant to Item 402 of Regulation S–K (17 CFR 229.402) occurring on or after January 21, 2013.

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SUPPLEMENTARY INFORMATION: We are adopting new Rule 14a–21 and amendments to Rules 14a–4,[1] 14a–6,[2] 14a–8[3] and a new Item 24 and amendments to Item 5 of Schedule 14A[4] and amendments to Item 3 of Schedule 14C[5] under the Securities Exchange Act of 1934 ("Exchange Act").[6] We are also adopting amendments to Item 402[7] of Regulation S–K,[8] Item 1011[9] of Regulation M–A,[10] Item 15 of Schedule 13E–3,[11] Item 8 of Schedule 14D–9,[12] Item 11 of Schedule TO,[13] and amendments to Item 5.07 of Form 8–K.[14]

Table of Contents

I. Background and Summary
II. Discussion of the Amendments
A. Shareholder Approval of Executive Compensation
1. Rule 14a–21(a)
a. Proposed Rule
b. Comments on the Proposed Rule
c. Final Rule
2. Item 24 of Schedule 14A
a. Proposed Amendments
b. Comments on the Proposed Amendments
c. Final Rule
3. Amendments to Item 402(b) of Regulation S–K
a. Proposed Amendments
b. Comments on the Proposed Amendments
c. Final Rule
B. Shareholder Approval of the Frequency of Shareholder Votes on Executive Compensation
1. Rule 14a–21(b)
a. Proposed Rule
b. Comments on the Proposed Rule
c. Final Rule
2. Item 24 of Schedule 14A
a. Proposed Amendments
b. Comments on the Proposed Amendments
c. Final Rule
3. Amendment to Rule 14a–4
a. Proposed Amendments
b. Comments on the Proposed Amendments
c. Final Rule
4. Amendment to Rule 14a–8
a. Proposed Amendments
b. Comments on the Proposed Amendments
c. Final Rule
5. Amendment to Form 8–K
a. Proposed Amendments
b. Comments on the Proposed Amendments
c. Final Rule
6. Effect of Shareholder Vote
C. Issues Relating to Both Shareholder Votes Required by Section 14A(a)
1. Amendments to Rule 14a–6
a. Proposed Amendments
b. Comments on the Proposed Amendments
c. Final Rule
2. Broker Discretionary Voting
3. Relationship to Shareholder Votes on Executive Compensation for TARP Companies
D. Disclosure of Golden Parachute Arrangements and Shareholder Approval of Golden Parachute Arrangements
1. General
2. Item 402(t) of Regulation S–K
a. Proposed Amendments
b. Comments on the Proposed Amendments
i. General Comments on the Proposed Item 402(t) Table
ii. Comments on the Elements of Compensation and Presentation of the Proposed Item 402(t) Table
iii. Comments on Individuals Subject to Item 402(t) Disclosure
iv. Comments on Item 402(t) Disclosure in Annual Meeting Proxy Statements
c. Final Rule
i. Item 402(t) Table and Narrative Requirements
ii. Elements of Compensation and Presentation of Item 402(t) Table
iii. Individuals Subject to Item 402(t) Disclosure
iv. Item 402(t) Disclosure in Annual Meeting Proxy Statements
3. Amendments to Schedule 14A, Schedule 14C, Schedule 14D–9, Schedule 13E–3, Schedule TO, and Item 1011 of Regulation M–A
a. Proposed Amendments
b. Comments on the Proposed Amendments
c. Final Rule
4. Rule 14a–21(c)
a. Proposed Rule
b. Comments on the Proposed Rule
c. Final Rule
i. Scope of Rule 14a–21(c) Shareholder Advisory Vote
ii. Exceptions to Rule 14a–21(c) Shareholder Advisory Vote
E. Treatment of Smaller Reporting Companies

[1] 17 CFR 240.14a–4.
[2] 17 CFR 240.14a–6.
[3] 17 CFR 240.14a–8.
[4] 17 CFR 240.14a–101.
[5] 17 CFR 240.14c–101.
[6] 15 U.S.C. 78a *et seq.*
[7] 17 CFR 229.402.
[8] 17 CFR 229.10 *et seq.*
[9] 17 CFR 229.1011.
[10] 17 CFR 229.1000 *et seq.*
[11] 17 CFR 240.13e–100.
[12] 17 CFR 240.14d–101.
[13] 17 CFR 240.14d–100.
[14] 17 CFR 249.308.

F. Transition Matters
III. Paperwork Reduction Act
A. Background
B. Summary of the Final Rules
C. Summary of Comment Letters and Revisions to Proposals
D. Revisions to PRA Reporting and Cost Burden Estimates
IV. Cost-Benefit Analysis
A. Introduction
B. Comments on the Cost-Benefit Analysis
C. Benefits
D. Costs
V. Consideration of Impact on the Economy, Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation
VI. Final Regulatory Flexibility Act Analysis
A. Reasons for, and Objectives of, the Proposed Action
B. Legal Basis
C. Significant Issues Raised by Public Comments
D. Small Entities Subject to the Final Amendments
E. Reporting, Recordkeeping, and Other Compliance Requirements
F. Duplicative, Overlapping, or Conflicting Federal Rules
G. Significant Alternatives
VII. Statutory Authority and Text of the Amendments

I. Background and Summary

On October 18, 2010, we proposed a number of amendments to our rules relating to the shareholder approval of executive compensation and golden parachute compensation.[15] We proposed these rules to implement Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act").[16] As discussed in detail below, we have taken into consideration the comments received on the proposed amendments and are adopting several amendments to our rules.[17]

The Act amends the Exchange Act by adding new Section 14A. New Section 14A(a)(1) requires that "[n]ot less frequently than once every 3 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to approve the compensation of executives,"[18] as disclosed pursuant to Item 402 of Regulation S–K, or any successor to Item 402 (a "say-on-pay vote"). The shareholder vote to approve executive compensation required by Section 14A(a)(1) "shall not be binding on the issuer or the board of directors of an issuer."[19]

Section 951 of the Act also adds new Section 14A(a)(2) to the Exchange Act, requiring that, "[n]ot less frequently than once every 6 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to determine whether [the say-on-pay vote] will occur every 1, 2, or 3 years."[20] As discussed below, this shareholder vote "shall not be binding on the issuer or the board of directors of an issuer."[21]

In addition, Section 951 of the Act amends the Exchange Act by adding new Section 14A(b)(1), which requires that, in any proxy or consent solicitation material for a meeting of shareholders "at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of an issuer, the person making such solicitation shall disclose in the proxy or consent solicitation material, in a clear and simple form in accordance with regulations to be promulgated by the Commission, any agreements or understandings that such person has with any named executive officers of such issuer (or of the acquiring issuer, if such issuer is not the acquiring issuer) concerning any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to the acquisition, merger, consolidation, sale or other disposition of all or substantially all of the assets of the issuer[* * *]."[22] These compensation arrangements are often referred to as "golden parachute" compensation. Such disclosure must include the aggregate total of all such compensation that may be paid or become payable to or on behalf of such named executive officer, and the conditions upon which it may be paid or become payable.[23] Under Section 14A(b)(2), "unless such agreements or understandings have been subject to [the periodic shareholder vote described in Section 14A(a)(1)]," [24] a separate shareholder vote to approve such agreements or understandings and compensation as disclosed is also required.[25] As with the say-on-pay vote and the shareholder vote on the frequency of such votes, this shareholder vote "shall not be binding on the issuer or the board of directors of an issuer."[26]

In addition to their non-binding status, none of the shareholder votes required pursuant to Section 14A is to be construed "as overruling a decision by such issuer or board of directors."[27] These shareholder votes also do not "create or imply any change to the fiduciary duties of such issuer or board of directors"[28] nor do they "create or imply any additional fiduciary duties for such issuer or board of directors."[29] Further, these votes will not be construed "to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation."[30] Section 14A also provides that "the Commission may, by rule or order, exempt an issuer or class of issuers" from the shareholder

[15] See Release No. 33–9153 (October 18, 2010) [75 FR 66590] (the "Proposing Release").

[16] Public Law 111–203 (July 21, 2010).

[17] The public comments we received on the Proposing Release are available on our Web site at *http://www.sec.gov/comments/s7-31-10/s73110.shtml.* In addition, to facilitate public input on the Act, the Commission provided a series of e-mail links, organized by topic, on its Web site at *http://www.sec.gov/spotlight/regreformcomments.shtml.* The public comments we received on Section 951 of the Act are available on our Web site *at http://www.sec.gov/comments/df-title-ix/executive-compensation/executive-compensation.shtml.*

[18] Exchange Act Section 14A(a)(1). Section 951 of the Act includes the language "or other meeting of the shareholders," which is similar to corresponding language in Section 111(e)(1) of the Emergency Economic Stabilization Act of 2008, or EESA, 12 U.S.C. 5221. As noted in the Proposing Release, we have previously considered this language in connection with companies required to provide a separate shareholder vote on executive compensation so long as the company has outstanding obligations under the Troubled Asset Relief Program, or TARP. *See Shareholder Approval of Executive Compensation of TARP Recipients,* Release No. 34–61335 (Jan. 12, 2010) [75 FR 2789] (hereinafter, the "TARP Adopting Release"). We continue to view this provision to require a separate shareholder vote on executive compensation only with respect to an annual meeting of shareholders for which proxies will be solicited for the election of directors, or a special meeting in lieu of such annual meeting. Similarly, Rules 14a–21(a) and (b) are intended to result in issuers conducting the required advisory votes in connection with the election of directors, the proxy materials for which are required to include disclosure of executive compensation.

[19] Exchange Act Section 14A(c).

[20] Exchange Act Section 14A(a)(2).

[21] Exchange Act Section 14A(c).

[22] Exchange Act Section 14A(b)(1).

[23] Exchange Act Section 14A(b)(1).

[24] Exchange Act Section 14A(b)(2).

[25] Exchange Act Section 14A(b)(2).

[26] Exchange Act Section 14A(c).

[27] Exchange Act Section 14A(c)(1).

[28] Exchange Act Section 14A(c)(2).

[29] Exchange Act Section 14A(c)(3).

[30] Exchange Act Section 14A(c)(4). In addition, Exchange Act Section 14A(d) provides that every institutional manager subject to Exchange Act Section 13(f) [15 U.S.C. 78m(f)] shall report at least annually how it voted on any shareholder vote required by Section 951 of the Act, including the shareholder vote on executive compensation, the shareholder vote on the frequency of shareholder votes on executive compensation, and the golden parachute compensation vote, unless such vote is otherwise required to be reported publicly by rule or regulation of the Commission. Amendments to our rules to implement this requirement were proposed in a separate rulemaking. *See Reporting of Proxy Votes on Executive Compensation and Other Matters,* Release No. 34–63123 (Oct. 18, 2010) [75 FR 66622].

advisory votes required by Section 14A.[31] In determining whether to make an exemption, the Commission is directed to take into account, among other considerations, whether the requirements of Section 14A(a) and (b) disproportionately burden small issuers.[32]

Section 14A(a)(3) requires that both the initial shareholder vote on executive compensation and the initial vote on the frequency of votes on executive compensation be included in proxy statements "for the first annual or other meeting of the shareholders occurring after the end of the 6-month period beginning on the date of enactment" of the Act.[33] Thus, the statute requires separate resolutions subject to shareholder vote to approve executive compensation and to approve the frequency of say-on-pay votes for proxy statements relating to an issuer's first annual or other meeting of the shareholders occurring on or after January 21, 2011, whether or not the Commission has adopted rules to implement Section 14A(a). Because Section 14A(a) applies to shareholder meetings taking place on or after January 21, 2011, any proxy statement that is required to include executive compensation disclosure pursuant to Item 402 of Regulation S–K, whether in preliminary or definitive form, even if filed prior to this date, for meetings taking place on or after January 21, 2011, must include the separate resolutions for shareholders to approve executive compensation and the frequency of say-on-pay votes required by Section 14A(a) without regard to whether the amendments in this release are in effect by that time.[34]

With respect to the disclosure of golden parachute arrangements in accordance with Commission regulations in merger proxy statements required by Section 14A(b)(1), we note that the statute similarly references a 6-month period beginning on the date of enactment of the Act. However, because the statute requires such disclosure to be "in accordance with regulations to be promulgated by the Commission,"[35] the golden parachute compensation arrangements disclosure under proposed new Item 402(t) and a separate resolution to approve golden parachute compensation arrangements pursuant to Rule 14a–21(c) will not be required for merger proxy statements relating to a meeting of shareholders until the effective date of our rules implementing Section 14A(b)(1). The rule amendments we adopt today with respect to new Rule 14a–21(c) and the amendments to the disclosure requirements in Item 5 of Schedule 14A, Item 3 of Schedule 14C, Item 1011 of Regulation M–A, Item 11 of Schedule TO, Item 15 of Schedule 13E–3, and Item 8 of Schedule 14D–9, are effective for initial filings on or after April 25, 2011.

We received over 60 comment letters in response to the proposed amendments. In addition, we received over a dozen letters relating to Section 951 of the Act.[36] These letters came from corporations, pension funds, professional associations, trade unions, law firms, consultants, academics, individual investors, and other interested parties. In general, the commentators supported the proposed amendments that would implement Section 951 of the Act. Some commentators, however, opposed some of the proposed amendments and suggested modifications or alternatives to the proposals.

We have reviewed and considered all of the comments that we received relating to the proposed amendments. The adopted rules reflect changes made in response to many of these comments. We discuss our revisions with respect to each proposed rule amendment in more detail throughout this release.

We are adopting Rule 14a–21 to provide a separate shareholder vote to approve executive compensation, to approve the frequency of such votes on executive compensation and to approve golden parachute compensation arrangements in connection with certain extraordinary business transactions. We are also adopting a new Item 24 of Schedule 14A to provide disclosure regarding the effect of the shareholder votes required by Rule 14a–21, such as whether each vote is non-binding. In addition, our amendments to Item 5 of Schedule 14A, Item 3 of Schedule 14C, Item 1011 of Regulation M–A, Item 8 of Schedule 14D–9, and Item 15 of Schedule 13E–3 will require additional disclosure regarding golden parachute arrangements in connection with certain extraordinary business transactions, Rule 13e–3[37] going-private transactions and tender offers.

We are also adopting amendments to Item 402 of Regulation S–K to require disclosure of an issuer's consideration of the say-on-pay vote in its Compensation Discussion and Analysis, and to prescribe disclosure about golden parachute compensation arrangements in new Item 402(t). In addition, we are adopting an instruction to Rule 14a–8 to clarify the treatment of shareholder proposals relating to the shareholder advisory votes required by Rule 14a–21. Finally, we are adopting amendments to Form 8–K to facilitate disclosure of the results of the shareholder advisory vote on the frequency of say-on-pay votes, and to require disclosure about whether and how the issuer will implement the results of the shareholder advisory vote on the frequency of say-on-pay votes.

II. Discussion of the Amendments

A. Shareholder Approval of Executive Compensation

1. Rule 14a–21(a)

Proposed Rule 14a–21(a) would require issuers,[38] not less frequently than once every three years, to include in their proxy statements a separate shareholder advisory vote to approve the compensation of executives. We are adopting the rule substantially as proposed with some changes in response to comments.

a. Proposed Rule

Under our proposed rule, an issuer would be required, not less frequently than once every three years, to provide a separate shareholder advisory vote in proxy statements to approve the compensation of its named executive officers, as defined in Item 402(a)(3)[39] of Regulation S–K. Rule 14a–21(a), as proposed, would specify that the separate shareholder vote on executive compensation is required only when proxies are solicited for an annual or other meeting of security holders for which our rules require the disclosure of executive compensation pursuant to Item 402 of Regulation S–K. Proposed Rule 14a–21(a) would require a separate shareholder vote to approve the compensation of executives for the first annual or other such meeting of shareholders occurring on or after January 21, 2011, the first day after the end of the 6-month period beginning on the date of enactment of the Act.

In accordance with Section 14A(a)(1), shareholders would vote to approve the compensation of the issuer's named

[31] Exchange Act Section 14A(e).

[32] Exchange Act Section 14A(e).

[33] Exchange Act Section 14A(a)(3).

[34] See Section II.E below for a discussion of a temporary exemption for smaller reporting companies.

[35] Exchange Act Section 14A(b)(1).

[36] These comment letters were received prior to publication of the Proposing Release. See note 17 above.

[37] 17 CFR 240.13e–3.

[38] Our rules as adopted apply to issuers who have a class of equity securities registered under Section 12 [15 U.S.C. 78*l*] of the Exchange Act and are subject to our proxy rules. Foreign private issuers, as defined in Rule 3b–4(c) [17 CFR 240.3b–4(c)], are not required under Section 14A or the rules we are adopting today to conduct a shareholder advisory vote on executive compensation nor a shareholder advisory vote on the frequency of such votes.

[39] 17 CFR 229.402(a)(3).

executive officers, as such compensation is disclosed pursuant to Item 402 [40] of Regulation S–K, including the Compensation Discussion and Analysis ("CD&A"), the compensation tables and other narrative executive compensation disclosures required by Item 402. We also proposed an instruction to Rule 14a–21 to specify that the rule does not change the scaled disclosure requirements for smaller reporting companies and that smaller reporting companies would not be required to provide a CD&A in order to comply with Rule 14a–21.

b. Comments on the Proposed Rule

Commentators were generally supportive of the proposal. Many commentators agreed with the approach, as proposed, not to designate specific language to be used or require issuers to frame the shareholder vote to approve executive compensation in the form of a standard resolution.[41] Some commentators indicated that issuers should have flexibility in drafting the resolution.[42] Commentators noted that flexibility would permit issuers to tailor the resolution to the issuer's individual circumstances.[43] Others stated that we should designate specific language for the resolution [44] or at least establish clear, minimum guidelines,[45] principles-based guidelines,[46] or model language,[47] while other commentators suggested we include language for a resolution in the form of non-exclusive examples [48] or a safe harbor.[49] Commentators indicated that it would be helpful to have an example of resolution language that would comply with the rule [50] and that sample language would simplify the drafting process for issuers and promote efficiency.[51]

Many commentators agreed with our proposed approach not to exempt smaller reporting companies from Rule 14a–21(a) and Exchange Act Section 14A(a)(1).[52] Some commentators did suggest that smaller reporting companies should be exempt from the say-on-pay vote [53] or required to conduct a say-on-pay vote on a triennial basis beginning in 2013.[54]

Some commentators suggested that we clarify the relationship between the federally created right and state law voting rights.[55] Most commentators, however, indicated there was no need for the Commission to adopt rules as to which shares are entitled to vote.[56] One commentator asserted that the issue as to which shares are entitled to vote is traditionally a state law matter that we do not need to address in our rulemaking.[57]

c. Final Rule

After considering the comments, we are adopting Rule 14a–21(a) substantially as proposed with some modifications. Under the final rule, issuers will be required, not less frequently than once every three years, to provide a separate shareholder advisory vote in proxy statements to approve the compensation of their named executive officers, as defined in Item 402(a)(3) of Regulation S–K. Rule 14a–21(a) specifies that the separate shareholder vote on executive compensation is required only when proxies are solicited for an annual or other meeting of security holders for which our rules require the disclosure of executive compensation pursuant to Item 402 of Regulation S–K. We have modified the proposal to clarify in the rule that the shareholder vote on executive compensation required by Exchange Act Section 14A(a)(1) and Rule 14a–21(a) is required with respect to an annual meeting of shareholders at which proxies will be solicited for the election of directors, or a special meeting in lieu of such annual meeting.[58] In addition, we have modified the rule to clarify that a say-on-pay vote is required at least once every three calendar years. Commentators expressed the view that as proposed, the rule would have required a say-on-pay vote within three years of the date of the most recent say-on-pay vote, which in some cases could have required a say-on-pay vote more frequently than once every three calendar years.[59]

As adopted, Rule 14a–21(a) requires a separate shareholder vote to approve the compensation of executives for the first annual or other meeting of shareholders occurring on or after January 21, 2011, the first day after the end of the 6-month period beginning on the date of enactment of the Act. In accordance with Section 14A(a)(1), shareholders would vote to approve the compensation of the issuer's named executive officers, as such compensation is disclosed pursuant to Item 402 [60] of Regulation S–K, including the CD&A, the compensation tables and other narrative executive compensation disclosures required by Item 402.[61] We have included an instruction to Rule 14a–21 to specify that Rule 14a–21 does not change the scaled disclosure requirements for smaller reporting companies and that smaller reporting companies will not be required to provide a CD&A in order to comply with Rule 14a–21. We understand that smaller reporting companies may wish to include supplemental disclosure to facilitate shareholder understanding of

[40] We proposed that if disclosure of golden parachute compensation arrangements pursuant to proposed Item 402(t) is included in an annual meeting proxy statement, such disclosure would be included in the disclosure subject to the shareholder advisory vote under Rule 14a–21(a). Such disclosure under Item 402(t), however, would not be required to be included in annual meeting proxy statements.

[41] *See, e.g.,* letters from American Federation of State, County and Municipal Employees ("AFSCME"), Center on Executive Compensation ("Center on Exec. Comp."), Compensia ("Compensia"), Davis Polk & Wardwell LLP ("Davis Polk"), the Financial Services Roundtable ("FSR"), Pfizer Inc. ("Pfizer"), Protective Life Corporation ("Protective Life"), and United Brotherhood of Carpenters ("UBC").

[42] *See, e.g.,* letters from Business Roundtable ("Business Roundtable") and Towers Watson ("Towers Watson").

[43] *See* letter from Business Roundtable.

[44] *See, e.g.,* letters from National Association of Corporate Directors ("NACD"), PGGM Investments ("PGGM"), Public Citizen ("Public Citizen"), and WorldatWork ("WorldatWork").

[45] *See, e.g.,* letters from Boston Common Asset Management ("Boston Common"), First Affirmative Financial Network, LLC ("First Affirmative"), Glass Lewis & Co. ("Glass Lewis"), Social Investment Forum ("Social Investment"), and Walden Asset Management ("Walden").

[46] *See, e.g.,* letters from International Corporate Governance Network ("ICGN") and Teachers Insurance and Annuities Association of America and College Retirement Equities Fund ("TIAA–CREF").

[47] *See, e.g.,* letter from Calvert Group, Ltd. ("Calvert").

[48] *See, e.g.,* letters from Society of Corporate Secretaries and Governance Professionals ("Society of Corp. Sec.") and Sullivan & Cromwell LLP ("Sullivan").

[49] *See, e.g.,* letters from The Boeing Company ("Boeing") and Pearl Meyer & Partners ("PM&P").

[50] *See* letter from Society of Corp. Sec.

[51] *See* letter from Sullivan.

[52] *See, e.g.,* letters from California Public Employees Retirement System ("CalPERS"), Council of Institutional Investors ("CII"), Glass Lewis, ICGN, PGGM, and the State Board of Administration of Florida ("SBA of Florida").

[53] *See, e.g.,* letters from NACD and UBC.

[54] *See* letter from the Committee on Federal Regulation of Securities, Section of Business Law of the American Bar Association ("ABA").

[55] *See, e.g.,* letter from the ABA.

[56] *See, e.g.,* letters from Business Roundtable, FSR, Pfizer, PGGM, and Protective Life.

[57] *See* letter from Business Roundtable.

[58] See the discussion in Note 18 above.

[59] *See* letter from ABA.

[60] If disclosure of golden parachute compensation arrangements pursuant to Item 402(t) is included in an annual meeting proxy statement, such disclosure would be included in the disclosure subject to the shareholder advisory vote under Rule 14a–21(a). Such disclosure under Item 402(t), however, is not required to be included in all annual meeting proxy statements.

[61] While not required, our rules "would not preclude an issuer from seeking more specific shareholder opinion through separate votes on cash compensation, golden parachute policy, severance or other aspects of compensation." *See* Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010, S. Rep. No. 111–176 at 133 (2010).

their compensation arrangements in connection with say-on-pay votes.[62] We do not believe, however, that this possibility supports exempting smaller reporting companies from the say-on-pay votes. As more fully discussed in Section II.E below, in order to ease compliance burdens for smaller reporting companies, we are adopting a two-year temporary exemption before these companies are required to conduct a shareholder advisory vote to approve executive compensation to permit these companies additional time to prepare for the new shareholder advisory votes.

As noted in the Proposing Release, consistent with Section 14A, the compensation of directors, as disclosed pursuant to Item 402(k)[63] or Item 402(r)[64] is not subject to the shareholder advisory vote. In addition, if an issuer includes disclosure pursuant to Item 402(s)[65] of Regulation S–K about the issuer's compensation policies and practices as they relate to risk management and risk-taking incentives, these policies and practices will not be subject to the shareholder advisory vote required by Section 14A(a)(1) as they relate to the issuer's compensation for employees generally. We note, however, that to the extent that risk considerations are a material aspect of the issuer's compensation policies or decisions for named executive officers, the issuer is required to discuss them as part of its CD&A,[66] and therefore such disclosure would be considered by shareholders when voting on executive compensation.

Though we have considered the views of commentators that prescribed language would be helpful, the final rule does not require issuers to use any specific language or form of resolution to be voted on by shareholders. This is consistent with the approach taken by the Commission in adopting Rule 14a–20 to implement the shareholder advisory vote on executive compensation for companies subject to the Emergency Economic Stabilization Act of 2008, or EESA. We believe that issuers should retain flexibility to craft the resolution language. As we noted in the Proposing Release, however, the shareholder advisory vote must relate to all executive compensation disclosure disclosed pursuant to Item 402 of Regulation S–K. Section 14A(a)(1) of the Exchange Act requires that the shareholder advisory vote must be "to approve the compensation of executives, as disclosed pursuant to [Item 402 of Regulation S–K] or any successor thereto."[67] We have added an instruction to Rule 14a–21(a) to indicate that this language from Section 14A(a)(1) should be included in an issuer's resolution for the say-on-pay vote and to provide a non-exclusive example of a resolution that would satisfy the applicable requirements.[68] A vote to approve a proposal on a different subject matter, such as a vote to approve only compensation policies and procedures, would not satisfy the requirement of Section 14A(a)(1) or final Rule 14a–21(a). We note that issuers are not limited to the required shareholder advisory vote under Rule 14a–21(a) and may solicit shareholder votes on a range of compensation matters to obtain more specific feedback on the issuer's compensation policies and programs.

2. Item 24 to Schedule 14A

We proposed a new Item 24 to Schedule 14A, to require disclosure in any proxy statement in which an issuer is providing a separate shareholder vote on executive compensation to briefly explain the general effect of the vote, such as whether the vote is non-binding. We are adopting this amendment to Schedule 14A as proposed with some modifications.

a. Proposed Amendments

Pursuant to proposed new Item 24 of Schedule 14A, issuers would be required to disclose in a proxy statement for an annual meeting (or other meeting of shareholders for which our rules require executive compensation disclosure) that they are providing a separate shareholder vote on executive compensation and to briefly explain the general effect of the vote, such as whether the vote is non-binding.[69] This was similar to the approach taken by the Commission in connection with disclosure requirements about the shareholder vote on executive compensation for companies subject to the EESA.[70]

b. Comments on the Proposed Amendments

Commentators were generally supportive of proposed Item 24 of Schedule 14A. We requested comment regarding whether any additional disclosures should be provided by issuers that would be useful to shareholders. Two commentators indicated that we should amend the proposal to require disclosure of the results of previous votes on executive compensation.[71] Another commentator suggested that we should remove the reference to the "general effect" of the vote as it would lead to boilerplate disclosure and remove the word "whether" from the rule given the non-binding nature of the vote.[72]

c. Final Rule

After considering the comments, we are adopting Item 24 to Schedule 14A as proposed with some modifications.[73] Though we agree that the disclosure of previous results would be useful to shareholders, these results are required to be disclosed pursuant to Item 5.07 of Form 8–K immediately following the votes. Consequently, we do not believe it is necessary to mandate such disclosure in Item 24 of Schedule 14A. As discussed below, we have modified the proposal to require disclosure of the current frequency of say-on-pay votes and to require disclosure of when the next say-on-pay vote will occur.

Item 24 is consistent with the approach taken by the Commission in Item 20 of Schedule 14A in connection with disclosure requirements about the shareholder advisory vote on executive compensation for companies subject to EESA. Based on our experience with these votes, we believe that such requirements will lead to disclosure of useful information about the nature and effect of the vote for shareholders to consider, such as whether the vote is non-binding. We note that although not required, issuers may choose to provide additional disclosure in their proxy materials.

3. Amendments to Item 402(b) of Regulation S–K

Item 402 requires the disclosure of executive compensation and includes

[62] *See* letter from Society of Corp. Sec., which notes that smaller reporting companies may "feel compelled to include CD&A to provide additional disclosure so as to reduce the potential for an unfavorable shareholder vote."

[63] 17 CFR 229.402(k).

[64] 17 CFR 229.402(r).

[65] 17 CFR 229.402(s).

[66] *See Proxy Disclosure Enhancements,* Release No. 33–9089 (Dec. 16, 2009) [74 FR 68334] at note 38.

[67] Exchange Act Section 14A(a)(1).

[68] Instruction to Rule 14a–21(a) provides the following non-exclusive example that would satisfy Rule 14a–21(a): "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."

[69] Section 14A(a) does not require additional disclosure with respect to the non-binding nature of the vote. We proposed to require additional disclosure so that information about the advisory nature of the vote is available to shareholders before they vote. We continue to believe this information should be available to shareholders.

[70] *See* Item 20 of Schedule 14A; TARP Adopting Release, *supra* note 18, at 75 FR 2790.

[71] *See* letters from ICGN and PGGM.

[72] *See* letter from ABA.

[73] See discussion of the modification to the proposed Item 24 relating to the frequency of say-on-pay votes below at Section II.B.2.c.

requirements prescribing narrative and tabular disclosure, as well as separate scaled disclosure requirements for smaller reporting companies.[74] Item 402(b)[75] contains the requirement for CD&A, which is intended to be a narrative overview that puts into context the executive compensation disclosure provided elsewhere in response to the requirements of Item 402. The CD&A disclosure requirement is principles-based, in that it identifies the disclosure concept and provides several non-exclusive examples. Under Item 402(b)(1), issuers must explain all material elements of their named executive officers' compensation by addressing mandatory principles-based topics in their CD&A.[76] Item 402(b)(2) of Regulation S–K sets forth certain non-exclusive examples of the kind of information that an issuer should address in its CD&A, depending upon the facts and circumstances.

In connection with our implementation of Section 14A(a)(1), we proposed amendments to require disclosure in CD&A regarding how issuers have considered the results of previous say-on-pay votes required by Section 14A and Rule 14a–20.[77] After reviewing comments on this proposal, we are adopting amendments to Item 402(b)(1) as proposed, with some modifications in response to concerns raised by commentators.

a. Proposed Amendments

We proposed to amend Item 402(b)(1) to add to the mandatory CD&A topics whether, and if so, how an issuer has considered the results of previous shareholder votes on executive compensation required by Section 14A or Rule 14a–20 in determining compensation policies and decisions and, if so, how that consideration has affected its compensation policies and decisions. We did not propose to add a specific requirement for smaller reporting companies to provide disclosure about how previous votes pursuant to Section 14A or Rule 14a–20 affected compensation policies and decisions because in our view such information would not be as valuable outside the context of a complete CD&A covering the full range of matters required to be addressed by Item 402(b), which smaller reporting companies are not required to provide.

b. Comments on the Proposed Amendments

Comments on the proposal were mixed. Several commentators expressed support for an amendment to Item 402(b)(1) to require that issuers discuss the results of the shareholder vote and its effect, if any, on executive compensation decisions and policies.[78] Many of these commentators agreed with the proposal that discussion of say-on-pay vote results in CD&A should be mandatory,[79] in some cases noting that this would provide shareholders a better understanding of how the board of directors considered the results of shareholder advisory votes[80] and encourage a dialogue between issuers and shareholders on the topic of compensation.[81] Commentators also indicated that a mandatory discussion of the consideration of say-on-pay votes will aid transparency of issuers' disclosures on compensation[82] and will help investors better understand compensation decisions made by issuers.[83]

A number of commentators stated that it would be more appropriate instead to include consideration of say-on-pay votes among the non-exclusive examples of the kind of information that should be addressed in CD&A, only if material given the issuer's individual facts and circumstances[84] because this approach would avoid boilerplate disclosure and require discussion only when material,[85] and that discussion on a mandatory basis may lead to awkward and non-substantive disclosure if the issuer has not made changes to its compensation program in response to the shareholder vote.[86]

Other commentators stated that no amendment to CD&A is required[87] because the Act does not require additional CD&A disclosure and it should not be required by rule,[88] the proposed amendment would add length to CD&A without providing meaningful information to shareholders,[89] and the amendment would deem the consideration of say-on-pay votes material whether such consideration is material or not.[90] Similarly a number of commentators who asserted that amending Item 402(b) is not required also expressed the view that if the Commission does adopt an amendment, such CD&A disclosure should be required only if material under the issuer's individual facts and circumstances.[91]

Commentators also disagreed with respect to which say-on-pay votes should be covered by the CD&A discussion. Some favored only the most recent say-on-pay vote,[92] indicating that mandating discussion of prior votes would result in extraneous discussion[93] and little benefit.[94] Other commentators indicated that prior votes should also be required to be addressed.[95] These commentators noted that such disclosure of prior votes is appropriate given the long-term process of determining compensation[96] and that it would permit investors to evaluate any trends in the results of say-on-pay votes.[97] One commentator stated that if CD&A disclosure with respect to say-on-pay votes is mandatory, it should be limited to the most recent vote, but if not mandatory should not be so limited.[98] Although there was little response to our request for comment regarding whether smaller reporting companies should be required to disclose their consideration of

[74] Item 402 also includes requirements to disclose director compensation (Items 402(k) and 402(r)) and the issuer's compensation policies as they relate to risk management (Item 402(s)).

[75] 17 CFR 229.402(b).

[76] These mandatory principles-based topics require the company to disclose the objectives of the company's compensation programs; what the compensation program is designed to reward; each element of compensation; why the company chooses to pay each element; how the company determines the amount (and, where applicable, the formula) for each element; and how each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements.

[77] 17 CFR 240.14a–20. Pursuant to the EESA, issuers that have received financial assistance under the Troubled Asset Relief Program, or TARP, are required to conduct a separate annual shareholder vote to approve executive compensation during the period in which any obligation arising from the financial assistance provided under the TARP remains outstanding.

[78] *See, e.g.,* letters from CalPERS, Calvert, CII, Colorado Public Employees' Retirement Association ("COPERA"), ICGN, Meridian Compensation Partners ("Meridian"), PGGM, Pensions Investment Research Consultants ("PIRC"), SBA of Florida, Sullivan, and TIAA–CREF.

[79] *See, e.g.,* letters from CalPERS, Calvert, CII, PGGM, PIRC, SBA of Florida, and TIAA–CREF.

[80] *See* letter from CalPERS.

[81] *See* letter from TIAA–CREF.

[82] *See* letter from PIRC.

[83] *See* letter from SBA of Florida.

[84] *See, e.g.,* letters from ABA, Boeing, Business Roundtable, Eaton Corporation ("Eaton"), FSR, PM&P, Sullivan, and UnitedHealth Group ("UnitedHealth").

[85] *See, e.g.,* letter from UnitedHealth.

[86] *See* letter from PM&P.

[87] *See, e.g.,* letters from Center on Exec. Comp., Compensia, Davis Polk, Pfizer, Society of Corp. Sec., and UBC.

[88] *See, e.g.,* letter from Center on Exec. Comp.

[89] *See* letter from Davis Polk.

[90] *See, e.g.,* letter from Society of Corp. Sec.

[91] *See, e.g.,* letters from Compensia, Davis Polk, and Society of Corp. Sec.

[92] *See, e.g.,* letters from ABA, Boeing, Eaton, FSR, McGuireWoods ("McGuireWoods"), Meridian, NACD, Pfizer, Protective Life, and Sullivan.

[93] *See* letter from Sullivan.

[94] *See* letter from McGuireWoods.

[95] *See, e.g.,* letters from Chris Barnard ("Barnard"), Calvert, PGGM, PIRC, PM&P, and SBA of Florida.

[96] *See, e.g.,* letter from PGGM.

[97] *See, e.g.,* letter from SBA of Florida.

[98] *See* letter from Boeing.

shareholder advisory votes on executive compensation, one commentator stated that our existing disclosure requirements for these companies are sufficient.[99]

c. Final Rule

After considering the comments, we are adopting amendments to the disclosure requirements of Item 402(b)(1) substantially as proposed, with a modification to clarify that this mandatory topic relates to the issuer's consideration of the most recent say-on-pay vote. As discussed below, issuers should address their consideration of the results of earlier say-on-pay votes, to the extent material.

The final rule amends Item 402(b)(1) to require issuers to address in CD&A whether and, if so, how their compensation policies and decisions have taken into account the results of the most recent shareholder advisory vote on executive compensation. Although it is not mandated by Section 951 of the Act, we continue to believe that including this mandatory topic in CD&A will facilitate better investor understanding of issuers' compensation decisions. Because the shareholder advisory vote will apply to all issuers, we view information about how issuers have responded to such votes as more in the nature of a mandatory principles-based topic than an example. The manner in which individual issuers may respond to such votes in determining executive compensation policies and decisions will likely vary depending upon facts and circumstances. We expect that this variation will be reflected in the CD&A disclosures.

Following consideration of the comments received, we have decided to limit the mandatory topic to whether, and if so, how the issuer has considered the results of the most recent say-on-pay vote in determining compensation policies and decisions, and if so, how that consideration has affected the issuer's executive compensation policies and decisions.[100] This modification reflects that, in making voting and investment decisions, shareholders will benefit from understanding what consideration the issuer has given to the most recent say-on-pay vote. Limiting the mandatory topic to the most recent shareholder vote should also focus the disclosure so there should not be lengthy boilerplate discussions of all previous votes. Although we have added issuer consideration of the most recent say-on-pay vote to the mandatory topics, we believe that, consistent with the principles-based nature of CD&A, issuers should address their consideration of the results of earlier say-on-pay votes to the extent such consideration is material to the compensation policies and decisions discussed.

Because companies with outstanding indebtedness under the TARP will continue to have an annual say-on-pay vote until they repay all such indebtedness, these votes should be addressed by issuers in CD&A as well. To reflect our treatment of companies subject to EESA with outstanding obligations under TARP, we have also modified the amendment to Item 402(b)(1) as adopted to address issuer consideration of the results of the most recent shareholder advisory vote on executive compensation required by Section 14A *or* Rule 14a–20. This reflects that the vote required pursuant to the EESA and 14a–20 is effectively the same vote that would be required under Section 14A(a)(1).[101]

Smaller reporting companies are subject to scaled disclosure requirements in Item 402 of Regulation S–K and are not required to include a CD&A. We are not adding a specific requirement for smaller reporting companies to provide disclosure about how previous votes pursuant to Section 14A affected compensation policies and decisions because we believe such information would not be as valuable outside the context of a complete CD&A covering the full range of matters required to be addressed by Item 402(b). However, we note that pursuant to Item 402(o) of Regulation S–K, [102] smaller reporting companies are required to provide a narrative description of any material factors necessary to an understanding of the information disclosed in the Summary Compensation Table. If consideration of prior say-on-pay votes is such a factor for a particular issuer, disclosure would be required pursuant to Item 402(o).

B. Shareholder Approval of the Frequency of Shareholder Votes on Executive Compensation

1. Rule 14a–21(b)

We proposed Rule 14a–21(b) pursuant to which issuers would be required, not less frequently than once every six years, to provide a separate shareholder advisory vote in proxy statements to determine the frequency of the shareholder vote on the compensation of executives required by Section 14A(a)(1). We are adopting this amendment substantially as proposed with slight modifications in response to comments.

a. Proposed Rule

Under proposed Rule 14a–21(b), issuers would be required, not less frequently than once every six years, to provide a separate shareholder advisory vote in proxy statements for annual meetings to determine whether the shareholder vote on the compensation of executives required by Section 14A(a)(1) "will occur every 1, 2, or 3 years." [103] As proposed, Rule 14a–21(b) would also clarify that the separate shareholder vote on the frequency of shareholder votes on executive compensation would be required only in a proxy statement for an annual or other meeting of shareholders for which our rules require compensation disclosure. Consistent with Section 14A, issuers would be required to provide the separate shareholder vote on the frequency of the say-on-pay vote for the first annual or other such meeting of shareholders occurring on or after January 21, 2011.

b. Comments on the Proposed Rule

Comments on the proposal were generally favorable. Many commentators agreed that the rule did not need to specify the required language to be used for the shareholder vote on the frequency of shareholder votes to approve executive compensation.[104] Some commentators, however, recommended that the Commission should specify language or provide non-exclusive examples of resolutions so issuers would know how the requirement may be satisfied.[105] A number of commentators also requested that the Commission clarify whether the vote should be presented in the form of a resolution given that shareholders will have a choice among three frequencies

[99] *See* letter from ICGN.

[100] Reporting companies are currently required to disclose, pursuant to Item 5.07 of Form 8–K [17 CFR 249.208a], the preliminary results of a shareholder vote within four business days after the end of the meeting at which the vote is held and final voting results within four business days after the final voting results are known. We are adopting amendments to require additional disclosure on Form 8–K regarding the company's determination of the frequency of say-on-pay votes. See Section II.B.5 below.

[101] The treatment of companies subject to EESA with outstanding obligations under TARP is discussed in Section II.C.3 below.

[102] 17 CFR 229.402(o).

[103] Exchange Act Section 14A(a)(2).

[104] *See, e.g.,* letters from AFSCME, Business Roundtable, FSR, Protective Life, and Towers Watson.

[105] *See, e.g.,* letters from Boeing, Pfizer, PGGM, Society of Corp. Sec., and Sullivan.

or abstaining from the frequency vote.[106] Although some commentators suggested that we specify which shares are entitled to vote in the shareholder vote on the frequency of say-on-pay votes,[107] most commentators indicated there was no need for the Commission to address this question.[108]

We also requested comment regarding whether a new issuer should be permitted to disclose the frequency of its say-on-pay votes in the registration statement for its initial public offering and be exempted from conducting say-on-pay votes and frequency votes at its annual meetings until the annual meeting for the year disclosed in its registration statement. Most commentators indicated that newly public companies should not be exempt from the say-on-pay and frequency votes and should be required to conduct say-on-pay and frequency votes at their first annual shareholders meeting after the initial public offering.[109] However, some commentators expressed support for such an exemption as it would provide these issuers additional time to formulate their compensation policies as a public company before conducting the shareholder votes required by Section 14A.[110]

c. Final Rule

After reviewing and considering the comments, we are adopting Rule 14a–21(b) as proposed with slight modifications to clarify that the frequency vote is required at least once during the six calendar years following the prior frequency vote.[111] Under Rule 14a–21(b), issuers will be required, not less frequently than once every six calendar years, to provide a separate shareholder advisory vote in proxy statements for annual meetings to determine whether the shareholder vote on the compensation of executives required by Section 14A(a)(1) "will occur every 1, 2, or 3 years."[112] After considering and reviewing comments on the proposed rule, we do not believe it is necessary to provide a form of resolution for the vote required by Rule 14a–21(b). In response to concerns raised by commentators and discussed below, we are also adopting a temporary exemption under which smaller reporting companies will not be required to conduct a shareholder advisory vote on the frequency of say-on-pay votes until meetings on or after January 21, 2013.[113]

Rule 14a–21(b) will also clarify that the separate shareholder vote on the frequency of shareholder votes on executive compensation will be required only in a proxy statement for an annual or other meeting of shareholders at which directors will be elected and that such vote is required only once every six calendar years. Under Rule 14a–21(b), issuers will be required to provide the separate shareholder vote on the frequency of the say-on-pay vote for the first annual or other such meeting of shareholders occurring on or after January 21, 2011. After reviewing the comment letters, we continue to believe that the say-on-pay vote and the frequency vote should be required of newly public companies in the proxy statement for such company's first annual meeting after the initial public offering. This will give shareholders the opportunity to express a view on these matters while the company is in the process of establishing policies that will apply as a public company and could benefit from understanding its shareholders' point of view.

2. Item 24 of Schedule 14A

In order to implement the requirements of Section 14A(a), we proposed new Item 24 to Schedule 14A, to briefly explain the general effect of the frequency vote, such as whether the vote is non-binding. We are adopting this amendment to Schedule 14A as proposed with a modification.

a. Proposed Amendments

In addition to disclosure regarding the vote on executive compensation, we proposed that issuers would be required to disclose in the proxy statement that they are providing a separate shareholder advisory vote on the frequency of the shareholder advisory vote on executive compensation. Proposed Item 24 of Schedule 14A would also require issuers to briefly explain the general effect of this vote, such as whether the vote is non-binding.

b. Comments on the Proposed Amendments

Commentators generally supported proposed Item 24 of Schedule 14A as it relates to the frequency of say-on-pay votes.[114] One commentator expressed the view that the proposed amendment is not needed as it will lead to boilerplate disclosure.[115] Some commentators also suggested that issuers should be required to disclose the current frequency of say-on-pay votes.[116]

c. Final Rule

After reviewing and considering the comments, we are adopting Item 24 of Schedule 14A as proposed with a modification. Issuers will be required to disclose in the proxy statement that they are providing a separate shareholder advisory vote on the frequency of say-on-pay votes. Item 24 of Schedule 14A will also require issuers to briefly explain the general effect of this vote, such as whether the vote is non-binding.[117] As noted above, this is similar to the approach taken by the Commission in connection with disclosure requirements about the shareholder advisory vote on executive compensation for companies subject to EESA.[118] Based on our experience with these votes, we believe that such requirements will lead to useful disclosure of information about the nature and effect of the vote for shareholders to consider, such as whether the vote is non-binding.

After reviewing comments, we are also adding a requirement to Item 24 for issuers to provide disclosure of the current frequency of say-on-pay votes and when the next scheduled say-on-pay vote will occur,[119] in their proxy materials. We believe this will provide useful information to shareholders about upcoming say-on-pay and frequency shareholder advisory votes.

3. Amendment to Rule 14a–4

In order to implement the requirements of Section 14A(a)(2), we also proposed amendments to Rule 14a–4. After considering comments, we are adopting the amendments to Rule 14a–4 as proposed, with slight modification.

[106] *See, e.g.,* letters from ABA, Pfizer, Society of Corp. Sec., and Sullivan.

[107] *See, e.g.,* letter from the ABA.

[108] *See, e.g.,* letters from Business Roundtable, FSR, Pfizer, PGGM, and Protective Life.

[109] *See, e.g.,* letters from AFSCME, CII, CalPERS, ICGN, Georg Merkl ("Merkl"), Public Citizen, and RAILPEN Investments and Universities Superannuation Scheme ("RAILPEN & USS").

[110] *See, e.g.,* letters from ABA, Compensia, Davis Polk, NACD, and Sullivan.

[111] As proposed, Rule 14a–21(b) would have required a frequency vote within the six-year period from the date of the most recent frequency vote.

[112] Exchange Act Section 14A(a)(2).

[113] See discussion in Section II.E below.

[114] *See, e.g.,* letters from CalPERS, ICGN, PGGM, and Protective Life.

[115] *See* letter from Society of Corp. Sec.

[116] *See, e.g.,* letters from ICGN and TIAA–CREF.

[117] As discussed in Section II.A.2.a, Section 14A(a) does not require additional disclosure with respect to the non-binding nature of the vote. We are requiring additional disclosure so that information about the advisory nature of the vote is available to shareholders before they vote.

[118] See Section II.A.2.a, above.

[119] Issuers should disclose the current frequency as determined by the board following a shareholder advisory vote. We would not expect disclosure of either the current frequency or when the next scheduled say-on-pay vote will occur in proxy materials for the meeting where an issuer initially conducts the say-on-pay and frequency votes.

a. Proposed Amendments

As noted in the Proposing Release, Section 14A(a)(2) requires a shareholder advisory vote on whether say-on-pay votes will occur every 1, 2, or 3 years. Thus, shareholders must be given four choices: Whether the shareholder vote on executive compensation will occur every 1, 2, or 3 years, or to abstain from voting on the matter. In our view, Section 14A(a)(2) does not allow for alternative formulations of the shareholder vote, such as proposals that would provide shareholders with two substantive choices (*e.g.,* to hold a separate shareholder vote on executive compensation every year or less frequently), or only one choice (*e.g.,* a company proposal to hold shareholder votes every two years). We noted in the Proposing Release that we would expect that the board of directors will include a recommendation as to how shareholders should vote on the frequency of shareholder votes on executive compensation.[120] However, the issuer must make clear in these circumstances that the proxy card provides for four choices (every 1, 2, or 3 years, or abstain) and that shareholders are not voting to approve or disapprove the issuer's recommendation. Accordingly, we proposed amendments to our proxy rules to reflect the statutory requirement that shareholders must be provided the opportunity to cast an advisory vote on whether the shareholder vote on executive compensation required by Section 14A(a)(1) of the Exchange Act will occur every 1, 2, or 3 years, or to abstain from voting on the matter.[121]

Specifically, we proposed amendments to Rule 14a–4 under the Exchange Act, which provides requirements as to the form of proxy that issuers are required to include with their proxy materials, to require that issuers present four choices to their shareholders. Absent amendment, Rule 14a–4 requires the form of proxy to provide means whereby the person solicited is afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter to be acted upon, other than elections to office.[122] We proposed amendments to revise this standard to permit proxy cards to reflect the choice of 1, 2, or 3 years, or abstain, for these votes.

b. Comments on the Proposed Amendments

Comments on the proposal were generally favorable. Many commentators expressed support for the proposed approach where shareholders are given four choices on the frequency vote.[123] Some commentators suggested alternative approaches including a vote where shareholders would rank each choice of frequency or vote separately for each of 1, 2, and 3 years,[124] a vote where management would choose 1, 2, or 3 years as the frequency and ask shareholders to approve or disapprove its choice,[125] and a two-step approach whereby shareholders would first vote whether or not they have a preference as to the frequency of say-on-pay votes and, if they do have a preference, subsequently vote on whether such votes should be conducted every 1, 2, or 3 years.[126]

In addition, we requested comment in the Proposing Release as to whether issuers, brokers, transfer agents, and data processing firms would be able to accommodate the four choices for a single line item on the proxy card. Commentators indicated that they would be ready for the vote with four choices on the proxy card by January 21, 2011.[127] One commentator recommended that we clarify that issuers may vote uninstructed shares in accordance with management's recommendations so long as they follow the requirements of Rule 14a–4,[128] while another suggested that the Commission extend the transition guidance permitting the presentation of three choices for the frequency vote for the entire 2011 proxy season and perhaps require the three-choice approach for all issuers for 2011 to allow for uniformity among different issuers.[129]

c. Final Rule

After considering the comments, we are adopting the rule substantially as proposed with some modifications. Specifically, we are adopting amendments to Rule 14a–4 under the Exchange Act, which provides requirements as to the form of proxy that issuers are required to include with their proxy materials, to require that issuers present four choices to their shareholders. Under existing Rule 14a–4, the form of proxy is required to provide means whereby the person solicited is afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter to be acted upon, other than elections to office. Absent an amendment, Rule 14a–4 would not permit proxy cards to reflect the choice of 1, 2, or 3 years, or abstain. The amendments revise the rule to permit proxy cards to reflect the choice of 1, 2, or 3 years, or abstain, for the frequency vote.

In response to comment, we note that issuers may vote uninstructed proxy cards in accordance with management's recommendation for the frequency vote only if the issuer follows the existing requirements of Rule 14a–4 to (1) include a recommendation for the frequency of say-on-pay votes in the proxy statement, (2) permit abstention on the proxy card, and (3) include language regarding how uninstructed shares will be voted in bold on the proxy card.

4. Amendment to Rule 14a–8

In connection with implementing the requirements of Section 14A(a)(2), we also proposed a note to Rule 14a–8(i)(10) relating to shareholder proposals. After considering the comments, we are adopting the amendment to Rule 14a–8 with some modifications.

a. Proposed Amendments

Our proposed amendment to Rule 14a–8 under the Exchange Act would add a note to Rule 14a–8(i)(10) to clarify the status of shareholder proposals that seek an advisory shareholder vote on executive compensation or that relate to the frequency of shareholder votes approving executive compensation. Rule 14a–8 provides eligible shareholders with an opportunity to include a proposal in an issuer's proxy materials for a vote at an annual or special meeting of shareholders. An issuer generally is required to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within one of the rule's 13 substantive bases for exclusion.[130] One of the substantive bases for exclusion, Rule 14a–8(i)(10), provides that an issuer

[120] *See* Section II.B.3 of the Proposing Release.

[121] Because the shareholder vote on the frequency of voting on executive compensation is advisory, we do not believe that it is necessary to prescribe a standard for determining which frequency has been "adopted" by the shareholders.

[122] Rule 14a–4(b)(1).

[123] *See, e.g.,* letters from Calvert, COPERA, ICGN, Meridian, Merkl, PGGM, and Protective Life.

[124] *See* letter from Keith P. Bishop ("Bishop").

[125] *See* letter from UBC.

[126] *See* letter from Society of Corp. Sec.

[127] *See, e.g.,* letters from Broadridge Financial Solutions, Inc. ("Broadridge") and Proxytrust ("Proxytrust").

[128] *See* letter from Sullivan.

[129] *See* letter from ABA. For a discussion of transition matters, see Section II.F below.

[130] These substantive bases for exclusion are set forth in Rule 14a–8(i).

may exclude a shareholder proposal that has already been substantially implemented.

We proposed adding a note to Rule 14a–8(i)(10) to permit the exclusion of a shareholder proposal that would provide a say-on-pay vote or seeks future say-on-pay votes or that relates to the frequency of say-on-pay votes, provided the issuer has adopted a policy on the frequency of say-on-pay votes that is consistent with the plurality of votes cast in the most recent vote in accordance with Rule 14a–21(b). As noted in Section I above, a "say-on-pay" vote is defined as a separate resolution subject to shareholder vote to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S–K, or any successor to Item 402.

As proposed, an issuer would be permitted to exclude shareholder proposals that propose a vote on the approval of executive compensation as disclosed pursuant to Item 402 of Regulation S–K or on the frequency of such votes, including those drafted as requests to amend the issuer's governing documents, so long as the issuer has adopted a policy on the frequency of say-on-pay votes that is consistent with the plurality of votes cast in the most recent vote required by Rule 14a–21(b) and provides a vote on frequency at least as often as required by Section 14A(a)(2).

b. Comments on the Proposed Amendments

Comments on the proposal were mixed. Many commentators supported the proposed amendment to permit exclusion of shareholder proposals on frequency and say-on-pay,[131] stating that the amendment would eliminate redundancy and reduce administrative burdens and costs.[132] Other commentators disagreed with the general approach,[133] stating that they believe it would be unwise as a matter of public policy and would inappropriately interpret substantial implementation because the note would permit exclusion of proposals requesting a frequency that the issuer has not implemented.[134] Other commentators asserted that an amendment is not required because issuers should be permitted to exclude any shareholder proposals on frequency as long as the issuer complies with Section 14A(a)(2).[135] Some commentators suggested that we should also permit issuers to exclude shareholder proposals on the frequency of say-on-pay votes when they adopt a policy to hold say-on-pay votes more frequently than the frequency that is consistent with the plurality of votes cast in the most recent shareholder vote[136] to prevent issuers being penalized for providing shareholders with more frequent say-on-pay votes.[137] Other commentators felt that issuers should not be required to adopt a particular policy on the frequency of say-on-pay votes in order to be permitted to exclude shareholder proposals on executive compensation,[138] noting that an issuer should be permitted to exclude shareholder proposals on frequency so long as the issuer provides a reasonable basis for the frequency chosen to prevent an annual re-visiting of the frequency vote by shareholders.[139]

In addition, some commentators stated that the proposed note to Rule 14a–8(i)(10) should incorporate a majority standard rather than the proposed plurality standard, so that issuers would need to adopt a policy consistent with the majority of votes cast in order to exclude a shareholder proposal as substantially implemented,[140] noting that the majority standard would be consistent with policies that boards should implement actions recommended by majority shareholder vote.[141] Some commentators also recommended that issuers should be permitted to exclude shareholder proposals for votes on executive compensation that are narrower in scope[142] than the say-on-pay vote required under Rule 14a–21(a).[143] These commentators expressed the concern that shareholders could undermine the non-binding nature of the frequency vote through more specific vote proposals.[144]

Finally, some commentators indicated that it would be inappropriate to permit companies to exclude shareholder proposals on frequency if there have been material changes in the company's compensation program since the prior frequency vote[145] because shareholders should be permitted the opportunity to revisit their decision on the frequency vote under such circumstances.[146] Other commentators noted that material changes to an issuer's compensation program should not limit the availability of Rule 14a–8(i)(10) because shareholders will understand that a company's compensation program is dynamic and factor this into their frequency voting decisions.[147] These commentators noted that the difficulty in determining whether changes are material would erode the benefit of the note to Rule 14a–8(i)(10), create uncertainty as to a company's ability to exclude shareholder proposals on frequency,[148] and burden the staff with analyzing materiality on a case-by-case basis.[149]

c. Final Rule

After reviewing the comments, we are adopting the amendment to Rule 14a–8(i)(10) with some modifications.

We continue to believe that under certain conditions, an issuer should be permitted to exclude subsequent shareholder proposals that seek a vote on the same matters as the shareholder advisory votes on say-on-pay and frequency required by Section 14A(a). Consequently, consistent with the proposal, we are adding a note to Rule 14a–8(i)(10) to permit the exclusion of a shareholder proposal that would provide a say-on-pay vote, seeks future say-on-pay votes, or relates to the frequency of say-on-pay votes in certain circumstances; however, in response to comments,[150] we are changing the threshold for exclusion from a plurality to a majority. Specifically, as adopted, the note to Rule 14a–8(i)(10) will permit exclusion of such a shareholder proposal if, in the most recent shareholder vote on frequency of say-on-pay votes, a single frequency (*i.e.,* one, two or three years) received the support of a majority of the votes cast and the issuer has adopted a policy on

[131] *See, e.g.,* letters from ABA, Business Roundtable, Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce ("CCMC"), Eaton, FSR, ICGN, Pfizer, PGGM, and Protective Life.

[132] *See, e.g.,* letter from Business Roundtable.

[133] *See, e.g.,* letters from AFSCME, Calvert, Center on Exec. Comp., CII, Public Citizen, and UBC.

[134] *See, e.g.,* letter from AFSCME.

[135] *See* letter from UBC.

[136] *See, e.g.,* letters from ABA, Davis Polk, Meridian, Society of Corp. Sec., and Sullivan.

[137] *See* letter from Sullivan.

[138] *See, e.g.,* letters from Boeing and Center on Exec. Comp.

[139] *See* letter from Boeing.

[140] *See, e.g.,* letters from CalPERS, CII, and SBA of Florida.

[141] *See* letter from CII.

[142] An example would be a shareholder proposal for an advisory vote on the Chief Executive Officer's compensation as disclosed under Item 402 of Regulation S–K.

[143] *See, e.g.,* letters from Business Roundtable, Boeing, CCMC, Davis Polk, Pfizer, and Society of Corp. Sec.

[144] *See* letter from Boeing.

[145] *See, e.g.,* letters from Boston Common, Calvert, First Affirmative, ICGN, PIRC, PGGM, RAILPEN & USS, Social Investment, and Walden.

[146] *See* letter from RAILPEN & USS.

[147] *See, e.g.,* letters from ABA, Boeing, Frederic W. Cook & Co., Inc. ("Frederic Cook"), McGuireWoods, Pfizer, PM&P, and Protective Life.

[148] *See* letter from McGuireWoods.

[149] *See* letter from Frederic Cook.

[150] *See, e.g.,* letters from CalPERS, CII, and SBA of Florida.

the frequency of say-on-pay votes that is consistent with that choice.[151]

In light of the nature of the vote—with three substantive choices—it is possible that no single choice will receive a majority of votes and that, as a result, there may be issuers that may not be able to exclude subsequent shareholder proposals regarding say-on-pay matters even if they adopt a policy on frequency that is consistent with plurality of votes cast. We also recognize, however, that if no single frequency choice receives the support of a majority of votes cast, the choice preferred by the plurality may not represent the choice preferred by most of the company's shareholders. For example, if 30% of votes support annual voting, 30% support biennial voting, and 40% favor triennial voting, no frequency would have received a majority of votes cast; therefore, it is not clear that implementing the plurality choice would be favored by most of the company's shareholders. In that situation, if the company implemented triennial voting and the note to Rule 14a–8(i)(10) allowed exclusion of shareholder proposals seeking a different frequency, this could prevent shareholders from putting forth proposals that seek to request that the company implement a frequency that would be preferred by a majority of shareholders. After considering commentators' views, we are concerned that this approach would inappropriately restrict shareholder proposals on this topic, particularly in light of Section 14A(c)(4)'s directive that the shareholder advisory votes required by Sections 14A(a) and (b) may not be construed "to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation."

On the other hand, if a majority of votes cast favors a given frequency and the issuer adopts a policy on frequency that is consistent with the choice of the majority of votes, then in our view, as a matter of policy it is appropriate for Rule 14a–8 to provide for exclusion of subsequent shareholder proposals that would provide a say-on-pay vote, seek future say-on-pay votes, or relate to the frequency of say-on-pay votes. We believe that, in these circumstances, additional shareholder proposals on frequency generally would unnecessarily burden the company and its shareholders given the company's adherence to the view favored by a majority of shareholder votes regarding the frequency of say-on-pay votes.[152] As described above, an issuer would not be permitted to exclude such shareholder proposals under the note if no frequency choice received a majority of the votes cast.

As a result of this amendment, an issuer will be permitted to exclude shareholder proposals that propose a vote on the frequency of such votes,[153] including those drafted as requests to amend the issuer's governing documents. For example, if in the first vote under Rule 14a–21(b) a majority of votes were cast for a two-year frequency for future shareholder votes on executive compensation, and the issuer adopts a policy to hold the vote every two years, a shareholder proposal seeking a different frequency could be excluded so long as the issuer seeks votes on executive compensation every two years.[154]

We also believe that a shareholder proposal that would provide an advisory vote or seek future advisory votes on executive compensation with substantially the same scope as the say-on-pay vote required by Rule 14a–21(a)—the approval of executive compensation as disclosed pursuant to Item 402 of Regulation S–K—should also be subject to exclusion under Rule 14a–8(i)(10) if the issuer adopts a policy on frequency that is consistent with the majority of votes cast. This is consistent with the proposal, although like additional frequency votes, the note to Rule 14a–8(i)(10) would condition exclusion on the company implementing the frequency favored by a majority of shareholders. In this circumstance, shareholders would be provided the opportunity to provide say-on-pay votes on the frequency preferred by a majority of shareholders when last polled, and we believe additional proposals on the same matter would impose unnecessary burdens on companies and shareholders.

We are also modifying the note slightly. To avoid confusion, we are removing the requirement that an issuer must provide "a vote on frequency at least as often as required by Section 14A(a)(2)." We believe this language is not necessary as issuers are already required to comply with Section 14A(a)(2) in any event. In addition, we are removing the language "as substantially implemented" from the note to avoid confusion.

5. Amendment to Form 8–K

We also proposed amendments to Form 10–Q and Form 10–K to require additional disclosure regarding the issuer's decision to adopt a policy on the frequency of say-on-pay votes following a shareholder advisory vote on frequency. After considering the comments, we are not adopting amendments to Form 10–Q and Form 10–K. Instead, we are adopting a new Form 8–K Item to require disclosure of the issuer's decision on the frequency of say-on-pay votes.

a. Proposed Amendments

Issuers are currently required to disclose the preliminary results of shareholder votes pursuant to Item 5.07 of Form 8–K within four business days following the day the shareholder meeting ends and final voting results within four business days of when they are known. This item will require issuers to report how shareholders voted in the say-on-pay vote and the frequency of shareholder votes on executive compensation.

We proposed amendments to Form 10–K and Form 10–Q to require additional disclosure regarding the issuer's decision in light of such vote as to how frequently the company will include those say-on-pay votes for the six subsequent years. Our proposed amendments to Item 9B of Form 10–K and new Item 5(c) of Part II of Form 10–Q would have required an issuer to disclose this decision in the Form 10–Q covering the quarterly period during which the shareholder advisory vote occurs, or in the Form 10–K if the shareholder advisory vote occurs during the issuer's fourth quarter. In light of the relevance of this decision to potential shareholder proposals on the topic, we proposed this disclosure to notify shareholders on a timely basis about the issuer's decision on how frequently it

[151] For purposes of this analysis, an abstention would not count as a vote cast. We are prescribing this voting standard solely for purposes of determining the scope of the exclusion under the note to Rule 14a–8(i)(10), and not for the purpose of determining whether a particular voting frequency should be considered to have been adopted or approved by shareholder vote as a matter of state law.

[152] We recognize that this approach is different from the traditional "substantially implemented" standard in Rule 14a–8(i)(10) since the frequency sought by a shareholder would be different from the frequency the issuer has implemented. We have revised the note to avoid confusion in that regard. A shareholder proposal seeking a frequency that is the same as that provided by the company would be excludable under the traditional "substantially implemented" standards in Rule 14a–8(i)(10) without regard to the new note, assuming there are no other differences that would lead to a different result.

[153] No-action requests to exclude shareholder proposals that seek shareholder advisory votes on different aspects of executive compensation will be evaluated on a case-by-case basis by the staff.

[154] Issuers seeking to exclude a shareholder proposal under the note to Rule 14a–8(i)(10) are required to follow the same shareholder proposal process with the staff of the Commission as would be required if the issuer intended to rely on any other substantive basis for exclusion under Rule 14a–8.

will provide the say-on-pay vote to shareholders.

b. Comments on the Proposed Amendments

Comments on the proposal were mixed. A number of commentators supported the amendments as proposed that would require disclosure of an issuer's decision as to the frequency of say-on-pay votes in the Form 10–Q or Form 10–K for the period during which the advisory vote occurs [155] as the requirement would allow shareholders to readily obtain an issuer's decision on the frequency of say-on-pay votes.[156] Some commentators questioned whether the Commission should require such disclosure of an issuer's determination regarding frequency following the results of a shareholder advisory vote at all,[157] given that the shareholder vote on the frequency of say-on-pay votes is only advisory.[158] Other commentators suggested that we should allow issuers additional time to consider the results of the shareholder vote [159] and to contact shareholders for additional feedback,[160] particularly if the shareholders do not express a clear preference on frequency. These commentators recommended that we instead require that disclosure about the issuer's decision be included in a later Form 10–Q or Form 10–K filing,[161] Form 8–K filing,[162] or on the issuer's Web site.[163] These commentators indicated that a requirement for a later filing would still permit shareholders adequate time to submit a shareholder proposal on the frequency of say-on-pay votes.[164]

Commentators also noted that Item 5.07 of Form 8–K currently requires disclosure of the number of votes cast "for, against or withheld" on matters submitted to a vote of shareholders, but that the item would not permit disclosure of the results of the frequency vote for "1 year, 2 years, 3 years, or abstain." [165] These commentators suggested that we amend Item 5.07 of Form 8–K to facilitate reporting the results of the frequency vote.[166]

c. Final Rule

After reviewing the comments on this issue, we have concluded that disclosure of the issuer's determination regarding frequency of say-on-pay votes should be required, but we are adopting the disclosure requirement through an amendment to Item 5.07 of Form 8–K in lieu of amendments to Form 10–Q and Form 10–K. We have considered the position of commentators who were concerned that the required timing of disclosure under our proposal would not permit sufficient time for issuers to fully consider the results of the vote, including through board deliberations and consultation with shareholders as described above, before the disclosure of the decision is required.[167] In light of this concern, we are adopting this disclosure requirement as a Form 8–K requirement due at a later date, in lieu of amending Form 10–Q and Form 10–K, to give issuers additional time to make their decisions.

Under our final rule, Item 5.07 of Form 8–K requires an issuer to disclose its decision regarding how frequently it will conduct shareholder advisory votes on executive compensation following each shareholder vote on the frequency of say-on-pay votes. To comply, an issuer will file an amendment to its prior Form 8–K filings under Item 5.07 that disclose the preliminary and final results of the shareholder vote on frequency. This amended Form 8–K will be due no later than 150 calendar days after the date of the end of the annual or other meeting in which the vote required by Rule 14a–21(b) took place, but in no event later than 60 calendar days prior to the deadline for the submission of shareholder proposals under Rule 14a–8 for the subsequent annual meeting, as disclosed in the issuer's proxy materials for the meeting at which the frequency vote occurred.[168] In the amended Item 5.07 Form 8–K, the issuer must disclose its determination regarding the frequency of say-on-pay votes.[169]

We believe the time period specified for filing the amended Item 5.07 Form 8–K should address commentators' requests that we revise the proposal to allow companies additional time to carefully consider the results of the frequency vote, including through board and committee deliberations and discussions with shareholders, before disclosure of the decision is required.[170] It also should provide enough time for shareholders to consider whether to submit a shareholder proposal on say-on-pay votes or on the frequency of say-on-pay votes once the disclosure is provided.

In addition, in response to comment,[171] we are adopting a technical amendment to Item 5.07(b) of Form 8–K to facilitate reporting of shareholder votes on frequency. Item 5.07 of Form 8–K generally requires an issuer to "state the number of votes cast for, against, or withheld, as well as the number of abstentions and broker non-votes as to each such matter * * *." The amendments we adopt today will clarify that, with respect to the vote on the frequency of say-on-pay votes, the issuer will be required to disclose the number of votes cast for each of 1 year, 2, years, and 3 years, as well as the number of abstentions.[172]

6. Effect of Shareholder Vote

Although the language in Section 951 of the Act indicates that the separate resolution subject to shareholder vote is "to determine" the frequency of the shareholder vote on executive compensation, in light of new Section 14A(c) of the Exchange Act, we continue to believe this shareholder vote, and all shareholder votes required by Section 951 of the Act, are intended to be non-binding on the issuer or the issuer's board of directors. New Section 14A(c) states that the shareholder votes referred to in Section 14A(a) and Section 14A(b) (which includes all votes

[155] *See, e.g.,* letters from CalPERS, ICGN, Meridian, PGGM, and SBA of Florida.

[156] *See* letter from SBA of Florida.

[157] *See, e.g.,* letters from Business Roundtable, Boeing, Center on Exec. Comp., CCMC, FSR, and Society of Corp. Sec.

[158] *See, e.g.,* letter from Society of Corp. Sec.

[159] *See, e.g.,* letters from Compensia, Davis Polk, Eaton, Frederic Cook, PM&P, and Protective Life.

[160] *See, e.g.,* letters from ABA, Boeing, TIAA–CREF, and Time Warner Inc. ("Time Warner").

[161] *See, e.g.,* letters from Eaton, Frederic Cook, Compensia, and PM&P.

[162] *See, e.g.,* letters from ABA and Davis Polk.

[163] *See* letter from Business Roundtable.

[164] *See* letter from ABA.

[165] *See, e.g.,* letter from Davis Polk.

[166] *See* letter from PIRC.

[167] *See, e.g.,* letters from ABA, Boeing, Compensia, Davis Polk, Eaton, Frederic Cook, PM&P, Protective Life, TIAA–CREF, and Time Warner.

[168] Item 5.07 is not among the list of items subject to the safe harbor from liability in Rules 13a–11 [17 CFR 240.13a–11] and 15d–11 [17 CFR 240.15d–11] under the Exchange Act. In addition, companies that fail to file a timely report required by Item 5.07 will lose their eligibility to file Form S–3 registration statements. We are not making a change to this as a result of our amendments to Item 5.07. We continue to believe that Item 5.07 does not require management to make rapid materiality and similar judgments within the compressed Form 8–K timeframe. *See Additional Form 8–K Disclosure Requirements and Acceleration of Filing Date*, Release No. 33–8400 (Mar. 16, 2004) [69 FR 15594] at Section II.E and *Proxy Disclosure Enhancements*, Release No. 33–9089 (Dec. 16, 2009) [74 FR 68334] at Section II.E.

[169] Item 5.07(d) of Form 8–K.

[170] In this regard, we note the recent guidance provided by the Division of Corporation Finance that Regulation FD [17 CFR 243.100 *et seq.*] does not prohibit directors from speaking privately with a shareholder or group of shareholders as described in that guidance. *See* Regulation FD CDIs, Question 101.11.

[171] *See, e.g.,* letters from Davis Polk and PIRC.

[172] We are adopting a conforming technical change to Instruction 1 to Item 5.07 to carve out Item 5.07(d) from the four-business day period for reporting the event. *See* Instruction 1 to Item 5.07 of Form 8–K.

under Section 951 of the Act) "shall not be binding on the issuer or the board of directors of an issuer."[173] Though we received a comment letter asserting that the shareholder vote on frequency is binding,[174] in our view the plain language of Exchange Act Section 14A(c) indicates that this vote is advisory. Accordingly, we are adopting new Item 24 of Schedule 14A to include language to require disclosure regarding the general effect of the shareholder advisory votes, such as whether the vote is non-binding.[175]

C. Issues Relating to Both Shareholder Votes Required by Section 14A(a)

1. Amendments to Rule 14a–6

We proposed amendments to Rule 14a–6 to add the say-on-pay and frequency of say-on-pay votes to the list of items that do not require the filing of proxy materials in preliminary form. After considering comments, we are adopting the proposed amendments to Rule 14a–6, with some modification.

a. Proposed Amendments

Rule 14a–6(a) generally requires issuers to file proxy statements in preliminary form at least ten calendar days before definitive proxy materials are first sent to shareholders, unless the items included for a shareholder vote in the proxy statement are limited to specified matters. During the time before final proxy materials are filed, our staff has the opportunity to comment on the disclosures and issuers are able to incorporate the staff's comments in their final proxy materials. Absent an amendment to Rule 14a–6(a), a proxy statement that includes a solicitation for either the shareholder vote on the approval of executive compensation or the approval of the frequency of the votes approving executive compensation required by Sections 14A(a)(1) and 14A(a)(2) would need to be filed in preliminary form. Because the shareholder vote on executive compensation and the shareholder vote on the frequency of such shareholder votes are required for all issuers, we view them as similar to the other items specified in Rule 14a–6(a) that do not require a preliminary filing. In the Proposing Release, we noted our view that a preliminary filing requirement for the shareholder votes on executive compensation and the frequency of such votes would impose unnecessary administrative burdens and preparation and processing costs associated with the filing and processing of proxy material that would unlikely be selected for review in preliminary form.[176]

We proposed amendments to Rule 14a–6(a) to add the shareholder votes on executive compensation and the frequency of shareholder votes on executive compensation required by Section 14A(a) to the list of items that do not trigger a preliminary filing.[177] As proposed, a proxy statement that includes a solicitation with respect to either of these shareholder votes would not trigger a requirement that the issuer file the proxy statement in preliminary form, so long as a preliminary filing would not otherwise be required under Rule 14a–6(a).

b. Comments on the Proposed Amendments

Comments on the proposal were favorable. While one commentator stated that say-on-pay votes and votes on the frequency of say-on-pay votes should trigger the requirement to file in preliminary form to provide the market and investors additional time to consider the executive compensation disclosures,[178] the preponderance of commentators agreed that no preliminary proxy should be required.[179] These commentators noted the similarity in proposals for all issuers and the likelihood that the administrative burdens would outweigh any benefits from a preliminary filing.[180] In addition, one commentator asserted that we should not require a preliminary proxy statement for shareholder advisory votes on the frequency of say-on-pay votes that are not required by Section 14A so that issuers would not be required to file in preliminary form as a result of including a frequency vote in their proxy materials voluntarily.[181] Other commentators suggested that no preliminary proxy statement should be required for any separate shareholder vote on executive compensation,[182] noting that it would be inappropriate to require a preliminary filing for proposals on more narrow aspects of compensation if a preliminary filing is not required for broader proposals.[183]

c. Final Rule

After considering the comments, we are adopting the amendments to Rule 14a–6(a) as proposed, with slight modifications. We are adopting amendments to Rule 14a–6(a) to add any shareholder advisory vote on executive compensation, including shareholder votes to approve executive compensation and the frequency of shareholder votes on executive compensation required by Section 14A(a), to the list of items that do not trigger a preliminary filing. As adopted, a proxy statement that includes a solicitation with respect to any advisory vote on executive compensation, including a say-on-pay vote or a vote on the frequency of say-on-pay votes, would not trigger a requirement that the issuer file the proxy statement in preliminary form, so long as any other matters to which the solicitation relates include only the other matters specified by Rule 14a–6(a). Finally, in a revision from the proposal, this amendment will also encompass an advisory vote on executive compensation, including a vote on the frequency of say-on-pay votes, that is not required by Section 14A. Upon review of the comments, we are persuaded by commentators' arguments that our preliminary proxy filing requirements should not differentiate between say-on-pay votes simply because, in one case, the issuer is required to include the proposal, and, in the other, the issuer chooses to do so.

2. Broker Discretionary Voting

As noted in the Proposing Release,[184] Section 957 of the Act amends Section 6(b) of the Exchange Act[185] to direct the national securities exchanges to change their rules to prohibit broker discretionary voting of uninstructed shares in certain matters, including

[173] Exchange Act Section 14A(c).

[174] *See* letter from Merkl.

[175] Even though each of the shareholder advisory votes required by Section 14A is non-binding pursuant to the rule of construction in Section 14A(c), as we noted in Note 69 of the Proposing Release, we believe these votes could play a role in an issuer's executive compensation decisions.

[176] *See* Section II.C.1 of the Proposing Release. *See also, Proxy Rules—Amendments to Eliminate Filing Requirements for Certain Preliminary Proxy Material; Amendments With Regard to Rule 14a–8, Shareholder Proposals*, Release No. 34–25217 (Dec. 21, 1987) [52 FR 48982].

[177] In the recent release relating to the similar shareholder votes for companies subject to EESA with outstanding indebtedness under the TARP program, we received comments regarding whether a preliminary proxy statement should be required for shareholder votes on executive compensation for TARP companies. While some commentators argued that a preliminary proxy statement should be required, other commentators argued persuasively that the burdens of such an approach outweighed the costs. As a result, we decided to eliminate the requirement for a preliminary proxy statement for shareholder votes on executive compensation for TARP companies. *See* TARP Adopting Release, *supra* note 18, at 75 FR 2791.

[178] *See* letter from Brian Foley ("Foley").

[179] *See, e.g.,* letters from Ameriprise Financial ("Ameriprise"), ABA, Business Roundtable, CalPERS, Center on Exec. Comp., Compensia, Davis Polk, FSR, ICGN, Pfizer, PGGM, PM&P, Protective Life, and Society of Corp. Sec.

[180] *See, e.g.,* letter from Compensia.

[181] *See* letter from Business Roundtable.

[182] *See* letters from ABA and ICGN.

[183] *See* letter from ABA.

[184] See Section II.C.2 of the Proposing Release.

[185] 15 U.S.C. 78f(b).

shareholder votes on executive compensation. The national securities exchanges have made substantial progress in amending their rules regarding broker discretionary voting on executive compensation matters to implement this requirement.[186] Under these amended exchange rules, for issuers with a class of securities listed on a national securities exchange, broker discretionary voting of uninstructed shares is not permitted for a shareholder vote on executive compensation or a shareholder vote on the frequency of the shareholder vote on executive compensation.[187]

3. Relationship to Shareholder Votes on Executive Compensation for TARP Companies

Issuers that have received financial assistance under the Troubled Asset Relief Program, or TARP, are required to conduct a separate annual shareholder vote to approve executive compensation during the period in which any obligation arising from the financial assistance provided under the TARP remains outstanding.[188]

Because the vote required to approve executive compensation pursuant to the Emergency Economic Stabilization Act of 2008, or EESA, is effectively the same vote that would be required under Section 14A(a)(1), as we indicated in the Proposing Release,[189] we believe that a shareholder vote to approve executive compensation under Rule 14a–20 for issuers with outstanding indebtedness under the TARP would satisfy Rule 14a–21(a). Consequently, we noted in the Proposing Release that we would not require an issuer that conducts an annual shareholder advisory vote to approve executive compensation pursuant to EESA to conduct a separate shareholder advisory vote on executive compensation under Section 14A(a)(1) until that issuer has repaid all indebtedness under the TARP. Such an issuer would be required to include a separate shareholder advisory vote on executive compensation pursuant to Section 14A(a)(1) and Rule 14a–21(a) for the first annual meeting of shareholders after the issuer has repaid all outstanding indebtedness under the TARP. Commentators on this issue generally expressed support for our proposed approach to companies with outstanding indebtedness under TARP,[190] and we have determined to implement this approach under the rules as adopted.

Even though issuers with outstanding indebtedness under the TARP have a separate statutory requirement to provide an annual shareholder vote on executive compensation so long as they are indebted under the TARP, absent exemptive relief these issuers would be required, pursuant to Section 14A(a)(2) of the Exchange Act, to provide a separate shareholder advisory vote on the frequency of shareholder votes on executive compensation for the first annual or other such meeting of shareholders on or after January 21, 2011. In our view, however, because such issuers have a requirement to conduct an annual shareholder advisory vote on executive compensation so long as they are indebted under the TARP, a shareholder advisory vote on the frequency of such votes while the issuer remains subject to a requirement to conduct such votes on an annual basis would not serve a useful purpose. We expressed these views in the Proposing Release[191] and, as noted above, commentators supported our views on this point.

We have considered, therefore, whether issuers with outstanding indebtedness under the TARP should be subject to the requirements of Section 14A(a)(2) of the Exchange Act. We do not believe it is necessary or appropriate in the public interest or consistent with the protection of investors to require an issuer to conduct a shareholder advisory vote on the frequency of the shareholder advisory vote on executive compensation when the issuer already is required to conduct advisory votes on executive compensation annually regardless of the outcome of such frequency vote. Because Section 14A(a)(2) would burden TARP issuers and their shareholders with an additional vote while providing little benefit to either the issuer or its shareholders, we continue to believe an exemption by rule is appropriate, pursuant to both the exemptive authority granted by Section 14A(e) of the Exchange Act[192] and the Commission's general exemptive authority pursuant to Section 36(a)(1) of the Exchange Act.[193] As a result, Rule 14a–21(b), as we are adopting it, exempts an issuer with outstanding indebtedness under the TARP from the requirements of Rule 14a–21(b) and Section 14A(a)(2) until the issuer has repaid all outstanding indebtedness under the TARP. Similar to the approach for shareholder advisory votes under Rule 14a–21(a), such an issuer would be required to include a separate shareholder advisory vote on the frequency of shareholder advisory votes on executive compensation pursuant to Section 14A(a)(2) and Rule 14a–21(b) for the first annual meeting of shareholders after the issuer has repaid all outstanding indebtedness under the TARP.

D. Disclosure of Golden Parachute Arrangements and Shareholder Approval of Golden Parachute Arrangements

1. General

Section 14A(b)(1) of the Exchange Act requires all persons making a proxy or consent solicitation seeking shareholder approval of an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all of an issuer's assets to provide disclosure, in accordance with rules we promulgate, of any agreements or understandings that the soliciting person has with its named executive officers (or that it has with the named executive officers of the acquiring issuer) concerning compensation that is based on or otherwise relates to the

[186] *See, e.g., Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change to Amend NYSE Rule 452 and Listed Company Manual Section 402.08 to Eliminate Broker Discretionary Voting on Executive Compensation Matters,* Release No. 34–62874, SR–NYSE–2010–59 (Sept. 9, 2010); *Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Prohibit Members from Voting Uninstructed Shares on Certain Matters,* Release No. 34–62992, SR–NASDAQ–2010–114 (Sept. 24, 2010).

[187] Broker discretionary voting in connection with merger or acquisition transactions also is not permitted under rules of the national securities exchanges. *See, e.g.,* NYSE Rule 452.

[188] Section 111(e) of the Emergency Economic Stabilization Act of 2008, 12 U.S.C. 5221. *See also* Rule 14a–20.

[189] *See* Section II.C.3 of the Proposing Release.

[190] *See, e.g.,* letters from ABA, CalPERS, COPERA, Davis Polk, FSR, PGGM, and RAILPEN & USS.

[191] *See* Section II.C.3 of the Proposing Release.

[192] Exchange Act Section 14A(e) provides that "the Commission may, by rule or order, exempt an issuer or class of issuers from the requirement" under Sections 14A(a) or 14A(b). Section 14A(e) further provides that "in determining whether to make an exemption under this subsection, the Commission shall take into account, among other considerations, whether the requirements under [Section 14A(a) and 14A(b)] disproportionately burdens small issuers." In adopting this exemption, the Commission considered whether the requirements of Section 14A(a) and (b) as applied to TARP recipients to conduct a shareholder advisory vote on the frequency of say-on-pay votes could disproportionately burden small issuers. As described further in Section II.E below, we have also considered whether the provision as a whole disproportionately burdens small issuers. We note, in addition, that to the extent a TARP recipient is a small issuer, it will be subject to the exemption.

[193] 15 U.S.C. 78mm(a)(1). Exchange Act Section 36(a)(1) provides that "the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."

merger transaction. In addition, Section 14A(b)(1) requires disclosure of any agreements or understandings that an acquiring issuer has with its named executive officers and that it has with the named executive officers of the target company in transactions in which the acquiring issuer is making a proxy or consent solicitation seeking shareholder approval of an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all of an issuer's assets. Section 14A(b)(1) of the Exchange Act requires the disclosure to be in a "clear and simple form in accordance with regulations to be promulgated by the Commission" and to include "the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of such executive officer." [194]

Under existing Commission rules, a target issuer soliciting shareholder approval of a merger is required to describe briefly any substantial interest, direct or indirect, by security holdings or otherwise, of any person who has been an executive officer or director since the beginning of the last fiscal year in any matter to be acted upon.[195] In response to this requirement, target issuers often include disclosure in their proxy statements about compensation arrangements that may be payable to a target issuer's executive officers and directors in connection with the transaction. In addition, under our existing rules, issuers are required to include in annual reports and annual meeting proxy statements detailed information in accordance with Item 402(j) of Regulation S–K about payments that may be made to named executive officers upon termination of employment or in connection with a change in control.[196] The Item 402(j) disclosure is provided based on year-end information and various assumptions, and generally does not reflect any actual termination or termination event.[197]

2. Item 402(t) of Regulation S–K

We proposed Item 402(t) of Regulation S–K to require disclosure of named executive officers' golden parachute arrangements in both tabular and narrative formats. This disclosure will be required in merger proxies and other disclosure documents for similar transactions as described in Section II.D.3 below. After considering the comments on this proposal, we are adopting Item 402(t) as proposed, with some modifications.

a. Proposed Amendments

We proposed Item 402(t) of Regulation S–K to require disclosure of named executive officers' golden parachute arrangements in both tabular and narrative formats. We based our proposals on Section 14A(b)(1)'s requirement that disclosure of the golden parachute compensation in any proxy or consent solicitation to approve an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all assets be "in a clear and simple form in accordance with regulations to be promulgated by the Commission" and include "the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of such executive officer." [198]

Consistent with Section 14A(b)(1) of the Exchange Act, agreements or understandings between a target issuer conducting a solicitation and its named executive officers would be subject to disclosure under proposed Item 402(t). In addition, because golden parachute compensation arrangements also may involve agreements or understandings between the acquiring issuer and the named executive officers of the target issuer, we proposed that Item 402(t) require disclosure of this compensation in addition to the disclosure mandated by Section 14A(b)(1). Specifically, to cover the full scope of potential golden parachute compensation applicable to the transaction, we proposed that Item 402(t) require disclosure of all golden parachute compensation relating to the merger among the target and acquiring issuers and the named executive officers of each.[199]

We did not propose to amend the requirements for golden parachutes disclosure in annual meeting proxy statements, although, under our proposal companies would be permitted to provide disclosure in annual meeting proxies in accordance with the new requirement.[200]

b. Comments on the Proposed Amendments

Comments on the proposal were generally favorable. We requested comment on a number of aspects of proposed Item 402(t), which we describe in more detail below.

i. General Comments on the Proposed Item 402(t) Table

We proposed that the Item 402(t) table would present quantitative disclosure of the individual elements of compensation that a named executive officer would receive that are based on or otherwise relate to the merger, acquisition, or similar transaction, and the total for each named executive officer.

Many commentators agreed that Item 402(t) as proposed would elicit disclosure of all elements of golden parachute compensation "in a clear and simple form" as required by Section 14A(b)(1).[201] In addition, some commentators suggested that Item 402(t) should be clarified to require disclosure of only compensation triggered by the subject transaction so that issuers are not required to disclose any golden parachute compensation that would not be triggered by the subject transaction.[202]

ii. Comments on the Elements of Compensation and Presentation of the Proposed Item 402(t) Table

As proposed, Item 402(t) would not have any *de minimis* exceptions for compensation below a certain dollar threshold and would not require disclosure of previously vested equity and pension benefits. Some commentators urged that Item 402(t) should have *de minimis* exceptions, like Item 402(j),[203] because, in their view, the exclusion of such immaterial amounts would not be inconsistent with Section 14A(b)(1)'s requirement to

[194] Exchange Act Section 14A(b)(1).

[195] Item 5 of Schedule 14A.

[196] *See* Item 402(j) of Regulation S–K [17 CFR 229.402(j)], Item 8 of Schedule 14A, and Item 11 of Form 10–K. Item 402(j) disclosure is required in both Annual Reports on Form 10–K and in annual meeting proxy statements, though such disclosure is typically provided in annual meeting proxy statements and incorporated into the Form 10–K by reference pursuant to General Instruction G(3) of Form 10–K. References to "annual meeting proxy statements" in this context are meant to encompass both locations for the disclosure.

[197] See Instruction 1 to Item 402(j), which requires quantitative disclosure applying the assumptions that the triggering event took place on the last business day of the issuer's last completed fiscal year, and the price per share of the issuer's securities is the closing market price as of that date. Where a triggering event has actually occurred for a named executive officer who was no longer serving as a named executive officer of the issuer at the end of the last completed fiscal year, Instruction 4 to Item 402(j) requires Item 402(j) disclosure for that named executive officer only for that triggering event.

[198] Exchange Act Section 14A(b)(1).

[199] However, because any agreements between a soliciting target company's named executive officers and the acquiring company are beyond the scope of the disclosure required by Section 14A(b)(1), we did not propose to subject such agreements to the Rule 14a–21(c) shareholder advisory vote required by Section 14A(b)(2) and Rule 14a–21(c). *See* discussion of Rule 14a–21(c) in Section II.D.4 below.

[200] *See* Sections II.D.2 and II.D.4 below.

[201] *See, e.g.,* letters from Davis Polk, PGGM, and WorldatWork.

[202] *See, e.g.,* letters from Davis Polk, Society of Corp. Sec., and Wachtell.

[203] *See, e.g.,* letters from Compensia, Davis Polk, McGuireWoods, PM&P, and Sullivan.

disclose the total amount of golden parachute compensation.[204] In addition, some commentators asserted that we should amend Item 402(j) rather than propose a new Item 402(t).[205]

Most commentators agreed with the proposed approach to omit previously vested equity and pension benefits from the table,[206] as including such amounts in the table could lead to confusion by overstating the total compensation.[207] Other commentators, however, recommended that such compensation be disclosed in the table [208] to make the compensation disclosure more comprehensive.[209]

A number of commentators also requested various other changes to the proposed table. Some commentators argued that issuers should have more flexibility in drafting the table to fit their individual circumstances,[210] or that issuers should be permitted to differentiate between cash severance compensation and cash amounts for outstanding awards that have been accelerated.[211] With respect to employment agreements, most commentators supported our proposed approach to exclude disclosure of employment agreements from the Item 402(t) table,[212] though some commentators argued that such employment agreements should be quantified and included in the tabular disclosure to provide more comprehensive disclosure.[213] A number of commentators supported the footnote identification of amounts of "single-trigger" and "double-trigger" [214] compensation elements,[215] with some commentators recommending that the disclosure be included in the main text rather than in footnotes if an issuer believes it would be useful to the presentation.[216] One commentator, however, indicated that identification of single-trigger and double-trigger elements should not be required as it believed this disclosure would not be useful to investors.[217]

We also requested comment with respect to the appropriate measurement for issuer stock price for tabular disclosure in proxy statements for mergers or similar transactions. A number of commentators agreed with our proposed approach to calculate such amounts based on the issuer's share price as of the latest practicable date,[218] though many other commentators suggested that the share price contemplated by the deal should be used, if available,[219] with an alternative to use the average closing price over the first five business days following public announcement of the transaction.[220] One commentator expressed a concern that the share price as of the latest practicable date could lead to potential gaming of the price by issuers.[221]

iii. Comments on Individuals Subject to Item 402(t) Disclosure

Some commentators indicated that requiring disclosure under Item 402(t) of a broader group of individuals than is required by Exchange Act Section 14A(b)(1) would be potentially confusing to investors [222] as such disclosure goes beyond the requirements of Section 14A and could lead to as many as three separate tables.[223] Different commentators supported disclosure of the broader group of individuals [224] in order to provide the full picture of compensation being received in connection with the transaction.[225]

Most commentators supported the proposal that issuers would not be required to include Item 402(t) information with respect to individuals who would have been among the most highly compensated executive officers but for the fact that they were not serving as an executive officer at the end of the last completed fiscal year.[226] One commentator, however, argued that issuers should be permitted to include disclosure of the compensation of such individuals to conform to the presentation of compensation in prior filings and that we should clarify that the named executive officers subject to Item 402(t) is determined in the same manner as under Item 5.02(e) of Form 8–K.[227]

iv. Comments on Item 402(t) Disclosure in Annual Meeting Proxy Statements

In the Proposing Release, we did not propose requiring Item 402(t) disclosure in annual meeting proxy statements. Most commentators agreed that the proposed Item 402(t) narrative and tabular disclosure should not be required in annual meeting proxy statements [228] given the costs and burdens this would impose on issuers.[229] However, other commentators recommended that such disclosure should be required in annual meeting proxy statements,[230] noting that such information plays a key part in shareholder evaluation of an issuer's compensation program.[231]

c. Final Rule

After considering comments, we are adopting Item 402(t) of Regulation S–K as proposed, with some modifications, to require disclosure of named executive officers' golden parachute arrangements in both tabular and narrative formats.

i. Item 402(t) Table and Narrative Requirements

We are adopting the following new table, as proposed:

[204] *See* letter from Compensia.

[205] *See, e.g.,* letters from Business Roundtable and Meridian.

[206] *See, e.g.,* letters from ABA, Center on Exec. Comp., Davis Polk, FSR, ICGN, NACD, Pfizer, PM&P, Protective Life, and WorldatWork.

[207] *See* letter from ABA.

[208] *See, e.g.,* letters from Barnard, Glass Lewis, PGGM, and Senator Levin.

[209] *See, e.g.,* letter from Glass Lewis.

[210] *See* letter from ABA.

[211] *See* letter from Towers Watson.

[212] *See, e.g.,* letters from ABA, Center on Exec. Comp., Compensia, Davis Polk, Frederic Cook, FSR, Hermes, and PGGM.

[213] *See, e.g.,* letters from Glass Lewis, NACD, and PIRC.

[214] A "double-trigger" arrangement requires that the executive's employment be terminated without cause or that the executive resign for good reason within a limited period of time after the change-in-control to trigger payment. A "single-trigger" arrangement does not require such a termination or resignation after the change-in-control to trigger payment.

[215] *See, e.g.,* letters from CalPERS, CII, FSR, Hermes, ICGN, and PGGM.

[216] *See, e.g.,* letters from ABA and NACD.

[217] *See* letter from Protective Life.

[218] *See, e.g.,* letters from ABA, Center on Exec. Comp., and ICGN.

[219] *See, e.g.,* letters from Davis Polk, PM&P, and Sullivan.

[220] *See* letter from PGGM.

[221] *See* letter from PGGM.

[222] *See, e.g.,* letters from Center on Exec. Comp., Davis Polk, FSR, NACD, Pfizer, PGGM, Protective Life, Towers Watson, Wachtell, Lipton, Rosen & Katz ("Wachtell"), and WorldatWork.

[223] *See* letter from Davis Polk.

[224] *See, e.g.,* letters from CalPERS, ICGN, PIRC, and Senator Carl Levin ("Senator Levin").

[225] *See* letter from PIRC.

[226] *See, e.g.,* letters from Davis Polk, ICGN, PGGM, and PM&P.

[227] *See* letter from ABA.

[228] *See, e.g.,* letters from ABA, Center for Exec. Comp., Compensia, Davis Polk, Frederic Cook, FSR, Hermes Equity Ownership Services ("Hermes"), ICGN, McGuireWoods, PGGM, PM&P, and WorldatWork.

[229] *See, e.g.,* letter from Frederic Cook.

[230] *See, e.g.,* letters from AFSCME, Protective Life, and Public Citizen.

[231] *See* letter from AFSCME.

GOLDEN PARACHUTE COMPENSATION

Name	Cash ($)	Equity ($)	Pension/ NQDC ($)	Perquisites/ benefits ($)	Tax reim-bursement ($)	Other ($)	Total ($)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
PEO							
PFO							
A							
B							
C							

The table presents quantitative disclosure of the individual elements of compensation that an executive would receive that are based on or otherwise relate to the merger, acquisition, or similar transaction, and the total for each named executive officer.[232] As proposed and adopted, elements that will be separately quantified and included in the total will be any cash severance payment (*e.g.,* base salary, bonus, and pro-rata non-equity incentive plan [233] compensation payments) (column (b)); the dollar value of accelerated stock awards, in-the-money option awards for which vesting would be accelerated, and payments in cancellation of stock and option awards (column (c)); pension and nonqualified deferred compensation benefit enhancements (column (d)); perquisites and other personal benefits and health and welfare benefits (column (e)); and tax reimbursements (*e.g.,* Internal Revenue Code Section 280G tax gross-ups) (column (f)). Consistent with the proposal, we are adopting an "Other" column of the table for any additional elements of compensation not specifically includable in the other columns of the table (column (g)). This column, like the columns for the other elements, will require footnote identification of each separate form of compensation reported. The final column in the table requires disclosure, for each named executive officer, of the aggregate total of all such compensation (column (h)).[234] We are adopting the table as proposed, with a requirement for separate footnote identification of amounts attributable to "single-trigger" arrangements and amounts attributable to "double-trigger" arrangements, so that shareholders can readily discern these amounts.

As proposed and adopted, the tabular disclosure required by Item 402(t) requires quantification with respect to any agreements or understandings, whether written or unwritten, between each named executive officer and the acquiring company or the target company, concerning any type of compensation, whether present, deferred or contingent, that is based on or otherwise relates to an acquisition, merger, consolidation, sale or other disposition of all or substantially all assets. The table will quantify cash severance, equity awards that are accelerated or cashed out, pension and nonqualified deferred compensation enhancements, perquisites, and tax reimbursements. In addition, the table requires disclosure and quantification of the value of any other compensation related to the transaction.[235]

However, as adopted, Item 402(t) will require tabular and narrative disclosure in a proxy statement soliciting shareholder approval of a merger or similar transaction or a filing made with respect to a similar transaction only of compensation that is based on or otherwise relates to the subject transaction.[236] We agree with commentators that it would not be useful to shareholders to require disclosure of amounts that would not be paid or payable in connection with the transaction subject to shareholder approval.

To implement the statutory mandate to disclose the conditions upon which the compensation may be paid or become payable, as proposed and adopted, Item 402(t) [237] requires issuers to describe any material conditions or obligations applicable to the receipt of payment, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, their duration, and provisions regarding waiver or breach.[238] We are also adopting a requirement, as proposed, to provide a description of the specific circumstances that would trigger payment,[239] whether the payments would or could be lump sum, or annual, and their duration, and by whom the payments would be provided,[240] and any material factors regarding each agreement.[241] These narrative items are modeled on the narrative disclosure required with respect to termination and change-in-control agreements.[242]

ii. Elements of Compensation and Presentation of Item 402(t) Table

In response to commentators' requests for greater flexibility to facilitate clear presentation, we note that under our final rule issuers are permitted to add additional named executive officers, and additional columns or rows to the tabular disclosure, such as to disclose cash severance separately from other cash compensation or to distinguish "single-trigger" and "double-trigger" arrangements, so long as such disclosure is not misleading.

As noted in the Proposing Release,[243] we considered whether making the disclosure requirements in Item 402(j) applicable to transactions enumerated in Section 14A(b)(1), rather than adopting a new disclosure item for purposes of Section 14A(b)(1), would be an appropriate approach to satisfy the requirements of the Act. However, certain elements required by Section

[232] Item 402(t)(2) of Regulation S–K.

[233] As defined in Item 402(a)(6)(iii) of Regulation S–K.

[234] Exchange Act Section 14A(b)(1) requires disclosure of "the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of such executive officer."

[235] Consistent with our proposals, we have adopted Instruction 3 to Item 402(t)(2) to provide, like Instruction 1 to Item 402(j), that in the event uncertainties exist as to the provision of payments and benefits, or the amounts involved, the issuer is required to make a reasonable estimate applicable to the payment or benefit and disclose material assumptions underlying such estimate in its disclosure. Unlike Item 402(j), Item 402(t) does not permit the disclosure of an estimated range of payments.

[236] Instruction 1 to Item 402(t)(2).

[237] Item 402(t)(3) of Regulation S–K.

[238] Item 402(t)(3)(iii) of Regulation S–K.

[239] Item 402(t)(3)(i) of Regulation S–K.

[240] Item 402(t)(3)(ii) of Regulation S–K.

[241] Item 402(t)(3) of Regulation S–K. Such material factors would include, for example, provisions regarding modifications of outstanding options to extend the vesting period or the post-termination exercise period, or to lower the exercise price.

[242] Item 402(j) of Regulation S–K.

[243] *See* Section II.D.2 of the Proposing Release.

14A(b)(1) are not included in Item 402(j). Specifically, Item 402(j) does not require disclosure about arrangements that do not discriminate in scope, terms or operation in favor of executive officers and that are available generally to all salaried employees,[244] permits exclusion of *de minimis* perquisites and other personal benefits,[245] and does not require presentation of an aggregate total of all compensation that is based on or otherwise relates to a transaction.[246]

Despite the views of some commentators, we continue to believe that Item 402(t) should not permit exclusion of *de minimis* perquisites and other personal benefits because exclusion of these amounts would be inconsistent with Section 14A(b)(1), which requires disclosure of "the aggregate total of all such compensation that may [* * *] be paid or become payable [* * *]." Moreover, we continue to believe that the Section 14A(b)(1) requirement to disclose the information "in a clear and simple form" is best satisfied through the use of tabular disclosure, which Item 402(j) does not require.

Item 402(t), like Item 402(j),[247] does not require separate disclosure or quantification with respect to compensation disclosed in the Pension Benefits Table and Nonqualified Deferred Compensation Table. Item 402(t), as proposed and adopted, also does not require disclosure or quantification of previously vested equity awards because these award amounts are vested without regard to the transaction. We agree with the views expressed by some commentators that previously vested equity awards are not compensation "that is based on or otherwise relates to" the transaction. Similarly, after reviewing the comments, we continue to believe that we should not require tabular disclosure and quantification of compensation from *bona fide* post-transaction employment agreements to be entered into in connection with the merger or acquisition transaction. We agree with the views expressed by many commentators that future employment arrangements are not compensation "that is based on or otherwise relates to" the transaction.[248]

Under the final rule, where Item 402(t) disclosure is included in an annual meeting proxy statement,[249] 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, as proposed,[250] consistent with quantification standards used in Item 402(j). However, in response to comments, we have modified how the issuer stock price will be measured for calculating dollar amounts for the tabular disclosure required by Item 402(t) in connection with a transactional filing. In a proxy statement soliciting shareholder approval of a merger or similar transaction or a filing made with respect to a similar transaction, Item 402(t)'s tabular quantification of dollar amounts based on issuer stock price will be based on the consideration per share, if such value is a fixed dollar amount, or otherwise on the average closing price per share over the first five business days following the first public announcement of the transaction.[251]

iii. Individuals Subject to Item 402(t) Disclosure

We continue to believe that Item 402(t) disclosure should cover a broader group of individuals than is required by Section 14A(b). Because compensation arrangements may involve agreements or understandings between the acquiring issuer and the named executive officers of the target issuer, Item 402(t), as proposed and adopted, requires disclosure of the full scope of golden parachute compensation applicable to the transaction. We agree with commentators and continue to believe that shareholders may find disclosure about these arrangements that are not otherwise required to be disclosed by Section 14A(b) informative to their voting decisions.

As both proposed and adopted, we have included an instruction providing that Item 402(t) disclosure need not be provided for persons who are named executive officers because they would have been among the most highly compensated executive officers but for the fact that they were not serving as an executive officer at the end of the last completed fiscal year.[252] However, in response to comments, we are clarifying that where Item 402(t) disclosure is provided in a proxy statement soliciting shareholder approval of a merger or similar transaction or a filing made with respect to a similar transaction, this instruction will be applied with respect to the named executive officers for whom disclosure was required in the issuer's most recent filing requiring Summary Compensation Table disclosure.[253]

iv. Item 402(t) Disclosure in Annual Meeting Proxy Statements

We are not requiring Item 402(t) disclosure in annual meeting proxy statements. We agree with the views expressed by most commentators that the proposed Item 402(t) narrative and tabular disclosure should not be required in annual meeting proxy statements given the costs and burdens this would impose on issuers. We believe that the requirements of Item 402(j) provide sufficient information to shareholders in that context, and note that issuers may also include disclosure pursuant to Item 402(t) voluntarily if they believe it would permit shareholders to gain a better understanding of their compensation programs.

An issuer seeking to satisfy the exception from the separate merger proxy shareholder vote under Section 14A(b)(2) and Rule 14a–21(c) by including Item 402(t) disclosure in an annual meeting proxy statement soliciting the shareholder vote required by Section 14A(a)(1) and Rule 14a–21(a)[254] will be able to satisfy Item 402(j) disclosure requirements with respect to a change-in-control of the issuer by providing the disclosure required by Item 402(t).[255] The issuer

[244] Instruction 5 to Item 402(j).

[245] *See* Instruction 2 to Item 402(j), which permits exclusion of perquisites and other personal benefits or property if the aggregate amount of such compensation will be less than $10,000.

[246] As proposed, we are adopting conforming changes to Item 402(a)(6)(ii) [17 CFR 229.402(a)(6)(ii)] and Item 402(m)(5)(ii) [17 CFR 229.402(m)(5)(ii)] of Regulation S–K to clarify that information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the company and that are generally available to all salaried employees must be included in disclosure pursuant to proposed Item 402(t).

[247] *See* Instruction 3 to Item 402(j).

[248] Information regarding such future employment agreements is subject to disclosure pursuant to Item 5(a) and Item 5(b)(xii) of Schedule 14A to the extent that such agreements constitute a "substantial interest" in the matter to be acted upon.

[249] A company may choose to include the disclosure in the annual meeting proxy statement in order for the Section 14A(a)(1) shareholder vote to satisfy the exception from the merger proxy separate vote. See Section II.D.4 below.

[250] Instruction 2 to Item 402(t)(2).

[251] Instruction 1 to Item 402(t)(2).

[252] Instruction 1 to Item 402(t), which requires Item 402(t) disclosure for individuals covered by Items 402(a)(3)(i), (ii) and (iii), and for smaller reporting companies, the individuals covered by Items 402(m)(2)(i) and (ii). Item 402(t) disclosure will not be required for individuals for whom Item 402(t) disclosure otherwise is required by Item 402(a)(3)(iv), and for smaller reporting companies, by Item 402(m)(2)(iii).

[253] Instruction 1 to Item 402(t)(2) and Instruction 2 to Item 1011(b). This is similar to the approach used in Instruction 4 to Item 5.02 of Form 8–K.

[254] This exception and the comments we received on the exception are discussed in Section II.D.4 below.

[255] We note also that one example of material information to be addressed in CD&A is the basis for selecting particular termination or change-in-

Continued

must still include in an annual meeting proxy statement disclosure in accordance with Item 402(j) about payments that may be made to named executive officers upon termination of employment.

3. Amendments to Schedule 14A, Schedule 14C, Schedule 14D–9, Schedule 13E–3, Schedule TO, and Item 1011 of Regulation M–A

We proposed amendments to require that the disclosure set forth in Item 402(t) of Regulation S–K be included in merger proxies as well as filings for other transactions not referenced in the Act. After considering the comments received, we are adopting the amendments to Schedule 14A, Schedule 14C, Schedule 14D–9, Schedule 13E–3, and Item 1011 of Regulation M–A as proposed with slight modifications to Item 1011 of Regulation M–A. We are also adopting an amendment to Schedule TO to clarify that the Item 402(t) disclosure is not required in third-party bidders' tender offer statements, so long as the transactions are not also Rule 13e–3 going-private transactions.

a. Proposed Amendments

We proposed amendments to Items 5(a) and (b) of Schedule 14A under the Exchange Act, as well as conforming changes to Item 3 of Schedule 14C, Item 1011(b) of Regulation M–A, Item 15 of Schedule 13E–3 and Item 8 of Schedule 14D–9. These proposals were intended to implement the disclosure requirements in Section 14A(b)(1) as well as to extend the new disclosure requirements to similar transactions by requiring that the disclosure set forth in Item 402(t) of Regulation S–K be included in any proxy or consent solicitation material seeking shareholder approval of an acquisition, merger, consolidation, or proposed sale or other distribution of all or substantially all the assets of the issuer. Our proposals would require such disclosure not only in a proxy or consent solicitation relating to such a transaction, as required by the Act, but also in the following:

- Information statements filed pursuant to Regulation 14C;
- Proxy or consent solicitations that do not contain merger proposals but require disclosure of information under Item 14 of Schedule 14A pursuant to Note A of Schedule 14A;
- Registration statements on Forms S–4 and F–4 containing disclosure relating to mergers and similar transactions;
- Going private transactions on Schedule 13E–3; and
- Third-party tender offers on Schedule TO and Schedule 14D–9 solicitation/recommendation statements.

We also proposed amendments to Item 1011(b) of Regulation M–A that would require the bidder [256] in a third-party tender offer to provide information in its Schedule TO about a target's golden parachute arrangements only to the extent the bidder has made a reasonable inquiry about the golden parachute arrangements and has knowledge of such arrangements. In addition, we proposed exceptions to both the disclosure requirement under Item 1011(b) for both bidders and targets in third-party tender offers and filing persons in Rule 13e–3 going-private transactions where the target or subject company is a foreign private issuer, and to the disclosure obligation under Item 402(t) with respect to agreements and understandings with senior management of foreign private issuers where the target or acquirer is a foreign private issuer.

b. Comments on the Proposed Amendments

Comments on the proposal were generally favorable. A number of commentators expressed support for our proposed approach to require disclosure of golden parachute arrangements in connection with other transaction not specifically referenced in the Act.[257] One commentator objected that the proposal goes beyond the scope of the statute by requiring disclosure of golden parachute compensation in connection with tender and exchange offers.[258] One commentator also questioned whether such disclosure should be required in third-party tender offers, given the difficulty bidders may face in obtaining accurate information regarding a target company's golden parachute arrangements.[259] Commentators also supported excluding foreign private issuers from Item 402(t) disclosure requirements for bidders and target companies in third-party tender offers and filing persons in Rule 13e–3 going-private transactions.[260]

c. Final Rule

After considering the comments, we are adopting the amendments to Schedule 14A, Schedule 14C, Schedule 14D–9, Schedule 13E–3, and Item 1011 of Regulation M–A as proposed, with slight modifications to Item 1011 of Regulation M–A. We are also adopting an amendment to Schedule TO to provide that bidders in third-party tender offers are not required to provide the disclosure required by Item 1011(b) of Regulation M–A.

Issuers could structure transactions in a manner that avoids implicating Section 14(a) of the Exchange Act (*e.g.,* tender offers and certain Rule 13e–3 going-private transactions), while still effectively seeking the consent of shareholders with respect to their investment decision (*e.g.,* whether or not to tender their shares or approve a going-private transaction, in instances where such going-private transactions are not subject to Regulation 14A). For these reasons, we continue to believe that requiring Item 402(t) disclosure in all such transactions furthers the purposes of Section 14A(b) of the Exchange Act and would minimize the regulatory disparity that might otherwise result from treating such transactions differently. Thus, we are adopting amendments that would require the Item 402(t) disclosure in various transactions, whether a merger, acquisition, a Rule 13e–3 going-private transaction or a tender offer.[261]

In addition, we note that acquiring companies may solicit proxies to approve the issuance of shares or a reverse stock split in order to conduct a merger transaction, and that such proxy statements are required to include disclosure of information required under Item 14 of Schedule 14A pursuant to Note A of Schedule 14A. Thus, we are also adopting amendments that would require the Item 402(t) disclosure in those proxy statements that are required to include disclosure of information required under Item 14 of Schedule 14A pursuant to Note A of Schedule 14A.[262] The shareholder advisory vote required by Section 14A(b)(2), however, will not be extended to transactions beyond those specified in that section.

We have revised the final rule in response to comments to provide that

control events as triggering payment (*e.g.,* the rationale for providing a single trigger for payment in the event of a change-in-control). *See* Item 402(b)(2)(xi) of Regulation S–K.

[256] "Bidder" is defined in Rule 14d–1(g)(2) [17 CFR 240.14d–1(g)(2)].

[257] *See, e.g.,* letters from ICGN and PGGM.

[258] *See* letter from Wachtell.

[259] *See* letter from ABA.

[260] *See, e.g.,* letters from ABA, ICGN, and PGGM.

[261] As adopted, companies filing solicitation/recommendation statements on Schedule 14D–9 in connection with third-party tender offers will be obligated to provide this additional disclosure. *See* Item 8 of Schedule 14D–9. However, as explained below, bidders filing offer statements on Schedule TO will not have a similar obligation. *See* Item 11 of Schedule TO.

[262] *See* Item 5(a)(5) and Item 5(b)(3) of Schedule 14A, which will require acquiring companies to include the Item 402(t) disclosure with respect to each named executive officer of both the acquiring issuer and the target issuer.

bidders in third-party tender offers will not be required to comply with Item 1011(b), which calls for Item 402(t) disclosure. We are persuaded that bidders may face difficulties in obtaining the information necessary to provide such disclosure [263] and that it is not necessary to require a bidder to provide this information since the target companies will be required to provide the Item 402(t) golden parachute compensation disclosure in Schedule 14D–9 filed by the tenth business day from the date the tender offers are first published, sent or given to security holders.[264] We believe this revision to the proposal will alleviate a potential burden that bidders in third-party tender offers may encounter while still accomplishing our goal of minimizing the regulatory disparity that might otherwise result from treating third-party tender offers differently than other transactions described in this section by retaining the disclosure requirement in Schedule 14D–9. However, we did not adopt a similar revision to the proposed changes to Schedule 13E–3; therefore, the disclosure of golden parachute arrangements will be required in third-party tender offers that are also Rule 13e–3 going-private transactions.[265] In light of the revision to the proposal, we are not adopting the instruction to Item 1011(b) of Regulation M–A that would have allowed bidders to provide the disclosure only to the extent the information was known after making a reasonable inquiry. Therefore, Item 1011(b), as adopted, does not include the proposed instruction.

In addition, we are adopting as proposed an exception to the disclosure requirement under Item 1011(b) for targets in third-party tender offers and filing persons in Rule 13e–3 going-private transactions where the target or subject company is a foreign private issuer. Consistent with the proposal, we are also adopting an exception to the disclosure obligation under Item 402(t) with respect to agreements and understandings with senior management of foreign private issuers where the target or acquirer is a foreign private issuer.[266] We agree with commentators and believe such accommodations are appropriate in light of our long-standing accommodation to foreign private issuers regarding compensation disclosure.[267]

4. Rule 14a–21(c)

Section 14A(b)(2) generally requires a separate shareholder advisory vote on golden parachute compensation arrangements required to be disclosed under Section 14A(b)(1) in connection with mergers and similar transactions. A separate shareholder advisory vote would not be required on golden parachute compensation if disclosure of that compensation had been included in the executive compensation disclosure that was subject to a prior advisory vote of shareholders under Section 14A(a)(1) of the Exchange Act.

We proposed Rule 14a–21(c) to implement these requirements. We are adopting this rule substantially as proposed with some minor changes in response to comments.

a. Proposed Rule

Proposed Rule 14a–21(c) would require issuers to conduct a separate shareholder advisory vote in proxy statements for meetings at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all assets, consistent with Section 14A(b)(2). This shareholder advisory vote would be required only with respect to the golden parachute agreements or understandings required to be disclosed by Section 14A(b)(1), as disclosed pursuant to proposed Item 402(t) of Regulation S–K. We proposed Rule 14a–21(c) to require a shareholder advisory vote only on the golden parachute compensation agreements or understandings for which Section 14A(b)(1) requires disclosure and Section 14A(b)(2) requires a shareholder vote. Consistent with Section 14A(b)(2), as proposed, issuers would not be required to include in the merger proxy a separate shareholder vote on golden parachute compensation disclosed in accordance with Item 402(t) of Regulation S–K if Item 402(t) disclosure of that compensation had been included in the executive compensation disclosure that was subject to a prior vote of shareholders under Section 14A(a)(1) of the Exchange Act and Rule 14a–21(a).

b. Comments on the Proposed Amendments

Comments on the proposal were generally positive. As noted above, some commentators indicated that requiring disclosure under Item 402(t) of a broader group of individuals than would be covered by the Rule 14a–21(c) shareholder advisory vote would be potentially confusing to investors [268] as such disclosure goes beyond the requirements of Section 14A and could lead to as many as three separate tables.[269]

Most commentators agreed with our proposed approach that if golden parachute arrangements were modified or amended subsequent to being subject to the annual shareholder vote under Rule 14a–21(a), a separate shareholder vote in the merger proxy should be required to cover only the changes to such arrangements,[270] given that full disclosure of the full set of arrangements will also be provided.[271] Some commentators, however, believed that in this circumstance the subsequent vote should cover the entire set of golden parachute arrangements, not just the changes, so that shareholders have the opportunity to vote on the full complement of compensation that would be payable.[272]

In addition, some commentators recommended that certain changes to golden parachute arrangements that were altered or amended subsequent to being subject to the shareholder advisory vote under Rule 14a–21(a) should be exempt from a separate shareholder advisory vote in a merger proxy. In their view, there should be an exemption for certain routine, non-substantive changes, such as where the same compensation arrangements apply to new named executive officers who were not included in the prior disclosure that was subject to the shareholder vote,[273] subsequent grants in the ordinary course of additional awards subject to the same acceleration terms that applied to awards covered by a previous vote,[274] routine changes in salary subsequent to the prior vote,[275] and changes that result in a reduction in compensation value.[276] Other

[263] *See* letter from ABA.

[264] We are adopting an amendment to Schedule TO to avoid imposing on bidders the obligation to provide such disclosure. See Item 11 of Schedule TO.

[265] *See* Item 15 of Schedule 13E–3.

[266] Instruction 2 to Item 402(t).

[267] *See, e.g.,* Item 402(a)(1) of Regulation S–K, and Items 6.B and 6.E.2 of Form 20–F [17 CFR 249.220f].

[268] *See, e.g.,* letters from Center on Exec. Comp., Davis Polk, FSR, NACD, Pfizer, PGGM, Protective Life, Towers Watson, Wachtell, Lipton, Rosen & Katz ("Wachtell"), and WorldatWork.

[269] *See* letter from Davis Polk.

[270] *See, e.g.,* letters from ABA, Frederic Cook, McGuireWoods, NACD, PGGM, Protective Life, and WorldatWork.

[271] *See, e.g.,* letter from ABA.

[272] *See, e.g.,* letter from CII.

[273] *See, e.g.,* letters from McGuireWoods, PM&P, Protective Life, Steve Quinlivan ("Quinlivan"), and Sullivan.

[274] *See, e.g.,* letters from Business Roundtable, Compensia, FSR, McGuireWoods, PM&P, Protective Life, Sullivan, and Wachtell.

[275] *See* letter from McGuireWoods.

[276] *See, e.g.,* letters from Frederic Cook, Meridian, and Protective Life.

commentators stated that there should be no exceptions and that a new golden parachute vote should be required if there have been any changes since the arrangements were subject to the Rule 14a–21(a) shareholder advisory vote.[277]

c. Final Rule

After considering the comments, we are adopting Rule 14a–21(c) as proposed, with some modifications. Consistent with the proposal, our rule does not require issuers to use any specific language or form of resolution to be voted on by shareholders. In addition, we note that, as provided in Section 14A(c), this shareholder vote will not be binding on the issuer or its board of directors.

i. Scope of Rule 14a–21(c) Shareholder Advisory Vote

Under Rule 14a–21(c), issuers will be required to provide a separate shareholder advisory vote in proxy statements for meetings at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all assets, consistent with Section 14A(b)(2). However, issuers are not required to provide a separate shareholder advisory vote in proxy statements for meetings at which shareholders are asked to approve other proposals, such as an increase in authorized shares or a reverse stock split, which may be necessary for the issuer to effectuate a transaction. A vote under Rule 14a–21(c) is required only if the shareholders are voting to approve the transaction and the transaction and golden parachute arrangements come within those covered by Section 14A(b). Consistent with the proposal, this advisory vote will be required only with respect to the golden parachute agreements or understandings required to be disclosed by Section 14A(b)(1), as disclosed pursuant to proposed Item 402(t) of Regulation S–K.

Section 14A(b)(1) requires disclosure of any agreements or understandings between the soliciting person and any named executive officer of the issuer or any named executive officers of the acquiring issuer, if the soliciting person is not the acquiring issuer. When a target issuer conducts a proxy or consent solicitation to approve a merger or similar transaction, golden parachute compensation agreements or understandings between the acquiring issuer and the named executive officers of the target issuer are not within the scope of disclosure required by Section 14A(b)(1), and thus a shareholder vote to approve arrangements between the soliciting target issuer's named executive officers and the acquiring issuer is not required by Exchange Act Section 14A(b)(2). Consequently, consistent with the proposal, Rule 14a–21(c) as adopted requires a shareholder advisory vote only on the golden parachute compensation agreements or understandings for which Section 14A(b)(1) requires disclosure and Section 14A(b)(2) requires a shareholder vote. As described in Section II.D.2.c.iii above, however, disclosure of all golden parachute arrangements will be required, even though a vote on the arrangements will not be required.

ii. Exceptions to Rule 14a–21(c) Shareholder Advisory Vote

Consistent with Section 14A(b)(2) and our proposal, issuers will not be required to include in the merger proxy a separate shareholder vote on the golden parachute compensation disclosed under Item 402(t) of Regulation S–K if Item 402(t) disclosure of that compensation had been included in the executive compensation disclosure that was subject to a prior vote of shareholders under Section 14A(a)(1) of the Exchange Act and Rule 14a–21(a). In this regard, we note that Section 14A(b)(2) requires only that the golden parachute arrangements have been subject to a prior shareholder vote under Section 14A(a)(1); such arrangements need not have been approved by shareholders.

For issuers to take advantage of this exception, however, the executive compensation disclosure subject to the prior shareholder vote must have included Item 402(t) disclosure of the same golden parachute arrangements. Even if the annual meeting proxy statement provided some disclosure with respect to golden parachute arrangements,[278] the annual meeting proxy statement must include the disclosure required by Item 402(t) in order for the annual meeting shareholder vote under Section 14A(a)(1) and Rule 14a–21(a) to satisfy the exception from the merger proxy separate shareholder vote under Section 14A(b)(2) and Rule 14a–21(c). Consequently, we would expect that some issuers may voluntarily include Item 402(t) disclosure with their other executive compensation disclosure in annual meeting proxy statements soliciting the shareholder vote required by Section 14A(a)(1) and Rule 14a–21(a) so that this exception would be available to the issuer for a potential subsequent merger or acquisition transaction. We also expect that some issuers may choose to include the new disclosure for other reasons, such as investor interest in the information.

The exception will be available only to the extent the same golden parachute arrangements previously subject to an annual meeting shareholder vote remain in effect, and the terms of those arrangements have not been modified subsequent to the Section 14A(a)(1) shareholder vote. As proposed and adopted, if the disclosure pursuant to Item 402(t) has been updated to change only the value of the items in the Golden Parachute Compensation Table to reflect price movements in the issuer's securities, no new shareholder advisory vote under Section 14A(b)(1) will be required. New golden parachute arrangements, and any revisions to golden parachute arrangements that were subject to a prior Section 14A(a)(1) shareholder vote will be subject to the separate merger proxy shareholder vote requirement of Section 14A(b)(2) and Rule 14a–21(c).[279]

Additionally, we agree with certain commentators[280] that changes that result only in a reduction in value of the total compensation payable should not require a new shareholder vote. If the shareholders have had an opportunity to vote on a more highly valued compensation package, then we do not believe issuers should be required to provide a separate vote on a change that results only in a compensation package that has been reduced in value.

We believe that the other examples of changes cited by commentators, including changes in compensation because of a new named executive officer, additional grants of equity compensation in the ordinary course, and increases in salary, are significant changes to the golden parachute compensation disclosure and, consistent with Section 14A(b)(2), should be subject to a shareholder vote. Because a shareholder vote would already have been obtained on portions of the arrangements, however, only the new arrangements and revised terms of the arrangements previously subject to a Section 14A(a)(1) shareholder vote will be subject to the merger proxy separate

[277] *See, e.g.,* letters from Glass Lewis and PGGM.

[278] See CD&A and Item 402(j) of Regulation S–K, and for smaller reporting companies see Item 402(q)(2) of Regulation S–K for the disclosure requirements applicable to annual meeting proxy statements.

[279] For example, we would view any change that would result in an IRC Section 280G tax gross-up becoming payable as a change in terms triggering such a separate vote, even if such tax gross-up becomes payable only because of an increase in the issuer's share price.

[280] *See, e.g.,* letters from Frederic Cook, Meridian, and Protective Life.

shareholder vote under Section 14A(b)(2) and Rule 14a–21(c).

Consistent with the proposal, issuers providing for a shareholder vote on new arrangements or revised terms will need to provide two separate tables under Item 402(t) of Regulation S–K in merger proxy statements.[281] One table will disclose all golden parachute compensation, including both arrangements and amounts previously disclosed and subject to a say-on-pay vote under Section 14A(a)(1) and Rule 14a–21(a) and the new arrangements or revised terms. The second table will disclose only the new arrangements or revised terms subject to the vote, so that shareholders can clearly see what is subject to the shareholder vote under Section 14A(b)(2) and Rule 14a–21(c). Similarly, in cases where Item 402(t) requires disclosure of arrangements between an acquiring company and the named executive officers of the soliciting target company, issuers will need to clarify whether these agreements are included in the shareholder advisory vote by providing a separate table of all agreements and understandings subject to the shareholder advisory vote required by Section 14A(b)(2) and Rule 14a–21(c), if different from the full scope of golden parachute compensation subject to Item 402(t) disclosure.[282]

E. Treatment of Smaller Reporting Companies

Section 951 of the Act establishes a new Section 14A(e) of the Exchange Act, which provides that we may, by rule or order, exempt an issuer or class of issuers from the requirements of Section 14A(a) and (b). In determining whether to make an exemption under this subsection, we are directed to take into account, among other considerations, whether the requirements of Sections 14A(a) and 14A(b) disproportionately burden small issuers.

In the Proposing Release, we did not propose to exempt small issuers or smaller reporting companies[283] from the requirements of Sections 14A(a) and 14A(b). Comments on this issue were mixed. Many commentators agreed that the requirements of Section 14A should be applied to all issuers and that there should be no exemptions for smaller reporting companies,[284] while a number of other commentators asserted that smaller reporting companies should be exempt from the requirements of Exchange Act Section 14A and our proposed rules.[285] Among those opposed to applying the requirements to smaller reporting companies, in addition to stating that these requirements would be a burden to smaller reporting companies,[286] some commentators asserted that smaller reporting companies may feel compelled to include additional disclosure beyond the scaled requirements otherwise applicable to smaller reporting companies, including a CD&A, because of such votes,[287] which would impose significant burdens on these issuers. One commentator urged that, if we do not exempt smaller reporting companies, we should at least delay implementation of the proposed rules for smaller reporting companies so that smaller companies would have the opportunity to observe how larger companies conduct the vote and respond to the disclosure requirements.[288]

After reviewing and considering these comments, we are adopting a temporary exemption for smaller reporting companies so that these issuers will not be required to conduct either a shareholder advisory vote on executive compensation or a shareholder advisory vote on the frequency of say-on-pay votes until the first annual or other meeting of shareholders occurring on or after January 21, 2013.[289] We do not believe that smaller reporting companies should be permanently exempt from the say-on-pay vote, frequency of say-on-pay votes and golden parachute disclosure and vote because we believe investors have the same interest in voting on the compensation of smaller reporting companies and in clear and simple disclosure of golden parachute compensation in connection with mergers and similar transactions as they have for other issuers. However, after reviewing comments on the potential burdens on smaller reporting companies, we believe it is appropriate to provide additional time before smaller reporting companies are required to conduct the shareholder advisory votes on executive compensation and the frequency of say-on-pay votes.

We believe that a delayed effective date for the say-on-pay and frequency votes for smaller reporting companies should allow those companies to observe how the rules operate for other companies and should allow them to better prepare for implementation of the rules. We also believe that delayed implementation for these companies will allow us to evaluate the implementation of the adopted rules by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rule becomes applicable to them. We believe a temporary exemption by rule is appropriate, under the exemptive authority granted by Section 14A(e) of the Exchange Act[290] and also under the Commission's general exemptive authority pursuant to Section 36(a)(1) of the Exchange Act, in the public interest and consistent with the protection of investors.[291]

This temporary exemption for smaller reporting companies does not apply to the requirements of Section 14A(b)(2) and Rule 14a–21(c) to provide a shareholder advisory vote on golden parachute compensation in connection with mergers or other extraordinary transactions. We view the temporary exemption as a transition matter that will facilitate eventual compliance with the regular, periodic say-on-pay vote requirement by smaller reporting

[281] *See* Instruction 6 to Item 402(t)(2) of Regulation S–K.

[282] Instruction 7 to Item 402(t)(2). As discussed above, such agreements are not required to be subject to the Rule 14a–21(c) shareholder advisory vote, but issuers may voluntarily subject them to such a vote.

[283] "Smaller reporting company" is defined in Rule 12b–2 under the Exchange Act.

[284] *See, e.g.,* letters from AFSCME, Boston Common, CalPERS, Calvert, CII, First Affirmative, Glass Lewis, ICGN, Merkl, PGGM, Public Citizen, RAILPEN & USS, SBA of Florida, Senator Levin, Social Investment, and Walden.

[285] *See, e.g.,* letters from American Bankers Association ("Am. Bankers"), Independent Community Bankers of America ("ICBA"), NACD, Society of Corp. Sec., and Virginia Bankers Association ("VBA").

[286] *See, e.g.,* letters from ABA, Am. Bankers, and VBA.

[287] *See, e.g.,* letters from ABA and Society of Corp. Sec.

[288] *See* letter from ABA.

[289] Rules 14a–21(a) and (b).

[290] Exchange Act Section 14A(e) provides that "the Commission may, by rule or order, exempt an issuer or class of issuers from the requirement" under Sections 14A(a) or 14A(b). Section 14A(e) further provides that "in determining whether to make an exemption under this subsection, the Commission shall take into account, among other considerations, whether the requirements under [Section 14A(a) and 14A(b)] disproportionately burdens small issuers." In considering whether to provide an exemption, the Commission considered whether the requirements of Section 14A(a) and (b) as applied to smaller reporting companies to conduct a shareholder advisory vote on executive compensation and a shareholder advisory vote on the frequency of say-on-pay votes could disproportionately burden small issuers.

[291] 15 U.S.C. 78 mm(a)(1). Exchange Act Section 36(a)(1) provides that "the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."

companies. We do not believe similar considerations support an exemption for the shareholder advisory vote on golden parachute arrangements in light of the extraordinary nature of the transactions involved.

We have also crafted our amendments to minimize the costs for smaller reporting companies, while providing shareholders the opportunity to express their views on the companies' compensation arrangements. For example, once they fully apply to smaller reporting companies, our amendments will provide shareholders of those companies the same voting rights with respect to executive compensation as apply to shareholders of other companies subject to the proxy rules. We do not believe that Section 14A and our final rules, especially given the temporary exemption, would unduly burden smaller reporting companies. For example, our final rule does not alter the existing scaled disclosure requirements set forth in Item 402 of Regulation S–K for smaller reporting companies, which recognize that the compensation arrangements of smaller reporting companies typically are less complex than those of other public companies.[292] Under the rules we adopt today, we do not alter the provision in our rules that smaller reporting companies are not required to provide a CD&A. Therefore, the amendment to Item 402(b) of Regulation S–K will not apply to smaller reporting companies, as such companies are not required to provide a CD&A.

Our amendments will, however, require quantification of golden parachute arrangements in merger proxies. Smaller reporting companies are not required to provide this quantification under current Item 402(q) in annual meeting proxy statements, and are not required to do so under our new rules unless they seek to qualify for the exception for a shareholder advisory vote on golden parachute compensation in a later merger transaction. Even though our rules impose additional disclosure requirements relating to the shareholder advisory votes required by Section 14A, we do not believe our rules will impose a significant additional cost or disproportionate burden upon smaller reporting companies. As noted above, smaller reporting companies tend to have less complex compensation arrangements[293] so the additional disclosures should not add significantly to their disclosure burden. As a result, we do not believe the rules we adopt today place a disproportionate burden on smaller reporting companies.

F. Transition Matters

As noted above in Section I, Section 14A(a)(3) requires that both the initial shareholder vote on executive compensation and the initial vote on the frequency of votes on executive compensation be included in proxy statements relating to an issuer's first annual or other meeting of the shareholders occurring on or after January 21, 2011. Because Section 14A(a) applies to shareholder meetings taking place on or after January 21, 2011, any proxy statements, whether in preliminary or definitive form, even if filed prior to this date, for meetings taking place on or after January 21, 2011, must include the separate resolutions for shareholders to approve executive compensation and the frequency of say-on-pay votes required by Section 14A(a) without regard to whether our rules to implement Section 14A(a) have become effective by that time. To facilitate compliance with the new statute, we addressed certain first year transition issues in the Proposing Release. We are now extending those transition positions as described below.

Before effectiveness of the amendment to Rule 14a–6(a) adopted in this release, Rule 14a–6 will continue to require the filing of a preliminary proxy statement at least ten days before the proxy is sent or mailed to shareholders unless the meeting relates only to the matters specified by Rule 14a–6(a). Until the rules we are adopting to implement Exchange Act Section 14A become effective, we will not object if issuers do not file proxy material in preliminary form if the only matters that would require a filing in preliminary form are the say-on-pay vote and frequency of say-on-pay vote required by Section 14A(a).

Before the amendment to Rule 14a–4 adopted in this release becomes effective, Rule 14a–4 provides that persons solicited are to be afforded the choice between approval or disapproval of, or abstention with respect to, each matter to be voted on, other than elections of directors. Until effectiveness of the amendment to Rule 14a–4 adopted in this release, we will not object if the form of proxy for a shareholder vote on the frequency of say-on-pay votes provides means whereby the person solicited is afforded an opportunity to specify by boxes a choice among 1, 2 or 3 years, or abstain. In addition, we understand that, although some commentators indicated they are prepared for the four-choice frequency vote, the systems of other proxy service providers are currently set up to register at most three votes—for, against, or abstain—and these providers may have short-term difficulty in programming their systems to enable shareholders to vote among four choices. As a result, because the preparedness of these providers may vary significantly on a firm-by-firm basis, for any proxy materials filed for meetings to be held on or before December 31, 2011, we will not object if the form of proxy for a shareholder vote on the frequency of say-on-pay votes provides means whereby the person solicited is afforded an opportunity to specify by boxes a choice among 1, 2 or 3 years, and there is no discretionary authority to vote proxies on the frequency of say-on-pay votes matter in the event the person solicited does not select a choice among 1, 2 or 3 years.[294]

Issuers with outstanding indebtedness under the TARP are already required to conduct an annual shareholder advisory vote on executive compensation until the issuer has repaid all outstanding indebtedness under the TARP. Because such issuers are subject to an annual requirement to provide a say-on-pay vote, a requirement to provide a vote on the frequency of such votes would impose unnecessary burdens on issuers and shareholders, and our final rules provide an exemption from such requirement. Until the rules we are adopting to implement Exchange Act Section 14A become effective, we will not object if an issuer with outstanding indebtedness under the TARP does not include a resolution for a shareholder advisory vote on the frequency of say-on-pay votes in its proxy statement for its annual meeting, provided it fully complies with its say-on-pay voting obligations under EESA Section 111(e).

Finally, as we discussed above, we are adopting a temporary exemption for smaller reporting companies to defer application of the requirements of Section 14A(a)(1) and (a)(2) and Rule 14a–21(a) and (b) to conduct shareholder advisory votes on executive compensation and the frequency of such votes. Until the rules we are adopting to implement Exchange Act Section 14A

[292] *See Executive Compensation and Related Person Disclosure,* Release No. 33–8732A (Aug. 29, 2006) [71 FR 53158] (hereinafter, the "2006 Executive Compensation Release") at Section II.D.1. The scaled compensation disclosure requirements for smaller reporting companies are set forth in Item 402(1) [17 CFR 229.402(l)] through (r) [17 CFR 229.402(r)] of Regulation S–K.

[293] *See* 2006 Executive Compensation Release, *supra* note 292, at Section II.D.1.

[294] *See Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally,* Release No. 34–16356 (Nov. 21, 1979) [44 FR 68770].

become effective, we will not object if a smaller reporting company does not include a resolution for a shareholder advisory vote on say-on-pay or the frequency of say-on-pay votes in its proxy statement for its annual meeting. As with other issuers, smaller reporting companies are required to conduct the shareholder advisory vote on golden parachute compensation upon effectiveness of Rule 14a–21(c).

III. Paperwork Reduction Act

A. Background

Certain provisions of the final amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[295] We published a notice requesting comment on the collection of information requirements in the proposing release for the rule amendments, and we submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[296] The title for the collection of information is:

(1) "Regulation 14A and Schedule 14A" (OMB Control No. 3235–0059);

(2) "Regulation 14C and Schedule 14C" (OMB Control No. 3235–0057);

(3) "Form 8–K" (OMB Control No. 3235–0060);

(4) "Form 10" (OMB Control No. 3235–0064);

(5) "Regulation S–K" (OMB Control No. 3235–0071);[297]

(6) "Schedule 14D–9" (OMB Control No. 3235–0102);

(7) "Schedule 13E–3" (OMB Control No. 3235–0007);

(8) "Schedule TO" (OMB Control No. 3235–0515);

(9) "Form S–1" (OMB Control No. 3235–0065);

(10) "Form S–4" (OMB Control No. 3235–0324);

(11) "Form S–11" (OMB Control No. 3235–0067);

(12) "Form F–4" (OMB Control No. 3235–0325); and

(13) "Form N–2" (OMB Control No. 3235–0026).

The regulations, schedules, and forms were adopted under the Securities Act and the Exchange Act, except for Form N–2, which we adopted pursuant to the Securities Act and the Investment Company Act. The regulations, forms, and schedules set forth the disclosure requirements for periodic reports, current reports, registration statements and proxy and information statements filed by companies to help shareholders make informed voting decisions. The hours and costs associated with preparing, filing and sending the form or schedule constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

B. Summary of the Final Rules

As discussed in more detail above, we are adopting new Rule 14a–21 under the Exchange Act and new Item 24 of Schedule 14A. Rule 14a–21 will implement the requirements of Section 14A of the Exchange Act to provide separate shareholder advisory votes on executive compensation, the frequency of shareholder votes on executive compensation, and, in connection with merger and similar transactions, golden parachute compensation arrangements. New Item 24 of Schedule 14A will require disclosure in proxy statements with respect to each of these shareholder votes. New Rule 14a–21 and new Item 24 of Schedule 14A will increase existing disclosure burdens for proxy statements by requiring:

- New disclosure about the requirement to provide separate shareholder votes on executive compensation, the frequency of shareholder votes on executive compensation and golden parachute compensation arrangements in connection with merger transactions; and
- New disclosure of the general effect of the shareholder advisory votes, such as whether such votes are non-binding.

As discussed in more detail above, we are also adopting amendments to Item 402(b) of Regulation S–K. The amendments to Item 402(b) of Regulation S–K may increase existing disclosure burdens for proxy statements by requiring:

- New disclosure of whether, and if so, how the issuer has considered the results of the most recent shareholder vote on executive compensation required by Section 14A of the Exchange Act in determining compensation policies and decisions, and, if so, how that consideration has affected the issuer's compensation decisions and policies.

As discussed in more detail above, we are also adopting new Item 402(t) of Regulation S–K and amendments to Item 1011(b) of Regulation M–A, Item 5 of Schedule 14A, Item 3 of Schedule 14C, Item 15 of Schedule 13E–3, Item 11 of Schedule TO, and Item 8 of Schedule 14D–9. These amendments, other than the amendment to Schedule TO, will increase existing disclosure burdens for proxy statements, registration statements on Form S–4 and F–4, solicitation/recommendation statements on Schedule 14D–9, and going-private schedules by requiring:

- New tabular and narrative disclosure of understandings and agreements of named executive officers with acquiring and target companies in connection with merger, acquisition, Rule 13e–3 going-private transactions, and tender offers,[298] and disclosure of the aggregate total of all compensation that may be paid or become payable to each named executive officer.

As discussed in more detail above, we are adopting amendments to Form 8–K. The amendments to Form 8–K will increase existing disclosure burdens for current reports on Form 8–K by requiring:

- New disclosure of the issuer's decision of how frequently to provide a separate shareholder vote on executive compensation in light of a shareholder advisory vote on the frequency of shareholder votes on executive compensation conducted pursuant to Section 14A(a)(2) of the Exchange Act.

Together, new Rule 14a–21 and new Item 24 of Schedule 14A and the amendments to Item 5 of Schedule 14A, Item 3 of Schedule 14C, Item 402 of Regulation S–K, Item 1011 of Regulation M–A, Item 15 of Schedule 13E–3, Item 11 of Schedule TO, and Item 8 of Schedule 14D–9 will implement and supplement the requirements under Section 14A of the Exchange Act and also will provide additional meaningful disclosure regarding golden parachute arrangements and issuers' consideration of the shareholder votes and the effect of such votes on issuers' compensation policies and decisions. We believe these changes will result in more meaningful disclosure for investors making voting or investment decisions.

We are adopting an amendment to Rule 14a–4, which relates to the form of proxy that issuers are required to include with their proxy materials, to require that issuers present four choices to their shareholders in connection with the advisory vote on frequency. We are also adopting an amendment to Rule

[295] 44 U.S.C. 3501 *et seq.*

[296] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[297] The paperwork burden from Regulation S–K is imposed through the forms that are subject to the disclosures in Regulation S–K and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burdens imposed by Regulation S–K to be a total of one hour.

[298] Companies filing solicitation/recommendation statements on Schedule 14D–9 in connection with third-party tender offers will be obligated to provide this additional disclosure. However, bidders filing tender offer statements on Schedule TO will not have a similar obligation.

14a–6 to add the shareholder votes on executive compensation and the frequency of shareholder votes on executive compensation required by Section 14A(a), as well as any shareholder advisory vote on executive compensation, to the list of items that do not trigger the filing of a preliminary proxy statement. In addition, we are adopting an amendment to Rule 14a–8, adding a note to Rule 14a–8(i)(10) to clarify the status of shareholder proposals relating to the approval of executive compensation or the frequency of shareholder votes approving executive compensation. Finally, we are adopting conforming amendments to Item 402(a) and Item 402(m) of Regulation S–K, clarifying that the disclosure required by proposed Item 402(t) includes information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees. Pursuant to these conforming amendments, issuers may continue to omit such information in connection with disclosure required by other portions of Item 402 of Regulation S–K. The amendments to Rule 14a–4, Rule 14a–6, Rule 14a–8 under the Exchange Act and Item 402(a) and Item 402(m) of Regulation S–K will not increase any existing disclosure burden. We believe these amendments will merely clarify existing and new statutory requirements or reduce burdens otherwise arising from our proposals. As a result, these amendments will not affect any existing disclosure burden.

Compliance with the proposed amendments by affected U.S. issuers will be mandatory. Responses to the information collections will not be kept confidential and there would be no mandatory retention period for the information disclosed.

C. Summary of Comment Letters and Revisions to Proposals

In the Proposing Release, we requested comment on the PRA analysis. We did not receive any comments that addressed our overall burden estimates for the proposed amendments, though our analysis was cited by one commentator who discussed our cost-benefit analysis.[299]

We have made few substantive modifications to the proposed amendments. We have adopted an amendment to Form 8–K to require the disclosure we had proposed to require in Form 10–Q or Form 10–K. Therefore, we have adjusted our estimates to reflect no changes to Forms 10–Q and 10–K and to estimate the increased burdens for Form 8–K.

We have also revised our amendments with respect to Schedule TO to eliminate the proposed requirement for bidders in third-party tender offers to provide Item 402(t) disclosure. We have adjusted our estimates to reflect no changes to Schedule TO, as any increased burden will be reflected in Schedule 13E–3 because Item 402(t) disclosure will be required in any tender offer that is also a Rule 13e–3 going-private transaction.

D. Revisions to PRA Reporting and Cost Burden Estimates

We anticipate that the disclosure amendments will increase the burdens and costs for companies that would be subject to the proposed amendments. New Section 14A of the Exchange Act, as created by Section 951 of the Act, has already increased the burdens and costs for issuers by requiring separate shareholder votes on executive compensation and the frequency of shareholder votes on executive compensation. Section 14A also requires additional disclosure of golden parachute arrangements in proxy solicitations to approve merger transactions and a separate shareholder vote to approve such arrangements in certain circumstances. Our amendments address the Act's requirements in the context of disclosure under the Federal proxy rules, Regulation S–K and related forms and schedules, thereby creating only an incremental increase in the burdens and costs for such issuers. The amendments specify how issuers are to comply with Section 14A of the Exchange Act and require new disclosure with respect to comparable transactions.

For purposes of the PRA, in the Proposing Release we estimated the annual incremental paperwork burden for all companies to prepare the disclosure that would be required under our proposals to be approximately 25,192 hours of company personnel time and a cost of approximately $8,141,200 for the services of outside professionals. These estimates included the time and the cost of data gathering systems and disclosure controls and procedures, the time and cost of preparing and reviewing disclosure by in-house and outside counsel and executive officers, and the time and cost of filing documents and retaining records. In deriving our estimates, we recognize that the burdens will likely vary among individual companies based on a number of factors, including the size and complexity of their organizations, the nature and complexity of their golden parachute compensation arrangements, and the nature of their operations. We believe that some companies will experience costs in excess of this average in the first year of compliance with proposals and some companies may experience less than the average costs. As discussed above, as a result of changes to our proposed rules, we are slightly reducing the total PRA burden and cost estimates that we originally submitted to the OMB in connection with the proposed amendments. We estimate the annual incremental paperwork burden for all companies to prepare the disclosure that would be required under our rule amendments to be approximately 24,942 hours of company personnel time and a cost of approximately $7,841,200 for the services of outside professionals.

We derived our new burden hour and cost estimates by estimating the average number of hours it would take an issuer to prepare and review the proposed disclosure requirements. These estimates represent the average burden for all companies, both large and small. Our estimates have been adjusted to reflect the fact that some of the amendments will be required in some but not all of the above listed documents depending upon the circumstances, and would not apply to all companies.

With respect to reporting companies, the disclosure required by new Item 402(t) of Regulation S–K will be required in merger proxy and information statements, Forms S–4 and F–4, Schedule 13E–3 and certain solicitation/recommendation statements. The disclosure required by new Item 402(t) may also be included in annual meeting proxy statements on a voluntary basis.

The disclosure required by our amendments to Item 402(b) of Regulation S–K will be required in proxy and information statements as well as Forms 10, 10–K, S–1, S–4, S–11, and N–2. The proposed amendments to CD&A will not be applicable to smaller reporting companies because under current CD&A reporting requirements these companies are not required to provide CD&A in their Commission filings. Based on the number of proxy filings that were received in the 2009 fiscal year, we estimate that approximately 1,200 domestic companies are smaller reporting companies that have a public float of less than $75 million.

[299] *See* letter from CCMC.

In the Proposing Release, we based our annual burden estimates on other assumptions. We have made some small adjustments to these estimates to reflect the revisions we made to the amendments. First, we continue to assume that the burden hours of the amendments will be comparable to the burden hours related to similar disclosure requirements under current reporting requirements, such as the disclosure required by Item 402(j). Second, we continue to assume that substantially all of the burdens associated with the amendments to Rule 14a–21 and Item 24 will be associated with Schedule 14A as this will be the primary disclosure document in which these items will be prepared and presented. In the case of our proposed amendments to Item 402(b) and Item 402(t) of Regulation S–K, we continue to assume that the burdens associated with the amendments will be associated with various disclosure documents as these items will be included in a number of forms and statements. We have noted an additional 1 hour for the amendments to Form 8–K, and we are no longer proposing any amendments that would alter the disclosure burden of Form 10–Q and Form 10–K.

For each reporting company, we estimate that the amendments will impose on average the following incremental burden hours:

- 2 hours for the amendments to CD&A.
- 1 hour for the amendments to Item 24 of Schedule 14A.
- 1 hour for the amendments to Form 8–K.
- 20 hours for new Item 402(t) of Regulation S–K.

1. Annual Meeting Proxy Statements

For purposes of the PRA, in the case of reporting companies, we estimate the annual incremental paperwork burden for annual meeting proxy statements under the amendments will be approximately 1 hour per form for companies that are smaller reporting companies, and 3 hours per form for companies that are non-accelerated filers (and not smaller reporting companies), accelerated filers, or large accelerated filers.[300] The estimated burden is smaller for smaller reporting companies as such issuers are not required to include a CD&A.

2. Exchange Act Current Reports

For purposes of the PRA, we estimate the annual incremental paperwork burden for Form 8–K under the amendments will be approximately 1 hour per form. Our estimates below also account for the fact that each issuer will only be required to include additional disclosure in one amended Form 8–K each year the issuer conducts a shareholder advisory vote on frequency.

3. Securities Act Registration Statements and Exchange Act Registration Statements

For purposes of the PRA, in the case of reporting companies, we estimate the annual incremental paperwork burden for Securities Act and Exchange Act registration statements under the amendments is approximately 2 hours per form, which represents the additional burden associated with our amendments to CD&A.[301] In making our estimates, we note that the additional burdens in CD&A only apply to issuers who have conducted a prior shareholder advisory vote and would not apply, for example, to issuers making an initial filing on Form S–1 or Form S–11.

4. Merger Proxies, Tender Offer Documents and Schedule 13E–3

For purposes of the PRA, in the case of reporting companies, we estimate the annual incremental paperwork burden for merger proxy statements, and registration statements on Form S–4 and F–4 to be 21 hours per form, as these forms will be required to include additional disclosures under Item 24 of Schedule 14A and Item 402(t) of Regulation S–K. We estimate the annual incremental paperwork burden for merger information statements, and tender offer solicitation/recommendation statements and Schedules 13E–3 to be 20 hours per form, as these forms will be required to include Item 402(t) disclosure but will not be required to include additional disclosure under Item 24 of Schedule 14A.

The tables below illustrate the total annual compliance burden of the collection of information in hours and in cost under the proposed amendments for current reports; proxy and information statements; Form 10; registration statements on Forms S–1, S–4, F–4, S–11, and N–2; and Regulation S–K.[302] The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take an issuer to prepare and review the proposed disclosure requirements. For the Exchange Act report on Form 8–K, and the proxy statements we estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour.

For registration statements on Forms S–1, S–4, F–4, S–11, and N–2, and the Exchange Act registration statement on Form 10, we estimate that 25% of the burden of preparation is carried by the issuer internally and that 75% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour. There is no change to the estimated burden of the collections of information under Regulation S–K because the burdens that this regulation imposes are reflected in our revised estimated for the forms. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

[300] Our estimate for annual proxy statements is based upon an estimated burden over a six-year period during which the shareholder advisory votes required by Section 14A(a) would not occur annually. We used a six-year period because issuers will conduct at least two shareholder advisory votes on executive compensation and at least one shareholder advisory vote on the frequency of such votes in this time period. We then estimated an average annual burden based on the average burden over the six-year period.

[301] We have assumed that the annual incremental paperwork burden under the proposed amendments to Item 402(b) of Regulation S–K would be included in the annual meeting proxy statement.

[302] Figures in both tables have been rounded to the nearest whole number.

TABLE 1—INCREMENTAL PAPERWORK BURDEN UNDER THE AMENDMENTS FOR CURRENT REPORTS; PROXY AND INFORMATION STATEMENTS

	Number of responses [303] (A)	Incremental burden hours/ form (B)	Total incremental burden hours (C)=(A)*(B)	75% Company (D)=(C)*0.75	25% Professional (E)=(C)*0.25	Professional costs (F)=(E)*$400
8–K [304]	7,212	1	7,212	5,409	1,803	$721,200
Form 10 [305]	9	2	18	4	14	5,600
DEF 14A [306]	7,212					
Accel. Filers	6,112	3	18,336	13,752	4,584	1,833,600
SRC Filers	1,100	1	1,100	825	275	110,000
DEF 14C	582					
Accel. Filers	482	2	964	723	241	96,400
SRC Filers	100	0	0	0	0	0
Reg. S–K	N/A	N/A	N/A	N/A	N/A	N/A
Total			27,630	20,713		2,766,800

TABLE 2—INCREMENTAL PAPERWORK BURDEN UNDER THE AMENDMENTS FOR REGISTRATION STATEMENTS, MERGER PROXY AND INFORMATION STATEMENTS, TENDER OFFER DOCUMENTS AND SCHEDULES 13E–3

	Number of responses [307] (A)	Incremental burden hours/ form (B)	Total incremental burden hours (C)=(A)*(B)	25% Company (D)=(C)*0.25	75% Professional (E)=(C)*0.75	Professional costs (F)=(E)*$400
Form S–1 [308]	485	2	970	243	727	$290,800
Form S–11	22	2	44	11	33	13,200
Form S–4 [309]	499	21	10,479	2,620	7,859	3,143,600
Form F–4	27	21	567	142	425	170,000
DEFM 14A	137	21	2,877	719	2,158	863,200
DEFM 14C [310]	14	20	280	70	210	84,000
Schedule 14D–9	77	20	1,540	385	1,155	462,000
Schedule 13E–3	5	20	100	25	75	30,000
Form N–2 [311]	29	2	58	14	44	17,600
Reg. S–K	N/A	N/A	N/A	N/A	N/A	N/A
Total			16,915	4,229		5,074,400

IV. Cost-Benefit Analysis

A. Introduction

We are adopting amendments to implement and supplement the

[303] The number of responses reflected in the table equals the actual number of forms and schedules filed with the Commission during the 2009 calendar year, adjusted to reflect the estimated number of forms and schedules that would be required to include additional disclosure under our rules as proposed. As explained below in notes 304 through 306, we have reduced the number of estimated filings to reflect that the additional disclosure requirements will only apply to a smaller number of the forms filed.

[304] We calculated the burden hours for Form 8–K based on the number of proxy statements filed with the Commission during the 2009 calendar year. We assumed that there would be an aggregate equal number of Forms 8–K to disclose the issuer's plans with respect to the frequency vote as the number of proxy statements.

[305] The burden allocation for Form 10 uses a 25% internal to 75% outside professional allocation. We have reduced the number of estimated Form 10 filings to reflect that approximately 95% of these forms would not require additional disclosure, as new disclosure required under Item 402 will only relate to issuers in spin-off transactions that are disclosing compensation of public parent companies that have conducted a prior shareholder vote on executive compensation.

[306] The estimates for Schedule 14A and Schedule 14C are separated to reflect our estimate of the burden hours and costs related to the proposed amendments to CD&A which will be applicable to companies that are large accelerated filers, accelerated filers, and non-accelerated filers (that are not smaller reporting companies), but will not be applicable to smaller reporting companies.

[307] The number of responses reflected in the table equals the actual number of forms and schedules filed with the Commission during the 2009 calendar year, adjusted to reflect the estimated number of forms and schedules that would be required to include additional disclosure under our rules as proposed. As explained below in notes 308 through 311, we have reduced the number of estimated filings to reflect that the additional disclosure requirements will only apply to a smaller number of the forms filed.

[308] We have reduced the number of estimated Form S–1 and Form S–11 filings to reflect that approximately 60% of these forms will not require additional disclosure, as new disclosure required under Item 402 will only relate to issuers who are already public companies and have conducted a prior shareholder vote on executive compensation.

[309] We have reduced the number of estimated Form S–4 and Form F–4 filings to reflect an approximate 75% of these forms which will not relate to mergers or similar transactions but will be other transactions (*e.g.,* holding company formations and financings) to which the amended rules will not apply.

[310] We have reduced the number of estimated DEFM 14C filings to reflect an approximate 15% of these forms, which will not relate to merger transactions but will involve dissolutions and similar transactions.

[311] We have reduced the number of estimated Form N–2 filings to reflect that 29 filings were made by business development companies during calendar year 2009, because only business

provisions of the Dodd-Frank Act relating to shareholder approval of executive compensation and disclosure and shareholder approval of golden parachute compensation arrangements. Section 951 of the Dodd-Frank Act amends the Exchange Act by adding new Section 14A. New Section 14A(a)(1) requires companies to conduct a separate shareholder advisory vote to approve the compensation of executives. Section 14A(a)(2) requires companies to conduct a separate shareholder advisory vote to determine how often an issuer will conduct a shareholder advisory vote on executive compensation. In addition, Section 14A(b) requires companies soliciting votes to approve merger or acquisition transactions to provide disclosure of certain "golden parachute" compensation arrangements and, when such arrangements have not been included in the shareholder advisory vote on executive compensation, to conduct a separate shareholder advisory vote to approve the golden parachute compensation arrangements.[312]

We are adopting new Rule 14a–21 to implement Section 14A(a)(1) by providing separate shareholder advisory votes to approve executive compensation, to approve the frequency of such votes on executive compensation, and to approve golden parachute compensation arrangements at shareholder meetings at which shareholders are asked to approve merger transactions. In addition to the votes required by Section 14A, we are also adopting a new Item 24 of Schedule 14A to elicit disclosure, similar to our approach with respect to TARP companies providing shareholder advisory votes on executive compensation, regarding the effect of the shareholder votes required by Rule 14a–21, including whether the votes are non-binding.

New Item 402(t) of Regulation S–K implements and supplements the statutory requirement in Section 14A(b)(1) to promulgate rules for the clear and simple disclosure of golden parachute compensation arrangements that the soliciting person has with its named executive officers (if the acquiring issuer is not the soliciting person) or that it has with the named executive officers of the acquiring issuer that relate to the merger transaction. In addition, Item 402(t), will supplement the requirements of Section 14A(b)(1) by requiring disclosure of golden parachute compensation arrangements between the acquiring company and the named executive officers of the target company if the target company is the soliciting person.

Our amendments to Item 5 of Schedule 14A and Item 3 of Schedule 14C will require disclosure regarding golden parachute compensation arrangements in accordance with Section 14A(b)(1) of the Exchange Act. We are also adopting amendments to require that additional disclosure regarding golden parachute compensation arrangements be included in connection with other transactions. We are adopting amendments to Regulation M–A, Schedule 14D–9, and Schedule 13E–3 that will require additional disclosure regarding golden parachute compensation arrangements in connection with Rule 13e–3 going-private transactions and tender offers.[313]

We are also adopting amendments to Item 402 of Regulation S–K to require additional Compensation Discussion and Analysis disclosure about the issuer's response to the shareholder vote on executive compensation and to provide additional disclosure about golden parachute compensation arrangements. We are also adopting amendments to Form 8–K to require disclosure regarding the issuer's action as a result of the shareholder advisory vote on the frequency of shareholder votes on executive compensation.

We are adopting an amendment to Rule 14a–4, which relates to the form of proxy that issuers are required to include with their proxy materials, to require that issuers present four choices to their shareholders in connection with the advisory vote on frequency. We are also adopting an amendment to Rule 14a–6 to add the shareholder votes on executive compensation and the frequency of shareholder votes on executive compensation required by Section 14A(a), as well as any shareholder advisory vote on executive compensation, to the list of items that do not trigger the filing of a preliminary proxy statement. In addition, we are adopting an amendment to Rule 14a–8, adding a note to Rule 14a–8(i)(10) to clarify the status of shareholder proposals relating to the approval of executive compensation or the frequency of shareholder votes approving executive compensation.

The rules we are adopting, which implement the relevant provisions of the Dodd-Frank Act, will directly affect most public companies as well as potential private acquirers. Our amended rules implement the shareholder advisory vote requirements of Section 14A, promulgate rules for additional disclosure in accordance with Section 14A(b)(1), and provide for additional disclosure, not required by Section 14A, relating to the shareholder advisory votes. In addition, our amended rules expand the required disclosure of Section 14A(b)(1) to require disclosure of arrangements between additional parties, namely agreements between the acquiring company and named executive officers of the target company, and require disclosure with respect to additional transactions, including certain tender offers and Rule 13e–3 going-private transactions. As discussed below, the enhanced disclosure required by our amended rules regarding the shareholder approval of executive compensation and companies' responses to shareholder votes will provide shareholders and investors with timely information about such votes that is consistent with the information required to be provided under the Act and that enhance the operation of our rules pursuant to the Act. The enhanced disclosure regarding golden parachute compensation will provide a more complete picture of the compensation to shareholders as they consider voting and investment decisions relating to mergers and similar transactions.

We are sensitive to the costs and benefits imposed by the rule and form amendments we are adopting. The discussion below focuses on the costs and benefits of the amendments made by the Commission to implement the Act within its permitted discretion, rather than the costs and benefits of the Act itself.

B. Comments on the Cost-Benefit Analysis

In the Proposing Release, we requested qualitative and quantitative feedback on the nature of the benefits and costs described and any benefits and costs we may have overlooked. We received one comment letter relating to the cost-benefit analysis in the Proposing Release.[314] The commentator asserted that we had underestimated the costs and burdens involved because we did not take into account the following additional categories of costs: Costs

development companies will be subject to the amended disclosure required under Item 402 on Form N–2.

[312] According to the Dodd-Frank Wall Street Reform and Consumer Protection Act Conference Report at page 872, Section 951 is "designed to address shareholder rights and executive compensation practices."

[313] Companies filing solicitation/recommendation statements on Schedule 14D–9 in connection with third-party tender offers will be obligated to provide this additional disclosure. However, bidders filing tender offer statements on Schedule TO will not have a similar obligation.

[314] *See* letter from CCMC.

associated with proxy advisory firms and the potential for companies to retain additional consulting services relating to their compensation decisions and say-on-pay votes, additional costs associated with submitting no-action letter requests under Rule 14a–8, and increased costs due to increased demand for proxy solicitation and other shareholder communications services.[315]

C. Benefits

The amended rules we are adopting today are intended to implement and supplement the requirements of Section 14A of the Exchange Act as set forth in Section 951 of the Dodd-Frank Act. Our amended rules not only implement the shareholder advisory votes required by Section 14A, but also require additional disclosure addressing whether, and if so, how issuers have considered these required shareholder advisory votes, and if so, how such votes have affected the companies' compensation policies and decisions.

We believe the enhanced disclosures about the results of the shareholder advisory vote on the frequency of the approval of executive compensation will provide timely information to shareholders about the issuer's plans for future shareholder advisory votes. The enhanced disclosure and amendments to the CD&A requirements in Item 402(b) of Regulation S–K about whether, and if so, how an issuer has considered the results of a shareholder vote to approve executive compensation and, if so, how that consideration has affected its compensation policies and decisions will benefit shareholders and other market participants by providing potentially useful information for voting and investment decisions.

Our amended rules will also specify how the shareholder advisory votes required by Section 14A(a) relate to existing shareholder advisory votes required for issuers with outstanding indebtedness under TARP. In our view, because of the similarity of the separate annual say-on-pay vote requirements, a company with indebtedness under TARP need only provide one annual shareholder advisory vote. As we have discussed above, we have indicated that the annual shareholder advisory vote under EESA would fulfill the requirements for the shareholder vote pursuant to Section 14A(a)(1) and Rule 14a–21(a). We believe this benefits such companies by reducing confusion and burdens of the two requirements by specifying that two separate annual shareholder votes are not required. In addition, because issuers with indebtedness under TARP must conduct an annual shareholder advisory vote on executive compensation, we have adopted an exemption from the frequency vote required by Section 14A(a)(2) and Rule 14a–21(b) until the issuer repays all indebtedness under TARP. We believe this benefits such issuers and their shareholders by avoiding the cost and confusion of conducting a vote on the frequency of a shareholder advisory vote when the frequency of such a vote is mandated by another requirement.

After reviewing the comments we have received, we are also adopting a temporary exemption for smaller reporting companies that will delay the implementation of the shareholder advisory votes on say-on-pay and frequency required by Section 14A(a) and Rule 14a–21(a) and (b) for a two-year period. We believe that a delayed effective date for the say-on-pay and frequency votes will benefit smaller reporting companies by allowing these companies to observe how the rules operate for other companies by preparing them for implementation of the rules. We believe that delayed implementation for these companies will also allow us to evaluate the implementation of the adopted rules by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rule becomes applicable to them.

In these amended rules, we also provide guidance for issuers and shareholders regarding the interaction of the shareholder advisory votes required by Section 14A and shareholder proposals under Rule 14a–8 by adding a note to Rule 14a–8(i)(10). The note we are adopting will reduce potential confusion among shareholders and issuers with respect to what may be excluded under our rules in light of the new requirements under Section 14A, while preserving the ability of shareholders to make proposals relating to executive compensation.

New Item 402(t) of Regulation S–K will require narrative and tabular disclosure of golden parachute compensation arrangements in the clear and simple form required by Section 14A(b)(1) of the Exchange Act. Because Section 14A(b)(1) requires that disclosure not only be in a clear and simple form, but also that it include an aggregate total of all golden parachute compensation for each named executive officer, we have adopted Item 402(t) to require that such disclosure appear in a table. The tabular format is designed to provide investors with clear disclosure about golden parachute compensation that is comparable across different issuers and transactions and make the information more accessible. In addition to the tabular disclosure, we are also adopting amendments to require narrative disclosure to provide additional context and disclosure not suitable to the tabular format. Our approach is similar to the existing approach to executive compensation disclosure in Item 402 of Regulation S–K and provides a focused manner in which to present and quantify golden parachute compensation. Narrative disclosure supplements the tables by providing additional context and discussion of the numbers presented in the table. We believe that the combination of narrative and tabular disclosure will provide the clearest picture of the full scope of golden parachute compensation in the clear and simple format required by Section 14A(b)(1).

Because Section 14A(b)(1)'s disclosure requirements are limited to agreements or understandings between the person conducting the solicitation and any named executive officers of the issuer or any named executive officers of the acquiring issuer if the person conducting the solicitation is not the acquiring issuer, we have formulated Item 402(t) to require disclosure, in addition to the disclosure mandated by Section 14A(b)(1), of agreements or understandings between the acquiring company and the named executive officers of the target company. Item 402(t) requires disclosure of all golden parachute compensation relating to the merger among the target and acquiring companies and the named executive officers of each in order to cover the full scope of golden parachute compensation applicable to the transaction. By providing disclosure of the full scope of golden parachute compensation, we believe issuers will provide more detailed, comprehensive, and useful information to shareholders to consider when making their voting or investment decisions.

Likewise, additional disclosure on golden parachute compensation, without regard to whether the transaction is structured as a merger, a tender offer,[316] or a Rule 13e–3 going-private transaction that is not subject to Regulation 14A, will benefit

[315] *See* letter from CCMC. See also Section IV.D below for additional discussion.

[316] Companies filing solicitation/recommendation statements on Schedule 14D–9 in connection with third-party tender offers will be obligated to provide this additional disclosure. However, bidders filing tender offer statements on Schedule TO will not have a similar obligation.

shareholders and other market participants by allowing them to timely and more accurately assess the transaction and evaluate with greater acuity the golden parachute compensation that named executive officers could expect to receive and the related potential interests such officers might have in pursuing and/or supporting a change in control transaction. While our existing disclosure requirements include much of this disclosure, the specificity and narrative and tabular format of Item 402(t) will allow for a clear presentation of the full scope of the information. Furthermore, by standardizing disclosure of golden parachute compensation arrangements across different transaction structures, our amended rules will enable shareholders to compare more easily such compensation among various types of change in control transactions and structures. In addition, our amended rules will also enable the shareholders of the acquirer to timely and more accurately assess the cost of the acquisition transaction in proxy statements for which additional disclosure is required pursuant to Note A of Schedule 14A where acquirer shareholders do not vote on the merger transaction but vote to approve another proposal such as the issuance of shares or a stock split.

We have adopted such disclosure requirements in both tabular and narrative formats, with disclosure of aggregate total compensation, in accordance with the requirement of Section 14A(b)(1) that such disclosure be in a clear and simple form. To the extent investors expect to see information about all of the economic benefits that may accrue to an executive in one location of the proxy statement (including golden parachute arrangements and other compensation, such as future employment contracts), the benefit of this disclosure may be limited since the information about other executive compensation that may be disclosed in proxy materials does not need to be included in tabular format pursuant to Item 402(t) of Regulation S–K.

Our amended rules will also benefit issuers by specifying how they must comply with the requirements of Exchange Act Section 14A in the context of the Federal proxy rules. The amended rules will eliminate uncertainty that may exist among issuers and other market participants, if we did not propose any rules, regarding what is necessary under the Commission's proxy rules when conducting a shareholder vote required under Exchange Act Section 14A. The amended rules specify how the statutory requirements operate in connection with the Federal proxy rules and accordingly, we believe the amended rules promote better compliance with the requirements of Exchange Act Section 14A and reduce the amount of management time and financial resources necessary to ensure that issuers comply with their obligations under both Exchange Act Section 14A and the Federal proxy rules. This will benefit issuers, their shareholders and other market participants.

D. Costs

We recognize that the amendments we are adopting will impose new disclosure requirements on companies and are likely to result in costs related to information collection.[317] The amendments we are adopting that require the disclosure of executive compensation in a tabular format are likely to result in certain costs. We expect these costs, however, to be limited since much of the compensation required to be disclosed under our amended rules is currently required to be disclosed in narrative format in the existing disclosure regime.

Our analysis of the costs of the amendments we are adopting today relates to the incremental direct and indirect costs arising from the requirements in our rule amendments. The analysis below does not reflect any additional direct or indirect costs arising from new Exchange Act Section 14A, including the shareholder advisory votes on say-on-pay, frequency, and golden parachute compensation, and any likely additional costs which would be incurred because of these votes. As noted above, one commentator asserted that we had underestimated the costs and burdens involved because we did not take into account the following additional categories of costs: Costs associated with proxy advisory firms and the potential for companies to retain additional consulting services relating to their compensation decisions and say-on-pay votes, additional costs associated with submitting no-action letter requests under Rule 14a–8, and increased costs due to increased demand for proxy solicitation and other shareholder communications services.[318] We do not believe the additional costs described by the commentator will arise as a result of our amendments today as these items relate to increased costs resulting from the requirements of Section 14A, including the say-on-pay vote, the frequency vote, and the shareholder advisory vote on golden parachute compensation. With respect to costs associated with submitting no-action letter requests and Rule 14a–8, we note that Section 14A(c)(4) specifically provides that the Section 14A shareholder advisory votes may not be construed "to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation."[319] Although our new rules include a note advising of one circumstance when a shareholder proposal may be excluded, the rules do not impose any new obligations with respect to Rule 14a–8.

We are adopting new Item 402(t) to implement the requirement of Section 14A(b)(1) of the Exchange Act that we promulgate rules for disclosure of golden parachute compensation arrangements in a clear and simple form, which we believe is best provided in both narrative and tabular format. In addition to the required disclosure under Section 14A(b)(1), we are also expanding the disclosure to cover agreements between the acquiring company and the named executive officers of a target company in a merger or similar transaction. Though this additional disclosure will result in certain additional costs for issuers preparing a merger proxy, we believe that the additional disclosure is appropriate in order to provide shareholders information about the full scope of golden parachute compensation applicable to the transaction. If the disclosure provided by the issuer is not presented in a clear manner, the disclosure of golden parachute compensation for both target and acquirer executives in target and acquirer proxy statements may be confusing to investors. In addition, because parties often have to rely on each other for the other side's information, this reliance may add to

[317] We estimate the annual incremental paperwork burden for all companies to prepare the disclosure that would be required under both Exchange Act Section 14A and our rule amendments to be approximately 24,942 hours of company personnel time and a cost of approximately $7,841,200 for the services of outside professionals. As noted above in the Comments on the Cost-Benefit Analysis section, we received one comment letter relating to the cost-benefit analysis that asserted that the PRA numbers cited in the Proposing Release underestimated the costs and burdens involved. *See* letter from CCMC. We acknowledge that the PRA estimates do not reflect the full magnitude of the economic costs involved, but are estimates of the collection of information burden and cost for the limited purpose of the PRA. In addition to costs arising from our rule amendments, the PRA estimates include collection of information-related costs arising from new Exchange Act Section 14A.

[318] *See* letter from CCMC.

[319] Exchange Act Section 14A(c)(4).

the costs of mergers that are ultimately born by shareholders. There may also be certain indirect costs to issuers and shareholders as a result of our rule amendments, as the additional disclosure of golden parachute compensation may result in increased transactional expenses in the form of additional advisers and consultants, increased time to prepare disclosure documents, and increased time and expense to negotiate compensation arrangements.

Furthermore, companies engaging in or subject to a Rule 13e–3 going-private transaction and companies preparing solicitation/recommendation statements given their status as targets in third-party tender offers may face increased costs because of the required disclosure of golden parachute compensation arrangements, including the required table and aggregate totals. In addition, companies soliciting proxies or consents for transactions for which additional disclosure is required pursuant to Note A of Schedule 14A may face increased costs as well due to the additional disclosure requirements of Item 5 of Schedule 14A. We have adopted these disclosure requirements that go beyond the requirements of Section 14A(b)(1) because we believe the rules will reduce the regulatory disparity that might otherwise result from treating such transactions differently from mergers. In response to commentators, however, we have eliminated the proposed requirement for bidders in third-party tender offers to provide Item 402(t) disclosure. We believe this change is appropriate given that target companies that are the subject of third-party tender offers will provide the 402(t) disclosure in their Schedules 14D–9 within ten days after the commencement of the offers. We also believe this change addresses the concern expressed by one of the commentators that third-party bidders, particularly in non-negotiated transactions, may not have access to reliable information about the golden parachute arrangements between target companies and their named executive officers. By retaining the disclosure requirement in Schedule 14D–9, we are still able to minimize the regulatory disparity that might otherwise result from treating third-party tender offers differently than other transactions.

As noted above, there may also be additional indirect costs relating to such increased disclosure, as well as costs associated with obtaining compensation information from the other parties involved in a transaction in order to fulfill the issuer's disclosure obligations.

The expanded Compensation Discussion and Analysis disclosure may also result in costs associated with drafting disclosure that addresses whether, and if so, how the results of a shareholder vote on executive compensation were considered in determining the issuer's compensation policies and decisions and any resultant effect on those compensation policies and decisions. Similarly, the revisions to the current reporting requirements on Form 8–K may result in costs associated with assessing the results of a shareholder vote on the frequency of shareholder votes to approve executive compensation and drafting the additional disclosure regarding the company's plans to conduct votes in the future. Some of these costs could include the cost of hiring additional advisors, such as attorneys, to assist in the analysis and drafting.

We believe that these costs will not be unduly burdensome given that much of the disclosure is covered by our pre-existing disclosure requirements, even though we are adopting rules that require that such disclosure be included in both narrative and tabular format. The amendments we adopt exceed the pre-existing narrative requirements, as we are adopting tabular disclosure with an aggregate total and no *de minimis* threshold for perquisites. We expect that there will be incremental costs associated with drafting the additional disclosure, but that much of the information would be readily obtainable by the parties given existing disclosure requirements and as part of the due diligence process prior to drafting the transaction documents.

In addition to the direct costs associated with the required disclosure, the amended rules might create additional indirect costs for private companies that may be engaged in takeovers of public companies. We do not expect, however, the specific and detailed disclosure and the shareholder advisory vote regarding golden parachutes to diminish the number of takeover transactions.

The note to Rule 14a–8(i)(10) we are adopting may also impose certain costs on shareholders as it would permit issuers to exclude certain shareholder proposals that would otherwise not be excludable under our rules. In addition, our rule amendments may impose certain indirect costs on shareholders who might pursue alternative means to communicate their positions regarding the frequency of say-on-pay votes. We do not believe that the rules we are adopting today would impose any additional direct or indirect costs on issuers because of shareholder proposals. Any such costs would result from the shareholder advisory votes required by Section 14A.

V. Consideration of Impact on the Economy, Burden on Competition, and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act [320] also requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Section 2(b) [321] of the Securities Act and Section 3(f) [322] of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider whether the action will promote efficiency, competition, and capital formation.

The amendments we are adopting will implement the Section 14A requirement for shareholder advisory votes to approve executive compensation, the frequency of such votes, and golden parachute compensation arrangements in connection with merger and similar transactions. We also adopting certain additional disclosure requirements to provide investors with additional information about these required votes and to apply the required disclosure from Section 14A(b)(1) to certain other agreements and transaction structures. We do not believe that the additional disclosure we are adopting will impose a burden on competition.

The amendments we are adopting will not only implement the requirements of Section 14A of the Exchange Act, but will also help ensure that shareholders receive disclosure regarding the required votes, the nature of an issuer's responsibilities to hold the votes under Section 14A, and the issuer's consideration of the results of the votes and the effect of such consideration on the issuer's compensation policies and decisions. The amendments will also enhance the transparency of a company's compensation policies. As discussed in greater detail above, we believe these benefits will be achieved without imposing any significant additional burdens on issuers. As a result, the amendments we are adopting should improve the ability of investors to make informed voting and investment decisions, and, therefore lead to

[320] 15 U.S.C. 78w(a)(2).

[321] 15 U.S.C. 77b(b).

[322] 15 U.S.C. 78c(f).

increased efficiency and competitiveness of the U.S. capital markets.

We believe the amendments we are adopting will also benefit issuers and their shareholders by specifying in a clear and concise fashion how issuers must comply with the Dodd-Frank Act requirements, in the context of the Federal proxy rules and our disclosure rules. By specifying how issuers must comply with the shareholder advisory votes and enhanced disclosure requirements from Section 14A, our rules will allow for more consistent disclosure from all entities and clearer disclosure for shareholders. By reducing uncertainty and promoting efficient presentation of information, our rules will permit issuers to more efficiently plan and draft disclosure documents, including annual meeting proxy statements, merger proxies, and tender offer and going-private documents.

Our rules will also provide additional time before smaller reporting companies are required to conduct the shareholder advisory votes on executive compensation and the frequency of say-on-pay votes. We believe that a delayed effective date for smaller reporting companies should allow those companies to observe how the rules operate for other companies and will increase efficiency by allowing them to better prepare for implementation of the rules. We also believe that delayed implementation for these companies will allow us to evaluate the implementation of the adopted rules by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rules become applicable to them.

Our rules will require enhanced disclosure of golden parachute compensation arrangements in merger and similar transactions, regardless of how such transactions are structured. We believe the uniformity of our disclosure requirements across different types of transactions will help competition as issuers will be able to structure such transactions as they see fit, without the additional disclosure required by Section 14A(b) weighing in favor of a particular transaction structure. Though our amended rules will create additional, incremental disclosure burdens, we believe that the rules we are amending will enhance capital formation by allowing for clearer disclosure, more informed voting decisions by investors, and consistency across different types of transactions.

VI. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Analysis (FRFA) has been prepared in accordance with the Regulatory Flexibility Act.[323] This FRFA relates to revisions to the rules under the Exchange Act regarding the proxy solicitation process and related executive compensation disclosures.

A. Reasons for, and Objectives of, the Proposed Action

The rule amendments are designed to implement the requirements of Section 951 of the Dodd-Frank Act, enhance the disclosure relating to the shareholder advisory votes required by Exchange Act Section 14A, and specify how our proxy rules will apply to such votes. Specifically, we are adopting amendments to the proxy rules to require shareholder advisory votes to approve executive compensation, to approve the frequency of shareholder votes to approve executive compensation, and to approve golden parachute compensation arrangements in connection with merger transactions. The amendments also require enhanced disclosure regarding an issuer's consideration of these votes and the impact of such consideration on an issuer's compensation policies and decisions.

B. Legal Basis

We are adopting the amendments pursuant to Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Sections 3(b), 6, 7, 10, and 19(a) of the Securities Act of 1933, as amended, and Sections 13, 14(a), 14A, 23(a), and 36 of the Securities Exchange Act of 1934, as amended.

C. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on any aspect of the IRFA, including the number of small entities that would be affected by the proposed amendments, the nature of the impact, how to quantify the number of small entities that would be affected, and how to quantify the impact of the proposed amendments. We did not receive comments specifically addressing the IRFA. However, several commentators addressed aspects of the proposed rule amendments that could potentially affect small entities. In particular, some commentators believed that smaller companies should be exempted from all or part of the amendments.[324] Although we are not adopting a complete exemption from the amendments, we have made revisions to the amendments to phase-in the requirements for a shareholder advisory vote on executive compensation and a shareholder advisory vote on the frequency of say-on-pay votes for two full years to give smaller reporting companies more time to prepare for implementation of the rules and so that they can observe how larger companies conduct the votes. Smaller reporting companies will be required to conduct shareholder advisory votes on golden parachute compensation as required by Rule 14a–21(c) without a two-year delay.

D. Small Entities Subject to the Final Amendments

The amendments will affect some companies that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[325] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule 157[326] and Exchange Act Rule 0–10(a)[327] define a company, other than an investment company, to be a "small business" or "small organization" if it has total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,210 companies, other than investment companies, that may be considered small entities. The proposed amendments would affect small entities that have a class of securities that are registered under Section 12 of the Exchange Act. An investment company, including a business development company,[328] is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[329] We believe that certain of the amendments would affect small entities that are business development companies that have a class of securities registered under Section 12 of the Exchange Act. We estimate that there

[323] 5 U.S.C. 601.

[324] *See, e.g.,* letters from Am. Bankers, ICBA, NACD, Society of Corp. Sec., and VBA.

[325] 5 U.S.C. 601(6).

[326] 17 CFR 230.157.

[327] 17 CFR 240.0–10(a).

[328] Business development companies are a category of closed-end investment companies that are not required to register under the Investment Company Act [15 U.S.C. 80a–2(a)(48)].

[329] 17 CFR 270.0–10(a).

are approximately 31 business development companies that may be considered small entities.

E. Reporting, Recordkeeping, and Other Compliance Requirements

The disclosure amendments are designed to enhance the disclosure regarding the shareholder advisory votes required by Section 14A of the Exchange Act and provide additional disclosure about golden parachute compensation arrangements. These amendments would require small entities to provide:

- Disclosure of the shareholder advisory votes required by Section 14A and the effects of such votes, including whether they are non-binding;
- Disclosure of golden parachute arrangements described by Section 14A(b)(1) of the Exchange Act in merger proxies, and additional disclosure not required by Section 14A(b)(1) in connection with tender offers and going private transactions; and
- Disclosure of the issuer's decision in light of the shareholder vote on the frequency of shareholder votes to approve executive compensation required by Section 14A(a)(2) of the Exchange Act as to how frequently the issuer will include a shareholder vote on the compensation of executives.

F. Duplicative, Overlapping, or Conflicting Federal Rules

We believe the amendments would not duplicate, overlap, or conflict with other Federal rules.

G. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the disclosure amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Use of performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

Currently, small entities that are smaller reporting companies under Exchange Act Rule 12b–12 are subject to some different compliance or reporting requirements under Regulation S–K and the amendments will not affect these requirements.[330] Under Regulation S–K, smaller reporting companies are permitted to provide abbreviated compensation disclosure with respect to the principal executive officer and two most highly compensated executive officers for the last two completed fiscal years. Specifically, smaller reporting companies may provide the executive compensation disclosure specified in Items 402(l) through (r) of Regulation S–K, rather than the corresponding disclosure specified in Items 402(a) through (k) of Regulation S–K. Items 402(l) through (r) do not require smaller reporting companies to provide CD&A. Other than the amendments to CD&A, the remaining disclosure requirements apply to smaller reporting companies to the same extent as larger issuers, following the two-year phase-in period for say-on-pay votes and votes on the frequency of say-on-pay votes.

As noted above, the amendments to CD&A do not apply to smaller reporting companies. We are not expanding the existing scaled disclosure requirements under Item 402 of Regulation S–K, or establishing additional different compliance requirements or an exemption from coverage of the proposed amendments for smaller reporting companies. The amendments will provide investors with enhanced disclosure regarding the shareholder votes required by Section 14A of the Exchange Act and the issuers' consideration of the votes.

We are adopting amendments to Item 5 of Schedule 14A, as well as other forms and schedules, to implement and supplement the requirement of Section 14A(b)(1) to provide disclosure of golden parachute compensation arrangements in a clear and simple form. Under the amendments, all companies will be subject to the same golden parachute disclosure requirements. As amended, Schedule 14A will require the disclosure pursuant to Item 402(t) of Regulation S–K with respect to golden parachute compensation arrangements for merger proxies. Though much of the disclosure required by our amendment to Item 5 of Schedule 14A is currently required for all issuers, regardless of size, under our amended rules such disclosure will be required to be included in a tabular format pursuant to Item 402(t) of Regulation S–K, which will include an aggregate total and specific quantification of various compensation elements. All companies, regardless of size, will also be subject to these additional disclosure requirements in connection with other transactions not required by Section 14A(b)(1), including certain tender offers and Rule 13e–3 going-private transactions.

In addition, our amendments will require clear and straightforward disclosure of issuer's responses to shareholder advisory votes, and of golden parachute compensation arrangements in connection with mergers and similar transactions. We have used design rather than performance standards in connection with the amendments because, based on our past experience, we believe the amendments will be more useful to investors if there are specific disclosure requirements. The amendments are intended to result in more comprehensive and clear disclosure. In addition, the specific disclosure requirements in the amendments will promote consistent and comparable disclosure among all companies.

[330] Rule 12b–2 excludes business development companies from the definition of "smaller reporting companies."

VII. Statutory Authority and Text of the Amendments

The amendments described in this release are being adopted under the authority set forth in Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Sections 3(b), 6, 7, 10, and 19(a) of the Securities Act of 1933, as amended, and Sections 13, 14(a), 14A, 23(a), and 36 of the Securities Exchange Act of 1934, as amended.

List of Subjects in 17 CFR Parts 229, 240 and 249

Reporting and recordkeeping requirements, Securities.

Text of the Amendments

For the reasons set out in the preamble, the Commission amends title 17, chapter II, of the Code of Federal Regulations as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

■ 1. The general authority citation for part 229 is revised to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l,* 78m, 78n, 78n–1, 78o, 78u–5, 78w, 78*ll,* 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Amend § 229.402 by:
■ a. Revising the last sentence of paragraph (a)(6)(ii);
■ b. Removing "and" at the end of paragraph (b)(1)(v);
■ c. Removing the period and adding in its place "; and" at the end of paragraph (b)(1)(vi);
■ d. Adding paragraph (b)(1)(vii);
■ e. Revising the last sentence of paragraph (m)(5)(ii); and
■ f. Adding paragraph (t).

The revisions read as follows:

§ 229.402 (Item 402) Executive compensation.

(a) * * *

(6) * * *

(ii) * * * Except with respect to the disclosure required by paragraph (t) of this Item, registrants may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees.

* * * * *

(b) * * *

(1) * * *

(vii) Whether and, if so, how the registrant has considered the results of the most recent shareholder advisory vote on executive compensation required by section 14A of the Exchange Act (15 U.S.C. 78n–1) or § 240.14a–20 of this chapter in determining compensation policies and decisions and, if so, how that consideration has affected the registrant's executive compensation decisions and policies.

* * * * *

(m) * * *

(5) * * *

(ii) * * * Except with respect to disclosure required by paragraph (t) of this Item, smaller reporting companies may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the smaller reporting company and that are available generally to all salaried employees.

* * * * *

(t) *Golden Parachute Compensation.* (1) In connection with any proxy or consent solicitation material providing the disclosure required by section 14A(b)(1) of the Exchange Act (15 U.S.C. 78n–1(b)(1)) or any proxy or consent solicitation that includes disclosure under Item 14 of Schedule 14A (§ 240.14a–101) pursuant to Note A of Schedule 14A, with respect to each named executive officer of the acquiring company and the target company, provide the information specified in paragraphs (t)(2) and (3) of this section regarding any agreement or understanding, whether written or unwritten, between such named executive officer and the acquiring company or target company, concerning any type of compensation, whether present, deferred or contingent, that is based on or otherwise relates to an acquisition, merger, consolidation, sale or other disposition of all or substantially all assets of the issuer, as follows:

GOLDEN PARACHUTE COMPENSATION

Name (a)	Cash ($) (b)	Equity ($) (c)	Pension/ NQDC ($) (d)	Perquisites/ benefits ($) (e)	Tax reimbursement ($) (f)	Other ($) (g)	Total ($) (h)
PEO							
PFO							
A							
B							
C							

(2) The table shall include, for each named executive officer:

(i) The name of the named executive officer (column (a));

(ii) The aggregate dollar value of any cash severance payments, including but not limited to payments of base salary, bonus, and pro-rated non-equity incentive compensation plan payments (column (b));

(iii) The aggregate dollar value of:

(A) Stock awards for which vesting would be accelerated;

(B) In-the-money option awards for which vesting would be accelerated; and

(C) Payments in cancellation of stock and option awards (column (c));

(iv) The aggregate dollar value of pension and nonqualified deferred compensation benefit enhancements (column (d));

(v) The aggregate dollar value of perquisites and other personal benefits or property, and health care and welfare benefits (column (e));

(vi) The aggregate dollar value of any tax reimbursements (column (f));

(vii) The aggregate dollar value of any other compensation that is based on or otherwise relates to the transaction not properly reported in columns (b) through (f) (column (g)); and

(viii) The aggregate dollar value of the sum of all amounts reported in columns (b) through (g) (column (h)).

Instructions to Item 402(t)(2).

1. If this disclosure is included in a proxy or consent solicitation seeking approval of an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of the registrant, or in a proxy or consent solicitation that includes disclosure under Item 14 of Schedule 14A (§ 240.14a–101) pursuant to Note A of Schedule 14A, the disclosure provided by this table shall be quantified assuming that the triggering event took place on the latest practicable date, and that the price per share of the registrant's securities shall be determined as follows: If the shareholders are to receive a fixed dollar amount, the price per share shall be that fixed dollar amount, and if such value is not a fixed dollar amount, the price per share shall be the average closing market price of the registrant's securities over the first five business days following the first public announcement of the transaction. Compute the dollar value of in-the-money option awards for which vesting would be accelerated by determining the difference between this price and the exercise or base price of the options. Include only compensation that is based on or otherwise relates to the subject transaction. Apply Instruction 1 to Item 402(t) with respect to those executive officers for whom disclosure was required in the issuer's most recent filing with the Commission

under the Securities Act (15 U.S.C. 77a *et seq.*) or Exchange Act (15 U.S.C. 78a *et seq.*) that required disclosure pursuant to Item 402(c).

2. If this disclosure is included in a proxy solicitation for the annual meeting at which directors are elected for purposes of subjecting the disclosed agreements or understandings to a shareholder vote under section 14A(a)(1) of the Exchange Act (15 U.S.C. 78n–1(a)(1)), the disclosure provided by this table shall be quantified assuming that the triggering event took place on the last business day of the registrant's last completed fiscal year, and the price per share of the registrant's securities is the closing market price as of that date. Compute the dollar value of in-the-money option awards for which vesting would be accelerated by determining the difference between this price and the exercise or base price of the options.

3. In the event that uncertainties exist as to the provision of payments and benefits or the amounts involved, the registrant is required to make a reasonable estimate applicable to the payment or benefit and disclose material assumptions underlying such estimates in its disclosure. In such event, the disclosure would require forward-looking information as appropriate.

4. For each of columns (b) through (g), include a footnote quantifying each separate form of compensation included in the aggregate total reported. Include the value of all perquisites and other personal benefits or property. Individual perquisites and personal benefits shall be identified and quantified as required by Instruction 4 to Item 402(c)(2)(ix) of this section. For purposes of quantifying health care benefits, the registrant must use the assumptions used for financial reporting purposes under generally accepted accounting principles.

5. For each of columns (b) through (h), include a footnote quantifying the amount payable attributable to a double-trigger arrangement (*i.e.,* amounts triggered by a change-in-control for which payment is conditioned upon the executive officer's termination without cause or resignation for good reason within a limited time period following the change-in-control), specifying the time-frame in which such termination or resignation must occur in order for the amount to become payable, and the amount payable attributable to a single-trigger arrangement (*i.e.,* amounts triggered by a change-in-control for which payment is not conditioned upon such a termination or resignation of the executive officer).

6. A registrant conducting a shareholder advisory vote pursuant to § 240.14a–21(c) of this chapter to cover new arrangements and understandings, and/or revised terms of agreements and understandings that were previously subject to a shareholder advisory vote pursuant to § 240.14a–21(a) of this chapter, shall provide two separate tables. One table shall disclose all golden parachute compensation, including both the arrangements and amounts previously disclosed and subject to a shareholder advisory vote under section 14A(a)(1) of the Exchange Act (15 U.S.C. 78n–1(a)(1)) and § 240.14a–21(a) of this chapter and the new arrangements and understandings and/or revised terms of agreements and understandings that were previously subject to a shareholder advisory vote. The second table shall disclose only the new arrangements and/or revised terms subject to the separate shareholder vote under section 14A(b)(2) of the Exchange Act and § 240.14a–21(c) of this chapter.

7. In cases where this Item 402(t)(2) requires disclosure of arrangements between an acquiring company and the named executive officers of the soliciting target company, the registrant shall clarify whether these agreements are included in the separate shareholder advisory vote pursuant to § 240.14a–21(c) of this chapter by providing a separate table of all agreements and understandings subject to the shareholder advisory vote required by section 14A(b)(2) of the Exchange Act (15 U.S.C. 78n–1(b)(2)) and § 240.14a–21(c) of this chapter, if different from the full scope of golden parachute compensation subject to Item 402(t) disclosure.

(3) Provide a succinct narrative description of any material factors necessary to an understanding of each such contract, agreement, plan or arrangement and the payments quantified in the tabular disclosure required by this paragraph. Such factors shall include, but not be limited to a description of:

(i) The specific circumstances that would trigger payment(s);

(ii) Whether the payments would or could be lump sum, or annual, disclosing the duration, and by whom they would be provided; and

(iii) Any material conditions or obligations applicable to the receipt of payment or benefits, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, including the duration of such agreements and provisions regarding waiver or breach of such agreements.

Instructions to Item 402(t).

1. A registrant that does not qualify as a "smaller reporting company," as defined by § 229.10(f)(1) of this chapter, must provide the information required by this Item 402(t) with respect to the individuals covered by Items 402(a)(3)(i), (ii) and (iii) of this section. A registrant that qualifies as a "smaller reporting company," as defined by § 229.10(f)(1) of this chapter, must provide the information required by this Item 402(t) with respect to the individuals covered by Items 402(m)(2)(i) and (ii) of this section.

2. The obligation to provide the information in this Item 402(t) shall not apply to agreements and understandings described in paragraph (t)(1) of this section with senior management of foreign private issuers, as defined in § 240.3b–4 of this chapter.

■ 3. Amend § 229.1011 by redesignating paragraph (b) as paragraph (c) and adding new paragraph (b) to read as follows:

§ 229.1011 (Item 1011) Additional information.

* * * * *

(b) Furnish the information required by Item 402(t)(2) and (3) of this part (§ 229.402(t)(2) and (3)) and in the tabular format set forth in Item 402(t)(1) of this part (§ 229.402(t)(1)) with respect to each named executive officer

(1) Of the subject company in a Rule 13e–3 transaction; or

(2) Of the issuer whose securities are the subject of a third-party tender offer, regarding any agreement or understanding, whether written or unwritten, between such named executive officer and the subject company, issuer, bidder, or the acquiring company, as applicable, concerning any type of compensation, whether present, deferred or contingent, that is based upon or otherwise relates to the Rule 13e–3 transaction or third-party tender offer.

Instructions to Item 1011(b).

1. The obligation to provide the information in paragraph (b) of this section shall not apply where the issuer whose securities are the subject of the Rule 13e–3 transaction or tender offer is a foreign private issuer, as defined in § 240.3b–4 of this chapter.

2. For purposes of Instruction 1 to Item 402(t)(2) of this part: If the disclosure is included in a Schedule 13E–3 (§ 240.13e–100 of this chapter) or Schedule 14D–9 (§ 240.14d–101 of this chapter), the disclosure provided by this table shall be quantified assuming that the triggering event took place on the latest practicable date and that the price per share of the securities of the subject

company in a Rule 13e–3 transaction, or of the issuer whose securities are the subject of the third-party tender offer, shall be determined as follows: If the shareholders are to receive a fixed dollar amount, the price per share shall be that fixed dollar amount, and if such value is not a fixed dollar amount, the price per share shall be the average closing market price of such securities over the first five business days following the first public announcement of the transaction. Compute the dollar value of in-the-money option awards for which vesting would be accelerated by determining the difference between this price and the exercise or base price of the options. Include only compensation that is based on or otherwise relates to the subject transaction. Apply Instruction 1 to Item 402(t) with respect to those executive officers for whom disclosure was required in the most recent filing by the subject company in a Rule 13e–3 transaction or by the issuer whose securities are the subject of a third-party tender offer, with the Commission under the Securities Act (15 U.S.C. 77a *et seq.*) or Exchange Act (15 U.S.C. 78a *et seq.*) that required disclosure pursuant to Item 402(c).

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 4. The general authority citation for part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78o, 78o–4, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* 18 U.S.C. 1350, and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

■ 5. Amend § 240.13e–100 by revising Item 15 to read as follows:

* * * * *

§ 240.13e–100 Schedule 13E–3, Transaction statement under section 13(e) of the Securities Exchange Act of 1934 and Rule 13e–3 (§ 240.13e–3) thereunder.

* * * * *

Item 15. Additional Information

Furnish the information required by Item 1011(b) and (c) of Regulation M–A (§ 229.1011(b) and (c) of this chapter).

* * * * *

■ 6. Amend § 240.14a–4 by:

■ a. Adding the phrase "and votes to determine the frequency of shareholder votes on executive compensation pursuant to § 240.14a–21(b) of this chapter" at the end of the first sentence of paragraph (b)(1);

■ b. Adding paragraph (b)(3).

The addition reads as follows:

§ 240.14a–4 Requirements as to proxy.

* * * * *

(b) * * *

(3) A form of proxy which provides for a shareholder vote on the frequency of shareholder votes to approve the compensation of executives required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n–1(a)(2)) shall provide means whereby the person solicited is afforded an opportunity to specify by boxes a choice among 1, 2 or 3 years, or abstain.

* * * * *

■ 7. Amend § 240.14a–6 by:

■ a. Revising paragraph (a)(7); and

■ b. Adding the phrase "to paragraph (a)" following the words "Note 1", "Note 2", "Note 3" and "Note 4".

The revision reads as follows:

§ 240.14a–6 Filing requirements.

(a) * * *

(7) A vote to approve the compensation of executives as required pursuant to section 14A(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78n–1(a)(1)) and § 240.14a–21(a) of this chapter, or pursuant to section 111(e)(1) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5221(e)(1)) and § 240.14a–20 of this chapter, a vote to determine the frequency of shareholder votes to approve the compensation of executives as required pursuant to Section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n–1(a)(2)) and § 240.14a–21(b) of this chapter, or any other shareholder advisory vote on executive compensation.

* * * * *

■ 8. Amend § 240.14a–8 by adding *Note to paragraph (i)(10)* to read as follows:

§ 240.14a–8 Shareholder proposals.

* * * * *

(i) * * *

(10) * * *

Note to paragraph (i)(10): A company may exclude a shareholder proposal that would provide an advisory vote or seek future advisory votes to approve the compensation of executives as disclosed pursuant to Item 402 of Regulation S–K (§ 229.402 of this chapter) or any successor to Item 402 (a "say-on-pay vote") or that relates to the frequency of say-on-pay votes, provided that in the most recent shareholder vote required by § 240.14a–21(b) of this chapter a single year (*i.e.,* one, two, or three years) received approval of a majority of votes cast on the matter and the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the choice of the majority of votes cast in the most recent shareholder vote required by § 240.14a–21(b) of this chapter.

* * * * *

■ 9. Add § 240.14a–21 to read as follows:

§ 240.14a–21 Shareholder approval of executive compensation, frequency of votes for approval of executive compensation and shareholder approval of golden parachute compensation.

(a) If a solicitation is made by a registrant and the solicitation relates to an annual or other meeting of shareholders at which directors will be elected and for which the rules of the Commission require executive compensation disclosure pursuant to Item 402 of Regulation S–K (§ 229.402 of this chapter), the registrant shall, for the first annual or other meeting of shareholders on or after January 21, 2011, or for the first annual or other meeting of shareholders on or after January 21, 2013 if the registrant is a smaller reporting company, and thereafter no later than the annual or other meeting of shareholders held in the third calendar year after the immediately preceding vote under this subsection, include a separate resolution subject to shareholder advisory vote to approve the compensation of its named executive officers, as disclosed pursuant to Item 402 of Regulation S–K.

Instruction to paragraph (a):

The registrant's resolution shall indicate that the shareholder advisory vote under this subsection is to approve the compensation of the registrant's named executive officers as disclosed pursuant to Item 402 of Regulation S–K (§ 229.402 of this chapter). The following is a non-exclusive example of a resolution that would satisfy the requirements of this subsection: "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."

(b) If a solicitation is made by a registrant and the solicitation relates to an annual or other meeting of shareholders at which directors will be elected and for which the rules of the Commission require executive compensation disclosure pursuant to Item 402 of Regulation S–K (§ 229.402 of this chapter), the registrant shall, for the first annual or other meeting of shareholders on or after January 21, 2011, or for the first annual or other

meeting of shareholders on or after January 21, 2013 if the registrant is a smaller reporting company, and thereafter no later than the annual or other meeting of shareholders held in the sixth calendar year after the immediately preceding vote under this subsection, include a separate resolution subject to shareholder advisory vote as to whether the shareholder vote required by paragraph (a) of this section should occur every 1, 2 or 3 years. Registrants required to provide a separate shareholder vote pursuant to § 240.14a–20 of this chapter shall include the separate resolution required by this section for the first annual or other meeting of shareholders after the registrant has repaid all obligations arising from financial assistance provided under the TARP, as defined in section 3(8) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5202(8)), and thereafter no later than the annual or other meeting of shareholders held in the sixth calendar year after the immediately preceding vote under this subsection.

(c) If a solicitation is made by a registrant for a meeting of shareholders at which shareholders are asked to approve an acquisition, merger, consolidation or proposed sale or other disposition of all or substantially all the assets of the registrant, the registrant shall include a separate resolution subject to shareholder advisory vote to approve any agreements or understandings and compensation disclosed pursuant to Item 402(t) of Regulation S–K (§ 229.402(t) of this chapter), unless such agreements or understandings have been subject to a shareholder advisory vote under paragraph (a) of this section. Consistent with section 14A(b) of the Exchange Act (15 U.S.C. 78n–1(b)), any agreements or understandings between an acquiring company and the named executive officers of the registrant, where the registrant is not the acquiring company, are not required to be subject to the separate shareholder advisory vote under this paragraph.

Instructions to § 240.14a–21:

1. Disclosure relating to the compensation of directors required by Item 402(k) (§ 229.402(k) of this chapter) and Item 402(r) of Regulation S–K (§ 229.402(r) of this chapter) is not subject to the shareholder vote required by paragraph (a) of this section. If a registrant includes disclosure pursuant to Item 402(s) of Regulation S–K (§ 229.402(s) of this chapter) about the registrant's compensation policies and practices as they relate to risk management and risk-taking incentives, these policies and practices would not be subject to the shareholder vote required by paragraph (a) of this section. To the extent that risk considerations are a material aspect of the registrant's compensation policies or decisions for named executive officers, the registrant is required to discuss them as part of its Compensation Discussion and Analysis under § 229.402(b) of this chapter, and therefore such disclosure would be considered by shareholders when voting on executive compensation.

2. If a registrant includes disclosure of golden parachute compensation arrangements pursuant to Item 402(t) (§ 229.402(t) of this chapter) in an annual meeting proxy statement, such disclosure would be subject to the shareholder advisory vote required by paragraph (a) of this section.

3. Registrants that are smaller reporting companies entitled to provide scaled disclosure in accordance with Item 402(*l*) of Regulation S–K (§ 229.402(*l*) of this chapter) are not required to include a Compensation Discussion and Analysis in their proxy statements in order to comply with this section. For smaller reporting companies, the vote required by paragraph (a) of this section must be to approve the compensation of the named executive officers as disclosed pursuant to Item 402(m) through (q) of Regulation S–K (§ 229.402(m) through (q) of this chapter).

■ 10. Amend § 240.14a–101 by:

■ a. Removing the dash that appears before paragraph (a) of Item 5 and adding in its place an open parenthesis;

■ b. Adding paragraph (a)(5) of Item 5;

■ c. Adding the phrase "to paragraph (a)" following the word "Instruction" that follows new paragraph (a)(5) of Item 5;

■ d. Adding paragraph (b)(3) of Item 5;

■ e. Adding the phrase "to paragraph (b)" following the word "Instruction" that follows new paragraph (b)(3) of Item 5;

■ f. Adding Item 24.

The additions read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

SCHEDULE 14A. INFORMATION

* * * * *

Item 5. Interest of Certain Persons in Matters to Be Acted Upon.

(a) * * *

(5) If the solicitation is made on behalf of the registrant, furnish the information required by Item 402(t) of Regulation S–K (§ 229.402(t) of this chapter).

* * * * *

(b) * * *

(3) If the solicitation is made on behalf of the registrant, furnish the information required by Item 402(t) of Regulation S–K (§ 229.402(t) of this chapter).

* * * * *

Item 24. Shareholder Approval of Executive Compensation. Registrants required to provide any of the separate shareholder votes pursuant to § 240.14a–21 of this chapter shall disclose that they are providing each such vote as required pursuant to section 14A of the Securities Exchange Act (15 U.S.C. 78n–1), briefly explain the general effect of each vote, such as whether each such vote is non-binding, and, when applicable, disclose the current frequency of shareholder advisory votes on executive compensation required by Rule 14a–21(a) and when the next such shareholder advisory vote will occur.

■ 11. Amend § 240.14c–101 by adding paragraph (c) of Item 3 to read as follows:

§ 240.14c–101 Schedule 14C. Information required in information statement.

SCHEDULE 14C. INFORMATION

* * * * *

Item 3. * * *

(c) Furnish the information required by Item 402(t) of Regulation S–K (§ 229.402(t) of this chapter).

* * * * *

■ 12. Amend § 240.14d–100 by revising Item 11 to read as follows:

§ 240.14d–100 Tender offer statement pursuant to section 14(d)(1) of the Securities Exchange Act of 1934.

* * * * *

Item 11. Additional Information.

Furnish the information required by Item 1011(a) and (c) of Regulation M–A (§ 229.1011 of this chapter).

* * * * *

■ 13. Amend § 240.14d–101 by amending Item 8 to add the words "and (c)" after "Item 1011(b)".

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 14. The general authority citation for part 249 continues to read as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 15. Amend Form 8–K (referenced in § 249.308), Item 5.07, by revising paragraph (b), adding paragraph (d), and revising Instruction 1 to read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

Item 5.07. Submission of Matters to a Vote of Security Holders

* * * * *

(b) If the meeting involved the election of directors, the name of each director elected at the meeting, as well as a brief description of each other matter voted upon at the meeting; and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes as to each such matter, including a separate tabulation with respect to each nominee for office. For the vote on the frequency of shareholder advisory votes on executive compensation required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n–1) and § 240.14a–21(b), state the number of votes cast for each of 1 year, 2 years, and 3 years, as well as the number of abstentions.

* * * * *

(d) No later than one hundred fifty calendar days after the end of the annual or other meeting of shareholders at which shareholders voted on the frequency of shareholder votes on the compensation of executives as required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n–1), but in no event later than sixty calendar days prior to the deadline for submission of shareholder proposals under § 240.14a–8, as disclosed in the registrant's most recent proxy statement for an annual or other meeting of shareholders relating to the election of directors at which shareholders voted on the frequency of shareholder votes on the compensation of executives as required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n–1(a)(2)), by amendment to the most recent Form 8–K filed pursuant to (b) of this Item, disclose the company's decision in light of such vote as to how frequently the company will include a shareholder vote on the compensation of executives in its proxy materials until the next required vote on the frequency of shareholder votes on the compensation of executives.

* * * * *

Instruction 1 to Item 5.07. The four business day period for reporting the event under this Item 5.07, other than with respect to Item 5.07(d), shall begin to run on the day on which the meeting ended. * * *

* * * * *

By the Commission.

Dated: January 25, 2011.

Elizabeth M. Murphy,

Secretary.

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