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Securities and Exchange Commission

**17 CFR Parts 229, 240, and 249
Shareholder Approval of Executive
Compensation and Golden Parachute
Compensation; Proposed Rule**

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 240, and 249

[Release Nos. 33-9153; 34-63124; File No. S7-31-10]

RIN 3235-AK68

Shareholder Approval of Executive Compensation and Golden Parachute Compensation

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing 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: Comments should be received on or before November 18, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-31-10 on the subject line; or
- Use the Federal Rulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number S7-31-10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for Web site viewing and printing in the Commission’s Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Scott Hodgdon, Attorney-Adviser, at (202) 551-3430, Anne Krauskopf, Senior Special Counsel, at (202) 551-3500, or Perry Hindin, Special Counsel, at (202) 551-3440, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are proposing new Rule 14a-21 and amendments to Rules 14a-4,¹ 14a-6,² 14a-8³ and a new Item 24 and amendments to Item 5 to Schedule 14A⁴ and amendments to Item 3 to Schedule 14C⁵ under the Securities Exchange Act of 1934 (“Exchange Act”).⁶ We are also proposing amendments to Item 402⁷ of Regulation S-K,⁸ Item 1011⁹ of Regulation M-A,¹⁰ Item 15 of Schedule 13E-3,¹¹ Item 8 of Schedule 14D-9,¹² Item 9B in Part II of Form 10-K,¹³ and Item 5(c) in Part II of Form 10-Q.¹⁴

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I. Background and Summary

Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”)¹⁵ 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

¹⁵ Public Law 111-203 (July 21, 2010).

solicitation rules of the Commission require compensation disclosure”¹⁶ must also “include a separate resolution subject to shareholder vote to approve the compensation of executives,”¹⁷ 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.”¹⁸

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”¹⁹ whether the shareholder vote to approve the compensation of executives “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 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 annual shareholder vote to approve the compensation of executives 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

None of the shareholder votes required pursuant to Section 14A (including the shareholder vote to approve executive compensation, the shareholder vote on the frequency of such votes, and the shareholder vote to approve golden parachute compensation) is binding on an issuer or its board of directors or 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 In addition, 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(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.³¹ 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 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 the amendments proposed in this release have been adopted by that time.³²

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 “in accordance with regulations to be promulgated by the Commission,”³³ the golden parachute compensation arrangements disclosure under proposed new Item 402(t) and a separate

¹⁶ 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. 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, proposed 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.

¹⁷ Exchange Act Section 14A(a)(1).

¹⁸ Exchange Act Section 14A(c).

¹⁹ Exchange Act Section 14A(a)(2).

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). For a more detailed discussion of the advisory nature of the shareholder votes required by Section 951 of the Act, see Section II.B.6 below.

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 will be proposed in a separate rulemaking.

³¹ Exchange Act Section 14A(a)(3).

³² For a discussion of the relationship between Section 14A and the required shareholder votes on executive compensation for companies subject to EESA with outstanding obligations under TARP, see Section II.C.3 below.

³³ Exchange Act Section 14A(b)(1).

resolution to approve golden parachute compensation arrangements pursuant to Rule 14a–21(c) would 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).

We are proposing 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 merger transactions. We are also proposing a new Item 24 of Schedule 14A to provide disclosure regarding the effect of the shareholder votes required by Rule 14a–21, including disclosure of the non-binding nature of the votes. In addition, our proposed 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 would require additional disclosure regarding golden parachute arrangements in connection with mergers, Rule 13e–3³⁴ going-private transactions and tender offers.

We are also proposing amendments to Item 402 of Regulation S–K to address the issuer's response to the shareholder vote on executive compensation in Compensation Discussion and Analysis, and to prescribe disclosure about golden parachute compensation arrangements in proposed new Item 402(t). Finally, we are proposing amendments to Form 10–K and Form 10–Q to require disclosure about whether and how the issuer will implement the results of the shareholder advisory vote on the frequency of shareholder votes on executive compensation.

II. Discussion of the Proposed Amendments

A. Shareholder Approval of Executive Compensation

1. Proposed Rule 14a–21(a)

We are proposing Rule 14a–21(a), pursuant to which issuers³⁵ 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 executives. Proposed Rule 14a–21(a) 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, 2011,³⁶ the first day after the end of the 6-month period beginning on the date of enactment of the Act.

Proposed Rule 14a–21(a) would specify how an issuer must provide a separate shareholder advisory vote to approve the compensation of its named executive officers, as defined in Item 402(a)(3)³⁷ of Regulation S–K. 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 in Item 402³⁸ of Regulation S–K, including the Compensation Discussion and Analysis (“CD&A”), the compensation tables and other narrative executive compensation disclosures required by Item 402.³⁹ Smaller reporting companies⁴⁰ are subject to scaled executive compensation disclosure requirements and are not required to include a CD&A. Therefore, for smaller reporting companies, the shareholders would vote to approve the compensation of the named executive officers, as disclosed under Items 402(m)⁴¹ through 402(q)⁴² of Regulation S–K. We are also proposing an instruction to new Rule 14a–21 to specify that Rule 14a–21 does not change the scaled disclosure

³⁶ Section 14A(a)(3) requires the shareholder advisory votes beginning with “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 Section 951 of the Act. The Act was enacted on July 21, 2010.

³⁷ 17 CFR 229.402(a)(3).

³⁸ 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). We are not proposing, however, to require that such disclosure under Item 402(t) be included in all annual meeting proxy statements.

³⁹ 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).

⁴⁰ As defined in Rule 12b–2 [17 CFR 240.12b–2], these generally are companies with a public float of less than \$75 million as of the last day of their most recently completed second fiscal quarter.

⁴¹ 17 CFR 229.402(m).

⁴² 17 CFR 229.402(q).

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–21.⁴³

Consistent with Section 14A, the compensation of directors, as disclosed pursuant to Item 402(k)⁴⁴ and by Item 402(r)⁴⁵ is not subject to the shareholder advisory vote. In addition, if an issuer includes disclosure pursuant to Item 402(s)⁴⁶ 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 would 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,⁴⁷ and therefore such disclosure would be considered by shareholders when voting on executive compensation.

Our proposed rule would not require issuers to use any specific language or form of resolution to be voted on by shareholders. However, the shareholder vote must relate to all executive compensation disclosure set forth pursuant to Item 402 of Regulation S–K. New Section 14A(a)(1) of the Exchange Act requires that the shareholder vote must be “to approve the compensation of executives, as disclosed pursuant to [Item 402 of Regulation S–K] or any successor thereto.”⁴⁸ In our view, 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 proposed Rule 14a–21(a).⁴⁹

Request for Comment

(1) Should we include more specific requirements regarding the manner in which issuers should present the

⁴³ In connection with the shareholder vote on executive compensation for companies subject to EESA with outstanding obligations under TARP, we adopted a similar instruction to Rule 14a–20. See TARP Adopting Release, *supra* note 16, at 75 FR 2795.

⁴⁴ 17 CFR 229.402(k).

⁴⁵ 17 CFR 229.402(r).

⁴⁶ 17 CFR 229.402(s).

⁴⁷ See *Proxy Disclosure Enhancements*, Release No. 33–9089 (Dec. 16, 2009) [74 FR 68334] at note 38.

⁴⁸ Exchange Act Section 14A(a)(1).

⁴⁹ See the corresponding discussion in the TARP Adopting Release, *supra* note 16, at 75 FR 2791, note 14.

³⁴ 17 CFR 240.13e–3.

³⁵ Our proposed rules would apply to issuers who have a class of equity securities registered under Section 12 [15 U.S.C. 78l] of the Exchange Act and are subject to our proxy rules. The application of this provision to companies subject to EESA with outstanding obligations under TARP is discussed in Section II.C.3 below.

shareholder vote on executive compensation? For example, should we designate the specific language to be used and/or require issuers to frame the shareholder vote to approve executive compensation in the form of a resolution? If so, what specific language or form of resolution should be used?

(2) Would it be appropriate to exempt smaller reporting companies from the shareholder vote to approve executive compensation? Please explain the reasons why an exemption would, or would not, be appropriate. Would the proposed amendments be disproportionately burdensome for smaller reporting companies?⁵⁰

(3) Should we establish compliance dates to phase-in effectiveness of our proposed rules? Are there other transition issues that our rules should address?

(4) Section 14A(a)(1), like Section 111(e) of the EESA, does not specify which shares are entitled to vote in the shareholder vote to approve executive compensation, nor does this section direct the Commission to adopt rules addressing this point. As in our implementation of EESA Section 111(e), we are not proposing to address this question in our rules. Should our rules implementing Section 14A(a)(1) address this question? If so, how, and on what basis?

2. Proposed Item 24 to Schedule 14A

We are also proposing a new Item 24 to Schedule 14A. Pursuant to this item, 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.⁵¹ This is similar to the approach taken by the Commission in connection with disclosure requirements about the shareholder vote

on executive compensation for companies subject to EESA.⁵²

Request for Comment

(5) Are there other disclosures that should be provided by issuers regarding the shareholder vote on executive compensation? If so, what kinds of disclosure would be useful to shareholders?

3. Proposed Amendments to Item 402(b)⁵³ of Regulation S–K

In connection with our implementation of Section 14A(a)(1), we are also proposing amendments to Item 402(b) of Regulation S–K. Item 402 requires the disclosure of executive compensation and includes requirements prescribing narrative and tabular disclosure, as well as separate scaled disclosure requirements for smaller reporting companies.⁵⁴ Item 402(b) contains the CD&A requirement. CD&A 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:

- What are the objectives of the company's compensation programs?
- What is the compensation program designed to reward?
- What is each element of compensation?
- Why does the company choose to pay each element?
- How does the company determine the amount (and, where applicable, the formula) for each element?
- How do each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements?

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.

Our proposals would amend Item 402(b) 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 shareholder advisory votes on executive compensation. This proposed new disclosure is not mandated by Section 951 of the Act, but we believe that a requirement to provide that information would facilitate better investor understanding of issuers' compensation decisions. We note that the shareholder advisory vote on executive compensation will apply to all issuers, and as a result, 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. Accordingly, the proposal would amend Item 402(b)(1) to require issuers to address in CD&A whether, and if so, how they have considered the results of previous shareholder votes on executive compensation required by Section 14A and Rule 14a–20⁵⁵ in determining compensation policies and decisions and, if so, how that consideration has affected their compensation policies and decisions.⁵⁶

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 proposing to add 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

⁵⁰ 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 Section 14A(a) and 14A(b) disproportionately burden small issuers. We are also soliciting comment on a number of issues relating to smaller reporting companies as discussed further in Section II.E below.

⁵¹ Section 14A(a) does not require additional disclosure with respect to the non-binding nature of the vote. We are proposing to require additional disclosure so that information about the advisory nature of the vote is available to shareholders before they vote.

⁵² See Item 20 of Schedule 14A; TARP Adopting Release, *supra* note 16, at 75 FR 2790.

⁵³ 17 CFR 229.402(b).

⁵⁴ 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)). As noted above, disclosure pursuant to these paragraphs is beyond the scope of the shareholder advisory vote to approve executive compensation. Similarly, as noted in note 38 above, disclosure pursuant to proposed Item 402(t) is beyond the scope of the shareholder advisory vote to approve executive compensation unless the issuer includes that disclosure in its annual meeting proxy statement.

⁵⁵ 17 CFR 240.14a–20. Because companies with outstanding indebtedness under the TARP will continue to have an annual say-on-pay vote until they repay all such indebtedness, we are proposing that these votes be addressed by issuers in CD&A as well. The treatment of companies subject to EESA with outstanding obligations under TARP is discussed in Section II.C.3 below.

⁵⁶ Reporting companies are currently required to disclose, pursuant to Item 5.07 of Form 8–K [17 CFR 249.208a], the results of a shareholder vote within four business days after the end of the meeting at which the vote is held. We are not proposing any additional disclosure on Form 8–K for a company to discuss the results of the votes required by Exchange Act Section 14A, though companies may voluntarily provide additional disclosure.

addressed by Item 402(b). However, we note that pursuant to Item 402(o)⁵⁷ of Regulation S–K, 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 executive compensation advisory votes is such a factor for a particular issuer, disclosure would be required pursuant to Item 402(o).

Request for Comment

(6) Should we amend Item 402(b) to require disclosure of the consideration of the results of the shareholder advisory vote on executive compensation in CD&A as proposed? If not, please explain why not.

(7) Should the requirement to discuss the issuer's consideration of the results of the shareholder vote be included in Item 402(b)(1) as a mandatory principles-based topic, as proposed, or should it be included in Item 402(b)(2) as a non-exclusive example of information that should be addressed, depending upon materiality under the individual facts and circumstances? In this regard, commentators should explain the reasons why they recommend either approach.

(8) Should the proposed requirement for CD&A discussion of the issuer's consideration of previous shareholder advisory votes be revised to relate only to consideration of the most recent shareholder advisory votes?

(9) For smaller reporting companies, should we instead require disclosure to address the consideration of previous shareholder advisory votes on executive compensation? Would such information be valuable outside the context of a complete CD&A? Would the existing requirements under Item 402(o) of Regulation S–K, pursuant to which smaller reporting companies must provide a narrative disclosure of any material factors necessary to an understanding of the information disclosed in the Summary Compensation Table, be sufficient information for investors in smaller reporting companies?

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

1. Proposed Rule 14a–21(b)

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.”⁵⁸ 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 solicited for an annual or other meeting of shareholders for which our rules require compensation disclosure.⁵⁹ Under proposed Rule 14a–21(b), 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, 2011.⁶⁰

Request for Comment

(10) Should we include more specific requirements regarding the manner in which issuers should present the shareholder vote on the frequency of shareholder votes on executive compensation? For example, should we designate the specific language to be used and/or require issuers to frame the shareholder vote on the frequency of shareholder votes to approve executive compensation in the form of a resolution? If so, what specific language or form of resolution should be used?

(11) Should a new issuer 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 and frequency votes until the year disclosed? For example, if an issuer discloses in its initial public offering prospectus that it will conduct a say-on-pay vote every two years, should we exempt it from the requirements of Section 14A(a)(1) and 14A(a)(2) for its first annual meeting as a reporting company?

(12) Section 14A(a)(2) does not specify which shares are entitled to vote in the shareholder vote on the frequency of the shareholder vote to approve executive compensation, nor does this section direct the Commission to adopt

⁵⁸ Exchange Act Section 14A(a)(2).

⁵⁹ As discussed above in note 16, proposed Rule 14a–21(b) would require issuers to conduct the required advisory vote in connection with the election of directors, when our rules call for disclosure of executive compensation. In our view, a separate shareholder vote on the frequency of shareholder votes on executive compensation is required 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.

⁶⁰ See Section II.C.3 below for a discussion of the application of this section to companies subject to EESA with outstanding obligations under TARP.

rules addressing this point. We are not proposing to address this question in our rules, but should our rules implementing Section 14A(a)(2) address this question? If so, how, and on what basis?

2. Proposed Item 24 of Schedule 14A

In addition to disclosure regarding the vote on executive compensation, 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. 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.⁶¹ As noted above, this is similar to the approach taken by the Commission in connection with disclosure requirements about the shareholder vote on executive compensation for companies subject to EESA.

Request for Comment

(13) Should we require disclosure about the general effect of this shareholder advisory vote? Is such disclosure useful to shareholders?

(14) Are there other disclosures that should be provided by issuers regarding the shareholder vote on the frequency of say-on-pay votes? If so, what kinds of disclosure would be useful to shareholders?

3. Proposed Amendment to Rule 14a–4

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 would expect that the board of directors will include a recommendation as to how shareholders should vote on the frequency of shareholder votes on

⁶¹ As discussed above in note 51, Section 14A(a) does not require additional disclosure with respect to the non-binding nature of the vote. We are proposing to require additional disclosure so that information about the advisory nature of the vote is available to shareholders before they vote.

⁵⁷ 17 CFR 229.402(o).

executive compensation. 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 are proposing 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.⁶²

Specifically, we are proposing 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.⁶³ The proposed amendments would revise this standard to permit proxy cards to reflect the choice of 1, 2, or 3 years, or abstain, for these votes.

Request for Comment

(15) Will the four choices available to shareholders for the frequency of shareholder votes on executive compensation be sufficiently clear?

(16) Will issuers, brokers, transfer agents, and data processing firms be able to accommodate four choices (*i.e.*, 1, 2, or 3 years, or abstain) for a single line item on a proxy card? What technical or processing difficulties do such a change to the proxy card present? If there are technical or processing

difficulties, are there practical ways to mitigate them?

4. Proposed Amendment to Rule 14a-8

We are also proposing an amendment to Rule 14a-8 under the Exchange Act to add a note to Rule 14a-8(i)(10) that would 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.⁶⁴ One of the substantive bases for exclusion, Rule 14a-8(i)(10), provides that an issuer may exclude a shareholder proposal that has already been substantially implemented.

We believe that under certain conditions, an issuer's response to the say-on-pay and related frequency votes in Section 951 of the Act may be viewed as having substantially implemented subsequent shareholder proposals that seek a vote on the same matters. We are proposing to add a new 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).⁶⁵ 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 a result of this proposed amendment, if an issuer implements the results of the advisory vote of its

shareholders as to how often it will solicit votes to approve the compensation of its executives, it 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). For example, if in the first vote under Rule 14a-21(b) the largest number of votes were cast for a two-year frequency for future shareholder votes on executive compensation, and the issuer discloses that it has approved 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 and provides a vote on frequency at least every six years as required by Section 14A(a)(2).

We believe that, in these circumstances, additional shareholder proposals on frequency generally would unnecessarily burden the company and its shareholders given the company's substantial implementation of a plurality shareholder vote regarding the frequency of say-on-pay votes. For the same reasons, a shareholder proposal that would provide an advisory vote or seek future advisory votes on executive compensation with substantially the same scope as the vote required by Rule 14a-21(a) would be subject to exclusion under Rule 14a-8(i)(10).⁶⁶

Section 14A(c)(4) provides 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." As proposed to be amended, Rule 14a-8(i)(10) would only provide a basis for exclusion of a say-on-pay proposal if the company 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 shareholder vote. Otherwise, simply having the required vote on frequency would not restrict or limit the ability of a shareholder to have a say-on-

⁶² 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. As discussed in the following section, however, for purposes of Rule 14a-8 we are proposing that an issuer may exclude as "substantially implemented" a shareholder proposal that seeks a say-on-pay vote or that relates to the frequency of say-on-pay votes only if the issuer has implemented a say-on-pay voting frequency that is consistent with the vote of a plurality of the votes cast. For that rule, we are proposing a plurality standard because the proxy card will have three substantive choices (1, 2, or 3 years), and as a consequence there may be situations where none of these three frequencies has been supported by a majority of the votes cast or shares represented at a meeting.

⁶³ Rule 14a-4(b)(1).

⁶⁴ These substantive bases for exclusion are set forth in Rule 14a-8(i).

⁶⁵ More specifically, to exclude such shareholder proposals, the issuer must have adopted the voting frequency receiving the greatest number of votes in the most recent advisory vote on the frequency of say-on-pay votes. We are prescribing this voting standard solely for purposes of determining the scope of the exclusion under 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.

⁶⁶ A shareholder proposal that proposes a periodic say-on-pay vote would not be excludable under Rule 14-8(i)(10) if the issuer does not adopt a frequency policy that is consistent with the plurality of votes cast in the most recent shareholder vote pursuant to Rule 14a-21(b).

pay proposal included in the company's proxy materials.

Request for Comment

(17) Is it necessary or appropriate to prescribe a standard, such as a plurality, as proposed, for resolving whether issuers have substantially implemented the shareholders' vote on the frequency of the vote on executive compensation for purposes of Rule 14a-8? Is a standard other than plurality appropriate? Should the standard vary if the company's capital structure includes multiple classes of voting stock (e.g., where classes elect different subsets of the board of directors)?

(18) Is the proposed amendment to Rule 14a-8(i)(10) appropriate? Should we, as proposed, allow the exclusion of shareholder proposals that propose say-on-pay votes with substantially the same scope as the votes required by Rule 14a-21(a)? If not, please explain why not.

(19) Should we, as proposed, permit the exclusion of shareholder proposals that seek to provide say-on-pay votes more or less regularly than the frequency endorsed by a plurality of votes cast in the most recent vote required under Rule 14a-21(b), as described above? Are there other circumstances under which shareholder proposals relating to the frequency of say-on-pay votes should be considered substantially implemented and subject to exclusion under Rule 14a-8(i)(10)?

(20) Should we amend Rule 14a-8(i)(10) to address other specific factual scenarios that are likely to occur as a result of the implementation of Section 951 and our related rules? Are there other specific facts and circumstances under which Rule 14a-8(i)(10) should permit or prohibit the exclusion of shareholder proposals that seek say-on-pay votes?

(21) Should the proposed note to Rule 14a-8(i)(10) be available if the issuer has materially changed its compensation program in the time period since the most recent say-on-pay vote required by Section 14A(a)(1) and Rule 14a-21(a) or the most recent frequency vote required by Section 14A(a)(2) and Rule 14a-21(b)?

5. Proposed Amendments to Form 10-K and Form 10-Q

Issuers are currently required to disclose the results of shareholder votes pursuant to Item 5.07 of Form 8-K within four business days following the day the shareholder meeting ends. The rules we propose today would not alter this requirement. We are proposing amendments to Form 10-K and Form 10-Q to require additional disclosure

regarding the issuer's action as a result of the shareholder vote on the frequency of shareholder votes on executive compensation in accordance with Section 14A.⁶⁷

Our proposed amendments to Item 9B of Form 10-K and new Item 5(c) of Part II of Form 10-Q would require an issuer to disclose, in the quarterly report on Form 10-Q covering the period during which the shareholder advisory vote occurs, or in the annual report on Form 10-K if the shareholder advisory vote occurs during the issuer's fourth quarter, its decision regarding how frequently it will conduct shareholder advisory votes on executive compensation in light of the results of the shareholder vote on frequency. Because the shareholder vote to determine the frequency of shareholder votes on executive compensation is advisory and non-binding on the issuer, we are proposing disclosure in the Form 10-Q (or the Form 10-K for shareholder meetings taking place during the fourth quarter) to notify shareholders on a timely basis whether the issuer's determination regarding frequency will follow the results of the shareholder vote.

Request for Comment

(22) Should we require, as proposed, disclosure in a Form 10-Q or Form 10-K regarding the issuer's plans with respect to the frequency of its shareholder votes to approve executive compensation? Would this disclosure be useful for investors?

(23) Would the proposed Form 10-Q or Form 10-K disclosure notify shareholders on a timely basis of the issuer's determination regarding the frequency of the say-on-pay vote? Should this disclosure instead be included in the Form 8-K reporting the voting results otherwise required to be filed within four business days after the end of the shareholder meeting, or in a separate Form 8-K required to be filed within four business days of when an issuer determines how frequently it will conduct shareholder votes on executive compensation in light of the results of the shareholder vote on frequency?

(24) Would the amendments to Form 10-Q and 10-K, as proposed, allow an issuer sufficient time to analyze the results of the shareholder votes on the frequency of shareholder votes on executive compensation and reach a conclusion on how it should respond? Should the issuer's plans with respect to

the frequency of such shareholder votes instead be required to be disclosed no later than in the Form 10-Q or Form 10-K for the next full time period ended subsequent to the vote (for example, if the vote occurs in the second quarter of the issuer's fiscal year, the disclosure would be required no later than in the Form 10-Q for the third quarter)?

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 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. Under new Section 14A(c), the shareholder votes referred to in Section 14A(a) and Section 14A(b) (which includes all votes under Section 951 of the Act) "shall not be binding on the issuer or the board of directors of an issuer."⁶⁸ As proposed, new Item 24 of Schedule 14A would include language to require disclosure regarding the general effect of the shareholder advisory votes, such as whether the vote is non-binding.⁶⁹

Request for Comment

(25) Under the proposed rules, the shareholder vote on the frequency of the say-on-pay vote would not bind the issuer or board of directors of the issuer. Are there other ways to provide for a vote "to determine" the frequency of the say-on-pay resolution that are consistent with the Section 14A(c) rule of construction that the vote "shall not be binding"?

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

1. Proposed Amendments to Rule 14a-6

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

⁶⁷ A company may, but is not required to, provide additional disclosure in Item 5.07 of Form 8-K regarding any of the shareholder votes required by Section 951 of the Act and how the results of these votes affect its plans for the future.

⁶⁸ Exchange Act Section 14A(c).

⁶⁹ 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), we believe these votes could play a role in an issuer's executive compensation decisions.

are able to incorporate the staff's comments in their final proxy materials. However, an issuer is not required to file preliminary materials if the only matters to be acted upon are:

- The election of directors,
- The election, approval or ratification of the accountants,
- Approval or ratification of certain employee benefits plans or plan amendments,
- Shareholder proposals under Rule 14a-8,⁷⁰ and
- Shareholder votes to approve executive compensation for companies with outstanding indebtedness under the TARP, in accordance with the EESA.⁷¹

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 would be 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.⁷²

We are proposing to amend 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.⁷³

⁷⁰ Rules 14a-6(a)(5) and (6) specify other proposals by investment companies registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 *et seq.*], the inclusion of which does not compel filing of preliminary materials.

⁷¹ See Rule 14a-6(a)(7) [17 CFR 240.14a-6(a)(7)].

⁷² In our view, 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. See *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].

⁷³ 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 under the proposed amendments, 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 any other matters to which the solicitation relates include only the other matters specified by Rule 14a-6(a).

Request for Comment

(26) Should we amend Rule 14a-6(a) under the Exchange Act as proposed so that issuers are not required to file a preliminary proxy statement as a consequence of providing a separate shareholder vote on executive compensation in accordance with Rule 14a-21(a)? If not, please explain why not.

(27) Should we amend Rule 14a-6(a) under the Exchange Act as proposed so that issuers are not required to file a preliminary proxy statement as a consequence of providing a separate shareholder vote on the frequency of shareholder votes on executive compensation in accordance with Rule 14a-21(b)? If not, please explain why not.

(28) Should we amend Rule 14a-6(a) under the Exchange Act so that issuers are not required to file a preliminary proxy statement as a consequence of providing any other separate shareholder vote on executive compensation? If so, please explain in what circumstances.

2. Broker Discretionary Voting

Section 957 of the Act amends Section 6(b) of the Exchange Act⁷⁴ to direct national securities exchanges to change their rules to prohibit broker discretionary voting of uninstructed shares in certain matters, including shareholder votes on executive compensation. The national securities exchanges have begun to amend their rules regarding broker discretionary voting on executive compensation matters to implement this requirement.⁷⁵ Under these amended exchange rules, for issuers with a class of securities listed on a national securities exchange, broker discretionary voting of uninstructed shares would not be permitted for a

statement for shareholder votes on executive compensation for TARP companies. See TARP Adopting Release, *supra* note 16, at 75 FR 2791.

⁷⁴ 15 U.S.C. 78f(b).

⁷⁵ 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).

shareholder vote on executive compensation or a shareholder vote on the frequency of the shareholder vote on executive compensation.⁷⁶

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.⁷⁷

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), 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 would not require issuers who conduct an annual shareholder vote to approve executive compensation pursuant to EESA to conduct a separate shareholder vote on executive compensation under Section 14A(a)(1) until such issuers have repaid all indebtedness under the TARP. These issuers would be required to include a separate shareholder advisory vote on executive compensation pursuant to Section 14A(a)(1) and proposed Rule 14a-21(a) for the first annual meeting of shareholders after the issuer has repaid all outstanding indebtedness under the TARP.

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, 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

⁷⁶ Broker discretionary voting in connection with merger or acquisition transactions is not permitted under current rules of the national securities exchanges. See, e.g., NYSE Rule 452.

⁷⁷ Section 111(e) of the Emergency Economic Stabilization Act of 2008, 12 U.S.C. 5221. See also Rule 14a-20.

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 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 believe an exemption by rule is appropriate, pursuant to both the exemptive authority granted by Section 14A(e) of the Exchange Act⁷⁸ and the Commission's general exemptive authority pursuant to Section 36(a)(1) of the Exchange Act.⁷⁹ As a result, Rule 14a-21(b), as proposed, would exempt issuers 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), these issuers would be required to include a separate shareholder advisory vote on the

⁷⁸ 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 proposing the 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 I.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 would be subject to the exemption.

⁷⁹ 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."

frequency of shareholder advisory votes on executive compensation pursuant to Section 14A(a)(2) and proposed Rule 14a-21(b) for the first annual meeting of shareholders after the issuer has repaid all outstanding indebtedness under the TARP.

Request for Comment

(29) Should issuers who have outstanding indebtedness under the TARP be required to conduct a shareholder advisory vote under Rule 14a-21(a) for the first annual meeting after the issuer has repaid all outstanding indebtedness under the TARP? Should we amend Rule 14a-20 to reflect this requirement?

(30) Should issuers who have outstanding indebtedness under the TARP satisfy Rule 14a-21(a) when such issuers conduct a shareholder advisory vote to approve executive compensation pursuant to Rule 14a-20? Should we reflect this position in Rule 14a-21(a)?

(31) Should issuers who have outstanding indebtedness under the TARP be exempted, as proposed, from the requirement to conduct a shareholder advisory vote under Section 14A(a)(2) and Rule 14a-21(b) until the first annual meeting after the issuer has repaid all outstanding indebtedness under the TARP? Is our proposed approach consistent with the purposes of Section 951 of the Act? Instead, should issuers who have outstanding indebtedness under the TARP be required to provide the shareholder vote on frequency at a time when they are still required to provide an annual vote under EESA? Should such an issuer be permitted, at its discretion, to conduct a shareholder advisory vote on frequency while it has outstanding indebtedness under the TARP and, if such vote is held, not be required to conduct such a vote at its first annual meeting after it 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 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 in 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."⁸⁰

Under existing Commission rules, a target company 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.⁸¹ In response to this requirement, target companies often include disclosure in their proxy statements about compensation arrangements that may be payable to a target company's executive officers and directors in connection with the transaction. In addition, under our existing rules, companies 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.⁸² The Item 402(j) disclosure is provided based on year-end information and various assumptions, and generally does not

⁸⁰ Exchange Act Section 14A(b)(1).

⁸¹ Item 5 of Schedule 14A.

⁸² 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.

reflect any actual termination or termination event.⁸³

While the Commission's existing rules require disclosure about golden parachute arrangements as described above, they do not include detailed requirements for such disclosures that are applicable to proxy or consent solicitations to approve the transaction, as required by Section 14A(b)(1) of the Exchange Act. Consequently, in order to implement the disclosure requirements of Section 14A(b)(1), we are proposing to amend Schedule 14A to require disclosure with respect to golden parachute compensation arrangements in proxy or consent solicitations in connection with an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all assets, in accordance with new proposed Item 402(t) of Regulation S-K. As described below, although not required by Section 14A(b)(1), we are also proposing to amend the disclosure requirements of other, similar forms, so that comparable golden parachutes disclosure would be required in other, similar transactions.⁸⁴ We are not proposing to amend the requirements for golden parachutes disclosure in annual meeting proxy statements, although, as described below, under our

proposal companies would be permitted to provide disclosure in annual meeting proxies in accordance with the new requirement.⁸⁵

Section 14A(b)(1) requires disclosure of 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. In the typical case, the soliciting person is the target company in a merger transaction since target company shareholder approval is ordinarily required to approve a merger under state law. 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 company and the named executive officers of the target company, we have formulated proposed Item 402(t) to require disclosure of this compensation in addition to the disclosure mandated by Section 14A(b)(1). As proposed, Item 402(t) would require 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.⁸⁶

2. Proposed Item 402(t) of Regulation S-K

As noted above, Section 14A(b)(1) of the Exchange Act requires 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 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."⁸⁷ To satisfy these requirements for proxy or consent solicitations for these transactions, proposed Item 402(t) of Regulation S-K would require disclosure of named executive officers' golden parachute arrangements in both tabular and narrative formats.⁸⁸ We are proposing the following new table:

GOLDEN PARACHUTE COMPENSATION

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

The table would present 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.⁸⁹ Elements that would be separately

quantified and included in the total would be any cash severance payment (e.g., base salary, bonus, and pro-rata non-equity incentive plan⁹⁰

⁸³ 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.

⁸⁴ See Section II.D.3 below.

⁸⁵ See Sections II.D.2 and II.D.4 below.

⁸⁶ As described below, 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), such agreements would not be subject 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.

⁸⁷ Exchange Act Section 14A(b)(1).

⁸⁸ Proposed Instruction 1 to Item 402(t) would provide that disclosure would be required 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). Accordingly, issuers would not have to provide 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, for whom Item 402 information otherwise is required by Item 402(a)(3)(iv), and for smaller reporting companies by Item 402(l)(2)(iii).

⁸⁹ Proposed Item 402(t)(2) of Regulation S-K.

⁹⁰ As defined in Item 402(a)(6)(iii) of Regulation S-K.

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)). We have proposed 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, would require footnote identification of each separate form of compensation reported. The final column in the table would require disclosure, for each named executive officer, of the aggregate total of all such compensation (column (h)).⁹¹ As proposed, the table would require 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.⁹²

As noted above, issuers are currently required to provide disclosure in annual reports on Form 10-K and in annual meeting proxy statements of potential payments upon termination or change-in-control for their named executive officers under Item 402(j) of Regulation S-K. That item, which does not typically apply to merger proxies, requires disclosure regarding each contract, agreement, plan or arrangement, whether written or unwritten, that provides for payments to a named executive officer at, following, or in connection with termination or change in control of the issuer.⁹³ 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. It appears, however, that certain elements required by Section 14A(b)(1) are not included in Item 402(j). Specifically, we believe that the requirement in Section 14A(b)(1) to present the information in a clear and simple form is most appropriately satisfied through the use of tabular disclosure, and Item 402(j) does not require disclosure in tabular format. In addition, 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,⁹⁴ permits exclusion of *de minimis* perquisites and other personal benefits,⁹⁵ and does not require presentation of an aggregate total of all compensation that is based on or otherwise relates to a transaction.⁹⁶

We also considered whether it would be appropriate to amend Item 402(j) to include the elements required by Section 14A(b)(1), rather than adopting a new disclosure item. Section 14A(b)(1) addresses only compensation that is “based on or otherwise relates to an acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of the issuer.” In comparison, Item 402(j) requires disclosure of potential payments in connection with “any termination, including without limitation resignation, severance, retirement or a constructive termination of a named executive officer, or a change in control of the registrant or a change in the named executive officer’s responsibilities.”⁹⁷ Although we could amend Item 402(j) to mandate disclosure of all the elements required by Section 14A(b)(1) for every termination scenario covered by the item, we believe such an approach would impose significant new burdens on issuers. Alternatively, although we could amend Item 402(j) to include the disclosure elements required by Section

14A(b)(1) only with respect to change in control of the issuer, we believe that such an approach could result in a disclosure presentation that would be confusing to investors. Consequently, we are proposing the new item requirements described above.

In a proxy statement soliciting shareholder approval of a merger or similar transaction, Item 402(t)’s tabular quantification of dollar amounts based on issuer stock price would be required to be based on the closing price per share as of the latest practicable date.⁹⁸ Where Item 402(t) disclosure is included in an annual meeting proxy statement,⁹⁹ such amounts would 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,¹⁰⁰ consistent with quantification standards used in Item 402(j).¹⁰¹

The tabular disclosure required by Item 402(t) would require 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. As described above, the proposed table would quantify cash severance, equity awards that are accelerated or cashed out, pension and nonqualified deferred compensation enhancements, perquisites, and tax reimbursements. In addition, the proposed table would require disclosure and quantification of the value of any other compensation related to the transaction.¹⁰²

However, Item 402(t) would require tabular and narrative disclosure only of compensation that is based on or otherwise relates to the transaction. As proposed, Item 402(t), like Item

⁹¹ 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.”

⁹² 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.

⁹³ The circumstances covered by Item 402(j) include, without limitation, resignation, severance, retirement, a constructive termination of a named executive officer, a change in control of the registrant, or a change in a named executive officer’s responsibilities.

⁹⁴ Instruction 5 to Item 402(j).

⁹⁵ 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.

⁹⁶ We are also proposing 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).

⁹⁷ Item 402(j) of Regulation S-K.

⁹⁸ Proposed Instruction 1 to Item 402(t)(2).

⁹⁹ 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 shareholder vote. See Section II.D.4 below.

¹⁰⁰ Proposed Instruction 2 to Item 402(t)(2).

¹⁰¹ See Instruction 1 to Item 402(j).

¹⁰² We have proposed an 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), as proposed Item 402(t) would not permit the disclosure of an estimated range of payments.

402(j),¹⁰³ would not require separate disclosure or quantification with respect to compensation disclosed in the Pension Benefits Table and Nonqualified Deferred Compensation Table. Item 402(t) also would not require disclosure or quantification of previously vested equity awards. Because these amounts are vested without regard to the transaction, we do not view them as compensation “that is based on or otherwise relates to” the transaction. Similarly, the proposed table would not require disclosure and quantification of compensation from bona fide post-transaction employment agreements to be entered into in connection with the merger or acquisition transaction, as we do not view future employment arrangements as compensation “that is based on or otherwise relates to” the transaction.¹⁰⁴

Pursuant to the proposed narrative disclosure requirements,¹⁰⁵ to implement the statutory mandate to disclose the conditions upon which the compensation may be paid or become payable, Item 402(t) would require 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.¹⁰⁶ We have also proposed a requirement to provide a description of the specific circumstances that would trigger payment,¹⁰⁷ whether the payments would or could be lump sum, or annual, and their duration, and by whom the payments would be provided,¹⁰⁸ and any material factors regarding each agreement.¹⁰⁹ These proposed narrative items are modeled on the narrative disclosure currently required with respect to termination and change-in-control agreements.¹¹⁰ 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)¹¹¹ would 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).¹¹² The issuer would, however, still be obligated to 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.

Request for Comment

(32) Should Item 402(t) disclosure be required only in the context of an extraordinary transaction, as proposed? Should we extend the Item 402(t) disclosure requirement to annual meeting proxy statements generally, or in annual meeting proxy statements in which the shareholder advisory vote required by Section 14A(a)(1) is solicited? Would this disclosure be useful in annual meeting proxy statements in the absence of an actual transaction, or are the existing compensation disclosure requirements applicable to annual meeting proxy statements sufficient? Should we amend Item 402(j) to cover the matters required by Section 14A(b)(1) that are not otherwise required by that Item, rather than adopt proposed Item 402(t)?

(33) As proposed, Item 402(t) would require 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. Would it be potentially confusing to require disclosure under Item 402(t) that relates to golden parachute compensation of a broader group of individuals than required by Section 14A(b)(1)?

(34) Does proposed Item 402(t) tabular disclosure capture “any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to” the transaction? Will proposed Item 402(t) elicit disclosure of all elements of golden parachute compensation that may be paid or become payable and the

aggregate total thereof “in a clear and simple form”? If not, what specific revisions are necessary to accomplish these objectives?

(35) Should we also require tabular disclosure of previously vested equity and pension benefits and require the total amount to include those amounts? For example, should the value of vested pension and nonqualified deferred compensation be presented so that shareholders may easily compare that value to the value of any enhancements attributable to the change-in-control transaction? Similarly, should the value of previously vested restricted stock and the in-the-money value of previously vested options be presented so that shareholders can compare these amounts to the value of awards for which vesting would be accelerated? Would inclusion of these amounts in the total overstate the amount of compensation payable as a result of the transaction?

(36) In the table, will the proposed footnote identification of amounts of single-trigger and double-trigger compensation elements effectively highlight amounts payable on each basis? If not, should these elements be highlighted by disclosing them in separate columns, or by some other means? Is this information useful to investors?

(37) Are there any elements captured by the “Other” column that should be presented separately, or in a different manner? If so, please explain why and how.

(38) Should employment agreements that named executive officers of the target issuer enter into with the acquiring issuer for services to be performed in the future be excluded from the table, as proposed? Are such agreements used to induce target executives to support the transaction? Should such employment agreements instead be required to be quantified and included in the table? If such agreements should be quantified, should they be quantified separately, such as in a separate table, or is there a better way to present such agreements? If quantification is appropriate, should we specify how employment agreements should be quantified, for example by requiring a reasonable estimate applicable to the payment or benefit and disclosure of material assumptions underlying such estimates, or a valuation based on projected first year annual compensation, or average annual basis, or a present value for this compensation? If so, please explain.

(39) In proxy statements soliciting shareholder approval of a merger or similar transaction, we are proposing

¹⁰³ See Instruction 3 to Item 402(j).

¹⁰⁴ Information regarding such future employment agreements is subject to disclosure pursuant to Item 5(a) of Schedule 14A to the extent that such agreements constitute a “substantial interest” in the matter to be acted upon, as well as Item 5(b)(xii).

¹⁰⁵ Proposed Item 402(t)(3) of Regulation S-K.

¹⁰⁶ Proposed Item 402(t)(3)(iii) of Regulation S-K.

¹⁰⁷ Proposed Item 402(t)(3)(i) of Regulation S-K.

¹⁰⁸ Proposed Item 402(t)(3)(ii) of Regulation S-K.

¹⁰⁹ Proposed 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.

¹¹⁰ Item 402(j) of Regulation S-K.

¹¹¹ This exception is discussed in Section II.D.4 below.

¹¹² 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-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.

that the tabular quantification of dollar amounts based on issuer stock price be based on the closing price per share as of the latest practicable date. Is this measurement date appropriate? Would a different measurement, such as the average closing price over the first five business days following the public announcement of the transaction, more accurately reflect the amounts payable to the named executive officers in connection with the transaction? If so, explain why.

(40) The proposed narrative disclosure would explain by whom payments would be provided. Are any additional instructions needed to provide clarity with respect to the tabular disclosure in circumstances where separate payments would be made by the target issuer and the acquiring issuer? Should a separate table be required where golden parachute compensation is payable to named executive officers of the acquiring issuer, as well as named executive officers of the target issuer?

(41) Will the proposed narrative disclosure adequately describe the conditions upon which the golden parachute compensation may be paid or become payable to or on behalf of each named executive officer? What, if any, additional disclosure is needed to accomplish this objective? What, if any, disclosure that we have proposed to require is not necessary to accomplish this objective? Explain why.

(42) Are there other items of narrative disclosure that would be useful for investors? For example, should we require issuers to describe the basis for selecting each form of payment and to describe why it chose the various forms of compensation?¹¹³

(43) As proposed, many of the table's columns would report more than one element of golden parachute compensation, with footnote quantification of the individual elements. Would it facilitate investor understanding to present in separate columns any of those individual elements, such as the different components of cash severance? If so, explain which elements and why. Would additional columns make the table too complex?

(44) As proposed, issuers would not have to provide 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.¹¹⁴ Should Item 402(t) information be required if such individuals remain employed by the issuer at the time of the proxy solicitation? If so, explain why. Also, as proposed, issuers would have to provide Item 402(t) information with respect to all individuals who served as the principal executive officer or principal financial officer of the issuer during the last completed fiscal year or who were among the issuer's other most highly compensated executive officers at the end of that year,¹¹⁵ even if such persons are no longer employed by the issuer at the time of the proxy solicitation. Would Item 402(t) disclosure with respect to such an individual serve a useful purpose or should we exclude former employees from the disclosure requirement?

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

We are proposing 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 amendments would be consistent with the goals of Section 14A(b)(1) 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 amendments 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;¹¹⁶
- 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;¹¹⁷

¹¹⁴ Item 402(a)(3)(iv) provides that up to two such individuals are named executive officers for purposes of this item's general disclosure requirements.

¹¹⁵ Such persons are named executive officers as defined in Item 402(a)(3)(i)-(iii).

¹¹⁶ See proposed Item 3 of Schedule 14C.

¹¹⁷ For example, acquiring companies may solicit proxies to approve the issuance of shares or a reverse stock split in order to conduct a merger transaction; such proxy statements would be required to include disclosure of information required under Item 14 of Schedule 14A pursuant to Note A of Schedule 14A. See proposed Item 5(a)(5) and Item 5(b)(3) of Schedule 14A.

- Registration statements on Forms S-4 and F-4 containing disclosure relating to mergers and similar transactions;¹¹⁸

- Going private transactions on Schedule 13E-3;¹¹⁹ and

- Third-party tender offers on Schedule TO¹²⁰ and Schedule 14D-9¹²¹ solicitation/recommendation statements.

Issuers may 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 believe 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, our proposed amendments would require the Item 402(t) disclosure in whatever form the transaction takes, whether a merger, acquisition, a Rule 13e-3 going private transaction or a tender offer. The vote required by Section 14A(b)(2), however, would not be extended to transactions beyond those specified in that section.

We are also proposing to include language in Item 1011(b) of Regulation M-A that would require the bidder¹²² in a third-party tender offer to provide information in its Schedule TO about a target's golden parachute arrangements but only to the extent the bidder has made a reasonable inquiry about the golden parachute arrangements and has knowledge of such arrangements, since certain bidders in non-negotiated transactions may not have access to such information. In addition, we are proposing an exception to 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

¹¹⁸ In addition to the proposed disclosure requirements on golden parachute arrangements in registration statements on Forms S-4 and F-4, companies will continue to be subject to the requirement to file such agreements and understandings as exhibits to these registration statements as required by Item 601(b)(10) of Regulation S-K [17 CFR 229.601(b)(10)].

¹¹⁹ See proposed Item 15 of Schedule 13E-3.

¹²⁰ See proposed Item 1011(b) of Regulation M-A.

¹²¹ See proposed Item 8 of Schedule 14D-9.

¹²² "Bidder" is defined in Rule 14d-1(g)(2) [17 CFR 240.14d-1(g)(2)].

¹¹³ See Item 402(b)(2)(xi) of Regulation S-K.

target or subject company is a foreign private issuer.¹²³ We are also proposing 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.¹²⁴ We believe such accommodations are appropriate in light of our long-standing accommodation to foreign private issuers regarding compensation disclosure.¹²⁵

Request for Comment

(45) Should we require Item 402(t) disclosure, as proposed, in transactions not specifically referenced in the Act? Is this disclosure necessary to minimize potential regulatory arbitrage? If not, please explain why not.

(46) Are there any impediments to providing this disclosure in such transactions? If so, please explain.

(47) Are the proposed exceptions from the 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 where the target or subject company is a foreign private issuer appropriate? Is the proposed exception from the Item 402(t) disclosure obligation with respect to agreements or understandings with senior management of foreign private issuers appropriate? If not, why not? Are any other exceptions for transactions involving foreign private issuers necessary?

4. Proposed Rule 14a-21(c)

Section 951 of the Act also amends the Exchange Act to add Section 14A(b)(2), which 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 and Rule 14a-21(a).

As discussed above,¹²⁶ we are proposing new Item 402(t) of Regulation S-K to implement the compensation disclosure requirements set forth in new

Section 14A(b)(1) of the Exchange Act by requiring disclosure of the full scope of golden parachute compensation applicable to the transaction. Consistent with Section 951 of the Act, whether or not Section 14A(b)(2) also requires the issuer to solicit shareholder approval of golden parachute compensation arrangements, disclosure prescribed by proposed Item 402(t) would be required in any proxy or consent solicitation for a meeting at which shareholders are asked to approve an acquisition, merger, consolidation or sale of the issuer's assets.

Under proposed Rule 14a-21(c), issuers would 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). This 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. 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, we have 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.

As described above,¹²⁷ however, because compensation arrangements may involve agreements or understandings between the acquiring issuer and the named executive officers of the target issuer, proposed Item 402(t) of Regulation S-K would require disclosure of compensation pursuant to these arrangements, as well as the

arrangements for which Section 14A(b)(1) requires disclosure, in order to require disclosure of the full scope of golden parachute compensation applicable to the transaction. In this regard, Item 402(t) of Regulation S-K would require disclosure of a broader group of agreements and understandings than required by Exchange Act Section 14A(b)(1), but proposed Rule 14a-21(c) would require a separate shareholder advisory vote only on the agreements and understandings described in Exchange Act Section 14A(b)(1). Even though agreements and understandings between the acquiring issuer and the named executive officers of the target issuer would not be subject to the Rule 14a-21(c) vote unless the acquiring issuer is soliciting proxies to approve the merger, we are proposing to require this disclosure because we believe that shareholders may find disclosure about these arrangements informative to their voting decisions regarding not only the Rule 14a-21(c) advisory vote, but also the transaction itself. Moreover, some issuers may choose to subject these arrangements to the shareholder advisory vote voluntarily because of investor interest in the full scope of golden parachute compensation applicable to the transaction or for other reasons.

Our proposed rule would not require issuers to use any specific language or form of resolution to be voted on by shareholders. This shareholder vote would not be binding on the issuer or its board of directors. In addition, consistent with Section 14A(b)(2), issuers would 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 would need to have included Item 402(t) disclosure of the same golden parachute arrangements. Even if the annual meeting proxy statement provides some disclosure with respect to golden

¹²³ "Foreign private issuer" is defined in Rule 3b-4(c) [17 CFR 240.3b-4(c)].

¹²⁴ Proposed Instruction 2 to Item 402(t).

¹²⁵ 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].

¹²⁶ See Section II.D.2 above.

¹²⁷ See Section II.D.2 above.

parachute arrangements,¹²⁸ the annual meeting proxy statement would need to 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 14-21(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 would 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. New golden parachute arrangements, and any revisions to golden parachute arrangements that were subject to a prior Section 14A(a)(1) shareholder vote would be subject to the separate merger proxy shareholder vote requirement of Section 14A(b)(2) and Rule 14a-21(c).¹²⁹ Because a shareholder vote would already have been obtained on portions of the arrangements, however, we are proposing that only the new arrangements and revised terms of the arrangements previously subject to a Section 14A(a)(1) shareholder vote would be subject to the merger proxy separate shareholder vote under Section 14A(b)(2) and Rule 14a-21(c).

Under our proposal, issuers providing for a shareholder vote on new arrangements or revised terms would provide two separate tables under Item

402(t) of Regulation S-K in merger proxy statements.¹³⁰ One table would 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 would 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 should 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.¹³¹

Request for Comment

(48) If golden parachute arrangements have been modified or amended subsequent to being subject to the annual shareholder vote under Rule 14a-21(a), should we require the merger proxy separate shareholder vote to cover the entire set of golden parachute arrangements or should we, as proposed, require a separate vote only as to the changes to such arrangements? For example, if a new arrangement is added, would the Section 14A(b)(2) shareholder advisory vote be meaningful if shareholders do not have the opportunity to express their approval or disapproval of the full complement of compensation that would be payable?

(49) Should we exempt certain changes to golden parachute arrangements that have been altered or amended subsequent to their being subject to the annual shareholder vote under Rule 14a-21(a)? For example, should we require a separate vote under Rule 14a-21(c) if the only change is the addition of a new named executive officer not included in the prior disclosure or a change in terms that would reduce the amounts payable? Should we provide an exemption for

golden parachute arrangements previously subject to an annual shareholder vote if the only change is the subsequent grant, in the ordinary course, of additional awards under an employee benefit plan, such as stock options or restricted stock, that are subject to the same acceleration terms that applied to those already covered by the previous vote? For example, if subsequent to the previous vote, additional equity awards are granted in the ordinary course pursuant to a plan, such as an annual option grant, and those awards are subject to acceleration in the event of a change in control on the same terms as earlier awards that were subject to the previous vote, should we exempt those subsequent awards? Should any other types of changes to golden parachute compensation arrangements be so exempted?

(50) Where an issuer voluntarily includes Item 402(t) disclosure in an annual meeting proxy statement to satisfy the exception from the Section 14A(b)(2) shareholder vote, should all Item 402(t) disclosure be required to be presented in one section of the document, without cross references, to facilitate shareholder understanding? If not, why not? Does proposed Instruction 6 to Item 402(t)(2) assure certainty and predictability regarding the availability of this exception? If not, what additional instructions are needed?

(51) Section 14A(b)(2) does not specify which shares are entitled to vote in the shareholder vote to approve the agreements or understandings and compensation specified in Section 14A(b)(1), nor does this section direct the Commission to adopt rules addressing this point. We are not proposing to address this question in our rules, but should our rules implementing Section 14A(b)(2) address this question? If so, how, and on what basis?

E. Treatment of Smaller 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 Sections 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.

Our proposed rules would not exempt small issuers from the requirements of Sections 14A(a) and 14A(b). We believe the shareholder advisory votes and

¹²⁸ 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.

¹²⁹ As proposed, 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) would be required. However, if any terms of such agreements have changed subsequent to the prior Section 14A(a)(1) shareholder vote, a separate vote under Section 14A(b)(2) and Rule 14a-21(c) would be required. 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.

¹³⁰ See proposed Instruction 6 to Item 402(t)(2) of Regulation S-K.

¹³¹ Proposed Instruction 7 to Item 402(t)(2). As discussed above, such agreements are not required to be subject to the proposed Rule 14a-21(c) shareholder advisory vote, but issuers may voluntarily subject them to such a vote.

additional disclosure required by Section 14A and our proposed rules would be significant for investors in all issuers, including smaller reporting companies.¹³² As a result, the proposed rules discussed above will all apply to smaller reporting companies, with the exception of our proposed amendment to Item 402(b) of Regulation S–K, as smaller reporting companies are not required to provide a CD&A. We do not believe that smaller reporting companies should be 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.

We have crafted our proposals to minimize the costs for smaller reporting companies, while providing shareholders the opportunity to express their views on the companies' compensation arrangements. For example, our proposed amendments would provide the shareholders of smaller reporting companies with the same voting rights with respect to executive compensation as shareholders of other companies subject to the proxy rules. We are not currently aware that Section 14A and our proposed rules would unduly burden smaller reporting companies. Our proposed amendments, for example, would 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.¹³³ Under our proposed rules, we would not alter the provision in our rules that smaller reporting companies are not required to provide a CD&A.

Our proposed rules would, 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 would not be required to do so

under our proposals 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 proposed rules would impose additional disclosure requirements relating to the shareholder advisory votes required by Section 14A, we preliminarily do not believe our proposed rules would impose a significant additional cost or disproportionate burden upon smaller reporting companies. As noted above, smaller reporting companies tend to have less complex compensation arrangements¹³⁴ so the proposed additional disclosures should not add significantly to their disclosure burden. As a result, we do not believe our proposed rules would place a disproportionate burden on smaller reporting companies.

Request for Comment

(52) Should we fully, partially, or conditionally exempt smaller reporting companies or some other category of smaller companies from some or all of the requirements of Section 14A? Are the provisions of Section 14A unduly burdensome on small companies and if so, how are they unduly burdensome?

(53) Should we fully, partially, or conditionally exempt smaller reporting companies or some other category of smaller companies from any or all of our proposed rules? If so, which ones? Are any of our proposed rules unduly burdensome to smaller reporting companies and if so, how are they unduly burdensome?

(54) Are the golden parachute arrangements of smaller reporting companies relatively simple and straightforward compared to those of larger issuers? Would the disclosure of such arrangements required by proposed Item 402(t) impose an undue burden on smaller reporting companies?

(55) Should we clarify in an instruction to Rule 14a–21, as proposed, that smaller reporting companies are not required to include a CD&A in their proxy statements in order to comply with our proposed amendments?

(56) Are there any other steps that we should take to reduce the 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 the Commission has adopted rules to implement Section 14A(a) by that time. Therefore, in order to facilitate compliance with the new statute, we are addressing certain first year transition issues.

Rule 14a–6 currently requires 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 we take final action to implement Exchange Act Section 14A, 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).

Rule 14a–4 under the Exchange Act currently 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. Exchange Act Section 14A(a)(2) requires a “separate resolution subject to shareholder vote to determine whether [the say-on-pay] votes * * * will occur every 1, 2, or 3 years.”¹³⁵ Until we take final action to implement Exchange Act Section 14A, 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 some proxy service providers may have difficulty in the short term in programming their systems to enable shareholders to vote among four choices and that their systems are currently set up to register at most three votes—for, against, abstain. If proxy service providers are not able to reprogram their

¹³² “Smaller reporting company” is defined in Rule 12b–2 under the Exchange Act.

¹³³ 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.

¹³⁴ In adopting executive compensation disclosure requirements applicable to smaller reporting companies, we have recognized that the executive compensation arrangements of these issuers typically are less complex than those of other public companies. See 2006 Executive Compensation Release, *supra* note 133, at Section II.D.1.

¹³⁵ Exchange Act Section 14A(a)(2).

systems to enable shareholders to vote among four choices in time for the shareholder votes required by Section 14A(a)(2), until we take final action to implement Exchange Act Section 14A, 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 proxies are not voted 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.¹³⁶

Finally, 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. Until we take final action to implement Exchange Act Section 14A, 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).

G. General Request for Comment

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

III. Paperwork Reduction Act

A. Background

The proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").¹³⁷ We are submitting the proposed amendments to the Office of

Management and Budget ("OMB") for review in accordance with the PRA.¹³⁸ 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 10-K" (OMB Control No. 3235-0063);
- (4) "Form 10-Q" (OMB Control No. 3235-0070);
- (5) "Form 10" (OMB Control No. 3235-0064);
- (6) "Regulation S-K" (OMB Control No. 3235-0071);¹³⁹
- (7) "Schedule 14D-9" (OMB Control No. 3235-0102);
- (8) "Schedule 13E-3" (OMB Control No. 3235-0007);
- (9) "Schedule TO" (OMB Control No. 3235-0515);
- (10) "Form S-1" (OMB Control No. 3235-0065);
- (11) "Form S-4" (OMB Control No. 3235-0324);
- (12) "Form S-11" (OMB Control No. 3235-0067);
- (13) "Form F-4" (OMB Control No. 3235-0325); and
- (14) "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, 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.

As discussed in more detail above, we are proposing new Rule 14a-21 under the Exchange Act and new Item 24 of Schedule 14A. Proposed Rule 14a-21 would 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 would require disclosure in proxy statements with respect to each of these shareholder votes. New Rule 14a-21 and new Item 24 of Schedule 14A would 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 proposing amendments to Item 402(b) of Regulation S-K. The proposed 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 previous shareholder votes 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 proposing new Item 402(t) of Regulation S-K and the proposed amendments to Item 1011(b) of Regulation M-A, Item 5 of Schedule 14A, Item 15 of Schedule 13E-3 and Item 8 of Schedule 14D-9. These proposed amendments would increase existing disclosure burdens for proxy statements, registration statements on Form S-4 and F-4, tender offer schedules 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, tender offer and Rule 13e-3 going-private transactions, 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 proposing to amend Forms 10-K and 10-Q. The proposed amendments to Form 10-K and Form 10-Q would increase existing disclosure burdens for

¹³⁸ 44 U.S.C. 3507(d) and 5 CFR 1320.11.

¹³⁹ 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.

¹³⁶ See *Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally*, Release No. 34-16356 (Nov. 21, 1979) [44 FR 68770].

¹³⁷ 44 U.S.C. 3501 *et seq.*

annual reports on Form 10-K and quarterly reports on Form 10-Q 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 proposed amendments to Item 5 of Schedule 14A and the proposed amendments to Item 402 of Regulation S-K, Item 1011 of Regulation M-A, Item 15 of Schedule 13E-3 and Item 8 of Schedule 14D-9 would implement and supplement the requirements under Section 14A of the Exchange Act and also would provide additional meaningful disclosure regarding golden parachute arrangements and regarding issuers' consideration of the shareholder votes and the impact of such votes on issuers' compensation policies and decisions. We believe these changes may result in more meaningful disclosure for investors making voting or investment decisions.

We are proposing 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 proposing 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) to the list of items that do not trigger the filing of a preliminary proxy statement. In addition, we are proposing 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 proposing 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 proposed 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 would not increase any existing disclosure burden. We believe these proposals, if adopted, would merely clarify existing and new statutory requirements or reduce burdens otherwise arising from our proposals. As a result, these amendments would not affect any existing disclosure burden.

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

B. Burden and Cost Estimates Related to the Proposed Amendments

We anticipate that the proposed disclosure amendments would 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 proposed 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 proposed amendments will 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, we estimate 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 include 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, 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.

We derived the above 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 proposed amendments would 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 would be required in merger proxy and information statements, Forms S-4 and F-4, Schedule 13E-3 and certain tender offer documents and solicitation/recommendation statements. As proposed, 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 would 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 would 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.

Our annual burden estimates are also based on other assumptions. First, we assumed that the burden hours of the proposed amendments would 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 assumed that substantially all of the burdens associated with the proposed amendments to Rule 14a-21 and Item 24 would be associated with Schedule 14A as this would be the primary

disclosure document in which these items would be prepared and presented. In the case of our proposed amendments to Item 402(b) and Item 402(t) of Regulation S-K, we have assumed the burdens associated with the proposed amendments would be associated with various disclosure documents as these items will be included in a number of forms and statements. For each reporting company, we estimate that the proposed amendments would impose on average the following incremental burden hours:

- 2 hours for the proposed amendments to CD&A
- 1 hour for the proposed amendments to Item 24 of Schedule 14A
- 1 hour for the proposed amendments to Form 10-K
- 1 hour for the proposed amendments to Form 10-Q
- 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 proxy statements under the proposed amendments would 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.¹⁴⁰ The estimated burden is smaller for smaller reporting companies as such issuers are not required to include a CD&A.

2. Exchange Act Periodic Reports

For purposes of the PRA, we estimate the annual incremental paperwork burden for Form 10-K under the proposed amendments would be approximately 1 hour per form.¹⁴¹ We

estimate the annual incremental paperwork burden for Form 10-Q under the proposed amendments would be approximately 1 hour per form. Our estimates below also account for the fact that each issuer would only be required to include additional disclosure in either the Form 10-K or one of the quarterly Form 10-Q filings each year.

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 proposed amendments would be approximately 2 hours per form, which represents the additional burden associated with our proposed amendments to CD&A. In making our estimates, we note that the additional burdens in CD&A would 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, registration statements on Form S-4 and F-4 to be 21 hours per form, as these forms would 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, tender offer documents and tender offer solicitation/recommendation statements and

Schedules 13E-3 to be 20 hours per form, as these forms would 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 annual reports; quarterly 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.¹⁴² 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 reports on Form 10-K and Form 10-Q, 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 the 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 burden 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.

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

	Number of responses ¹⁴³	Incremental burden hours/form	Total incremental burden hours	75% Company	25% Professional	Professional costs
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.75	(E)=(C)*0.25	(F)=(E)*\$400
10-K ¹⁴⁴	1,803	1	1,803	1,352	451	\$180,400
10-Q	5,409	1	5,409	4,057	1,352	540,800
Form 10 ¹⁴⁵	9	2	18	4	14	5,600
DEF 14A ¹⁴⁶	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

¹⁴⁰ 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.

¹⁴¹ 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 so that the annual incremental paperwork burden for the Form 10-K relates only to the proposed amendments to Item 9A.

¹⁴² Figures in both tables have been rounded to the nearest whole number.

TABLE 1—INCREMENTAL PAPERWORK BURDEN UNDER THE PROPOSED AMENDMENTS FOR ANNUAL REPORTS; QUARTERLY REPORTS; PROXY AND INFORMATION STATEMENTS—Continued

	Number of responses ¹⁴³	Incremental burden hours/form	Total incremental burden hours	75% Company	25% Professional	Professional costs
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.75	(E)=(C)*0.25	(F)=(E)*\$400
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 PROPOSED AMENDMENTS FOR REGISTRATION STATEMENTS, MERGER PROXY AND INFORMATION STATEMENTS, TENDER OFFER DOCUMENTS AND SCHEDULES 13E-3

	Number of responses ¹⁴⁷	Incremental burden hours/form	Total incremental burden hours	25% Company	75% Professional	Professional costs
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.25	(E)=(C)*0.75	(F)=(E)*\$400
Form S-1 ¹⁴⁸	485	2	970	243	727	\$290,800
Form S-11	22	2	44	11	33	13,200
Form S-4 ¹⁴⁹	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 ¹⁵⁰	14	20	280	70	210	84,000
Schedule TO-T ¹⁵¹	50	20	1,000	250	750	300,000
Schedule 14D-9	77	20	1,540	385	1,155	462,000
Schedule 13E-3	5	20	100	25	75	30,000
Form N-2 ¹⁵²	29	2	58	14	44	17,600
Reg. S-K	N/A	N/A	N/A	N/A	N/A	N/A
Total .....	.....	.....	17,915	4,479	.....	5,374,400

C. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment to:

¹⁴³ 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 144 through 146, we have reduced the number of estimated filings to reflect that the additional disclosure requirements as proposed would only apply to a smaller number of the forms filed.

¹⁴⁴ We calculated the burden hours for Forms 10-K and 10-Q 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 10-K and 10-Q to disclose the issuer's plans with respect to the frequency vote as the number of proxy statements and further assumed that 75% of issuers would disclose this information on Form 10-Q and 25% would disclose this information on Form 10-K.

¹⁴⁵ 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 as proposed would 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.

¹⁴⁶ 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 would be applicable to companies that are large accelerated filers, accelerated filers, and non-accelerated filers (that are not smaller reporting companies), but would not be applicable to smaller reporting companies.

¹⁴⁷ 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 148 through 152, we have reduced the number of estimated filings to reflect that the additional disclosure requirements as proposed would only apply to a smaller number of the forms filed.

¹⁴⁸ We have reduced the number of estimated Form S-1 and Form S-11 filings to reflect that approximately 60% of these forms would not require additional disclosure, as new disclosure required under Item 402 as proposed would only relate to issuers who are already public companies and have conducted a prior shareholder vote on executive compensation.

¹⁴⁹ 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 would not apply.

¹⁵⁰ We have reduced the number of estimated DEFM14C filings to reflect an approximate 15% of these forms, which will not relate to merger

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;

- Evaluate the accuracy of our estimate of the burden of the proposed collections of information;

- Determine whether there are ways to enhance the quality, utility, and

transactions but will involve dissolutions and similar transactions.

¹⁵¹ We have reduced the number of estimated Schedules TO-T, 14D-9 and 13E-3 to reflect the approximate number of these filings to which the proposed rules would apply, based on the total number of filings from calendar year 2009. We have substantially reduced the number of Schedules 13E-3 to avoid double counting, as the majority of these forms are filed in conjunction with a DEF14A. In addition, we have reduced the number of Schedule TO-T filings as we anticipate that some bidders would incorporate by reference disclosure in Schedule 14D-9 and not incur an additional disclosure burden.

¹⁵² 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 development companies would be subject to the proposed disclosure required under Item 402 on Form N-2.

clarity of the information to be collected;

- Evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments will have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503 and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090, with reference to File No. S7-31-10. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7-31-10 and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549-0213. Because OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if OMB receives them within 30 days of publication.

IV. Cost-Benefit Analysis

A. Introduction

We are proposing rulemaking to implement and supplement the 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.¹⁵³

We are proposing 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 proposing 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.

Our proposed 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), as proposed, would 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 proposed amendments to Item 5 of Schedule 14A would require disclosure regarding golden parachute compensation arrangements in accordance with Section 14A(b)(1) of the Exchange Act. We are also proposing that additional disclosure regarding golden parachute compensation arrangements be required in connection with other transactions. We have proposed amendments to Regulation M-A, Schedule 14D-9 and

Schedule 13E-3 that would require additional disclosure regarding golden parachute compensation arrangements in connection with Rule 13e-3 going-private transactions and tender offers.

We are also proposing 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 proposing amendments to Form 10-K and Form 10-Q 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 proposing 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 proposing 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) to the list of items that do not trigger the filing of a preliminary proxy statement. In addition, we are proposing 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.

Our proposed rulemaking, which implements the relevant provisions of the Dodd-Frank Act, will directly affect most public companies as well as potential private acquirers. Our proposed 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 proposed 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 proposed rulemaking regarding the shareholder approval of executive

¹⁵³ 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."

compensation and companies' responses to shareholder votes would 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 would enhance the operation of our rules pursuant to the Act. The enhanced disclosure regarding golden parachute compensation would provide a more complete picture of the compensation to shareholders as they consider voting and investment decisions relating to mergers and similar transactions.

B. Benefits

The proposed rulemaking is 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. The proposed amendments also provide for enhanced disclosure relating to the shareholder advisory votes required by Exchange Act Section 14A and how an issuer's consideration of such votes affects its compensation policies and decisions. Our proposed rules would not only implement the shareholder advisory votes required by Section 14A, but would also require additional disclosure addressing 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 would provide timely information to shareholders about the issuer's plans for future shareholder advisory votes. Our proposed enhanced disclosure and proposed amendments to the CD&A requirements in Item 402(b) of Regulation S-K about an issuer's consideration of the results of a shareholder vote to approve executive compensation and how that consideration has affected its compensation policies and decisions would benefit shareholders and other market participants by providing potentially useful information for voting and investment decisions.

Our proposed rules would 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 proposed 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.

In our proposed 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 proposing a note to Rule 14a-8(i)(10). The proposed note would reduce potential confusion among shareholders and issuers with respect to what may be excluded under our rules by providing for the exclusion of certain shareholder proposals that the company has substantially implemented, while preserving the ability of shareholders to make proposals relating to executive compensation.

New proposed Item 402(t) of Regulation S-K would 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 proposed 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 proposing narrative disclosure to provide additional context and provide 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 proposed combination of narrative and tabular disclosure would 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 proposed 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. As proposed, Item 402(t) would require 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 would provide more detailed and comprehensive 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 or a Rule 13e-3 going-private transaction that is not subject to Regulation 14A, would benefit 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 proposed Item 402(t) would 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 proposed rules would enable

shareholders to compare more easily such compensation among various types of change in control transactions and structures. In addition, our proposed rules would 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 proposed such disclosure 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, as proposed, the information about other executive compensation that may be disclosed in proxy materials would not need to be included in the tabular format pursuant to Item 402(t) of Regulation S-K.

Our proposed rulemaking would 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 proposed rulemaking would 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 proposed rules would specify how the statutory requirements operate in connection with the federal proxy rules and accordingly, we believe the proposed rulemaking would 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 would benefit issuers, their shareholders and other market participants.

C. Costs

We recognize that the proposed amendments would impose new disclosure requirements on companies and are likely to result in costs related

to information collection. The proposed rulemaking that requires the disclosure of executive compensation in a tabular format is 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 proposed rulemaking is currently required to be disclosed in narrative format in the existing disclosure regime.

We have proposed 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 have also proposed 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 would 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. There may also be certain indirect costs to issuers and shareholders as a result of our proposed rules, 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 third-party tender offer or Rule 13e-3 going-private transaction may face increased costs because of the required disclosure of golden parachute compensation arrangements, including the required table and aggregate totals, under the proposed rulemaking. 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 proposed these disclosure requirements that go beyond the requirements of Section 14A(b)(1) because we believe the proposed rules would reduce the regulatory disparity that might otherwise result from treating such transactions differently from mergers. 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 under the proposed rulemaking 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 proposed revisions to the periodic reporting requirements on Forms 10-K and 10-Q 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 would not be unduly burdensome given that most of the disclosure is covered by our existing disclosure requirements, even though we are proposing that such disclosure be included in both narrative and tabular format. In addition to the existing narrative requirements, we are proposing 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 proposed rule 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.

Our proposed note to Rule 14a-8(i)(10) may also impose certain costs on shareholders as our proposal would permit issuers to exclude certain shareholder proposals that would otherwise not be excludable under our rules. In addition, our proposals may impose certain indirect costs on shareholders who might pursue alternative means to communicate their

positions regarding the frequency of say-on-pay votes.

For purposes of the PRA, we have estimated the collection of information burden and cost. However, we acknowledge that the PRA estimates do not reflect the full magnitude of the economic costs considered above. The estimates of total amount of time and resources spent in preparing are 25,202 labor hours and \$8,142,000 costs. Of these, 15,300 labor hours and \$2,040,000 are estimated for annual meeting proxy and information statements, 5,409 labor hours and \$721,200 are estimated for periodic reports, 272 labor hours and \$327,200 for Securities Act registration statements (excluding Forms S-4 and F-4), Exchange Act registration statements, and Investment Company Act registration statements, and 4,211 labor hours and \$5,052,800 for merger proxies and information statements, registration statements on Forms S-4 and F-4, tender offer statements and Schedules 13E-3 for Rule 13e-3 transactions that are not otherwise subject to Regulation 14A.

D. Request for Comment

We request data to quantify the costs and the value of the benefits described above. We seek estimates of these costs and benefits, as well as any costs and benefits not already defined, that may result from the adoption of these proposed amendments. We also request qualitative feedback on the nature of the benefits and costs described above and any benefits and costs we may have overlooked.

V. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"¹⁵⁴ we solicit data to determine whether the proposals constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on the potential impact of the proposed amendments on the U.S. economy on an annual basis, any potential increase in costs or prices for consumers or individual industries, and any potential effect on competition,

investment or innovation.

Commentators are requested to provide empirical data and other factual support for their views if possible.

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

Section 23(a)(2) of the Exchange Act¹⁵⁵ 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)¹⁵⁶ of the Securities Act and Section 3(f)¹⁵⁷ 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.

Our proposed amendments would 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 have proposed 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 have proposed in our rulemaking would impose a burden on competition.

The proposed amendments would not only implement the requirements of Section 14A of the Exchange Act, but would 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 proposed amendments would also enhance the transparency of a company's compensation policies. As discussed in greater detail above, we believe these benefits would be achieved without imposing any significant additional burdens on

issuers. As a result, the proposed amendments should improve the ability of investors to make informed voting and investment decisions, and, therefore lead to increased efficiency and competitiveness of the U.S. capital markets.

We believe the proposed amendments would also benefit issuers and their shareholders by specifying 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 proposed rules would allow for more consistent disclosure from all entities and clearer disclosure for shareholders. By reducing uncertainty, our proposed rules would 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 as proposed would 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 proposed disclosure requirements across different types of transactions would help competition as issuers would 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 proposed rules would create additional, incremental disclosure burdens, we believe that our proposed rules would enhance capital formation by allowing for clearer disclosure, more informed voting decisions by investors, and consistency across different types of transactions.

We request comment on whether the proposed amendments, if adopted, would impose a burden on competition. We also request comment on whether the proposed amendments, if adopted, would promote efficiency, competition, and capital formation. Commentators are requested to provide empirical data and other factual support for their view to the extent possible.

VII. Initial Regulatory Flexibility Act Analysis

This initial Regulatory Flexibility Analysis (IRFA) has been prepared in accordance with the Regulatory Flexibility Act. It relates to proposed revisions to the rules under the Exchange Act regarding the proxy

¹⁵⁵ 15 U.S.C. 78w(a).

¹⁵⁶ 15 U.S.C. 77b(b).

¹⁵⁷ 15 U.S.C. 78c(f).

¹⁵⁴ 5 U.S.C. 603.

solicitation process and related executive compensation disclosures.

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

These proposals 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 would apply to such votes. Specifically, the proposals amend 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. Our proposals 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 proposing the amendments pursuant to Sections 13, 14(a), 14A, 23(a), and 36 of the Exchange Act.

C. Small Entities Subject to the Proposed Action

The proposed amendments would affect some companies that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."¹⁵⁸ 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 157¹⁵⁹ and Exchange Act Rule 0-10(a)¹⁶⁰ defines 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,¹⁶¹ 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.¹⁶² We believe that certain proposals would affect small entities that are business development companies who have a class of securities registered under Section 12 of the Exchange Act. We estimate that there are approximately 32 business development companies that may be considered small entities.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed 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.

E. Duplicative, Overlapping, or Conflicting Federal Rules

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

F. 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 proposed 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 proposed amendments would not affect these requirements.¹⁶³ 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 proposed amendments to CD&A, the remaining proposed disclosure requirements would apply to smaller reporting companies to the same extent as larger issuers.

As noted above, the proposed amendments to CD&A would not apply to smaller reporting companies. We are not proposing to expand the existing scaled disclosure requirements under Item 402 of Regulation S-K, or establish additional different compliance requirements or an exemption from coverage of the proposed amendments for smaller reporting companies. The proposed amendments would 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 proposing 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 our proposed rules, all companies would be subject to the same golden parachute disclosure requirements. As proposed, Schedule 14A would 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

¹⁶³ Rule 12b-2 excludes business development companies from the definition of "smaller reporting companies."

¹⁵⁸ 5 U.S.C. 601(6).

¹⁵⁹ 17 CFR 230.157.

¹⁶⁰ 17 CFR 240.0-10(a).

¹⁶¹ 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)].

¹⁶² 17 CFR 270.0-10(a).

required by our proposed amendment to Item 5 of Schedule 14A is currently required for all issuers, regardless of size, under our proposed rules such disclosure would be required to be included in a tabular format pursuant to Item 402(t) of Regulation S-K, which would include an aggregate total and specific quantification of various compensation elements. All companies, regardless of size, would 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 proposed amendments would 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 proposed amendments because, based on our past experience, we believe the proposed amendments would be more useful to investors if there were specific disclosure requirements. The proposed disclosures are intended to result in more comprehensive and clear disclosure. In addition, the specific disclosure requirements in the proposed amendments would promote consistent and comparable disclosure among all companies.

We seek comment on whether we should exempt small entities from any of the proposed disclosures or scale the proposed amendments to reflect the characteristics of small entities and the needs of their investors.

G. Solicitation of Comments

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How the proposed amendments can achieve their objective while lowering the burden on small entities;
- The number of small entity companies that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entity companies discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the

Final Regulatory Flexibility Analysis, if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. Statutory Authority and Text of the Proposed Amendments

The amendments described in this release are being proposed 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, 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 Proposed Amendments

For the reasons set out in the preamble, the Commission proposes to amend 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 authority citation for part 229 is amended by adding authority for § 229.402 and § 229.1011 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, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 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.

* * * * *

Section 229.402 is also issued under sec. 951, Pub. L. 111-203, 124 Stat. 1376.

Section 229.1011 is also issued under sec. 951, Pub. L. 111-203, 124 Stat. 1376.

* * * * *

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 previous shareholder advisory votes on executive compensation required by section 14A of the Exchange Act (15 U.S.C. 78n-1) and previous shareholder advisory votes on executive compensation required by § 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

(i) 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

(ii) 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 is the closing market price as of the latest practicable 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.

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.

Instruction 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):

The addition reads 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. In connection with any Schedule TO (§ 240.14d–100 of this chapter), a bidder’s disclosure obligation pursuant to paragraph (b) of this section need be provided only to the extent known after making reasonable inquiry.

3. 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), TO (§ 240.14d–100 of this chapter) or 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, is the closing market price as of the latest practicable date.

* * * * *

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

4. The authority citation for Part 240 is amended by adding authority for § 240.13e–100, § 240.14a–4, § 240.14a–

6, § 240.14a–8, § 240.14a–21, § 240.14a–101, and § 240.14c–101 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, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78l, 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.

* * * * *

Section 240.13e–100 is also issued sec. 951, under Pub. L. 111–203, 124 Stat. 1376.

Section 240.14a–4 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

Section 240.14a–6 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

Section 240.14a–8 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

Section 240.14a–21 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

Section 240.14a–101 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

Section 240.14c–101 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

* * * * *

5. Amend § 240.13e–100 by revising Item 15.

The revisions 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) removing “and/or” at the end of paragraph (a)(6);

(b) revising paragraph (a)(7);

(c) adding paragraph (a)(8).

The revisions read 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; and/or

(8) 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.

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

§ 240.14a-8 Shareholder proposals.

* * * * *

(j) * * *

(10) * * *

Note to paragraph (i)(10): A company may exclude, as substantially implemented, 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 the company 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 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 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 and not less frequently than once every 3 years thereafter, 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.

(b) If a solicitation is made by a registrant and the solicitation relates to an annual or other meeting of shareholders 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 and not less frequently than once every 6 years thereafter, 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 not less frequently than once every 6 years thereafter.

(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 provide a separate shareholder 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) 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 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 paragraph (b)(3) of Item 5;
- (d) adding Item 24.

The revisions 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), and briefly explain the general effect of each vote, such as whether each such vote is non-binding.

11. Amend § 240.14c-101 by adding paragraph (c) of Item 3.

The revisions 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-101 by revising Item 8 to add the words “and (c)” after “Item 1011(b)”.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

13. The authority citation for part 249 is amended by adding authority for § 308a and § 310 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.

* * * * *

Section 249.308a is also issued under sec. 951, Pub. L. 111-203, 124 Stat. 1376.

Section 249.310 is also issued under sec. 951, Pub. L. 111-203, 124 Stat. 1376.

* * * * *

14. Amend Form 10-Q (referenced in § 249.308a) by adding paragraph (c) to Item 5 in Part II to read as follows:

Note: The text of Form 10-Q does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10-Q

* * * * *

Part II—Other Information

* * * * *

Item 5. Other Information

* * * * *

(c) If an annual or other meeting of shareholders relating to the election of directors has occurred during the period covered by this report at which shareholders voted on the frequency of shareholder votes on the compensation of executives as required by section 14A of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1), 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 for the six years subsequent to such meeting.

15. Amend Form 10-K (referenced in § 249.310) by adding a second sentence to Item 9B in Part II to read as follows:

Note: The text of Form 10-K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10-K

* * * * *

Part II—Other Information

* * * * *

Item 9B. Other Information

(a) * * * If an annual or other meeting of shareholders relating to the election of directors has occurred during the fourth fiscal quarter in the period covered by this report at which shareholders voted on the frequency of shareholder votes on the compensation of executives as required by section 14A of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1), 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 for the six years subsequent to such meeting.

* * * * *

Dated: October 18, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010-26535 Filed 10-27-10; 8:45 am]

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