

SEC Adopts Final “Say on Pay” Rules Under Dodd-Frank

Concluding another chapter in the long-simmering debate over whether and how shareholders should vote on executive pay, the SEC yesterday adopted, in a three to two vote, final “Say on Pay” rules under the Dodd-Frank Act. Under these rules, companies are required

- to hold an advisory “Say on Pay” vote at least once every three years,
- to hold an advisory “frequency” vote at least once every six years, in order to allow shareholders to indicate how often they would like to be presented with a “Say on Pay” vote (i.e., every one, two or three years); and
- to hold an advisory vote on “golden parachute” compensation arrangements as part of proxy statements for shareholder meetings approving certain M&A transactions, as well as to provide enhanced disclosure of such arrangements in their annual proxy statements.

The “Say on Pay” and “frequency” vote requirements are effective for proxy statements filed on or after January 21, 2011; the “golden parachute” advisory vote and disclosure requirements will be applicable to filings initially filed on or after April 25, 2011.

In general, the final rules follow the rules the SEC originally proposed last October, with certain clarifications/revisions:

- The SEC exempted, for two years, smaller reporting companies (those with less than \$75 million in public float) from the requirement to hold “Say on Pay” and “frequency” votes. This will allow the SEC to monitor the impact of the new rules on larger companies before deciding how mandatory “Say on Pay” should be implemented for smaller issuers. The temporary exemption should cut the total number of required 2011/2012 “Say on Pay” and “frequency” votes significantly (some suggest by as much as 50%).
- Companies will need to file, within 150 days after an annual meeting at which a “frequency” vote is held, a Form 8-K to disclose their decision on “frequency.” This timeframe should enable Boards to consider thoughtfully the results of their shareholders’ advisory “frequency” vote. The disclosure will better enable investors to monitor whether companies adopted their shareholders’ preferences.
- Proxy statements for annual meetings will have to disclose the general nature of the frequency vote (i.e., that it is non-binding), the current frequency of “Say on Pay” votes, and when the next scheduled “Say on Pay” vote will occur.

- Companies will need to address in the CD&A whether, and if so, how, their compensation policies and decisions took into account the results of the most recent “Say on Pay” vote. The original proposal required consideration of “previous” votes.
- Companies may omit future shareholder proposals seeking a different pay vote “frequency” if they adopt a frequency that is supported by a majority vote by their investors. The original proposal allowed companies to exclude proposals if they heeded a plurality vote for a particular frequency. Under the new rule, if neither one, two or three year frequency garners a majority vote, a company may be faced with having to put “frequency” votes on the ballot each year.

The SEC’s Adopting Release can be found at: <http://www.sec.gov/rules/final/2011/33-9178.pdf>.

If you have any questions or need additional information, please feel free to contact:

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