SEC ADOPTS FINAL SAY ON PAY RULES

Companies now must weigh implications of voting frequency

The SEC voted 3-2 to adopt final rules on say on pay (SOP) and the frequency of SOP shareholder votes. A non-binding advisory vote on executive compensation is required by the Dodd-Frank Act. As expected, final rules remain close to the proposed rules. Dodd-Frank mandates that public companies must include an SOP vote in their proxies for all shareholder meetings, as of January 21, 2011. Companies must also include a proposal asking shareholders to vote on how often they would like to vote on SOP. Choices are annual, every other year or once every three years.

The highlights of the changes in the final SEC rules include:

- Delayed implementation of the SOP and frequency SOP rules for small reporting companies (less than $75 million in public float until January 21, 2013.
- Companies adopting the SOP frequency votes supported by a majority of shareholders can omit future shareholder SOP frequency proposals. (Proposed rules permitted companies to omit future shareholder SOP frequency proposals if they adopted the frequency supported by a plurality of voters).
- While a company is required to report the results of the SOP frequency vote and the company's decision on what frequency to adopt, the SEC did change reporting the decisions on Form 8K to 150 days after the annual meeting.
- Golden parachute compensation shareholder advisory vote and disclosure requirements in proxy statements apply with statements filed on or after April 25, 2011.

Radford Perspective:
With shareholders now being asked to select either annual, biennial or triennial SOP votes, companies must determine for the first time what the board and management's position is on the optimal frequency for SOP.

Proxy advisory firms Institutional Shareholder Services (ISS) and Glass Lewis & Co. have both come out in favor of annual votes, which weighs heavily in the decision-making of some boards not inclined to advocate a position at odds with the proxy advisors' recommendations. However, Aon Hewitt has recently concluded a study showing that companies are currently split between recommending annual vs. triennial say on pay votes, with 40% favoring an annual vote, and 44% recommending that the vote be held only every three years (another 9% have opted to make no recommendation). While this is early data and the numbers may well swing as vote returns continue to come in from early filers, it is clear that there is no unanimous position among boards at this point (the survey was completed in January).

The merits of one-year votes include:

- They represent an enthusiastic embrace rather than reluctant/minimum adoption of SOP, and support ongoing communications with shareholders on important executive compensation issues
- They could easily “win out” over other frequencies based on ISS and Glass Lewis support
- They may insulate Comp Committees from no votes

Meanwhile, three-year votes:

- Foster a longer-term view of compensation and performance, which is more consistent with how executive compensation programs are designed; it is more aligned to a company focus on long-term value creation
- Mitigate against the impact of temporary or one-time events; since SEC rules will require companies to discuss the impact of prior SOP votes in the CD&A, an annual vote could compel companies to react reflexively/too quickly

Radford will continue to monitor the voting patterns for SOP and report out changes in those patterns as warranted.

More Information

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

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