



Final Rules Expected in Say on Pay

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The Securities and Exchange Commission ("SEC") has announced its intention to consider final rules for executive compensation advisory votes an open meeting to be held on Tuesday, January 25, 2011. These rules are mandated by the Dodd-Frank Act, which requires all public filers to hold "say on pay" votes in 2011 (1st annual meeting on or after Jan. 21). Shareholders must be given the opportunity to advise companies whether future pay votes should occur every one, two or three years.

While the final rules are not likely to contain any real surprises, of particular interest will be whether the so-called "small-company exemption" (<\$75 million in market capitalization) and new issuer exemption will survive. During the comment period, investors generally opposed this exemption while the smaller filers are pushing hard for adoption.

Vote Frequency: "Say When"

As of mid-January 2011, RiskMetrics is reporting that nearly 100 early filers have indicated a fairly strong preference for less frequent shareholder advisory votes on executive compensation.

To date, approximately 54% of all early filers have indicated support for a triennial shareholder advisory vote, while approximately 30% have indicated a preference for an annual vote. The remaining portion is roughly split between a biennial vote and no recommendation at all.

A partial listing of higher profile companies and their recommendations appears below:

1 Year

Apple
Beazer Homes USA
Oshkosh
TD Ameritrade
Visa

3 Year

Costco
Accenture
Ashland
Johnson Controls
Monsanto
Emerson Electric

Nevertheless, RiskMetrics indicates that two recent polls suggest that a greater percentage of issuers may support annual votes as the 2011 proxy season progresses.

In the first, conducted by TheCorporateCounsel.net blog in early 2011, 50% of respondents indicated they were leaning towards an annual vote, while 33% favored a triennial vote, 4 percent said biennial, and 4 percent expected no recommendation.

Similar results were obtained in a Towers Watson survey of 135 companies: 51% percent plan to hold an annual vote, 39%, and 10% expect to hold a biennial vote.

I find the dearth of support for the two-year period a bit puzzling. Three years is simply too long, while 1 year may not provide enough time for analysis, implementation and feedback.

This point was enunciated very clearly in the recent Hormel Foods filing:

"[A] say-on-pay vote every two years strikes the right balance between having the vote too frequently with an annual vote and being less responsive to stockholders with a vote every third year. The Board believes an annual say-on-pay vote would not allow for changes to the Company's compensation program to be in place long enough to evaluate whether the changes were effective."

A say-on-pay vote in January 2011 that leads to review and changes to the compensation program prior to the next fiscal year would only be in place a few months before the next annual say-on-pay vote would take place in January 2012.

However, this approach could lead to a more collaborative effort between issuers, their shareholders, and their compensation consultants.

In fact, RiskMetrics offers further support regarding the potential momentum building for annual reviews, reporting that over this past summer, pay vote proponents sent an open letter to more than 350 companies that urged companies to hold annual votes. Timing of new programs aside, these proponents believe that an annual vote is the most effective method of ensuring increased accountability.

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