Dodd-Frank Update: Say-on-Pay and Say-on-Frequency

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The Securities and Exchange Commission has released final rules[1] implementing Dodd-Frank Act provisions requiring shareholder approval of executive compensation, or say-on-pay. The final rules exempted smaller reporting companies from the say-on-pay requirements until the 2013 proxy season, but, for all other public companies, say-on-pay rules are in effect for 2011. Companies required to hold a say-on-pay vote at their 2011 annual meeting also must hold an additional vote covering the frequency of future say-on-pay votes. These new voting requirements do not require filing a preliminary proxy statement - the definitive proxy statement is sufficient. The following discussion summarizes the proxy statement changes required to implement these votes and related issues.

Say-on-Pay

Under the SEC's final rules, say-on-pay consists of a non-binding vote of the company's shareholders on the compensation of its named executive officers.[2] It does not apply to the compensation of directors or of management generally. The vote explicitly applies to the description of named executive officer compensation already required to be included in the proxy statement and there are no substantial additional compensation disclosure requirements for 2011.

In the description of the say-on-pay proposal itself, companies must disclose that the vote is being undertaken as a requirement of Section 14A of the Securities Exchange Act and must describe the general effect of the say-on-pay resolution, including its non-binding nature. Companies that have already filed proxy statements have taken approaches ranging from extensive additional disclosure to very little beyond a straightforward statement regarding the resolution. The say-on-pay resolution itself must state that the vote is to approve named executive officer compensation disclosed in the proxy statement as required by Item 402 of Regulation S-K. The final rules give a sample resolution that should work for most companies with minimal revision:

> RESOLVED, that the compensation paid to the company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion, is hereby APPROVED.

Say-on-Frequency

Companies subject to the say-on-pay rules are required to hold a vote at least once every three calendar years. The determination of whether the say-on-pay vote is to be held annually, biannually or triennially is also put to an advisory shareholder vote, known as say-on-frequency. Say-on-frequency votes must be held the first year that say-on-pay applies and at least once every six calendar years thereafter. The vote must allow shareholders to vote for one, two or three year periods between say-on-pay votes or to abstain from voting.

In addition to providing for those four options, the say-on-frequency proposal must include a statement regarding the general effect of the vote and its non-binding nature. Other than that, there is no particular disclosure requirement.

The SEC expects that the board of directors will include a recommendation on the say-on-frequency proposal and has confirmed that uninstructed proxy cards can be voted in accordance with management's recommendations for the say-on-frequency vote if the proxy card includes a bold statement regarding how uninstructed shares will be voted. As of the time of this update, a majority of filed proxy statements include a board of directors recommendation to approve triennial say-on-pay votes. Most of the remaining proxy statements include a recommendation for annual votes.

Reporting

Within four business days following the annual meeting, the results of the say-on-pay and say-on-frequency votes must be reported with the other meeting results on a Form 8-K. The Form 8-K is required to be amended to state the company's decision regarding the frequency of say-on-pay votes, if the decision is not disclosed in the initial Form 8-K filing. The deadline for this amendment is 150 days after the date of the meeting or 60 days before shareholder proposals seeking to be included in the company's proxy are due, whichever comes first.

Future proxy statements must include disclosure in the compensation discussion and analysis section concerning whether the most recent say-on-pay vote was taken into account when evaluating compensation policies and decisions and, if so, how it affected them. Also, the frequency of say-on-pay votes and the date of the next vote must be stated.

TARP Participants

In addition to delaying say-on-pay for smaller reporting companies until 2013, all banks still subject to TARP say-on-pay requirements will continue to comply with TARP rules for say-on-pay. Such banks need only comply with the SEC's say-on-pay and say-on-frequency rules after the TARP say-on-pay requirement has lapsed.

XBRL Applies to All Filers

For all public companies that are not large accelerated filers and, therefore, are not currently subject to XBRL financial reporting requirements, XBRL tagging will apply to the Form 10-Q for the first quarter that ends after June 15, 2011. For most companies this means that XBRL tagging of financial statements and basic tagging of financial notes and schedules will apply to the Form 10-Q for the second quarter of 2011. The initial implementation of XBRL is time consuming. If you have not begun the process with a third party provider at this point, it would be advisable to start immediately. Calendar year reporters should also consider that the number of first time XBRL filers will be very high for the quarter ending June 30, so early preparation is particularly important.

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[1] SEC Release No. 33-9178

[2] Broker discretionary votes may not be voted on executive compensation matters, including say-on-pay and say-on-frequency proposals.

For more information about this topic, please contact the author or any member of the Williams Mullen Securities & Corporate Governance team.

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