

PUBLICATION

How to Plan for the 2011 Proxy Season

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With the upcoming proxy season quickly approaching, public companies should begin to consider the additional proxy disclosures required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) with respect to the 2011 proxy season. These additional disclosures are discussed below.

Say-on-Pay and Say-When-on-Pay

Section 951 of Dodd-Frank requires public companies holding an annual meeting on or after January 21, 2011 to submit to shareholders a non-binding advisory vote approving the compensation of the company's named executive officers, as disclosed in the company's proxy statement pursuant to Item 402 of Regulation S-K. This non-binding vote, referred to as "Say-on-Pay," is required to be added as a proposal in the company's proxy statement and proxy card.

Section 951 of Dodd-Frank also requires a non-binding vote on whether the Say-on-Pay vote should occur every one, two or three years, referred to as "Say-When-on-Pay." The Say-When-on-Pay vote must occur at least once every six years.

The Securities and Exchange Commission (SEC) issued proposed rules on Say-on-Pay and Say-When-on-Pay on October 18, 2010 but has not yet adopted final rules. However, advisory votes on both Say-on-Pay and Say-When-on-Pay are required for companies holding annual meetings on or after January 21, 2011 even if the SEC has not adopted final rules by that date. Companies should note that the SEC's proposed rules do not provide an exemption for smaller reporting companies from complying with Say-on-Pay and Say-When-on-Pay.

In order to prepare for Say-on-Pay and Say-When-on-Pay, public companies should start evaluating their executive compensation practices to ensure they are aligned with their shareholders' interests. Companies should consider potentially problematic or controversial elements of executive compensation and fully vet these items with management and the company's board of directors. In addition, companies should engage their compensation consultants early in the proxy planning process this year in anticipation of these additional discussions. Management and compensation committees should carefully scrutinize the Compensation Disclosure & Analysis section of the proxy statement to ensure the disclosure of executive compensation is clear, understandable and accurately explains the rationale behind the company's compensation programs for its executive officers. Also, companies need to consider whether they will recommend to shareholders a voting frequency for the Say-When-on-Pay vote and how they will explain their position in the proxy statement. Finally, because Say-on-Pay and Say-When-on-Pay require two new proposals in the proxy statement, companies should begin drafting these portions of the proxy statement to now allow plenty of time for review by management, the board of directors and compensation consultants.

Golden Parachute Pay

Dodd-Frank also requires an advisory vote on executive compensation in connection with solicitations for shareholder approval of merger and acquisition transactions. A proxy statement relating to a merger or acquisition of the company must include (1) tabular disclosure regarding the compensation triggered by the

transaction and (2) a separate non-binding vote on such compensation unless such compensation was already voted on at the annual meeting.

Unlike Say-on-Pay and Say-When-on-Pay, companies will not be required to comply with the golden parachute advisory vote until the effective date of the SEC's final rules, which is expected to be in early 2011. Once the rules are effective, this golden parachute advisory vote is only required for proxy statements relating to change in control transactions, although companies may opt to present this compensation for vote at an earlier time.

Broker Discretionary Voting (NYSE Rule 452)

In addition to last year's amendment to New York Stock Exchange (NYSE) Rule 452 prohibiting brokers from voting uninstructed shares with respect to the election of directors, the SEC has approved another amendment to NYSE Rule 452, also prohibiting brokers from voting uninstructed shares with respect to any matter related to executive compensation. This amendment to NYSE Rule 452 is currently effective and prohibits brokers from voting on Say-on-Pay, Say-When-on-Pay and golden parachute pay if the broker's customer does not provide specific voting instructions on these matters.

Other Considerations for the Upcoming Proxy Season

- Proxy Access—the ability of shareholders who meet certain requirements to select nominees for a company's board of directors to be included in the company's proxy materials—has been delayed pending resolution by the U.S. Court of Appeals for the District of Columbia Circuit of the petition filed by the Business Roundtable and the Chamber of Commerce of the United States challenging the legality of the rule. The rule is not expected to be effective before the 2011 proxy season for calendar year-end companies.
- The SEC will be implementing other rules required by Dodd-Frank in the coming months, but most, if not all, of these rules will not be effective for the 2011 proxy season. These rules address issues such as: compensation committee independence; compensation consultant independence; pay for performance, hedging and clawbacks; and SEC whistleblowers.