Shareholders Have Their Say: Say on Pay
Developments in U.S. and Canada

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Recent U.S. Developments

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) calls for mandatory say-on-pay votes at all annual meetings of U.S. issuers and certain foreign issuers that are subject to the Securities and Exchange Commission’s (SEC) proxy rules. Shareholders will also vote on whether they want the vote to occur every one, two or three years. Although both of these votes are non-binding advisory votes, companies and shareholders are paying close attention to the results. In addition, the Dodd-Frank Act requires disclosure of golden parachute arrangements and shareholder approval of such arrangements in connection with meetings held under the U.S. proxy rules to approve acquisition transactions.

- Companies that are public in the U.S. and subject to the SEC’s proxy rules are required to conduct say-on-pay votes at meetings for which proxies are solicited in any proxy circular filed after January 21, 2011. The effective date for small issuers (with a public float of less than $75 million) has been delayed until January 21, 2013. Foreign private issuers, including most Canadian companies which are inter-listed in the United States, are exempt from the SEC’s proxy rules and not subject to this requirement.
- The say-on-pay vote is a vote "for" or "against" on the entire executive compensation package. Shareholders cannot select to vote “against” on just one or two items, which can leave issuers uncertain about which elements of their pay packages are undesirable to shareholders.
- A say-on-pay frequency vote must be held at least every six years, beginning this year. Shareholders must be given four choices to determine how often say-on-pay votes should be held: every year, every two years, every three years, or abstain. Institutional shareholders and advisory firms such as Institutional Shareholder Services have advocated for an annual vote.
- Brokers who are the record owners of shares will not be permitted to vote shares for which the broker does not receive instructions from the beneficial shareowner.
- Both the say-on-pay and the frequency votes are non-binding advisory votes. However, future shareholder proposals seeking the issuer to allow additional say-on-pay votes or relating to the frequency of say-on-pay votes can be excluded from the proxy only if the issuer has adopted a policy that is consistent with the majority outcome of the last frequency vote. Because of the nature of the vote - with three substantive choices – it is possible that no single choice will receive a majority of votes and as a result, some issuers will not be able to exclude subsequent shareholder proposals regarding
say-on-pay. Further, issuers must disclose the results of shareholder votes and how the company is responding to those votes.

- The preliminary results of shareholder votes must be disclosed in a Form 8-K filed pursuant to Item 5.07 within four business days following the shareholder meeting, and final results (if not originally available at the time) must be disclosed through an amendment to the Form 8-K within four business days of when they are known. Under the new rules, the issuer will be required to amend or further amend those Form 8-K filings to disclose its decision regarding how frequently it will hold shareholder advisory votes on compensation in light of the voting results. The amended Form 8-K is due 150 calendar days following the shareholder meeting at which the vote took place.
- The Compensation Discussion and Analysis requirements in future proxies must explain whether and if so how, the compensation policies and arrangements have changed as a result of shareholder votes.
- Golden parachute disclosure and a non-binding shareholder advisory vote is also required in proxy statements subject to the SEC’s proxy rules for meetings at which shareholders are asked to approve an acquisition, merger, consolidation or proposed sale of all or substantially all assets. The golden parachute disclosure is also required in other documents relating to acquisition transactions that are subject to SEC disclosure requirements, such as tender offer (or take-over bid) circulars, but not in proxy circulars for annual meetings.
- The term “golden parachute” includes all agreements and understandings between the target or acquirer with each named executive officer of the target or acquirer that relates to a merger or acquisition type of transaction.
- A new table is required to quantify any type of compensation (present, deferred or contingent) and if the amount is uncertain, to make reasonable estimates applicable to the payment and disclose the assumptions underlying the estimate.
- For foreign private issuers, the rules include exceptions to the disclosure requirement (a) where the target or subject company in a third-party tender offer or going-private transaction is a foreign private issuer, and (b) where the target or acquirer is a foreign private issuer, with respect to agreements with the senior management of foreign private issuers. These exemptions are relevant where a document subject to SEC disclosure requirements other than a foreign target’s proxy circular must be prepared in connection with the transaction, as a foreign private issuer target will in any case be exempt from all of the SEC’s proxy requirements with respect to its own proxy circular.
- The SEC issued final rules on January 25, 2011 in Releases 33-9178 and 34-63768, which implement the requirements described above.

**Status of Say-on-Pay in Canada**

In Canada, shareholder voting on executive compensation is not required. However, institutional shareholders are pressuring issuers to explain their intentions toward voluntarily adopting a shareholder vote. Many companies have voluntarily adopted a shareholder resolution to vote on executive pay. Several companies have indicated that they would adopt a say-on-pay vote within the next few years, and some have stated that they did not have intentions to implement a say-on-pay vote as they believed that their current governance practices were sufficient in overseeing executive compensation packages.

On January 10, 2011, the Ontario Securities Commission released Staff Notice 54-701 indicating that it is monitoring international developments in respect of say-on-pay and considering whether Canadian securities regulators should consider introducing mandatory say-on-pay. Interested parties may submit comments up to March 31, 2011.

**Other Dodd-Frank Executive Compensation Issues**
The SEC delayed its rule-making on other requirements of the Dodd-Frank Act until the August-December 2011 timeframe, which means that rules might not yet be in place for the 2012 proxy season. The issues covered by these pending rules include compensation claw backs, hedging policies for executives and directors, pay for performance disclosures, and disclosure of the pay equity ratio of the CEO to other employees. For a summary of the Dodd-Frank Act compensation and governance provisions, visit Osler Update, “Financial Services Reform Adopted in United States: Sweeping New Rules Will Affect All U.S. Public Companies.”

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