INSIGHTS

THE CORPORATE & SECURITIES LAW ADVISOR

ASPEN PUBLISHERS Volume 24 Number 10, October 2010

EXECUTIVE COMPENSATION

Dodd-Frank's "Say-on-Pay" Provisions

The Dodd-Frank Act now requires all public companies to hold say-on-pay, say-on-frequency, and say-on-parachutes votes, with the first such vote occurring next year. Companies should begin taking steps now to prepare for these votes.

By David C. Lee and Brian D. O'Neill

Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), effective January 21, 2011, public companies must: (1) hold a periodic say-on-pay advisory vote; (2) hold a vote on the frequency of say-on-pay advisory votes at least once every six years (the "say-on-frequency" vote); and (3) in connection with an acquisition, merger, consolidation, or a sale of all or substantially all of an issuer's assets, disclose, and hold a shareholder advisory vote on, certain "golden parachute" arrangements (so-called "say-on-parachutes"), unless such arrangements already have been voted upon by shareholders. Though simple in concept, complying with these provisions is likely to be complicated in execution. Some guidance is expected in the form of clarifying regulations to be proposed by the Securities and Exchange Commission (SEC). Nevertheless, there are some steps that companies can take now to prepare for the upcoming say-on-pay votes.

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What are "Say-on-Pay," "Say on Frequency" and "Say-on-Parachutes"?

In general, say-on-pay is the practice of providing shareholders with an advisory vote on executive compensation. The practice has been a legal requirement in several nations for some time. For instance, the United Kingdom began to require shareholder advisory votes at "quoted" companies in 2003, while the Netherlands and Australia began to require such votes in 2004 and 2005, respectively. Shareholders began to propose say-on-pay votes at various U.S. companies in 2006, and, although none passed that year, shareholders proposed say-on-pay votes at more companies in 2007.[1] Eight received majority support.[2] With the passage of the American Recovery and Reinvestment Act of 2009 (the Recovery Act), companies receiving aid from the United States government under the Troubled Asset Relief Program (TARP) were required to conduct such votes.[3]

Section 951 of the Dodd-Frank Act expanded say-on-pay to all public companies by adding new Section 14A(a) to the Securities Exchange Act of 1934 (Exchange Act), although the SEC has authority under new Section 14A(e) to exempt certain classes of issuers. Section 14A(a)(1) of the Exchange Act requires all public companies to, at least once every three years, provide shareholders with an opportunity to vote (on a non-binding basis) on the compensation of named executive officers as disclosed pursuant to Item 402 of Regulation S-K. In addition, under Section 14A(a)(2), at least once every six years, companies must provide shareholders with an opportunity to vote "to determine" whether the say-on-pay vote will be annual, biennial, or triennial (the "say-on-frequency" vote). The first say-on-pay and say-on-frequency votes must occur at the first annual or other shareholder meeting occurring on or after January 21, 2011.

Under new Section 14A(b)(2), a separate vote is required to approve so-called "golden parachute" compensation whenever a public company seeks shareholder approval for "an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of an issuer." Disclosure is required for any agreements or understandings that the "person making such solicitation" has "with any named executive officers of such issuer (or of the acquiring issuer, if such issuer is not the acquiring issuer) concerning any type of compensation (whether present, deferred or contingent)" that is "based on or otherwise relates to" the transaction.[4] This vote, however, would not be on the executive compensation disclosure required by Item 402 of Regulation S-K in its entirety (including the CD&A and tables), but rather on the compensation "agreements or understandings and compensation as disclosed," and would only apply to agreements and arrangements that have not previously been subject to a shareholder vote under Section 14A(a).

Importantly, consistent with the non-binding nature of the say-on-pay vote required by the Recovery Act, Section 14A(c) specifically indicates that the say-on-pay and say-on-parachutes votes required under Section 14A are non-binding. Moreover, Section 14A(c) expressly provides that the say-on-pay and say-on-parachutes votes shall not be construed as "overruling a decision by such issuer or board of directors," "to create or imply any change to the fiduciary duties," or to "create or imply any additional fiduciary duties for such issuer or board of directors."

What Ambiguities Need to Be Resolved?

Certain ambiguities in the statutory language raise significant issues, as discussed below.

Is the Frequency Vote Regarding Say-on-Pay Binding or Nonbinding?

While the say-on-pay vote clearly is a non-binding advisory vote, whether the say-on-frequency vote is binding or not is somewhat ambiguous. On the one hand, the reference in Section 14A(a)(2) to the vote "to determine" the frequency of say-on-pay votes suggests that shareholders have a binding vote. On the other hand, Section 14A(c) indicates that the "shareholder vote referred to in [Sections 14A(a) and (b)] shall not be binding on the issuer or the board of directors of the issuer…" and does not distinguish between the say-on-pay vote and the say-on-frequency vote. This suggests that Section 14A(a)(2)'s reference to a vote "to determine" the frequency of say-on-pay votes only states the subject of the resolution, and does not reflect a Congressional intent to make the vote binding (which would be in clear opposition to the following Section 14A(c)). Commentators generally have expressed the view that the say–on-frequency vote is non-binding, but clarification is expected in the forthcoming SEC rules.

How Will the Say-on-Frequency Vote Be Presented to Shareholders?

As noted above, Section 14A(a)(2) requires companies to provide shareholders with an opportunity to vote on whether the say-on-pay vote will be annual, biennial, or triennial. It is unclear as to how companies are to present this proposal. That is, must a company allow shareholders to vote for one of four alternatives (annual, biennial, triennial, or abstain) in a "multiple choice" manner, or can it provide shareholders with one proposal to ratify the company's recommendation of one of the three alternatives (*e.g.*, a proposal to vote biennially), for which they may either vote for or against or abstain? The first approach would conflict with current Rule 14a-4(b), which provides that proxy cards must provide an opportunity to approve, disapprove, or abstain on each matter to be acted upon. Moreover, the second approach accords with Rule 14a-4(b)'s general requirement that companies present shareholders with the options to approve, disapprove, or abstain on a matter. Further, a "multiple choice" proposal raises questions about what vote would be necessary to approve any of the alternative proposals under state law and the company's governing documents, which generally provide for a majority vote to approve proposals. Finally, such a proposal implicates logistical issues, as vendors who provide proxy voting services may not be equipped to handle a format with so many choices.

Permitting companies to choose a specific say-on-frequency proposal and present it to shareholders for ratification also gives companies the flexibility to choose a frequency of shareholder votes that they believe best suits their company and its shareholders. Whereas triennial say-on-pay votes may arguably result in the vote receiving inordinate attention and taking on undue significance as a potential repudiation of three years of pay practices, annual say-on-pay votes may at the same time prove distracting for executives and investors, who have finite resources to spend analyzing proxy issues. On the other hand, annual votes could give shareholders more influence over compensation practices and an outlet for showing their dissatisfaction with compensation short of voting against the members of a company's compensation committee. The optimal choice will likely depend on the company and its shareholder base.

What Language Should the Resolution Use to Satisfy Section 14A(a)(1)?

The ability of companies to customize the say-on-pay resolutions required by Section 14A(a)(1) is uncertain. The language of the provision, "requiring a vote on executive compensation as disclosed under Item 402 of Regulation S-K," could mean a number of things: a vote on each executive officer's compensation, a vote on all executive officers' compensation in the aggregate, or perhaps a separate vote on only the chief executive officer's compensation; a vote on compensation for all years presented in the various charts required by Item 402, or, perhaps, after three successive annual votes, a vote on only the new compensation payments and awards reflected in the Item 402 disclosure; or perhaps different elements of compensation could even be broken into different votes, with separate votes for cash, stock and severance payments. But Section 14A(a)(1) speaks in terms of "a separate resolution," not many resolutions, and of "executives," plural, not each executive individually. Further, the UK version of say-on-pay uses a single resolution for all executive officers, as have American companies that have voluntarily implemented say-on-pay or have done so pursuant to the Recovery Act. In this regard, Rule 14a-20, which the SEC adopted to implement the say-on-pay provisions of the Recovery Act, describes the requirement in terms of a "separate shareholder vote" as well. It is unlikely that the SEC would permit any deviation from the apparent statutory imperative, the UK example, and the SEC's own requirements in Rule 14a-20 in its future rules on the subject. Nevertheless, the SEC may not prohibit experimentation by permitting companies to seek "voluntary" say-on-pay votes with respect to more specific aspects of compensation programs.

Although there has been some variation in the language used in say-on-pay resolutions, many companies have used simple language that is similar to the text of new Section 14A(a)(1). For example, AFLAC, the first U.S. company to voluntarily offer shareholders a vote on executive pay, proposed the following resolution in its 2010 proxy statement:

> Resolved, that the shareholders approve the overall executive pay-for-performance compensation policies and procedures employed by the Company, as described in

> the Compensation Discussion and Analysis and the tabular disclosure regarding named executive officer compensation in this Proxy Statement.

Some companies have asked for shareholders to vote only on the compensation policies, procedures, and philosophy, rather than on the amounts disclosed in the tables. For instance, at Intel Corporation's 2010 meeting of shareholders, the company presented the following resolution:

> Do you approve of the Compensation Committee's executive compensation philosophy, policies, and procedures as described in the 'Compensation Discussion and Analysis' section of this proxy statement?

Taking a rather different approach, RiskMetrics Group ("RMG") voluntarily put forth three separate compensation resolutions in its 2008 proxy statement—one to approve the "compensation philosophy, policies and procedures" described in the CD&A, a second to approve the "compensation decisions made by the Board with regard to NEO performance" described in the CD&A, and a third to approve the application of the company's compensation philosophy, policies and procedures in the following year. (For 2009, RMG offered only the first two proposals.)

The RMG example illustrates one way companies could use periodic shareholder votes to provide more specific feedback from investors. Additionally, if companies can choose a triennial frequency of say-on-pay votes, they could use the intervening years between votes to propose shareholder resolutions on different aspects of executive compensation.

Will a Say-on-Pay or Say-on-Frequency Proposal Require an Issuer to File a Preliminary Proxy Statement?

Rule 14a-6 generally requires that proxy statements be filed in preliminary form at least 10 days before they are mailed to shareholders, subject to several exceptions for certain routine matters. Say-on-pay and say-on-frequency votes, however, are not currently covered by such exceptions. The SEC's forthcoming rulemaking will likely address this issue, as the same rationale for the current exclusion of compensation plan adoption and amendment resolutions applies to say-on-pay and say-on-frequency proposals. Moreover, the number of preliminary proxy statement filings will increase dramatically, and possibly become a disproportionate burden on the SEC's staff, if Rule 14a-6 is not amended to exclude say-on-pay and say-on-frequency proposals from preliminary proxy statement filing requirements. In fact, TARP companies subject to the say-on-pay requirements under the Recovery Act are not required to file preliminary proxy statements under Rule 14a-6(a)(7). Such proposals will likely become routine annual meeting matters and should not merit a preliminary proxy statement filing and possible review by the SEC's staff.

The ability of companies to customize the say-on-pay resolutions required by Section 14A(a)(1) is uncertain.

When Is a "Golden Parachute" Approval Required?

An important complexity to "say-on-parachutes" lies in applying its exception for agreements or understandings that have already been subject to a shareholder vote under Section 14A. Whether the exception applies when the material terms of the executive compensation aspects of an agreement have been subject to a say-on-pay shareholder vote, but the particular application of the actual terms of a transaction covered by Section 14A(b)(1) has not been, is unclear. Typically, companies disclosing change in control compensation under Item 402(j) use information as of the fiscal year-end, such as share prices, in calculating the value of change in control payments. An actual transaction, however, will very likely result in the payout of different amounts than previously disclosed under Item 402(j). Commentators generally are of the view that the fact that the terms of an actual transaction result in different change in control compensation should not result in the exception in Section 14A(b)(2) being unavailable, so long as the material terms of the agreements and understandings remained the same as those previously disclosed. Clarification by the SEC of the availability of this exception would be helpful.

What Disclosure Should Be Required About the Results of a "No" Vote?

For TARP recipients, Item 20 of Schedule 14A requires disclosure of "the general effect of the [say-on-pay] vote, such as whether the vote is non-binding." For voluntary adopters of say-on-pay, Item 18 of Schedule 14A required similar, but somewhat more expansive, disclosure of the actions "intended to be taken by the registrant in the event of a negative vote on the matter by the security holders." Because "say on pay" is now mandatory, Item 18 of Schedule 14A no longer applies; however, the SEC may include in its forthcoming rules similar disclosure requirements specifically for say-on-pay and say-on-parachutes.

What Can We Expect to Happen?

In 2009, shareholders approved every say-on-pay resolution required by Rule 14a-20.[5] Speaking of those results, Ed Durkin, director of corporate affairs for the United Brotherhood of Carpenters and Joiners, noted that "[w]hat this indicates, quite frankly, is the say-on-pay process as it's formulated doesn't work."[6] However, in 2010, three company-sponsored compensation votes did not pass: KeyCorp, Occidental Petroleum and Motorola.

Possible Explanations for Results So Far

Many factors may have influenced say-on-pay votes thus far. For instance, the requirement for a shareholder vote on compensation at TARP companies was imposed late in the 2009 proxy season, and institutional investors may have had little time to analyze proposals. The general success of say-on-pay proposals might be explained, in part, by brokers using their discretionary voting authority under New York Stock Exchange Rule 452, which likely allowed brokers to contribute a significant number of affirmative votes. That, however, will change for the next proxy season. Section 957 of the Dodd-Frank Act amended Section 6(b) of the Exchange Act to require national securities exchanges to prohibit discretionary voting by brokers on certain matters, including matters related to "executive compensation." To effectuate Section 957 of the Dodd-Frank Act, the New York Stock Exchange amended Rule 452 to prohibit broker discretionary voting on executive compensation matters and added commentary expressly stating that the prohibition includes say-on-pay, say-on-frequency, and say-on-parachutes votes.[7]

Issuers Will Need to Engage with Investors

More "no" votes won't necessarily lead to improved executive compensation practices, from the perspective of some investors. Even if shareholders fail to approve a say-on-pay proposal, a vote on a company's executive compensation as a whole is arguably uninformative. As Chris Young, Director of M&A and Proxy Fight Research at ISS, has said, shareholder votes on compensation generally are "a blunt instrument that may send out nebulous signals."[8] There are many significant compensation decisions for which shareholder approval might be sought—peer groups, performance targets, the cash/equity mix, and other salient features of a compensation program. But Section 14A(a)(1) requires a vote on the compensation as disclosed: Regulation S-K Item 402 disclosure, which includes CD&A and compensation tables, in its entirety. As Mr. Young noted, a negative vote generates more questions than answers: "What are shareholders really upset about? Total pay? Pay relative to performance? Pay relative to peers? Purely poor performance? The failure to engage sufficiently with shareholders? Private jet usage?" (Again, flexibility in phrasing the resolutions could help companies craft proposals that would yield better, more detailed feedback.) Because the vote itself conveys little information, its utility will come primarily from the impetus it gives to companies to engage with shareholders before the vote.

The International Experience of Say-On-Pay

Indeed, the evidence from other nations' experiences with "say on pay" votes suggests that they will spur increased engagement with shareholders. An ISS Center for Corporate Governance Report (ISS Report), issued in April 2007, found, based on conversations with experts in Australia, the United Kingdom and the Netherlands, that "say on pay" votes in those nations "have strengthened the dialogue between shareholders and boards and have had a positive impact on each of them."[9]

In the United Kingdom, this dialogue appears to have produced significant changes. The ability of British institutional investors to impose a set of best practices has resulted in significant change in executive compensation practices in the United Kingdom since 2002. Citing a 2004 study by Deloitte & Touche on the results of the United Kingdom's 2002 enactment of "say on pay" legislation, the ISS Report found that "say on pay" votes "have succeeded in strengthening pay-for-performance linkages and eliminating some potential severance arrangements seen as rewards for failure."[10] In particular, the report cites two "dramatic improvements:" (1) companies "all but eliminated severance provisions exceeding one year's basic salary"; and (2) "boards have virtually eliminated a practice known as performance retesting," wherein companies would extend and modify performance targets in incentive plans if they had not been met at the end of the initial performance measurement period. The ISS Report also found a related trend away from multi-year block awards to executives and toward the annual awarding of stock incentives.[11]

A 2009 article in the Harvard Journal on Legislation found similar trends toward greater influence of institutional shareholders in setting pay practices and a near complete elimination of multi year executive contracts.[12] It is likely that these changes explain the relatively low historical level of shareholder dissent in U.K. say-on-pay votes, about 7-10% according to a July 2010 study covering the period from 2002-2007.[13] Notably, however, at least three companies in the United Kingdom have had investors reject their remuneration reports.[14]

These results may be partly the consequence of factors peculiar to the United Kingdom, including the highly concentrated ownership of British public companies.[15] Members of the Association of British Insurers and the National Association of Pension Funds own, approximately 30% of the shares of large public companies in the United Kingdom, giving their "best practices" significant influence.[16] Even outside of those two investors, ownership of shares in British public companies is highly concentrated and more coordinated. Moreover, bolstered by the statutory ability of a 5 percent shareholder to call a special meeting and the ability to directly amend articles of incorporation, British shareholders have more power to act directly than shareholders of most American corporations.[17]

Although studies have found changes in the structure of compensation, so far they have not found significant evidence that shareholder votes on executive compensation have pushed executive pay down. Rather, as stated in the ISS Report, "observers in all three markets—the U.K., the Netherlands and Australia—note that executive pay levels are still ratcheting upward."[18] A March 2009 study by Fabrizio Ferri and David Maber, both of Harvard Business School, found a similar result in their examination of the effects of shareholder advisory votes on compensation in the United Kingdom.[19] After controlling for performance and other factors, they found no change in the level and growth rate of the pay of chief executive officers.[20] They did, however, find "a marked increase in the sensitivity of CEO pay to poor performance."[21]

The Potential for Similar Results in the U.S.

The United States has a far greater number of public companies than the United Kingdom, and unlike the United Kingdom, where say-on-pay applies only to "quoted companies," (companies listed for trading on a stock market), the United States now requires a shareholder vote on executive compensation for all public companies (unless the SEC exempts certain issuers or classes of issuers under the exemptive authority granted by new Section 14A(e) of the Exchange Act). As a consequence, the effect of say-on-pay in the United States might differ from that in the United Kingdom. There are, however, reasons to expect a similar result, particularly in terms of the spread of so-called "best practices" and increased conformity of executive compensation practices in general.[22]

Dodd-Frank places additional burdens on institutional investors.

An important reason that such a result may emerge is that American companies often pay close attention to, and follow, the policies of proxy advisory firms. In that regard, ISS dominates the market for proxy advisory services; according to a Government Accountability Office report, it had four times the number of clients as its nearest competitor in 2007.[23] ISS's dominance of the proxy advisory market, and the reliance of institutional investors on its services, gives its viewpoints enormous influence among U.S. boards of directors.[24] And its influence may increase as a result of a confluence of several factors arising from the Dodd-Frank Act.

One such factor is that Dodd-Frank places additional burdens on institutional investors. Though most often viewed as an additional right, for institutional investors, say-on-pay also imposes an additional obligation—to vote intelligently on compensation disclosure, in the best interests of their clients. This obligation proceeds from their fiduciary duty to vote the shares they hold on behalf of their clients in their clients' best interests.[25] Many institutional investors use proxy advisors for this reason, and "[i]n some cases, proxy advisory firms are given authority to execute proxies or voting instructions on behalf of their client."[26] Although larger institutional investors can afford to maintain their own research staffs, most still rely to some extent on proxy advisors, and smaller and mid-size institutional investors may rely upon proxy advisors almost entirely.[27] But even in large firms with their own research staffs, resources are limited, and voting authority often is exercised by corporate governance professionals who do not exercise investment authority.[28] Some institutional investors "rely on pre-developed voting policies and procedures to ensure consistency across portfolios, to aid in post-vote monitoring and reporting, and otherwise to comply with applicable fiduciary duties."[29] The bifurcation of investment responsibility and voting responsibility on so-called corporate governance matters could lead to formulaic application of compensation preferences. As Mr. Durkin, of the United Brotherhood of Carpenters and Joiners, noted, performing an individual assessment of each company is difficult, so "it gets down to almost like this checklist—you take a quick look at their plan, see if they have some good or bad features, and make a quick judgment."[30]

Another factor that may tend to magnify the importance of proxy advisory firms in the U.S. is increased disclosure of institutional investors' votes requiring all Form 13F filers to disclose their voting records annually. (Most registered investment companies were already required to disclose their voting records annually on Form N-PX, pursuant to Rule 30b1-4 under the Investment Company Act of 1940.) Because new Section 14A(d) of the Exchange Act requires investment managers subject to Section 13(f) of the Exchange Act to report, at least annually, on how they voted on say-on-pay and say-on-parachutes proposals, they may experience public pressure to conform to recommendations of proxy advisory firms and be more likely to apply "best practices" and "one size fits all" prescriptions in voting on compensation matters. (ISS's need to minimize the conflicts of interest between its consulting and advisory services means it must make recommendations "strictly according to policy," which means that investors following its recommendations will likely end up voting according to formulaic recommendations.)[31] Moreover, the recent amendment of New York Stock Exchange Rule 452 discussed above will likely increase the proportion of votes represented by institutional investors, and therefore, indirectly, further augment the influence of proxy advisors.

Voting authority often is exercised by corporate governance professionals who do not exercise investment authority.

Still another factor that will likely increase the importance of proxy advisory firms, and lead to conformity in pay practices, is that directors may seek to avoid the reputational damage, both to the company and to themselves, brought about by a "no" vote on executive compensation. The 2010 Concise Voting Guidelines (the Guidelines) published by ISS note that "in general" dissatisfaction with pay practices can be expressed by voting against a proposal to approve compensation disclosure, rather than withholding votes from directors who are on the compensation committee.[32] If there is a say-on-pay proposal, the Guidelines recommend withholding votes from members of the compensation committee only "in egregious cases, or if the board fails to respond to concerns raised" by a prior shareholder vote on executive compensation.[33] Thus, boards of directors will have an incentive to follow the compensatory policies recommanded by proxy advisors, who they may reasonably conclude have increasing influence among institutional investors, who may themselves come to represent an even greater portion of the number of votes cast at annual meetings. This combination could create significant pressure on companies to conform their compensation practices to published "best practices" recommended by proxy advisors and others.

What Can You Do to Prepare?

Companies can take a number of steps to prepare for next year's say-on-pay votes. Because investors will be faced with a very large number of companies to review, they may look for "red flags" and focus only on the companies that draw their attention. To avoid that type of focus, companies should consider some of the actions outlined below.

- Develop a plan to communicate with proxy advisors and shareholders—and execute on the plan. Communications with shareholders could constitute the solicitation of a proxy under Rule 14a-1, so avoid discussions of a specific futures proposal. In addition, be cognizant of obligations under Regulation FD and not selectively disclose material, nonpublic information.
- Tell your performance story, and relate the compensation committee's decisions to the company's performance. If there is not one already, consider adding an executive summary to your CD&A that gives a plain English view into the compensation committee's decision-making. Find ways to simplify your CD&A and to make your compensation tables easier to understand.
- Become better informed about the composition of your shareholder base. Because NYSE Rule 452 has been amended to eliminate broker discretionary voting on compensation matters, companies can expect to work harder

to garner votes to approve say-on-pay, as they do to secure approval for equity compensation plans. Proportionately, institutional investors, and hence proxy advisory firms, are likely to have greater influence on the outcome of a vote than in the past, particularly with relatively lower retail participation levels for issuers using the notice and access model. If retail participation historically has been low, consider measures to boost retail participation, such as an educational campaign.

- Review your compensation policies to address specific concerns that investors or proxy advisors have raised in the past, as well as considering the general principles of compensation advanced by ISS and others. ISS has published a guide to evaluating say-on-pay proposals,[34] and the Council of Institutional Investors has published a checklist of so-called "red flags."[35] Carefully review the business justifications for practices that ISS views as "poor" pay practices, such as tax gross-ups, guaranteed equity awards, and perquisites of various kinds.
- Determine what frequency of advisory votes will best suit your company, in light of its pay practices and shareholder base. If the SEC's forthcoming rules affirm that companies have the power to choose the frequency of say-on-pay votes, or present shareholders with a single proposal in the say-on-frequency vote (rather than offering a "multiple choice" style vote), companies with many smaller institutional investors may want to hold only triennial votes. Companies also may wish to consider offering voluntary say-on-pay proposals between triennial (or biennial) votes under Section 14A(a)(1).
- Develop resolution language for the advisory votes and, if the SEC's rules permit it, consider alternatives to the statutory language.

NOTES

1. Barbara Kiviat, *Giving Investors a Say on CEO Pay*, Time Magazine, April 9, 2008, *http://www.time.com/time/business/article/0,8599,1729480,00.html.*
2. Paul Hodgson, The Corporate Library, *A Brief History of Say on Pay* (October 2009), *http://www.thecorporatelibrary.com/info.php?id=205.*
3. The Recovery Act amended Section 111(e) of the Emergency Economic Stabilization Act to require say-on-pay votes. The SEC later adopted Rule 14a-20 under the Exchange Act, which provides that "the registrant shall provide a separate shareholder vote to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S-K, including the compensation discussion and analysis, the compensation tables, and any related material."
4. Currently, it is relatively common in merger proxy statements to have disclosure regarding payments to executive officers of target companies resulting from the transaction, primarily based on the requirement to disclose the interests of these persons in the transaction.
5. Tomoeh Murakami Tse, *Shareholders Say Yes to Executive Pay Plans*, Washington Post, September 26, 2009.
6. *Id.*
7. *See* Exchange Act Release No. 34-62874 for a detailed discussion of this issue.
8. Morrow & Co., LLC Interview with Chris Young, Director of M&A and Proxy Fight Research at ISS, 1-3 The Proxy Files (2010).
9. Stephen Deane, RiskMetrics Group, *What International Markets Say on Pay: An Investor Perspective* (April 2007), at 3, *http://www.riskmetrics.com/system/files/private/SayOnPay.pdf.*
10. Deane, *supra* note 11, at 3.
11. *Id.* at 8.
12. Jeffrey N. Gordon, Say on Pay: Cautionary Notes on the U.K. Experience and the Case for Shareholder Opt-In, 46 Harvard Journal on Legislation 324, 347 (2009).
13. Martin Conyon and Graham Sandler, *Shareholder Voting and Directors' Remuneration Report Legislation: Say on Pay in the UK.* Corporate Governance: An International Review, Vol. 18, Issue 4, 296, 311, (July 2010), *http://ssrn.com/abstract=1647230 or doi:10.1111/j.1467-8683.2010.00802.x.*
14. *See* Subodh Mishra, *Third U.K. Company Sees Majority Opposition to Pa Vote* (May 25, 2010), *http://blog.riskmetrics.com/gov/2010/05/third-uk-company-sees-majority-opposition-to-pay-vote.html.*
15. Gordon, *supra*, note 12, at 343-44.
16. *Id.*
17. *Id.* at 349. Prior to the adoption of The Companies (Shareholders' Rights) Regulations, which amended Section 303(2)(a) of Part 13, Chapter 3 of the Companies Act of 2006, holders of 10% of the outstanding shares were entitled to require directors to call a special meeting. See *http://www.legislation.gov.uk/ukpga/2006/46/section/303* for the text of the amendments.
18. Deane, *supra* note 11, at 9.

19. Fabrizio Ferri and David Maber, *Say on Pay Votes and CEO Compensation: Evidence from the UK* 20 (European Financial Management Association Symposium, 2009), *http://efmaefm.org/0EFMSYMPOSIUM/CGC%202009/papers/Ferri.pdf.*

20. *Id*.

21. *Id*. at 19.

22. Gordon, *supra*, note 12, at 351-53.

23. Government Accountability Office, Report to Congress, Corporate Shareholder Meetings—Issues Relating to Firms That Advise Institutional Investors on Proxy Voting, at 1 (June 2007) ("GAO Report").

24. *See* GAO Report, at 13 (describing Institutional Shareholder Services (now known, again, as RiskMetrics Group) as the dominant proxy advisory firm)

25. *See* GAO Report, fn. 1 (discussing the fiduciary duties of institutional investors with regard to voting).

26. *See* "Concept Release on the U.S. Proxy System," Exchange Act Release 34-62495, at 25.

27. *See* GAO Report, at 15.

28. *See* Charles M. Nathan and Parul Mehta, *The Parallel Universes of Institutional Investing and Institutional Voting* (April 2, 2010), *http://ssrn.com/abstract=1583507* (describing the bifurcation of voting and investment functions in institutional money managers).

29. "Concept Release on the U.S. Proxy System," Exchange Act Release 34-62495, at 84.

30. Tomoeh Murakami Tse, *Shareholders Say Yes to Executive Pay Plans*, Washington Post, September 26, 2009.

31. *See* RiskMetrics Group, Due Diligence Compliance Package, Institutional Shareholder Services Inc. Policies, Procedures and Practices Regarding Potential Conflicts of Interest, at 2 (March 2010), *http://www.riskmetrics.com/sites/default/files/DueDiligenceCompliancePackage.pdf.*

32. 2010 RiskMetrics Group U.S. Proxy Voting Guidelines Summary, at 38.

33. *Id*.

34. RiskMetrics Group, *Evaluating U.S. Company Management Say on Pay Proposals* (2010) *http://www.riskmetrics.com/system/files/private/EvaluatingMgmtSayonPayProposals.pdf.*

35. Council of Institutional Investors, *Top 10 Red Flags to Watch for When Casting an Advisor Vote on Executive Pay* (2010), *http://www.riskmetrics.com/system/files/private/EvaluatingMgmtSayonPayProposals.pdf.*

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