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Annual Meeting 8-K: Don’t Forget Say-When-on-Pay Determination

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As public companies go through the annual meeting cycle this year, many will be holding “say-when-on-pay” votes this month in light of the requirement under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) to hold such vote every six years and the fact that many public companies first held this vote in 2011 following the enactment of Dodd-Frank.

Under the Dodd-Frank Act, registrants are required to hold a non-binding advisory vote every six years regarding the frequency (either every one year, every two years or every three years) of a non-binding advisory vote regarding the executive compensation paid to the named executive officers of the registrant, commonly referred to as say-on-pay. When say-when-on-pay votes were first held in 2011, there was a significant amount of commentary regarding the appropriate frequency of holding say-on-pay votes, and among registrants who first held say-when-on-pay votes in 2011, there were a significant number of registrants where management recommended that shareholders vote in favor of the triennial option.

However, it quickly became apparent that most institutional shareholders (like proxy advisory firms such as ISS) favored holding annual say-on-pay votes, such that registrants would have great difficulty in receiving plurality shareholder support in favor of the triennial alternative even where management recommended in favor of this alternative (except among registrants that had significant insider or controlling stockholder ownership that could outweigh opposition among institutional stockholders to the triennial option). Moreover, while say-when-on-pay votes are advisory, among registrants that recommended in favor of the triennial option where shareholders voted in favor of the annual alternative, most registrants acceded to their shareholders’ preference of holding an annual say-on-pay vote rather than risk the negative publicity and other downsides (including from ISS) that would result from holding a triennial say-on-pay vote against their shareholders’ wishes.

In light of this experience from six years ago, say-when-on-pay votes have become anticlimactic for most public companies, with the vast majority of registrants recommending in favor of the annual say-on-pay alternative and receiving overwhelming shareholder support in favor of this option. Notwithstanding the anticlimactic nature of this vote, registrants should be reminded of the requirement under Item 5.07(d) of Form 8-K to report the determination of the registrant, in light of the shareholder vote on say-when-on-pay, regarding how frequently the registrant intends to hold say-on-pay votes until the next required say-when-on-pay shareholder vote.

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Under the Form 8-K rules, the disclosure must either be made in the Form 8-K disclosing the annual meeting voting results or in a separate Form 8-K amendment filed within 150 days following the date of the annual meeting (but, in any event no later than 60 days prior to the Rule 14a-8 shareholder proposal submission deadline).

This Form 8-K disclosure requirement can be easy to overlook in light of the fact that it has been six years since most registrants have had to comply with the requirement. Nevertheless, registrants should remain mindful of this disclosure requirement, and in most cases it will be advisable for registrants to disclose the determination of the registrant regarding the frequency of say-when-on-pay in the Form 8-K disclosing the annual meeting voting results, which Form 8-K is generally required to be filed within four business days following the annual meeting (among other merits, this approach ensures that permissive disclosure via a subsequent Form 8-K/A is not later forgotten).

In complying with the disclosure requirement, some registrants have disclosed that the board of directors of the registrant took board action on the annual meeting date approving the registrant's determination regarding the frequency of say-on-pay. In contrast, other registrants have disclosed simply that the public company is recommending in favor of a particular option in light of the board's prior recommendation and the shareholder vote in favor of this recommendation at the annual meeting. Either approach is fine in most circumstances, and typically the absence of formal board approval of the relevant option on the annual meeting date (generally, the annual alternative) should not be seen as problematic where the board has previously recommended in favor of such option as reflected in the proxy statement and the shareholders of the registrant have approved such option.

One consequence of forgetting to comply with this Form 8-K disclosure requirement – which occurred with some regularity in 2011 – is that registrants who do not disclose their intent regarding say-when-on-pay within the 150-day reporting deadline noted above may lose their Form S-3 eligibility for up to a year following the failure to meet such deadline, which impedes the ability of registrants to access capital markets via a public offering. In 2011, where registrants neglected to comply with this Form 8-K disclosure requirement, the SEC staff liberally granted S-3 eligibility waivers to registrants that asked for relief, at least among registrants that intended to follow the recommendation of their shareholders regarding say-when-on-pay. It remains to be seen whether the staff will be as lenient this year in light of the fact that this Dodd-Frank disclosure requirement has now been in effect for six years.

In summary, while say-when-on-pay votes have largely become perfunctory among registrants in light of current market norms and institutional shareholder preferences in favor of annual say-on-pay, registrants should be mindful of the technical Form 8-K disclosure requirements associated with this Dodd-Frank statutory requirement.

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