



## Man Bites Dog: SEC Staff Overrules Congress

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Yesterday, Broc Romanek reported in his [blog](#) that the Securities and Exchange Commission staff has posted several new Compliance and Disclosure Interpretations with respect to Say-on-Pay. In particular, I noted that the staff disagrees with Congress.

New Section 14A(a)(2) of the Securities Exchange Act of 1934 as added by Section 951 of the Dodd-Frank Act provides (emphasis added):

*FREQUENCY OF VOTE.—Not less frequently than once every 6 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to determine whether votes on the resolutions required under paragraph (1) will occur every 1, 2, or 3 years.*

There isn't any ambiguity in what Congress said about the inclusion of a resolution and there isn't any ambiguity in what the SEC staff says in response to Question #169.04:

*Question: Must the vote on say-on-frequency, as required by Rule 14a-21(b), be in the form of a "resolution"?*

*Answer: No. [Feb. 11, 2011]*

Although I understand that including a resolution with three options presents a number of challenges, the staff's position contradicts the plain language of the statute and misapprehends the mechanics of shareholder meetings.

The C&DI is oddly worded. The SEC doesn't have direct authority over the conduct of shareholder meetings. The SEC has the authority to prescribe the contents of proxy statements and proxy cards. Thus, I don't think that the staff should be expressing a view on the conduct of voting at shareholder meetings. These are matters of state, not federal, law.

Shareholders do not vote when they execute a proxy card – the vote occurs when the shareholders cast their votes at the meeting (in person and by proxy). Thus, the correct question for the SEC is whether the proxy must include a resolution. Congress said yes, the staff says no.

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The C&DI also conflates the act of voting with the matters being voted on. At the meeting, shareholders vote on resolutions. The resolution is not the vote and the vote is not the resolution. Thus, the question of whether a vote must be in the form of a resolution is akin to asking whether a bark must be in the form of a dog.

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