May 4, 2011

The First 100 Days of Say-On-Pay Mark Many More Failed Votes and the Advent of Say-On-Golden Parachutes

With the end of April 2011, it has been one-hundred days since shareholders were able to render advisory votes on the executive compensation provided at their publicly-held companies in accordance with rules adopted by the Securities and Exchange Commission ("SEC") in January 2011 ("Say-On-Pay"). These rules were promulgated under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Reform Act"). Our *Say-On-Pay Site* provides periodic blogs on Say-on-Pay developments, along with an overview of the applicable rules and requirements, and there are also updated Say-On-Pay voting results and statistics.

Surprising Number of Say-On-Pay Rejections

Of the *512 Say-On-Pay votes* which have been reported through May 1, 2011, shareholders have already voted against approving the disclosed executive compensation of their named executive officers at the following twelve companies:

- *Ameron International Corporation*
- *Beazer Homes USA, Inc.*
- *Cogent Communications Group, Inc.*
- *Hemispherx Biopharma, Inc.*
- *Hewlett-Packard Company*
- *Jacobs Engineering Group Inc.*
- *Janus Capital Group Inc.*
- *M.D.C. Holdings, Inc.*
- *Navigant Consulting, Inc.*
- *Shuffle Master, Inc.*
- *Stanley Black & Decker, Inc.*
- *Umpqua Holdings Corporation*

Another company, *IsoRay, Inc.*, reported that its "*stockholders did not approve, on an advisory basis, the compensation of IsoRay's named executive officers*" even though it also reported that there were more "For" votes than "Against" votes on its Say-On-Pay proposal.

Clear Trends for Say-On-Frequency

One element of the Say-On-Pay rules is that shareholders also get to vote on how frequently the Say-On-Pay vote will be conducted at their company ("Say-On-Frequency"). In particular, shareholders can provide an advisory vote that states their wishes as to whether the Say-On-Pay vote should occur every one, two or three years. In soliciting the Say-On-Frequency vote, a company's board of directors can provide its recommendation (or it can provide no recommendation) as to which frequency it believes shareholders should support.

As we reported in our *March 21, 2011 "The Latest Results and Trends After Second Month of Say-On-Pay Voting*" blog, there was a clear trend which indicated that shareholders preferred annual Say-On-Frequency voting at least with respect to companies which are not smaller reporting companies. Indeed, annual frequency has now received the most shareholder votes at over 70% of the companies that have reported on their Say-On-Frequency votes (and at over 75% if smaller reporting company results are excluded). This preference for annual voting is particularly evident with respect to those companies which are "Large Accelerated Filers", as such term is defined under SEC rules (i.e., public companies with a market value of at least $700 million), with the shareholders at close to 90% of such companies favoring annual voting. A biennial frequency continues to be the ignored "middle child" as such frequency has received the most votes at only 2% of reporting companies.

Moreover, as illustrated in the voting results tables, with just two exceptions at smaller reporting companies, whenever a board of directors has recommended an annual Say-On-Pay vote, the company's shareholders have so far always (on 233 occasions) voted in support of such recommendation. Furthermore, even when a board of directors at a large accelerated filer has recommended triennial voting, the company's shareholders have voted against such recommendation in favor of a more frequent vote approximately 75% of the time.

"Smaller Reporting Companies" (i.e., those public companies with less than $75 million of public float) have had more success garnering support for triennial voting but, as we have commented before, we expect that going forward more/most smaller reporting companies will continue to take advantage of the two year exemption from Say-On-Pay that was provided by the SEC in its final rules (i.e., smaller reporting companies therefore will not conduct a Say-On-Pay vote until required in January 2013). In April2011, there were a total of 298 say-on-pay votes reported of which only eight were conducted by smaller reporting companies. The two year delay for smaller reporting companies represented a change from the SEC's proposed rules which did not provide any such transitional relief for smaller reporting companies. Those smaller reporting companies that have conducted Say-On-Pay votes in early 2011 generally had already filed their proxy statements (in accordance with the Reform Act and the SEC's proposed rules) for their annual meeting of shareholders prior to the release of the SEC's final rules which relaxed the Say-On-Pay requirements for smaller reporting companies. We have included their results even though technically they do not have to comply with Say-On-Pay until 2013.

Commencement of Say-on-Golden Parachutes Voting

The third prong of the Say-On-Pay rules is that shareholders will now also get to render an advisory non-binding vote on the golden parachute compensation provided to named executive officers in connection with merger or similar transactions ("Say-On-Golden Parachutes"). Companies are required to provide tabular and textual disclosure of such golden parachute arrangements in their merger/acquisition proxy solicitations that are filed on or after April 25, 2011. See our *January 28, 2011 "Some Interesting New Developments as SEC Adopts Final Say-on-Pay Rules*" blog for more details on the disclosure and voting requirements for Say-On-Golden Parachutes.

If you have any questions regarding this information, please contact Greg Schick at (415) 774-2988.

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