



SAY ON PAY TRENDS

“KIDS, DON’T TRY THIS AT HOME”

This is our fourth update on trends in 2011 Say On Pay and Say When On Pay proposals. In this alert, we will discuss reasons for failing Say On Pay proposals, including unnecessary risks companies take if they are not properly advised throughout this process, and also review the most recent trends in company “frequency” recommendations (Say When On Pay). For more data from our previous alerts, [click here](#).

FAILING SAY ON PAY PROPOSALS

Last year, which was the first time most investors saw a meaningful number of Say On Pay proposals, only three companies out of over 300 presenting this proposal (between voluntary presenters and TARP companies) failed to gain approval of their Say on Pay proposals -- a failure rate of less than 1%.

Thus far this year, five companies have already confirmed their proposals failed (with other companies yet to report their voting results). At the current rate, this would project to over 200 companies that will see their pay programs voted down in 2011.

While this result is non-binding, it brings significant negative visibility to these companies, and puts pressure on them to identify and address the underlying factors prior to the following meeting. If they fail to do this, next year they may face additional pressure in the form of withhold recommendations against board members, including members of the compensation committee. Under the new rules, companies will have to indicate their future frequency selection on a Form 8-K filing within 150 days of the meeting. The rules also require additional disclosure in next year’s Compensation Discussion and Analysis (CD&A) regarding whether, and if so how, companies have considered the results of the most recent say-on-pay vote.

ARE COMPANIES GOING IT ALONE?

Despite the significant amount of recent regulatory changes, including Say On Pay, it appears that two of the first five failing companies, Jacobs Engineering and Shuffle Master, did not use the services of a proxy solicitor (at least no such retention was disclosed in their proxies).

This may be the result of many mid-size and smaller companies not having used solicitors in the past, and not understanding what they really do. This is unfortunate, as it is unlikely these and other “go it alone” companies would have the benefit of:

In advance of the solicitation:

- Projections of likely “frequency” voting by their larger institutional investors
- Accurate information on which of their investors practice internally-driven voting, versus which typically follow proxy advisor recommendations
- Knowing whether their compensation practices are likely to trigger negative proxy advisor recommendations
- Expert review of draft proxy disclosures with an eye on clarity and understandability
- Developing relationships with the governance heads and proxy voters at their larger investors who have demonstrated a willingness to engage with their portfolio companies in advance of proxy season, and share their views, policies and hot button issues
- Fine-tuning their proxy disclosures to factor in the intelligence they gain from this pre-proxy dialogue with top investors

During the solicitation:

- Real time interpretation of street-name voting, identifying which significant investors underlie blocks of votes cast anonymously, in custodial (and thus not investor) name
- Recommendations for selective follow-up solicitation with larger unvoted retail investors, balancing costs against likely incremental supportive vote pickup
- Avoiding “surprise” negative votes and director withholds. When your senior management and board ask you “did we take all prudent steps to anticipate this and mitigate our risk”, what will your answer be?

After the meeting:

- Post-meeting analysis of which investors cast negative votes and why. This is necessary to facilitate efficient and effective post-meeting engagement as part of identifying and then correcting causes of negative voting
- As your ownership base turns over, regular updates on new owners, their voting practices, and degree of proxy advisor reliance
- Sharing of best practices of other clients – learn from the mistakes of others before they become your own

A frequent mistake that companies make is tracking the proposals and voting results of their peer companies and thinking they will have similar results. This makes sense in many areas, as these are the companies you compete against in the markets for talent, as well as for selling your goods and services. When it comes to proxy voting, however, *it's all about your company's unique ownership profile* (which may vary significantly from that of your industry peers).

TRENDS IN COMPANY FREQUENCY PREFERENCES

“THE TIMES THEY ARE A-CHANGIN”

In our second alert, we indicated that, as of January 30, of the first 207 companies to file proposals under the new rules, companies recommended triennial frequency over annual by over a 2 to 1 rate (59.4% triennial, 28.5% annual, 6.3% biennial and 5.8% no recommendation).

As we reported in our most recent alert, through the end of February this preference by companies for triennial was continuing, though eroding somewhat. As of that time, with 296 proxies filed (including the earlier 207), triennial remained the selection of choice over annual, by a 56.1% to 33.4% rate (with the balance almost evenly split between biennial and no recommendation).

Most recently, this trend is reversing. As the pace of new filings by companies with Spring meetings is accelerating, more recent filers are recommending annual over triennial, such that by mid-March, with 739 companies having filed their proxies, annual recommendations for the first time are exceeding triennial, by 48.8% annual to 44.3% triennial (with 3.4% biennial and 3.4% no recommendation). *

No doubt this shift in company preferences is in response to early voting results and institutional voting policy disclosures, in which a majority of institutional investors as well as the leading proxy advisors are consistently voting for annual Say On Pay irrespective of company recommendations. So, while a number of the largest investors are thus far supporting frequencies other than annual (including BlackRock, Capital World/Capital Research and Wellington), understanding how all of your institutional holders will vote can be the pivotal factor in determining the success or failure of your Say When On Pay proposal.

This recent shift in frequency preferences by filers validates the results of a survey of 135 companies conducted by leading compensation consulting firm Towers Watson in mid-December, in which a majority of responders said they were leaning toward recommending annual over triennial.

For more information on how to prepare for Say on Pay, the increasing challenges of the 2011 proxy season, and how we can help you mitigate your company's risk, please contact either:

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* Source, *TheCorporateCounsel.net* and Mark Borges Proxy Disclosure blogs