# Without Knowing The Reasons, Issuers Can't Take Account Of Say-on-Pay Votes

By Keith Paul Bishop on September 23, 2011 in Corporate Governance

The recently completed proxy season has yielded a virgin crop of shareholder "say-on-pay" votes, as required by Section 951 of the Dodd-Frank Act. Although not required by Congress, the Securities and Exchange Commission amended Item 402(b)(1) of Regulation S-K to require an issuer to address in its Compensation Discussion and Analysis whether and, if so, how its compensation policies and decisions have taken into account the results of the most recent shareholder advisory vote on executive compensation. This is one of those requirements that sounds good, but is impossible to implement in any rational way.

Under Rule 14a-21, issuers are now required to include a separate resolution subject to shareholder advisory vote to approve the compensation of its named executive officers, as disclosed pursuant to Item 402 of Regulation S-K. But what does voting to "for" or "against" such a resolution really tell an issuer?

Below are *just a few* possible reasons that shareholders may choose to either vote for or against approval of executive compensation.

| **Possible Reasons for Voting Against** | **Possible Reasons for Voting For** |
|---|---|
| Compensation is too high | Compensation is too low |
| Compensation is too low | Compensation is just right |
| Compensation is just right, but I'm unhappy with management for other reasons | Compensation is too high, but I'm happy with management for other reasons |

The intent of the shareholders is further clouded by the fact that issuers present a single resolution with respect to the executive officers as a group. A shareholder, for example, may vote against approval because she thinks that the CEO is overpaid even though she also thinks that the other executive officers are underpaid. Conversely, a different shareholder may vote for approval for the very same reason.

Given this state of affairs, it is entirely unclear what the SEC expected to see when it mandated that issuers disclose if, and how, their compensation decisions took account of the shareholders' vote,

whether for or against. Someone clearly blundered in mandating this disclosure, but for issuers "theirs not to reason why . . . ".

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