Will Your Proxy Card Pass Muster? SEC Releases Say-on-Pay Guidance

by Kenneth C. Oh on February 28, 2012

In the wake of the financial crisis, executive compensation is a highly volatile issue for many pubic companies.

Shareholders and the public are increasingly putting pressure on companies to reign in compensation packages; yet, at the same time, companies must work to retain key executives.

In addition, under the Dodd-Frank Wall Street Reform and Consumer Protection Act, executive compensation is also becoming more highly regulated. Shareholder advisory votes regarding executive compensation plans became required on January 21, 2011 for most public companies (smaller reporting companies are not required to conduct say-on-pay votes until January 21, 2013).

Under the new rules, public companies must conduct say-on-pay votes at least once every three years at a stockholder meeting where proxies are solicited for the election of directors. At least once every six years, companies are required to allow shareholders to vote on how often they would like to be presented with the say-on-pay vote: every year, every other year, or once every three years. In addition, companies must disclose in the proxy statement the general effect of the say-on-pay vote. While the vote is non-binding, a company will need to explain how the most recent vote affected compensation policies.

Earlier this month, the Securities and Exchange Commission Division of Corporation Finance published a new Compliance and Disclosure Interpretation (CDI), which provides some guidance regarding the new say-on-pay rules. The CDI addresses how properly to describe the advisory vote to approve executive compensation on proxy cards and voting instruction forms.

According to the SEC, the following are examples of advisory vote descriptions that would be consistent with SEA Rule 14a-21's requirement for shareholders to be given an advisory vote to approve the compensation paid to a company's named executive officers:

- To approve the company's executive compensation
- Advisory approval of the company's executive compensation
- Advisory resolution to approve executive compensation
- Advisory vote to approve named executive officer compensation

According to the SEC, simply saying "To hold an advisory vote on executive compensation" would not be consistent with Rule 14a-21 because shareholders could interpret this language as asking them to vote on whether or not the company should hold an advisory vote on executive compensation, rather than asking shareholders to actually approve, on an advisory basis, the compensation paid to the company's named executive officers.

If you have concerns about your company's compliance and disclosure obligations with the new say-on-pay rules or other executive compensation issues, we recommend meeting with an experienced business attorney.