

Say-on-Pay Voting Frequency — The Financial CHOICE Act Adds Uncertainty to the Process

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by Kimberley R. Anderson

The House passed the Financial CHOICE Act on Thursday as part of the new administration's bid to overhaul Dodd-Frank. It is not expected to get through the Senate in its current form, but it does provide an interesting read. While current disclosure requirements have become too lengthy and cumbersome in many respects, the proposed change to Say-on-Pay voting frequency requires a materiality determination that may prove difficult for companies to implement.

Currently, public companies are required to provide their shareholders with an advisory vote on executive compensation no less than once every three years. Most companies hold the vote annually. The Financial CHOICE Act would modify this requirement so that the vote is held "[e]ach year in which there has been a material change to the compensation of executives of an issuer from the previous year."

So, each year the issuer would have to determine if there has been a material change to executive compensation when deciding what proposals are put before shareholders at the annual meeting. I expect many issuers would continue to hold an annual vote to seek feedback from their shareholders even if there was no material change in compensation. However, given the high profile nature of a negative say-on-pay result, would issuers shy away from the advisory vote in a year of poor company performance (absent an obviously material change to executive compensation)? Will an issuer's determination not to include the advisory vote bring on another wave of proxy disclosure litigation? Could an issuer determine not to hold a say-on-pay vote for multiple years in a row?

Fewer say-on-pay advisory votes may not be problematic for issuers with strong corporate governance and shareholder engagement. However, for other issuers, say-on-pay advisory votes provided shareholders with a powerful (albeit imprecise) means of communicating their displeasure to the Board of Directors.

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