Cooley

Shareholder Engagement on Compensation Matters: Special Time-Sensitive Complications for the 2025 Proxy Season

March 4, 2025

As most public companies know, shareholder outreach is often an important part of the playbook when a company is seeking approval of compensation-related proposals at an annual meeting. A company may engage with shareholders proactively ahead of a compensation-related proposal or in response to a negative recommendation from proxy advisory firms. In addition to engagement relating to current-year proposals, where a company in a prior year received less than a specified favorable vote on its "say-on-pay" proposal – more than 70% for Institutional Shareholder Services (ISS) or 80% for Glass Lewis – proxy advisors expect the company and its independent directors to engage with shareholders following the annual meeting regarding its executive compensation practices, and detail such engagement in the proxy for the next year's annual meeting, including information about the extent of the outreach (i.e., which shareholders were engaged), what the company and its independent directors heard, and what, if anything, the company did in response to shareholder concerns.

Recent new guidance from the Securities and Exchange Commission (SEC) on an essentially unrelated topic has made it more likely that certain large investors (generally, the types of institutional shareholders typically targeted for such outreach) may decline to engage if approached by a company this year. The SEC guidance relates to investors that beneficially own greater than 5% of a voting class of equity securities in a company. In very simplified terms, the investor must publicly report those holdings – on a short-form Schedule 13G if the ownership is deemed "passive" and otherwise on a much more onerous Schedule 13D. Investors are loath to subject themselves to Schedule 13D reporting absent an appropriately compelling reason. The new guidance was the subject of a more detailed Cooley alert from February 14, 2025.

Before the new SEC guidance, it was commonly understood that engagement with a company on certain ordinary matters – including say-on-pay votes and other compensation matters – would not cause the investor's ownership to be viewed as other than passive. Under the new guidance, however, the ownership will no longer be viewed as passive if the investor "exerts pressure" on management to make specific changes to policies or practices or indicates that its support for director nominees will be withheld absent changes desired by the investor. Uncertainty regarding the scope of the new standard has caused some institutional shareholders to suspend engagement activities pending greater clarity around what will cause a loss of passive investment status.

As a result, companies that have not yet engaged in shareholder outreach in connection with low support for a prior year's say-on-pay results, or that may want to engage with shareholders in connection with a key compensation-related proposal, or a negative proxy advisor recommendation with respect to a say-on-pay vote or other compensation-related proposal at this year's annual meeting, should not be surprised if some shareholders decline such engagement this proxy season. Such companies should consider:

- Outreach to a broader and different set of shareholders (including less than 5% holders).
- Taking extra care to disclose their executive compensation programs in their proxy statement in a persuasively favorable manner that relies less heavily on the nature and consequences of their shareholder outreach efforts.
- Alternative means of disclosing information, such as filing additional soliciting materials and pointing investors to that information.

Time is of the essence. Any company that anticipates needing to conduct shareholder outreach in the coming days and weeks should determine as soon as possible what outreach will in fact be possible, and be prepared to adjust its strategy as needed.

Your executive compensation and public company contacts at Cooley are ready to help you navigate this largely unexpected complication as your proxy filing date rapidly approaches.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Alessandra Murata Palo Alto	amurata@cooley.com + 1 650 843 5696
Michael Bergmann Washington, DC	mbergmann@cooley.com +1 202 728 7008
Brad Goldberg New York	bgoldberg@cooley.com +1 212 479 6780

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.