

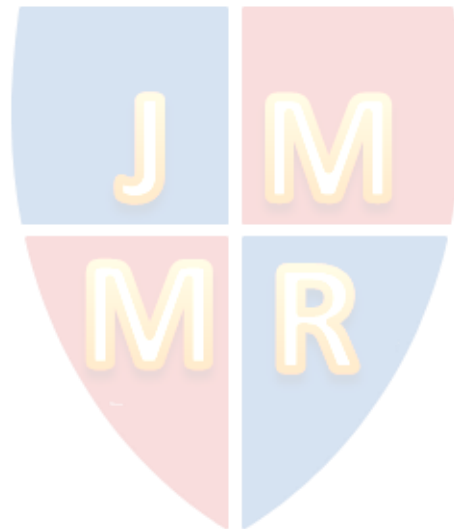
“Say-on-pay” proxies in the banking industry

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ABSTRACT

This article explains the advent of so-called say-on-pay advisory voting; discusses criteria for shareholder assessment of compensation plans; and examines nascent advisory voting results in the largest institutions of the commercial banking industry. Only two of the sampled twenty banks saw advisory votes of less than 80 percent so far in 2012, and only one experienced a “failed” vote. Possible reasons for the two outlier votes are presented.

Keywords: say-on-pay, advisory voting, Dodd-Frank Act, banking, executive compensation



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INTRODUCTION

Since the turn of the twenty-first century, financial and economic crises have aroused concerns about the interests of agents, shareholders and the general public. The Sarbanes-Oxley Act, government bailouts of key firms following the 2007-2008 recession, and the recent Dodd-Frank Wall Street Reform and Consumer Protection Act were intended to strengthen the U.S. financial system and protect public and shareholder interests.

The passage of the Dodd-Frank Act launched the “say-on-pay” era. U.S. corporations are in their second year of regulatory compliance mandating that shareholders periodically have a voice, via voting, on compensation proposals pertaining to high-level executives. Although the vote is only advisory, say-on-pay has led firms to revisit financial transparency and shareholder engagement (Lynn 2011). Companies have had to think twice about self-serving compensation plans, as the costs of losing a say-on-pay vote included future votes against directors, tarnished reputations, and potential lawsuits (McCord 2011). What some have called “sue-on-pay” lawsuits have been filed in both state and federal courts when shareholder complaints were not acted upon, regardless of the vote outcome (Allen 2012).

In 2011 and the start of the 2012 proxy season, we began to see the effects of say-on-pay votes for the approximately 9000 firms listed on U.S. stock exchanges (Kapner 2012). In stockholder meetings since 2011, companies with a capitalization of \$75 million or more were required to include advisory votes; other firms have until 2013 to comply (Wilson, Brett and Haymon, 2011). We were not the first nation to adopt say-on-pay; Great Britain, for one, instituted this practice in 2001 (Morgenson 2012).

Very few corporations have lost say-on-pay votes; that is, shareholders have accepted the proffered pay plans. The executive compensation organization, Equilar, looked at the results of advisory votes at 2252 companies in the first 6 months of 2011 and found that nearly 75% of the votes were approved by at least a 90 percent shareholder vote, and only 1.7 percent of the votes “failed” shareholder approval; overall there was a 98.3 percent approval rate (Hemphill 2011-2012). Last year, just two banks — both with less than \$15 billion of assets — out of a sample of more than 200 garnered less than 50% support, according to data from GMI Ratings. Only fifteen banks, or about 7%, won less than 75% approval (Peters, Horowitz and Terris 2012).

BACKGROUND ON ADVISORY VOTING

Say-on-pay was first passed in U.S. House Bill 1257 in 2007 but was held in abeyance by the U.S. Senate. In 2010 Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act. The stated aim of the Dodd-Frank legislation was “To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail’, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.” In addition to changing the U. S. regulatory structure, the act gave shareholders a voice on executive pay (non-binding) and golden parachutes; required board compensation committees to include only independent directors; mandated expanded clawback policies for executive compensation when inaccurate financial statements were issued; and directed the Securities and Exchange Commission to clarify compensation disclosures. The nonbinding votes on executive compensation packages were required in Section 951 at least once every three years (Dodd-Frank Act 2010).

In 2011, the Securities and Exchange Commission adopted several rules (Exchange Act Rule 14-21) to implement the Dodd-Frank law (Lynn 2011). The say-on-pay vote [SEC Rule 14a-21(a)] was to approve the compensation of the firm's named executive officers and was required at least once every three years starting in 2011. A separate advisory vote on the frequency of say-on-pay [Rule 14a-21(b)] was ordered no less frequently than once every six years and if an extraordinary event or merger occurred, then a third advisory vote was necessary on "say-on-golden parachutes" [Rule 14a-21(c)]. Also, a proxy statement's Compensation Discussion and Analysis (CD&A) section had to disclose if and how a shareholder say-on-pay vote influenced pay decisions. Also mandated was disclosure that each vote and the nature and frequency of the vote was required by the Exchange Act (Albano et. al. 2011) (Lynn 2011). This article focuses on the actual say-on-pay vote.

While advisory proxy statements are written differently for each company a representative say-on-pay resolution follows:

Resolved, that the compensation paid to company name's named executive officers, as disclosed in the Compensation Discussion and Analysis, compensation tables and narrative discussion and pursuant to Section 14A of the securities Exchange Act is hereby Approved.

WHY BANKING?

Whether banks were viewed as culprits or casualties of the recent economic and financial crisis, they clearly garnered much media attention and public scrutiny. Banks played pivotal roles in the mortgage process and the packaging and distribution of debt derivatives. Irrational exuberance propelled the housing market until the housing bubble burst and foreclosures escalated, leaving many financial institutions facing large losses (Amadeo 2012). "Too big to fail" was one justification of the ensuing emergency loans that several of the nation's largest banks received. Since 2009 those big banks have individually repaid most of that aid (ProPublica 2012). The most prominent victim of the crisis was the venerable Lehman Brothers, one of the five largest investment banks in 2007, brought down in part by a risky real estate portfolio (CNBC 2008). The conclusions of the Financial Crisis Inquiry Commission of the U.S. Senate underscored the nature of bank involvement, that financial derivatives served to hide the magnitude of leverage and that failures in financial regulation injured the financial markets (Federal Reserve 2011). It might be expected, then, that bank shareholders would take a keen and active interest in their investments.

In mid-2012 the prospects of banks looked brighter. U.S. bank earnings rose in the first three months of 2012 to their highest level in nearly five years, and about 67 percent of U.S. banks reported improved earnings. The number of troubled banks fell for the fourth straight quarter (Gordon 2012). But FDIC statistics revealed a longer-term trend: the decline in the number of commercial banks. Since 2007 the number of commercial banks fell from 7284 to 6263. In that period there were over 100 mergers and over 400 bank failures (2012). Yet the largest banks tended to hold an increasing percentage of our nation's financial assets. In 1990 the nation's 10 largest financial institutions held approximately 20 percent of our total financial assets; by 2010 they held about 54 percent (Mother Jones 2010). This lends credence to the notion that today large banks may be too big to fail. The significance of large banks and their recent travails have made them targets of public concern.

RELEVANT THEORY AND PRACTICE

Agency theory concerns the relationship between shareholders as principals of an organization and managers as agents of the corporation and shareholders. Agency costs arise in the resolution of conflicts of interest between managers and shareholders (Jensen and Meckling 1976). In a prevailing viewpoint, equity-based compensation is seen as a means to pull interests together. How pay is determined may have an impact on the degree to which alignment occurs (Jensen and Murphy, 1990). Likewise, how boards are managed will impact shareholder outcomes. The shareholder's economic interest is typically an increase in share value, but an agent's interest may be more personal, e.g., job security or greater compensation. Ownership today, however, is dispersed and relegated to boards (Cai and Walkling, 2011). Today the manager, more likely than the shareholders, determines board makeup, and the compensation program may therefore benefit the manager (Cai, Garner and Walkling 2009) (Bebchuk 2003). Research by Cai and Walkling suggested that say-on-pay created value for firms with inefficient compensation systems but harmed value for other companies (2011). But while "against" votes suggested that something was wrong, they did not prescribe what was right, although many ideas have been offered for appropriately incentivizing pay (see Bebchuk and Fried 2010).

Large institutional investors such as The California State Teachers' Retirement System, have a strong voting interest in seeing that firms create shareholder value. Writing for The California State Teachers' Retirement System (CalSTRS), Sheehan and Mastagni pointed out that compensation issues are complex, require transparency and when poorly assembled, injure shareholder value. They recognized the important role of compensation committees in establishing performance metrics, and the difficulties that issuers faced aligning pay to performance and selecting peer groups. CalSTRS did not automatically reject say-on-pay proposals but voted against approximately 23% of 2,166 pay resolutions through the first half of 2011 because of questionable practices relating to the aforementioned issues as well as excessive executive benefits such as tax gross-ups. They also noted that legal requirements of proxies tended to be too complex for an average investor (2012). A Towers Watson survey suggested that an 80 percent stockholder approval rating (a 20% vote against board recommendations), may be becoming the expectation of corporations (Wilson, Brett and Haymon, 2011). As such an 80 percent benchmark was employed in the table below.

The Council of Institutional Investors (CIC) developed a list of red flags to inform shareholders on advisory votes. Some of their criteria are abridged and paraphrased below (2010):

- Do executives hold relatively large amounts of the firm's stock?
- Do strong clawback policies exist?
- Is most of the CEO's pay performance based?
- Are perquisites reasonable?
- Is CEO pay more than three times greater than the pay of other top executives?
- Is the stock options policy tied to managerial performance?
- Is CEO performance awarded only for above-median peer performance?
- Are poor performers or retirees receiving non-excessive perquisites?
- Is the compensation policy clear and convincing?
- Are compensation committee advisors truly independent?

A negative response to any of these queries may be a reason for concern. One red flag alone may not trigger a “no” vote but might be a reason for further scrutiny. These criteria were employed below.

METHODOLOGY

The twenty largest U. S. commercial banks by revenue, as listed in the 2012 Fortune 500, were examined for 2012 say-on-pay proxy votes on executive compensation (see table below). These institutions had revenues ranging from \$4.78 billion to \$115.074 billion and the top five alone, had total assets exceeding \$8 trillion (Fortune 2012). Company proxy statements, confirmations from news articles and data from Proxymonitor.org provided data on votes and results. As per the discussion above, an 80 percent benchmark was used to determine a “successful” vote from the perspective of the corporation. Where the vote for approval was less than 90 percent, the actual percentage was indicated to reveal the degree of shareholder approval. “Failed” votes, those where shareholders rejected the firm’s compensation package, were also indicated. Where a shareholder approval was less than 80 percent, a further exploration of compensation plans, including the CIC criteria above, was made to find possible reasons for the outcome.

Not all of the largest banks were in the same lines of business and the recent low-interest business climate may not have affected their earnings prospects equally. Ally Financial for example, was primarily in the auto loan business, while Bank of New York Mellon earned significant fees as a securities record keeper. While the voting results of twenty companies may not be generalizable to the entire banking industry, they are indicative of recent shareholder sentiment toward the largest financial institutions holding a majority of the nation’s financial assets.

For Ally Financial no proxy statement was filed. In April, 2012 the U. S. Treasury Department reported that total compensation for the CEO was frozen at the 2011 level (about \$9.5 million) and that compensation for many executives would be reduced by 10%. Ally still owed about \$12 billion from its bailout (The Associated Press 2012). In May The Treasury Department gave approval for Ally to put its mortgage unit into bankruptcy to assist in the recovery of bailout funds (Bloomberg 2012).

RESULTS AND FINDINGS

The say-on-pay findings are in Table 1 (Appendix). It may be impossible to know for certain to which of the CIC’s criteria the disparate shareholders responded. Compensation determinations are complex. Citigroup’s CD&A suggested that many of the CIC criteria have been satisfied. The company claimed mixed results with greater net income and loan growth over the previous year. Citigroup repaid the bailout funds it received in 2010, and 60% of the NEOs’ annual incentive awards were deferred and continued to be at-risk during a four year vesting period due to potential clawbacks and ties to the firm’s stock price. Stock and some cash awards appeared to be in alignment with shareholder interests as potential clawbacks, vesting after termination and limits on hedging policies that could negate the alignment, all applied. NEOs had no employment guarantees, severance agreements or tax gross-up perks and paid more for medical benefits than lower paid employees. Given that the 2011 say-on-pay vote garnered an over 92 percent approval, Citigroup felt justified in extending aspects of its 2010 pay program.

The compensation philosophy was clear and the independent compensation consultant only worked for the compensation committee. Citigroup's ten peers for senior compensation determinations included eight of the twenty largest banks from the above sample, suggesting that executives with comparable pay and responsibilities were considered (Citigroup Proxy 2012).

Yet there appears to be a perceived, long-term disconnect between pay and performance. Citigroup shareholders' rejection of a board-approved, executive compensation plan was the first negative vote for a large bank. The say-on-pay vote failure denied top officers millions of dollars in bonuses which were payable even if pretax profits declined by 50% from the previous year (Kapner 2012). The Office of the New York City Comptroller voted its 8 million shares against Citigroup's plan and the Executive Director stated that "pay was excessive relative to performance" (Peters, Horwitz and Terris 2012). One observer opined that CEO Vikram Pandit's longer-term record mattered the most; the firm's share price was recently nearly 90 percent lower than when Pandit assumed the reins in 2006 (McKenna 2012).

Bank of New York Mellon claimed an increase in total and fee revenue. It also had strong stock ownership requirements, compensation forfeiture procedures under certain circumstances, and an anti-hedging policy. Their 2011 advisory vote was about 80 percent in favor of their compensation program, suggesting shareholder approval of their pay philosophy. Base salaries for NEOs only represented approximately 10 percent of target awards, and restricted stock units and stock options had vesting periods of three and four years respectively. The large majority of options were underwater, but no re-pricing was permitted. Post-retirement vesting of restricted stock was not automatic. No tax gross-ups were allowed. Eight of the twelve relevant peer companies were among the twenty largest commercial banks (Bank of New York Mellon Proxy 2012).

One questionable area of governance was the possible lack of perceived independence of the so-called independent compensation firm. That consultant was an affiliate of an insurance provider whose other affiliates received considerably more in commissions and fees than was paid to the consultant. However, the bank explained that several safeguards to independence were in place (Bank of New York Mellon Proxy 2012 p.23).

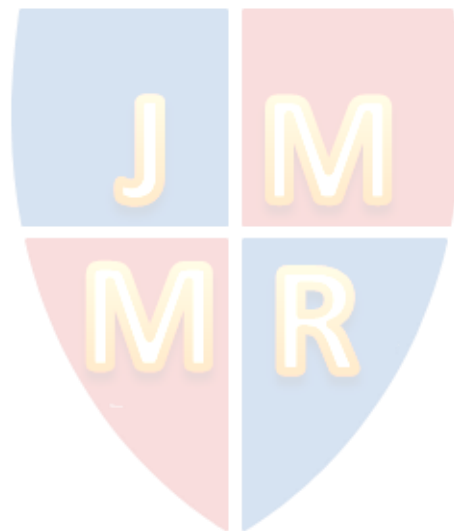
At the 2012 Bank of New York Mellon stockholders meeting, Chairman and CEO Gerald Hassell, received several criticisms, but two significant ones pertained to 1) a lawsuit alleging fraud in foreign currency trades that the New York Attorney General's Office estimated at a \$2 billion cost to the bank's clients and 2) their recent 1500 job cuts. (Sabatini 2012). As may have been the case at Citigroup, the far less than 80% approval vote could be a reflection of the longer term, the lack of payoff from the 2007 merger of Bank of New York and Mellon Financial; the merger's lack of payoff was noted as a source of major concern by one business writer two years ago (Kelly 2010).

CONCLUSION

Next year the two outlier companies and those with successful votes must disclose how the advisory vote results affected their compensation plans. However, as the 2012 say-on-pay votes are nonbinding, no changes may ensue. While the *frequency* of the advisory vote is not the focus of this article, it was interesting to note that as of May 25, 2012, only four of the sampled companies, American Express, Bank of New York Mellon, Capital One Financial, and Citigroup filed to recommend a say-on-pay vote annually (Say-on-Pay 2012). It is also interesting that through June 20, 2012, the SEC received 106 supplemental proxy filings (across a variety of industries) up 83 percent over the previous year. These company filings attempted to further

justify the companies' compensation strategies; 99 of the 106 discussed the link between pay and performance and 56 discussed the comparison peers (Chasan 2012).

While it may be too soon to see the full effects of the Dodd-Frank bill, its passage signaled a continuing concern for financial responsibility and stakeholder interests. One failed vote and one nearly failed vote did not constitute a shareholder revolt against the large banks that played and continue to play critical roles in the economy. Why have so many compensation resolutions passed? That shareholders heartily agreed with the compensation plans is moot. Some shareholders are indifferent and may never have voted; perhaps others accepted that professional managers and directors knew their business. It may have been that shareholders were looking at longer-term performance, but there are probably many combinations of factors that could have led to "for" and "against" votes. But it's clear from the failed vote at Citigroup Inc. and the significantly less than 80 percent approval rate at Bank of New York Mellon that shareholders can be and were motivated to protect share value. The value of those votes will be embodied in changes at the banks. The next year may reveal more.



APPENDIX

Table 1

Commercial Bank	2012 Say-on-Pay Vote	Shareholder Meeting Date	Approval Vote > 80%	“Failed Vote”
Bank of America Corp.	yes	5/9/12	yes	
J.P.Morgan Chase & Co.	yes	5/15/12	yes	
Citigroup	yes	5/15/12	No (45%)	yes
Wells Fargo	yes	4/25/12	yes	
Morgan Stanley	yes	5/14/12	yes	
Goldman Sachs Group	yes	5/24/12	yes	
American Express	yes	4/30/12	yes	
U.S. Bancorp	yes	4/17/12	yes	
Capital One Financial	yes	5/8/12	yes	
PNC Financial Svcs. Group	yes	4/24/12	yes	
Bank of New York Mellon Corp.	yes	4/10/12	No (58.63%)	
Ally Financial	no			
State Street Corp.	yes	5/16/12	yes	
BB&T Corp.	yes	4/24/12	yes	
SunTrust Banks	yes	4/24/12	yes	
Discover Financial Svcs.	yes	4/18/12	yes	
Regions Financial	yes	5/17/12	yes	
Fifth Third Bank	yes	4/17/12	yes	
CIT Group	yes	5/15/12	yes	
KeyCorp	yes	5/17/12	yes	

Data is for 2012. “Failed” means that the firm’s proposed pay package was rejected by shareholders. Abstentions are counted as “no” votes. Sources: Company SEC filings DEF 14A and 8-K, 2012 Fortune500, Proxymonitor.org.

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