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A Case to Exclude the Triennial Say-on-Pay Shareholder Proposal

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The United Brotherhood of Carpenters has sent a number of companies shareholder proposals seeking (a) triennial say-on-pay votes and (b) a vote not only on the overall executive compensation but also on different components, such as annual pay, long-term incentives and post-employment compensation.

The SEC has posted the first of the likely many no-action **letters** to exclude the proposal. In the letter, BorgWarner refers to the SEC final release in adopting Rule 14a-21, which implemented both the say-on-pay vote and the vote required once every six years on how frequently the say-on-pay vote should occur (the frequency vote).

At that time, the SEC adopted an amendment to Rule 14a-8(i)(10) to allow companies to exclude a shareholder proposal that seeks advisory votes to approve the compensation of executives as disclosed under Item 402 of Regulation S-K, or that relates to the frequency vote, so long as the company adopted a policy to implement the frequency that is consistent with the choice of the majority of votes cast. In this case, BorgWarner decided to adopt annual say-on-pay votes consistent with the selection made by more than 70% of shareholders.

The company also argues that the annual say-on-pay vote that it is currently providing is substantially duplicative of the approach in the shareholder proposal that seeks a view on multiple parts of the executive compensation, and that a number of questions raised by the language of the proposal renders it vague and indefinite under Rule 14a-8(i)(3).

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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