

The Use of Additional Soliciting Materials for Say-on-Pay Votes

May 2, 2012 | Client Update | 2-minute read

In year two of say-on-pay, we find that companies continue to file additional materials to solicit for favorable votes. These additional materials are generally in the form of a brief letter to shareholders highlighting aspects of executive compensation. Most are in the form of descriptive narratives, although a few companies use graphs and charts and even PowerPoints. While a few are filed early on following the proxy statement, the majority appear to be in response to negative recommendations on say-on-pay from proxy advisory firms.

Proxy disclosure this season has been thorough and detailed, which would suggest that additional materials are not technically necessary. However, even with lengthy disclosure on executive compensation, companies have many reasons to want to file additional materials. They may wish to highlight key aspects of compensation without worrying about including all the different aspects necessary for compliance with SEC rules, or the proxy advisory firms' reports have narrowed the main issues that become important to discuss. Some materials provide companies with a set of talking points or script for conversations with shareholders, and others believe that investors benefit from having a clear set of reasons in summary form as ammunition to reject the proxy advisory firms' recommendations.

A threshold question is whether to directly address the criticisms from the proxy advisory firms' reports. Most companies do usually focus at least on ISS pay-for-performance analysis (a favorite statement this season has been that the ISS peer group methodology is deeply flawed). This is not a surprise, since that analysis appears to be the primary source of most of the negative recommendations in the first place.

So far, we have not seen many companies actually modify existing compensation in any way, along the lines that Disney and GE did last year. Recently however, NCR Corp. initially [filed materials](#) that advocated for the company's say-on-pay vote, explained its compensation decisions and rebutted ISS, but about a week later, [the company indicated](#) that after discussions with shareholders, it decided to add performance conditions to the CEO's existing special retention award that were initially granted as time-based restricted stock units. This reportedly changed ISS' recommendations, and the company's vote was ultimately about 80% favorable.

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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