

Implementation of New Disclosure on Say on Pay Results

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Among the new proxy disclosure requirements under the Dodd-Frank Act is the mandate that issuers disclose in their CD&A whether, and, if so, how the registrant has considered the results of the most recent shareholder advisory vote on executive compensation in determining compensation policies and, if so, how that consideration has affected the registrant's executive compensation decisions and policies. Thus far, the vast majority of the 110 large accelerated filers who filed proxy statements in the 2012 season through February 29, 2012 have addressed this new requirement in their CD&As. Generally, the disclosure has been fairly predictable: those that received lower shareholder approval ratings on say on pay in 2011 have provided lengthier disclosure, often addressing changes made to their compensation programs, while those that received stronger shareholder support have simply stated that they have considered the results and decided to continue their previous compensation practices in light of the support.

However, 14 large accelerated filers have failed to disclose the effect of the 2011 say on pay vote results in their CD&As. Of these, 9 did not mention the say on pay vote in their CD&A at all. Five companies reported last year's vote results but did not go on to discuss whether or how the company considered the result.

Interestingly, the failure to disclose the effect of last year's say on pay vote has not negatively affected either ISS recommendations regarding this year's say on pay proposals or say on pay results in 2012. Of the 14 companies discussed above, the 9 that have received a recommendation on their 2012 say on pay proposal from ISS have all received a "for" recommendation. Of the 14 companies discussed above, the 6 that have reported their 2012 say on pay results as of February 29, 2012 have all received above 90% shareholder support. The lack of focus on the new disclosure by ISS and shareholders may be because all of these companies received at or above 89% shareholder support in 2011. Query whether the SEC will be as forgiving with respect to companies that do not address the new disclosure requirement.

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.

Kyoko Takahashi Lin

+1 212 450 4706

kyoko.lin@davispolk.com

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