

X. *The Impact of Say-on-Pay*

A. Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act¹ amends the Securities Exchange Act of 1934 by adding Section 14A, which directs the Securities and Exchange Commission (“SEC”) to craft regulation requiring issuers to hold shareholder votes on executive compensation plans.² Under the resulting “say-on-pay” Rule 14a-21(a), which took effect April 2011, issuers must provide a non-binding shareholder advisory vote to approve compensation of its named executives at least once every three years.³ As a corollary, Rule 14a-21(b), the “say-on-frequency” rule, requires that shareholders vote on how often say-on-pay votes occur.⁴ In addition to the goals of increased accountability, disclosure and shareholder dialogue,⁵ many advocates hoped that say-on-pay votes would help curb the compensation practices that they believe drove financial executives to engage in the type of risk-taking that led to the 2008 credit crisis.⁶

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 951, 124 Stat. 1376, 1899-90 (2010) (to be codified at 15 U.S.C. § 78n-1).

² *Id.*; Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Securities Act Release No. 9178, Exchange Act Release No. 63,768, 76 Fed. Reg. 6010, 6010-47 (Feb. 2, 2011) (to be codified at 17 C.F.R. pts. 229, 240, 249).

³ 76 Fed. Reg. at 6010, 6013.

⁴ *Id.* at 6016.

⁵ David Lynn, *Dodd-Frank One Year Later: The Public Company Executive Compensation, Governance and Disclosure Provisions*, CLIENT ALERT (Morrison Foerster LLP, Washington, D.C.) July 21, 2011, at 7, available at <http://www.mofo.com/files/Uploads/Images/110721-Dodd-Frank-One-Year-Later.pdf>.

⁶ See Jesse Hamilton, ‘Say-on-Pay’ Votes May Lead Boards to Revisit Pay, *Survey Finds*, BLOOMBERG, Oct. 12, 2011, <http://www.bloomberg.com/news/2011-10-12/-say-on-pay-votes-may-lead-boards-to-revisit-pay-survey-finds.html>. For more discussion on the reasons behind the rule’s enactment and advocates’ objectives, see generally Contributors from the Executive Compensation Emerging Issues Task Force, *The Economic Crisis: Broader Executive Compensation Reforms Coming Soon*, EXECUTIVE COMPENSATION ALERT (K&L Gates LLP, New York, NY), July 2009, available at <http://www.klgates.com/newsstand/detail.aspx?publicatoin=5777>; Christopher Keller & Michael Stocker, *Executive*

B. Explaining the Results

Since April 2011, shareholders have approved the vast majority of executive compensation proposals in say-on-pay votes,⁷ creating some concern that the say-on-pay rule may fail to reduce executive pay.⁸ By June 30 of the 2011 proxy season, a total of 2,502 say-on-pay votes yielded only thirty-nine rejections,⁹ despite proxy advisory firms' recommendations that shareholders reject plans in more than 250 votes.¹⁰ Reacting to the almost ninety-nine percent

Compensation's Role in the Financial Crisis, CORPORATE COUNSEL, Nov. 18, 2008, <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202426091714>; and Ronald D. Orol, *Dodd-Frank's 'Say on Pay' Could Impact Executive Pay*, MARKETWATCH, Aug. 26, 2010, <http://www.marketwatch.com/story/new-say-on-pay-law-could-temper-ceo-pay-2010-08-26>.

⁷ See John Laide, *Dodd-Frank "Say on Pay" Proposal Scorecard Results Disclosed as of June 30*, RESEARCH SPOTLIGHT (SharkRepellent.net), July 1, 2011, available at https://www.sharkrepellent.net/request?an=dt.getPage&st=1&pg=/pub/rs_20110701.html&Dodd-Frank_Say_on_Pay_Proposal_ScoreCard&md=72131 [hereinafter the SharkRepellent study] (showing a pass rate of 2,463 out of 2,502 issuers as of June 30, 2011).

⁸ See, e.g., Steven M. Davidoff, *Efforts to Rein In Executive Pay Meet With Little Success*, N.Y. TIMES, July 12, 2011 (DealBook), <http://dealbook.nytimes.com/2011/07/12/efforts-to-rein-in-executive-pay-meet-with-little-success/> (“[I]f the goal of these collective efforts is a reduction in compensation, the results are quite disheartening.”).

⁹ The SharkRepellent study does not define a “pass” vote or a “fail” vote. See the SharkRepellent study, *supra* note 7. The general assumption is that shareholder approval comes with “majority support.” See Robin Ferracone, *Say on Pay: Why Companies Failed*, FORBES, Sept. 28, 2011, <http://www.forbes.com/sites/robinferracone/2011/09/28/say-on-pay-why-companies-failed/>. It is notable, however, that Rule 14a-21 itself does not indicate “what percentage of shareholder votes constitutes an endorsement or a rebuttal of policies,” creating an area of discretion for issuers and their boards. Daniel Costello, *The Drought Is Over (At Least for C.E.O.'s)*, N.Y. TIMES, Apr. 9, 2011, <http://www.nytimes.com/2011/04/10/business/10comp.html?pagewanted=all>. See also 72 Fed. Reg. at 6012-16.

¹⁰ PRICEWATERHOUSECOOPERS, ANNUAL CORPORATE DIRECTOR SURVEY 2011 FINDINGS 4 (2011), available at http://www.pwc.com/en_US/corporate-governance/assets/annual-corporate-director-survey-2011.pdf. Just one the major proxy advisory firms, Institutional Investor Services (ISS) recommended rejections in 150 votes alone. See *Defending Against Shareholder "Say-on-Pay" Suits*, DECHERTONPOINT (Dechert LLP, New York, NY), Sept. 2011, at 2, available at <http://www.dechert.com/>

approval rate, one commentator suggests that the say-on-pay rule is little more than “a costly exercise that validates almost every companies’ [sic] pay practices.”¹¹

However, there are possible explanations for the strong shareholder support of executive compensation proposals. One factor contributing to shareholder support may be as simple as a general economic upturn.¹² The non-binding nature of the vote may disincentivize shareholders to vote against a proposal if they believe the board will adopt it regardless of the vote’s outcome.¹³ Indeed, boards have adopted rejected proposals in several instances.¹⁴ It is also expensive and time consuming to understand executive compensation practices. Even institutional investors who hold relatively small percentages of an issuer’s stock may find that the high cost of monitoring executive compensation is not worth the benefits, particularly when many of those investors have the option of relying on proxy advisory firms’ analysis and recommendations.¹⁵

files/Publication/5312a5d9-c3ac-4911-9b40-04007f14fe6e/Presentation/PublicationAttachment/bf7b8249-a2d7-4372-ba70-2e35b79d2785/C%26S_WCSL%20update_09-11_Defending_Against_Shareholder_Say-On-Pay%20Suits.pdf. Though this number was calculated several months after the SharkRepellent study, even by September 2011, only forty say-on-pay votes had failed. *See id.*

¹¹ Davidoff, *supra* note 8.

¹² *See* Costello, *supra* note 9. As Stanford Business School’s director of corporate governance research, David F. Larcker, observes, “What’s funny about pay is that when the market is going up, it covers a lot of sins.” *Id.*

¹³ One columnist describes “these non-binding votes” as “merely show” and suggests that shareholders ought to have their votes determine whether the board is able to adopt the compensation proposal at all. Roger Lowenstein, *Think About Sin When Bonuses Are Revealed: Roger Lowenstein*, BLOOMBERG, Mar. 24, 2011, <http://www.bloomberg.com/news/2011-03-24/think-about-sin-when-bonuses-are-revealed-commentary-by-roger-lowenstein.html>.

¹⁴ *See, e.g.,* Assad v. Hart, No. 11cv2269 WQH (BGS), 2012 WL 33220, at *2 (S.D. Cal. Jan. 6, 2012) (describing how board of Pico Holdings, Inc. failed to respond to a negative say-on-pay vote). For a discussion of litigation arising out of negative say-on-pay votes, see discussion *infra* Part C.

¹⁵ *See* Davidoff, *supra* note 8. While there is a disparity between the proxy advisory firms’ recommendations and shareholder voting patterns, it is important to remember that advisory firms recommended rejections in only a small minority of votes. *See* Lynn, *supra* note 5, at 9 (“[A]pproximately 12-13% of recommendations made by proxy advisers were against the Say-

Accordingly, the investor who relies solely on the issuer's proxy disclosure statements may be sufficiently persuaded that the proposed compensation is appropriate.¹⁶ Moreover, because executive compensation tends to increase on average throughout the market,¹⁷ compensation packages that appear exorbitant standing alone might seem average relative to those of other issuers or even to those of past years.¹⁸ On the other hand, the voting statistics may

on-Pay proposal . . ."). Thus, even if shareholders voted according to these recommendations, the results would represent a strong showing of support for current compensation practices. One possible reason for the disparity between recommendations and votes seems to be the lack of reliance on these firms by large institutional investors. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-765, CORPORATE SHAREHOLDER MEETINGS: ISSUES RELATING TO FIRMS THAT ADVISE INSTITUTIONAL INVESTORS ON PROXY VOTING 15, 17 (2007), *available at* <http://www.gao.gov/assets/270/263233.pdf> ("[L]arge institutional investors, which cast the great majority of proxy votes made by all institutional investors . . . reportedly place relatively less emphasis on the firms' research and recommendations than smaller institutional investors.").

¹⁶ The Dodd-Frank amendments to Item 402(b) of Regulation S-K require issuers to provide disclosure statements, namely in the form of Compensation Discussion & Analysis (CD&A), along with proxy voting materials. Shareholder Approval of Executive Compensation and Golden Parachute Compensation, 76 Fed. Reg. 6010, 6014-15 (Feb. 2, 2011) (to be codified at 17 C.F.R. pts. 229, 240, 249). Issuers used the CD&A as a "key point of engagement with shareholders on executive compensation issues," particularly by explaining important components of the executive compensation proposals and why shareholders should approve them. Lynn, *supra* note 5, at 7.

¹⁷ *See* Davidoff, *supra* note 8 ("[E]ach year executive pay rises ever higher and the industry average is reset.").

¹⁸ While data on 2011 compensation is still being collected, one management consulting firm estimated that 61% of midsize and large organizations expected "their annual bonus pools for 2011 to be as large or larger than those for 2010." Press Release, Towers Watson, Majority of U.S. Companies to Pay 2011 Executive Bonuses Equal To or Larger Than Last Year's, Towers Watson Survey Finds (Dec. 7, 2011), *available at* <http://www.towerswatson.com/press/6014>. It does appear, however, that issuers reduced compensation in the form of perquisites and reward-based pay in the past year. *See* Press Release, Compdata Surveys, Fewer Companies Offering Perks and Incentives to CEOs (Jan. 25, 2012), *available at* <http://www.prweb.com/releases/2012/1/prweb9133469.htm>. Issuers who highlighted these alterations to compensation packages likely pleased shareholders who were looking for cuts, particularly given

simply reflect shareholders' desire to have a say in, rather than alter or reduce, executive compensation. For example, in say-on-frequency votes, approximately eighty percent of shareholders voted to hold say-on-pay votes annually, as opposed to holding one every three years.¹⁹ Unlike say-on-pay votes, the say-on-frequency votes were very much in line with the recommendations of ISS, which only recommended annual votes.²⁰ Whatever the reasons, it appears that if Congress intended say-on-pay to reduce executive compensation, such reduction was not the result most shareholders cared to see.

C. Say-on-Pay and Fiduciary Duties

Of the issuers whose shareholders rejected executive compensation proposals, a number faced derivative litigation alleging that the boards breached their fiduciary duties by adopting proposed executive compensation plans despite a negative say-on-pay vote.²¹ In one typical case, plaintiffs argued that "the adverse . . . advisory shareholder vote on the [board's] 2010 executive compensation rebutted the business judgment surrounding the . . . [board's] decisions to increase executive compensation in 2010."²² While the courts are generally in agreement that Rule 14a-21 does not add or modify fiduciary duties,²³ at least one court found that a negative

executive compensation practices in recent years. In 2010, executive pay rose by twenty-three percent from 2009. See Pradnya Joshi, *We Knew They Got Raises. But This?*, N.Y. TIMES, July 2, 2011, <http://www.nytimes.com/2011/07/03/business/03pay.html>.

¹⁹ Davidoff, *supra* note 8.

²⁰ Lynn, *supra* note 5, at 10.

²¹ See, e.g., *Dennis v. Hart*, No. 11cv2271 WQH (WVG), 2012 WL 33199, at *2 (S.D. Cal. Jan. 6, 2012).

²² *Id.* (quoting Defendants' Notice of Removal at 37, *Dennis v. Hart*, No. 11cv2271 WQH (WVG) (S.D. Cal. Sept. 30, 2011), ECF No. 1).

²³ Section 951 of Dodd-Frank states that the say-on-pay vote "shall not be binding on the issuer or the board of directors of an issuer, and may not be construed— (1) as overruling a decision by such issuer or board of directors; (2) to create or imply any change to fiduciary duties of such issuer or board of directors; [or] (3) to create or imply any additional fiduciary duties for such issuer or board of directors." Dodd-Frank Act § 951. Pub. L. No. 111-203, § 951, 124 Stat. 1376, 1899-90 (2010) (to be codified at 15 U.S.C. § 78n-1). The federal court in *Dennis v. Hart* explained that the "Dodd-Frank Wall Street Reform Act did not change state law regarding fiduciary duty or the business judgment presumption." *Dennis*, 2012 WL

say-on-pay vote is at minimum evidence that the proposed executive compensation was not in the best interests of shareholders.²⁴ The court reasoned that because the board subsequently approved a shareholder-rejected proposal, plaintiffs pled facts sufficient to sustain a claim that the board acted against the best interests of shareholders and thus violated its fiduciary duties.²⁵ However, this appears to the minority view.²⁶ Still, litigation is costly for companies, even if cases are ultimately settled or dismissed.²⁷ Accordingly, issuers should work to garner shareholder support for compensation proposals prior to a say-on-pay vote and particularly after a rejection.²⁸

33199, at *3 (concluding that plaintiffs failed to state a claim for breach of fiduciary duty based on the board's failure to respond to a negative say-on-pay vote). *See also* Assad v. Hart, No. 11cv2269 WQH (BGS), 2012 WL 33220, at *4 (S.D. Cal. Jan. 6, 2012) ("Dodd-Frank . . . did not create a private right of action or create new fiduciary duties."). State courts agree that "an adverse say on pay vote *alone* [does not suffice] to rebut the presumption of business judgment protection applicable to directors' compensation decisions." Teamsters Local 237 Additional Sec. Benefit Fund v. McCarthy, No. 2011-cv-197841, 2011 WL 4836230, at *5 (Super. Ct. Ga. Sept. 16, 2011). *See also* Plumbers Local No. 137 Pension Fund v. Davis, No. 03:11-633-AC, 2012 WL 104776, at *7 (D. Or. Jan. 11, 2012) (applying *McCarthy*).

²⁴ *See* NECA-IBEW Pension Fund v. Cox (*Cincinnati Bell*), No. 1:11-cv-451, 2011 WL 4383368, at *2-3 (S.D. Ohio Sept. 20, 2011).

²⁵ *Id.* A state court in Georgia explicitly rejected this argument as a "novel contention," *see McCarthy*, 2011 WL 4836230, at *5, while a district court concluded that "it is unlikely that [*Cincinnati Bell*] remains viable legal authority." *Davis*, 2012 WL 104776, at *8.

²⁶ *See supra* text accompanying notes 23, 24 and 25.

²⁷ Defendants in case paid almost \$2 million to settle their shareholder derivative case based on a negative say-on-pay vote. *See* Peter M. Saporoff, Pamela B. Greene, Breton Leone-Quick & Ari N. Stern, *Lessons Learned from Initial "Say-on-Pay" Litigation*, SECURITIES LITIGATION ALERT (Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Boston, MA), July 18, 2011, available at <http://www.mintz.com/newsletter/2011/Advisories/1251-0711-NAT-LIT/web.htm>.

²⁸ For strategies to develop shareholder support and prevent litigation, see discussion *infra* Part E.

D. Issuers' Reactions to Say-on-Pay

Whether to earn shareholders' support or prevent litigation, boards have sought to increase shareholder communication and enhance disclosures concerning executive compensation plans in the past year.²⁹ In its 2011 corporate director survey, PricewaterhouseCoopers found that twenty-four percent of boards "increased board-level communications with proxy advisory firms,"³⁰ while thirty-one percent of directors increased board-level communications with major shareholders.³¹ Additionally, forty-five percent of directors changed compensation discussion and analysis ("CD&A") disclosures to be more "plain English,"³² thirty-one percent of directors incorporated "an executive summary of executive compensation in CD&A"³³ and twenty-two percent of directors increased the "use of charts and graphs in CD&A to communicate the compensation of executives."³⁴ Given that thirty-four percent of directors reportedly did nothing different in the past year than they had in past years,³⁵ it appears that many boards have implemented more than one strategy to provide improve dialogue and disclosures.

Not all measures have been forward-looking. Some issuers also took action to increase shareholder support following say-on-pay votes. For example, in response to a failed say-on-pay vote in 2011, Jacobs Engineering reached out to shareholders, introduced performance-based "market stock units" and further restricted the

²⁹ As one reporter writes, "Even the prospect of the public votes . . . appears to have altered the relationship between investors and corporate executives on many discussions . . ." Costello, *supra* note 9.

³⁰ PRICEWATERHOUSECOOPERS, *supra* note 10, at 4, 8. Issuers' use of these proxy advisory firms presents conflicts of interest that are worth considering in light of shareholders' reliance on the firms' say-on-pay voting recommendations. For a discussion of conflicts of interest between and among proxy advisory firms, institutional investors and issuers, see generally U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 15.

³¹ PRICEWATERHOUSECOOPERS, *supra* note 10, at 8.

³² *Id.* at 5. See also *supra* text accompanying note 16 (describing CD&A requirements).

³³ PRICEWATERHOUSECOOPERS, *supra* note 10, at 5.

³⁴ *Id.*

³⁵ *Id.*

CEO's stock grants.³⁶ After Jacobs obtained ISS's support and recommendation, shareholders approved the proposal in January 2012.³⁷ For other issuers, shareholders' demands are evident even absent a say-on-pay vote. After receiving bad press for the \$76.1 million compensation package its CEO received in 2010,³⁸ Occidental Petroleum implemented a modified compensation plan in 2011 to reduce the amounts it pays to its executives.³⁹ At least one issuer acted retroactively in response to shareholder dissatisfaction. In late 2011, shareholders filed suit against Nabors's CEO Eugene Isenberg for disgorgement of a \$100 million termination fee he received in October 2011.⁴⁰ In February 2012, Mr. Isenberg decided to waive the fee.⁴¹ A spokesperson for Nabors added that the decision "was in the best interest of shareholders."⁴²

E. Garnering Shareholder Support

Going forward, legal advisors warn issuers to be mindful of upcoming say-on-pay votes and pay attention to the results. According to the law firm Venable, issuers who receive only seventy to eighty percent shareholder approval on compensation packages should consider modifying those plans.⁴³ Issuers should also consider distributing additional proxy disclosure materials to rebut a negative

³⁶ *Jacobs Engineering Turns Say-on-Pay Nays into Yays*, WALL ST. J. CFO BLOG (JAN. 27, 2012, 5:35 PM), <http://blogs.wsj.com/cfo/2012/01/27/jacobs-engineering-turns-say-on-pay-nays-into-yays/tab/print/>.

³⁷ *See id.*

³⁸ *See, e.g., Daniel Gilbert & Isabel Ordonez, Occidental CEO's Pay More Than Doubled in 2010*, WALL ST. J., Mar. 24, 2011, <http://online.wsj.com/article/SB10001424052748703784004576221093786890326.html>.

³⁹ *Id.* *See also* Costello, *supra* note 9.

⁴⁰ Mark Maremont & Joann S. Lublin, *The \$100 Million Giveback*, WALL ST. J., Feb. 7, 2012, at B1.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Patricia McGowan, Jeffrey M. Keehn & Michael F. Sheehan, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: A Review of the 2011 Proxy Season and a Look Forward to 2012*, CORPORATE ALERT (Venable LLP, Baltimore, MD), Sept. 2011, available at http://www.venable.com/files/Publication/beb187fa-3f3d-4802-833e-3a3d406c85d4/Presentation/PublicationAttachment/dcb364d8-1095-4129-b5bf-43219b25c1cc/Review_of_the_2011_Proxy_Season_and_a_Look_Foward_to_2012.pdf.

recommendation by a proxy advising firm.⁴⁴ At the same time, issuers should expect to continue and improve communication with shareholders and proxy advisory firms, while preparing defensive strategies in case of proposal rejections or lukewarm shareholder support.⁴⁵ Moreover, upcoming SEC rules regarding disclosure of “pay-for-performance” and pay ratios may further instigate shareholders.⁴⁶ Another law firm warns that “‘pay-for-performance’ language is an attractive target” for dissatisfied shareholders and advises issuers to replace “kitchen sink” approaches to presenting compensation proposals with simple but detailed explanations of executive compensation plans.⁴⁷

Another option for issuers is to alter the *structure* of compensation along with or instead of the amount. Such changes could help satisfy proxy advisory firms whose ideal compensation packages focus on compensation structure as it relates to the issuer’s performance.⁴⁸ Increasingly, issuers have used stock-based pay to incentive and compensate its named executives.⁴⁹ In a special report on executive compensation, *The Wall Street Journal* suggests restructuring executive compensation such that executive performance aligns not only with those executives’ equity stakes in

⁴⁴ See *id.* At least two issuers successfully reversed negative recommendations by proxy advising firms in 2011. See *Defending Against Shareholder “Say-On-Pay” Suits*, *supra* note 10, at 3.

⁴⁵ See McGowan, Keehn & Sheehan, *supra* note 43.

⁴⁶ See *Implementing Dodd-Frank Wall Street Reform and Consumer Protection Act—Upcoming Activity*, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://sec.gov/spotlight/dodd-frank/dfactivity-upcoming.shtml#01-06-12> (last visited Feb. 8, 2012). Many issuers have pay-for-performance policies in place and outwardly attempt to adhere to them. See Saporoff, Greene, Leone-Quick & Stern, *supra* note 27. However, mandatory methods of disclosing such policies and how they factored into the board’s compensation decisions could highlight this issue for shareholders.

⁴⁷ See Saporoff, Greene, Leone-Quick & Stern, *supra* note 27.

⁴⁸ See Davidoff, *supra* note 8 (commenting that “the [proxy advisory] firms often focus on the structure of compensation and how tied it is to performance, not the absolute amount.”).

⁴⁹ See SUBODH MISHRA, ISS CORPORATE SERVICES, STOCKING UP: POST-CRISIS TRENDS IN U.S. EXECUTIVE PAY 2 (2012), available at http://www.isscorporateservices.com/sites/default/files/images/ISS_WhitePaper_Stocking_Up.pdf (“The past three reporting years covering fiscal 2008-2010 has seen a market shift toward the use of stock-based pay within the overall mix of pay elements for named executive officers collectively.”)

the company, but with their stakes in *debt*, as well.⁵⁰ Additionally, issuers should consider extending vesting periods until after executives retire in order to foster long-term thinking and perhaps reduce excessive short-term risk-taking.⁵¹ Given that most litigation arising out of say-on-pay voting focuses on pay as it relates to performance,⁵² it is safe to assume that shareholders care more about linking compensation to performance than capping salaries at a dollar amount. Rearranging compensation packages to encourage long-term decision-making and highlighting this factor in proxy disclosure statements is one way to tell shareholders that their long-term interests are important to the issuer and its executives.⁵³

F. The Future of Say-on-Pay

Not to be left out, shareholders overseas may soon wield a more powerful ballot against their own executives' compensation plans.⁵⁴ While British shareholders currently have the power of an advisory vote,⁵⁵ business secretary Vince Cable describes the current regime as a "clear market failure" given the continued "disconnect between top pay and company performance."⁵⁶ The British

⁵⁰ Alex Edelmans, *How to Fix Executive Compensation*, WALL ST. J., Feb. 27, 2012, at R1.

⁵¹ *Id.* The right compensation rewards and incentivizes properly. Excessive, short-term compensation packages catalyze excessive, short-term risk-taking, which economists and commentators believe was a significant cause of the 2008 credit crisis. *See* Keller & Stocker *supra* note 6.

⁵² *See, e.g.*, *Teamsters Local 237 Additional Sec. Benefit Fund v. McCarthy*, No. 2011-cv-197841, 2011 WL 4836230, at *2 (Super. Ct. Ga. Sept. 16, 2011). Plaintiffs in these cases often argue that the boards breached their fiduciary duties by having the issuers adopt "pay-for-performance" compensation policies and "fail[ing] to disclose in their proxy statements that the compensation awards were made notwithstanding or in contravention to these policies" Saparoff, Greene, Leone-Quick & Stern, *supra* note 27.

⁵³ As previously mentioned, the influence of proxy disclosure statements is one possible reason for why shareholder support for executive compensation proposals was so strong in 2011. *See* Lynn, *supra* note 5, at 7.

⁵⁴ Julia Werdigier, *British Government Looks to Rein In Executive Pay*, N.Y. TIMES, Jan. 23, 2012 (DealBook), <http://dealbook.nytimes.com/2012/01/23/british-government-looks-to-rein-in-executive-pay/>.

⁵⁵ *See* Orol, *supra* note 6.

⁵⁶ Werdigier, *supra* note 54. *But see* Fabrizio Ferri & David A. Maber, *Say on Pay Votes and CEO Compensation: Evidence from the UK*, REV. FIN.

government is thus looking to pass a bill that would require a scheme similar to the U.S. rule, particularly with respect to enhanced disclosure requirements.⁵⁷ Unlike Rule 14a-21, however, the shareholder vote proposed by Mr. Cable would be binding on issuers.⁵⁸

In the United States, issuers are preparing for the 2012 proxy season. So far, one issuer has failed its 2012 say-on-pay vote despite having received strong shareholder support for its compensation proposals in 2011.⁵⁹ Still, there are many votes yet to be had. As the season continues, it remains to be seen whether shareholders will continue to support executive compensation proposals as strongly as they did in 2011. If the trend persists, issuers might dampen their enthusiasm for shareholder dialogue and proxy advisory firm relationships. Conversely, if more shareholders begin to use say-on-pay votes to communicate disapproval, issuers might have to look beyond acknowledging their shareholders' voices and begin to make more substantive changes to—*i.e.*, *reduce*—executive compensation.

Kiersten Zaza⁶⁰

(forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1420394 (arguing that “UK investors perceived say on pay to be a value enhancing monitoring mechanism, and were successful in using say on pay votes to pressure firms to remove controversial pay practices and increase the sensitivity of pay to poor performance.”).

⁵⁷ Werdingier, *supra* note 54.

⁵⁸ *Id.*

⁵⁹ See *Unfavorable Say on Pay Votes – 2012*, EXECUTIVE PAY & LOYALTY, http://executiveloyalty.org/XC-Say_on_Pay_Unfav_2012.html (last visited Mar. 30, 2012) (“The 2011 [say-on-pay] vote was 82% favorable”); Int’l Game Tech., Supplemental Information Regarding Proposal 2 Advisory Vote on Executive Compensation (Schedule 14A) (Feb. 24, 2012), available at http://www.sec.gov/Archives/edgar/data/353944/000120677412000804/igt_defa14a.htm (disclosing that while two proxy advisory firms recommended that shareholders vote for the compensation proposal, ISS recommended that shareholders reject the proposal).

⁶⁰ Student, Boston University School of Law (J.D. 2013).