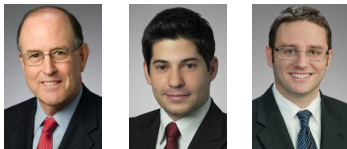


Securities Law

Federal Securities Law

Proxy Regulation

Responding to Negative Recommendations from Proxy Advisors on Say-on-Pay Proposals: Tactics Used by Reporting Companies in the 2011 Proxy Season



MAYER • BROWN

Contributed by Marc Folladori, Jeff Dobbs, and Ryan Cicero, Mayer Brown LLP

Introduction

Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires that all public reporting companies (except for certain exempted companies) include a resolution in their proxy statements asking shareholders to approve, on a

nonbinding, advisory basis, the compensation of their executive officers as disclosed under [Item 402](#) of Regulation S-K. This voting requirement is referred to as “say-on-pay.”

Proxy advisory firms counsel investors on proxy and shareholder issues and provide recommendations as to how shareholders should vote on a given proposal. Institutional Shareholder Services (ISS) is the largest proxy advisory firm, followed by Glass Lewis & Co. (Glass Lewis). During the 2011 proxy season, advisory firms issued hundreds of “for” or “against” recommendations for say-on-pay proposals presented by companies to their shareholders. As of September 29, 2011, ISS had issued negative recommendations with respect to 340 companies during the 2011 proxy season.¹

Companies have a variety of tools at their disposal that they can use to respond to a negative recommendation on their compensation programs, including the following:

- advance individual engagement with institutional shareholders via conference calls and meetings;
- “roadshows” delivering informative materials to investment-side analysts and institutional shareholders;
- an additional analyst call focusing on executive compensation matters; and
- filing additional definitive proxy soliciting materials on Form DEFA14A.

Each one of these tools presents securities law concerns, as companies need to be mindful of the proxy rules of the Securities and Exchange Commission (SEC) and, where applicable, avoid disclosure of nonpublic material information. Additionally, a company’s use of any of the above tools could require a DEFA14A filing if a script, talking points, or slides are utilized. This article principally focuses on the practice (and effectiveness) of filing additional definitive proxy soliciting materials in response to a negative say-on-pay recommendation.²

Originally published by Bloomberg Finance L.P. Reprinted with permission. Bloomberg Law Reports® is a registered trademark and service mark of Bloomberg Finance L.P.

This document and any discussions set forth herein are for informational purposes only, and should not be construed as legal advice, which has to be addressed to particular facts and circumstances involved in any given situation. Review or use of the document and any discussions does not create an attorney-client relationship with the author or publisher. To the extent that this document may contain suggested provisions, they will require modification to suit a particular transaction, jurisdiction or situation. Please consult with an attorney with the appropriate level of experience if you have any questions. Any tax information contained in the document or discussions is not intended to be used, and cannot be used, for purposes of avoiding penalties imposed under the United States Internal Revenue Code. Any opinions expressed are those of the author. Bloomberg Finance L.P. and its affiliated entities do not take responsibility for the content in this document or discussions and do not make any representation or warranty as to their completeness or accuracy.

– Split Recommendations

The various proxy advisory firms have different approaches for evaluating say-on-pay proposals. As a result, it is not uncommon for companies to get a favorable recommendation from one advisory firm while receiving a negative recommendation from another.³ In addressing “split” recommendations such as these, companies should keep in mind that ISS recommendations probably carry more weight with investors than do recommendations from Glass Lewis or other proxy advisory firms. If a company receives a favorable recommendation from ISS and a negative recommendation from Glass Lewis or another firm, the company may not find it advisable to address the negative recommendation; it is possible that doing so would draw more attention to the negative recommendation than would otherwise be the case. Based on this premise, this article principally addresses responses by reporting companies to negative ISS recommendations, and assumes that ISS as well as other proxy advisory firms have issued negative recommendations in the particular company’s case.

– Analysis of Voting Statistics

Overall, ISS has recommended against “say on pay” proposals at approximately 11 percent of U.S. companies that have held advisory votes in 2011, but less than 2 percent of companies experienced failed say-on-pay votes.⁴ This suggests that companies have had some success in combating negative recommendations via engagement with shareholders and use of additional definitive proxy soliciting materials.

As of September 27, 2011, eight companies included in the S&P 500 index, or 1.6 percent of all companies that comprise the S&P 500 index, experienced failed say-on-pay votes.⁵ Of the more than 2,700 companies in the Russell 3000 index that reported voting results as of September 25, 2011,⁶ shareholders voted down say-on-pay proposals at only 38 of these companies. The fact that less than 2.0 percent of the companies in the Russell 3000 index that reported voting results lost their say-on-pay proposals indicates that investors overwhelmingly are approving say-on-pay proposals.⁷ As for companies that received failed votes, the primary concern appears to have been the relationship between pay and performance in the executive compensation plans.⁸ ISS identified pay for performance concerns with respect to 26 of the 36 Russell 3000 companies that experienced failed advisory votes.⁹ Nevertheless, more than 86 percent of the companies that received a negative recommendation from ISS still received a majority vote on their say-on-pay proposals.¹⁰

.....
The fact that less than 2.0 percent of the companies in the Russell 3000 index that reported voting results lost their say-on-pay proposals indicates that investors overwhelmingly are approving say-on-pay proposals.
.....

Failed say-on-pay proposals did not skew towards any specific industry; however, a larger proportion of the companies experiencing failed advisory votes are based in the energy, manufacturing, and homebuilding industries.¹¹ No company in the Russell 3000 that received a favorable recommendation from ISS had its proposal voted down, and, as indicated above, a large percentage of those that did receive a negative recommendation still had their proposals approved. Thus, a negative recommendation from an advisory firm is by no means a prediction of an impending failure of the say-on-pay vote. Rather, it appears that companies that did have a favorable recommendation were more likely to receive a much higher percentage of “yes” votes—91.2 percent on average—which may have beneficial effects on those companies’ businesses and public relations.¹²

Company Responses—the DEFA14A Trend

A trend emerged in 2011 among companies that received a negative recommendation from a proxy advisor. Since the beginning of the 2011 proxy season, there has been an increase in follow-up solicitation materials either directly or indirectly challenging a proxy advisor’s recommendation on say-on-pay proposals. These follow-up materials primarily consist of additional definitive proxy soliciting materials, filed on the SEC’s EDGAR database as DEFA14As. A DEFA14A filing is required under [Section 14\(a\)](#) of the Securities Exchange Act of 1934 and [Rule 14a-6](#) thereunder when a registered company wants to provide additional materials or make communications in connection with its solicitation of proxies for an upcoming shareholder vote. Examples of additional communication materials that have been used in solicitation efforts include letters to shareholders, website pages, email correspondence, presentation materials (particularly in the form of PowerPoint presentations), talking points, and scripts.¹³ Although the say-on-pay vote is nonbinding, a negative vote can impact investor relations adversely and increase litigation risk.¹⁴ Accordingly, concerns over lawsuits may prompt some companies to respond to a negative recommendation.

Companies filing DEFA14As often highlight errors or flaws in the analysis contained in the proxy advisor’s report, or provide arguments to strengthen their position on the say-on-pay proposal, so that shareholders will support the proposal notwithstanding the proxy advisor’s recommendation. Companies that have responded to a proxy advisor’s negative recommendation with a DEFA14A tend to include a defense

of compensation plans with respect to pay and performance, an attack on the peer groups of other companies cited by the proxy advisor, and/or a rebuttal of the valuation method used by the proxy advisor to evaluate executive compensation plans. A company's response to a negative recommendation does not always succeed in persuading shareholders to vote in favor of the say-on-pay-proposal. Companies that failed to receive a majority vote on their say-on-pay proposals after responding to an "against" recommendation from ISS include Hewlett-Packard Co. (receiving a 48 percent vote in favor of the say-on-pay proposal), Freeport-McMoRan Copper & Gold Inc. (46 percent), Jacobs Engineering Group Inc. (45 percent), Talbots, Inc. (47 percent), Navigant Consulting, Inc. (45 percent), Premiere Global Services, Inc. (48 percent), Blackbaud, Inc. (45 percent) and Monolithic Power Systems, Inc. (36 percent).

Specifics of a Negative Recommendation

ISS typically cites issues related to pay-for-performance compensation plans, problematic pay practices, and/or other miscellaneous concerns as its rationale for negative recommendations. Pay-for-performance relates to compensation plans that link compensation with specified performance targets. Specifically, ISS' pay-for-performance policy (as applicable to Russell 3000 companies) provides that a company may have a problematic compensation plan if the company has a total shareholder return (calculated as stock price appreciation plus dividends, as measured for the last fiscal year and over the last three fiscal years) that is below the median level of similar returns for the company's peer group.

Peer groups are determined by the company's four-digit Global Industry Classification Standard (GICS) grouping code. If both the one- and three-year returns are below the median, then ISS evaluates the CEO's "Total Direct Compensation," as opposed to the "Total Compensation" number listed on the proxy report, to determine if there is a disconnect in the pay-for-performance plan. Total Direct Compensation includes the salary, bonus, non-equity incentive plan compensation, changes in pensions and above-market non-qualified deferred compensation earnings, and all other compensation listed in the company's Summary Compensation Table in its proxy statement, plus the value of equity awards as calculated under ISS' own set of assumptions. If the CEO's Total Direct Compensation has not decreased significantly in the past year, then ISS digs further, examining other factors it considers relevant to its pay-for-performance analysis. Many companies have objected to the fundamental limitations of the ISS' evaluation of pay-for-performance plans; specifically, companies objected to the determination of the peer group, the valuation of equity awards, and the evaluation time horizon. Additionally, companies have objected to ISS' evaluations as being too narrow to capture nuances in specific compensation plans or to factor in recent changes in industries, leading to an adjustment of overall compensation policies.

.....
A company's response to a negative recommendation does not always succeed in persuading shareholders to vote in favor of the say-on-pay-proposal.
.....

DEFA14A Responses to Negative Recommendations

The following sections summarize how different companies have approached their DEFA14A response to a negative ISS recommendation. DEFA14A filings contesting the ISS' pay-for-performance analysis typically object to (1) ISS' analysis of the pay-for-performance relationship, (2) the determination of the peer group for comparison purposes, (3) ISS' valuation method and/or assumptions, and (4) factual errors in the ISS report. ISS' pay-for-performance assessment of the company appears to be a key dissenting point, with almost half of company responses to say-on-pay negative recommendations contesting this assessment. Additionally, some companies were able to persuade their executives to agree to changes in their compensation programs that then were described in a DEFA14A filing.

The Pay and Performance Relationship

The relationship between pay and performance is an important focus area for ISS. As stated above, ISS has a defined policy for evaluating pay-for-performance programs. ISS favors compensation plans that clearly link executive pay to company performance, and takes a dim view of companies whose plans do not seem to conform to ISS' policy.¹⁵ Companies that have received negative feedback from ISS on their pay-for-performance compensation typically have countered by pointing out that ISS considers these plans within a narrow scope that may or may not align with the company's business reality.¹⁶ But some companies that had argued their point of view regarding the connection between pay and performance nonetheless lost on the advisory vote, possibly because insufficient attention was paid to this point within their DEFA14A response.¹⁷

– Changes in Executive Compensation

Many companies have taken the tactic of stressing to shareholders that the CEO's total compensation has increased only slightly in recent years,¹⁸ or that it actually *decreased* in recent years.¹⁹ Nonetheless, some companies making these arguments received a failed advisory vote. Therefore, whether or not these particular arguments are a positive force in swaying shareholder voting sentiment has yet to be seen.²⁰ Shareholders may feel that if a compensation program is too far out of line with market standards,

then even a decrease in an executive's total compensation may not, by itself, be sufficient to cause shareholders to change their votes.

– Changes in the Economic Environment

Arguments that focus on the changed economic environment also may not prove successful in contesting negative recommendations. For example, Monolithic Power Systems noted that ISS did not focus on the totality of the circumstances surrounding its CEO's compensation for 2010 and missed the relationship between the company's compensation decisions for 2010 and 2009—that is, ISS' analysis did not take into account the fact that the large percentage increase in the CEO's total compensation in 2010 was largely due to his scaled-back total 2009 compensation due to decisions made by the compensation committee in the dark economic days of early 2009.²¹ Monolithic Power recorded one of the lowest percentages of “yes” votes for its say-on-pay proposal reported to date. This result may have been partially due to the company's placing too much significance on the economic downturn in its arguments and not enough emphasis on a fact-based discussion of why its pay-for-performance practices were not disadvantageous to the shareholders.²²

– Peer Group Comparisons

As mentioned above, ISS determines if compensation plans need further evaluation through a comparison of total shareholder return over one - and three-year horizons to the returns of a company's peer group. As such, many ISS reports include a decision based on the peer comparisons conducted. Numerous companies have filed DEFA14As contesting the peer comparisons, mostly on the grounds that the peer groups were chosen improperly and did not include or represent the companies' true peers.

Northern Trust Corp. claimed that ISS' calculations of comparative financial performance were flawed because the index used in the report included several companies engaged in entirely different and unrelated businesses.²³ Similarly, Masimo Corp. made note of specific factors making the ISS-defined peer group invalid; namely, that most of the companies included in its peer group in ISS' report had significantly smaller market capitalizations, and that many were based in locations having a substantially lower cost of living than Irvine, California, where Masimo's headquarters is located.²⁴ This approach was successful for Masimo, as its say-on-pay proposal passed by a majority vote. Several other companies also have been successful in securing favorable advisory votes after including challenges to ISS' peer groups in their DEFA14As.²⁵

Contesting ISS' peer group construction, however, did not guarantee success in all say-on-pay votes. Premiere Global Services, Inc. stated that ISS' peer comparison did not take into account its true peers, which resulted in an unfair representation

of the company's recent performance.²⁶ This argument was presumably unpersuasive, since the company lost the advisory vote, receiving only 48 percent in favor, just shy of a majority.

ISS favors compensation plans that clearly link executive pay to company performance.

Similarly, Talbots, Inc. objected to the peer group composed by ISS.²⁷ Talbots noted that when looking at the “truly relevant peer companies (as were included in an [independent consulting study]),” the compensation of the top five executives as a whole, and the CEO as an individual, were significantly below the peer companies' median levels. However, Talbots did not include information about the methodology it used to select what it believed to be its peer companies, other than making the blanket statement that the Talbot-selected peer companies “(1) compete for the same executive talent and (2) more closely resemble Talbots competitive, operating and customer profile,” as well as operate in the “higher-end fashion retailer market.”²⁸

– Valuation Assumptions

Virtually every DEFA14A filed has contested ISS' valuation assumptions. Companies have attacked ISS' policy of not evaluating stock options as of the time of their grant, which is more consistent with U.S. generally accepted accounting principles (GAAP) or other valuation guidelines.²⁹ Others generally have criticized ISS' valuation method because, in their view, it overstated CEO compensation. For example, Tyco International Ltd. argued that the ISS model's evaluation of “fair value” of stock options granted had penalized the company strongly by inflating the value of its CEO's compensation in relation to peers that utilized restricted units in their compensation packages instead of stock options.³⁰

– Short-Term Versus Long-Term Horizons

The short time frame by which ISS evaluates compensation plans has been attacked frequently in DEFA14As. In its DEFA14A filing, General Electric Co. “strongly disagree[d] with ISS' analysis, which evaluates stock-price performance over a multi-year period, but evaluates CEO compensation on a year-over-year basis.”³¹ General Electric Co. argued that a year-over-year comparison of CEO compensation ignored the fact that the CEO had declined bonus awards and long-term performance plan payouts during the recession years of 2008 and 2009 and that his real increase in compensation from 2007 to 2010 was only 6.4 percent (excluding increases in the value of his pension).

– Factual Errors

Another key tactic used by many companies is to highlight perceived factual inaccuracies in the ISS report. This may serve to undermine shareholder perception of the validity of the report and weaken shareholder reliance on the recommendations made by ISS. Many companies have been successful in obtaining approval of their say-on-pay programs after identifying factual mistakes in the ISS report.³²

– Changes Already in Place

A few companies have responded to ISS negative recommendations by demonstrating that the changes advocated in the ISS reports already have been implemented; it proved successful for at least one company to do so.³³ In addition, some companies have made the decision to make changes to their compensation practices before filing their response to ISS' recommendation. This typically has happened in the context of debates over tax gross-ups. The Walt Disney Company actually removed its tax gross-up policy prior to the mailing of its proxy statement, and was quick to point this out in its response to ISS' recommendation regarding that removal.³⁴ By taking action to address the issue prior to both its DEFA14A response and its shareholder meeting, Disney arguably made it more likely that its shareholders would not be persuaded by ISS' other arguments within the report.³⁵

General Advice for DEFA14A Responses to Negative Recommendations

Based on statistics from 2011, a negative recommendation from ISS may not cause a failed advisory vote, but such a recommendation presents an opportunity for companies to engage with their shareholders. Companies should utilize the DEFA14A response mechanism to highlight business practices and company achievements that support the say-on-pay proposal. In doing so, companies should provide precise and informative materials that address the issues raised by the ISS report.

On a general basis, it is difficult to make the argument that, but for a company's DEFA14A filing, the company's say-on-pay vote would have failed; rather, the DEFA14A response is perhaps a factor that could help increase the likelihood of shareholder approval. In constructing DEFA14A responses to negative recommendations on say-on-pay, companies should consider the following factors:

- Negative recommendations that question the pay and performance relationship in an executive compensation plan appear to be the principal indicator of an impending failed advisory vote;
- It may prove useful to include information illustrating the company's positive corporate governance history with regard to executive compensation;³⁶

- It may be worthwhile to address shareholder concerns after filing the DEFA14A, such as modification of existing compensation plans, awards, employment agreements, and change in control agreements, and then consider filing a second DEFA14A highlighting that the company has addressed the concerns proactively;
- Companies should not hesitate to point out perceived substantive errors in proxy advisors' analysis of compensation programs. Companies in the S&P 500 can get an advance copy of the ISS report and may be able to communicate any errors identified before the report is disseminated publicly;
- Although it may be necessary in some instances to confront a particular aspect of an ISS report directly, companies generally should attempt to communicate a positive tone and message to shareholders rather than to appear defensive to criticism;
- Companies should consider preparing a DEFA14A before the proxy advisor reports are released in order to preempt likely concerns from proxy advisors and institutional shareholders; and
- Companies should make sure that any proxy solicitation firms engaged by them are well-versed in the arguments in favor of their compensation programs so that the solicitation firms are well-prepared for shareholder dialogue.

Marc Folladori has more than 35 years' experience assisting a broad spectrum of corporate clients. He has been a merger & acquisition and securities attorney in Texas since 1974, and has extensive experience representing companies in corporate governance and securities law disclosure matters. Folladori serves as outside corporate counsel for a number of publicly-held corporations and also provides U.S. counsel to foreign companies doing business in the United States. Marc can be reached at mfolladori@mayerbrown.com.

Jeff Dobbs is an associate in the Houston office of Mayer Brown's Corporate & Securities practice. His practice focuses on mergers and acquisitions, securities offerings, corporate governance, and general corporate matters. Dobbs has represented clients in a broad range of industries, including energy companies, telecommunications companies, chemical companies, biotechnology companies, and financial services companies. Jeff can be reached at jdobbs@mayerbrown.com.

Ryan Cicero is an associate in the Houston office of Mayer Brown's Corporate & Securities practice. His practice focuses on mergers and acquisitions, capital markets and general corporate governance. Ryan represents issuers and underwriters in debt and equity offerings, purchasers and sellers in mergers and acquisitions, and domestic and international companies in capital markets transactions. Ryan can be reached at rcicero@mayerbrown.com.

¹ 2011 U.S. Postseason Report, available at <http://www.issgovernance.com> (last visited Nov. 22, 2011); see also James D.C. Barrall & Alice M. Chung, *Say on Pay in the 2011 Proxy Season: Lessons Learned and Coming Attractions for U.S. Public Companies*, The Conference Board, Director Notes, No. DN-V3N13, July 2011, available at <http://www.issgovernance.com>.

conference-board.org/topics/publicationdetail.cfm?publicationid=1977&topicid=10&subtopicid=20.

- ² In particular, this article reviews the filing of DEFA14As in response to negative recommendations from proxy advisors. For a general discussion of the tools available to companies to defend their compensation programs, see *Reaching Out for Say-on-Pay Approval: Additional Soliciting Material this Proxy Season*, The Corporate Counsel, Vol. XXXVI, No. 3, May 2011.
- ³ See, e.g., *Gilead Sciences, Inc.*, Definitive Additional Materials (Form DEFA14A) (Apr. 28, 2011) (receiving a negative recommendation from ISS while receiving a positive recommendation from Glass Lewis); *RBC Bearings Inc.*, Definitive Additional Materials (Form DEFA14A) (Aug. 25, 2011) (same); *Cambrex Co.*, Definitive Additional Materials (Form DEFA14A) (Apr. 18, 2011) (same); *Healthcare Realty Trust Inc.*, Definitive Additional Materials (Form DEFA14A) (May 4, 2011) (same).
- ⁴ See 2011 U.S. Postseason Report, *supra* note 1.
- ⁵ S&P 900 Say on Pay Votes Reported Through September 27, 2011, available at <http://www.say-on-pay.com> (last visited Nov. 22, 2011).
- ⁶ Foley & Lardner LLP, Say on Pay Report from the 2011 Proxy Season, Legal News Alert, Oct. 17, 2011 (citing Mark Borges, *This Week's 'Say on Pay' Vote Results*, Sept. 25, 2011, available at <http://www.compensationstandards.com>).
- ⁷ Say on Pay Report from the 2011 Proxy Season, *supra* note 6.
- ⁸ 2011 U.S. Season Review: Say on Pay, ISS Governance Weekly, June 23, 2011.
- ⁹ *Id.*
- ¹⁰ Michael R. Littenberg, *The Votes Are In – Deconstructing the 2011 Say on Pay Vote*, The Harvard Law School Forum on Corporate Governance and Financial Regulation, July 29, 2011.
- ¹¹ *Id.*
- ¹² Michael R. Littenberg, *The Votes Are In on 'Say on Pay' in 2011*, Financial Executive, Sept. 2011.
- ¹³ Additional definitive proxy materials often are filed regardless of whether it is apparent that a negative recommendation concerning any board-sponsored proposal has been made. See, e.g., *Microsoft Corp.*, Definitive Additional Materials (Form DEFA14A) (Oct. 18, 2011) (update to shareholders regarding corporate governance changes); *Symantec Corp.*, Definitive Additional Materials (Form DEFA14A) (Sept. 14, 2011) (powerpoint slides with bullet points addressing compensation levels and a shareholder proposal); *Cedar Fair, L.P.*, Definitive Additional Materials (Form DEFA14A) (July 1, 2011) (reporting positive recommendations for board-backed proposals by the three leading proxy advisory firms).
- ¹⁴ Littenberg, *supra* note 12.
- ¹⁵ See, e.g., *Tyco Int'l Ltd.*, Definitive Additional Materials (Form DEFA14A) (Feb. 22, 2011) (refuting ISS' premise that Tyco's compensation plan does not align the CEO's pay with company performance); *RBC Bearings Inc.* Form DEFA14A, *supra* note 3 (same).
- ¹⁶ See *Gen. Elec. Co.*, Definitive Additional Materials (Form DEFA14A) (Apr. 7, 2011) (claiming that ISS' analysis failed to consider actions that aligned pay with performance during the recession); *Northern Trust Corp.*, Definitive Additional Materials (Form DEFA14A) (Apr. 1, 2011) (reemphasizing components of compensation related to equity-based incentive pay, cash incentives and business results); *McKesson Corp.*, Definitive Additional Materials (Form DEFA14A) (July 12, 2011) (noting strong financial and stock price performance along with recent changes made to compensation programs that aligned pay and performance). See also *Vornado Realty Trust*, Definitive Additional Materials (Form DEFA14A) (May 20, 2011) (noting that ISS did not state the company had a pay-for-performance misalignment, but that there was a concern about "a potential pay-for-performance misalignment" and then providing arguments why this was not the case); *Polo Ralph Lauren Corp.*, Definitive Additional Materials (Form DEFA14A) (July 26, 2011) (noting that ISS had acknowledged the company's net income improvements but determined that the company's performance goals were not sufficiently challenging; the company argued that ISS had failed to recognize general global economic weakness and uncertainty, as well as company strategic decisions and investments that were considered when the compensation committee set its performance goals). But see *Blackbaud, Inc.*, Definitive Additional Materials (Form DEFA14A) (June 10, 2011) (characterizing the ISS report as "fundamentally flawed because [it is] based on rigid models that fail to take into account Blackbaud's individual facts and circumstances").
- ¹⁷ See *Monolithic Power Sys., Inc.*, Definitive Additional Materials (Form DEFA14A) (June 10, 2011) (stating that long-term incentive compensation awards were tied to performance, based on achievement of revenue and non-GAAP operating income targets, but providing no further detail other than somewhat broad arguments); *Hewlett-Packard Co.*, Definitive Additional Materials (Form DEFA14A) (Mar. 11, 2011) (providing support for the company's pay-for-performance philosophy in one paragraph, principally referring to the shareholders to the company's previously-filed definitive proxy statement).
- ¹⁸ See *Gen. Elec.* Form DEFA14A, *supra* note 16 (noting that the CEO's pay increased a modest 6.4 percent since 2007, which was the last year he received a bonus).
- ¹⁹ See *McKesson Corp.* Form DEFA14A, *supra* note 16 (noting that ISS and Glass Lewis both acknowledged a 13 percent decrease in CEO compensation in the last year, though the two firms reached different conclusions on the company's proposal); *Tyco Int'l Ltd.* Form DEFA14A, *supra* note 15 (refuting the ISS report statement that the CEO's pay had remained relatively high in the past several years when in fact there had been a 14 percent decrease in compensation for the CEO in the last year, a more-than 30 percent decrease in targeted direct compensation); *Gilead Sciences, Inc.* Form DEFA14A, *supra* note 3 (noting that the CEO's total pay decreased from 2009 to 2010).
- ²⁰ See *Navigant Consulting, Inc.*, Definitive Additional Materials (Form DEFA14A) (Apr. 15, 2011) (stating that the CEO's total compensation had actually decreased in the last two years); *Talbots, Inc.*, Definitive Additional Materials (Form DEFA14A) (May 5, 2011) (arguing that pay was linked to performance properly given the company's at-risk compensation factors and that the CEO had not been awarded a salary increase since 2007).
- ²¹ *Monolithic Power Sys.* Form DEFA14A, *supra* note 17.
- ²² See also *Premiere Global Services, Inc.*, Definitive Additional Materials (Form DEFA14A) (June 2, 2011) (stating that "ISS' analysis failed to provide sufficient weight to company performance and alignment with pay-for-performance or to consider actions that aligned pay with performance during the recession").
- ²³ *Northern Trust Corp.* Form DEFA14A, *supra* note 16. See also *The Advisory Bd Co.*, Definitive Additional Materials (Form DEFA14A) (Aug. 25, 2011); *Amgen Inc.*, Definitive Additional Materials (Form DEFA14A) (May 9, 2011); *Principal Fin. Grp. Inc.*, Definitive Additional Materials (Form DEFA14A) (May, 4, 2011).
- ²⁴ *Masimo Corp.*, Definitive Additional Materials (Form DEFA14A) (May 23, 2011).
- ²⁵ See *Douglas Emmett Inc.*, Definitive Additional Materials (Form DEFA14A) (May 17, 2011); *Exxon Mobil Corp.*, Definitive Additional Materials (Form DEFA14A) (May 6, 2011); *J. C. Penney Co.*, Definitive Additional Materials (Form DEFA14A) (May 3, 2011).
- ²⁶ *Premiere Global Services, Inc.* Form DEFA14A, *supra* note 22.
- ²⁷ *Talbots, Inc.* Form DEFA14A, *supra* note 20.
- ²⁸ See also *Blackbaud Inc.* Form DEFA14A, *supra* note 16 (contending that ISS' definition of Blackbaud's peer group was incorrect because it focused "on a narrow range of publicly reported numerical measures alone, without application of qualitative criteria," pointing out to shareholders that it already had listed in its proxy statement its peer group and its methodology used with respect to these peers, which was based on qualitative and quantitative factors).
- ²⁹ See *RBC Bearings Inc.* Form DEFA14A, *supra* note 3 ("Instead of using the stock option values disclosed in our summary compensation table, ISS uses a different stock option valuations [sic] but does not appear to disclose the data source or method of calculation, and we believe [the ISS valuations] are not calculated in accordance with the accounting standards required by Regulation S-K, Item 402 under the Securities Exchange Act of 1934"); *Masimo Corp.* Form DEFA14A, *supra* note 24 (noting that "ISS has completely disregarded [the company's] stock option grant valuations, which are based on U.S. generally accepted accounting principles and [Securities and Exchange Commission] guidance, and instead used valuations that are inconsistent with applicable accounting guidance and proxy disclosure rules," resulting in an option valuation difference of more than 37 percent for 2010); *Gen. Elec. Co.* Form DEFA14A, *supra* note 16 (claiming that ISS' valuation of the CEO's option grant significantly overstated his total compensation and the ISS valuation model not only differed from GE's model, but also was inconsistent with GAAP); *Vornado Realty Trust* Form DEFA14A, *supra* note 16 (noting that "ISS' shorter holding period resulted in an option valuation approximately twice that resulting under GAAP calculations and overstates the value of [the option] awards"); *Amgen Inc.* Form DEFA14A, *supra* note 23 (stating that ISS overvalued the CEO's compensation and the

ISS methodology was inconsistent with GAAP and proxy disclosure rules); *Gilead Sciences Inc.* Form DEFA14A, *supra* note 3 (same); *Assured Guar. Ltd.*, Definitive Additional Materials (Form DEFA14A) (Apr. 22, 2011) (same); *Zimmer Holdings Inc.*, Definitive Additional Materials (Form DEFA14A) (Apr. 15, 2011) (same).

³⁰ *Tyco Int'l Ltd.* Form DEFA14A, *supra* note 15. See also *Collective Brands Inc.*, Definitive Additional Materials (Form DEFA14A) (May 17, 2011) (arguing that ISS' methodology overstated the value of stock appreciation rights); *J. C. Penney Co.*, Form DEFA14A, *supra* note 25 (stating that ISS' valuation significantly overstated the CEO's compensation); *Premiere Global Services, Inc.* Form DEFA14A, *supra* note 22 (stating that ISS' valuation of CEO's compensation significantly overstated his total compensation (and subsequently failing on the advisory vote)); *Freeport-McMoRan Copper & Gold Inc.*, Definitive Additional Materials (Form DEFA14A) (June 2, 2011) (noting "ISS' valuation of our stock option grants in February 2010 results in a 33% overstatement of the CEO's total compensation" (but losing the advisory vote)).

³¹ *Gen. Elec. Co.* Form DEFA14A, *supra* note 16; in response to arguments such as these, ISS announced in December 2011 that its pay-for-performance quantitative assessment will include two components—one component based on an evaluation of rankings of CEO pay and performance relative to a company's peers over a three-year period, and beginning in 2012, a new component based upon an evaluation of CEO pay trends relative to the company's shareholder return trends over a five-year period. See also <http://www.issgovernance.com/docs/EvaluatingPayForPerformance2012> for the new ISS pay-for-performance standards.

³² See *Cardinal Health, Inc.*, Definitive Additional Materials (Form DEFA14A) (Oct. 25, 2011) (noting that Glass Lewis incorrectly stated that the company does not grant performance-based long-term incentive awards); *The Walt Disney Co.*, Definitive Additional Materials (Form DEFA14A) (Mar. 2, 2011) (pointing out that ISS made an error in its report that was acknowledged in the introduction to the report but not corrected in the body, and that error resulted in an incorrect analysis upon which the recommendation relied); *Cambrex Corp.* Form DEFA14A, *supra* note 3 (noting, for example, that ISS indicated that the company did not disclose stock ownership guidelines for its directors when it was in fact disclosed on page 27 of the proxy statement); *Masimo Corp.* Form DEFA14A, *supra* note 24 (listing a number of "factual inaccuracies [that] call the integrity of the ISS report into question," including an inflated estimation of dilutable shares and an overestimation of the value of the CEO's option grant); *Principal Fin. Grp. Inc.* Form DEFA14A, *supra* note 23 (noting that ISS misstated the amounts of several elements of the CEO's pay); *Douglas Emmett Inc.* Form DEFA14A, *supra* note 25 (reporting that, after discussions with ISS, ISS agreed that the CEO's compensation plan, if fairly calculated on a GAAP basis, was actually at least 10 percent lower in 2010 than in 2009, and that it had agreed to recognize other errors made in the report). But see *Freeport-McMoRan Copper & Gold Inc.* Form DEFA14A, *supra* note 30 (stating that ISS did not consider the facts as disclosed by the company in its proxy statement but without providing much by way of background information); *Premiere Global Services Inc.* Form DEFA14A, *supra* note 22 (identifying numerous incorrect statements and factual oversights made by ISS in the report (but still losing on the advisory vote)).

³³ See *Cbeyond, Inc.*, Definitive Additional Materials (Form DEFA14A) (June 10, 2011) (contending that ISS' criticism of the company's compensation plan "is primarily backward-looking and fails to take into account recommended remedies already enacted for 2011 and future periods").

³⁴ *The Walt Disney Co.* Form DEFA14A, *supra* note 32.

³⁵ See also *Assured Guar. Ltd.* Form DEFA14A, *supra* note 29 (disclosing that the executives had agreed to waive their tax gross-up payments prior to the board meeting).

³⁶ See, e.g., *Microsoft Corp.*, Form DEFA14A, *supra* note 13; *Symantec Corp.* Form DEFA14A, *supra* note 13.