Battling for Say-on-Pay Transparency

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Proponents of Dodd-Frank's Say-on-Pay provision envisioned greater corporate transparency and accountability and, as a result, "greater efficiency and social responsiveness."[1] Indeed, those who fought for the legislation did so because of the very real need for greater transparency.[2] However, a cynical view and a dismissive attitude toward that spirit of transparency have hindered the ability of public shareholders to evaluate the information necessary to determine whether their interests are properly aligned with company executives.

Excessive Executive Pay

Executive compensation carries significant importance to shareholders, not only because of the actual expenses incurred from executive salaries, but also because of potential inefficient pay structures that may distort executives' incentives to perform. Indeed, the somewhat unfathomable rise in executive pay during the previous three decades has been the cause of considerable public criticism.[3] Alarming statistics demonstrate that the divide has only widened between executives and everyday workers during this period of time, which in turn, has led to substantial debate about executive pay practices. Shareholders and commentators loudly voiced their concerns about excessive executive compensation following the corporate scandals involving companies such as Enron and WorldCom early in the new millennium and again, following the 2007-2008 financial crisis. Those concerns, at times mixed with outrage, are fueled by the sentiment of income inequality – executive compensation has exploded while the compensation of average workers has lagged well behind. A recent AFL-CIO analysis of CEO pay across a broad sample of S&P 500 firms demonstrates that the average CEO earned 380 times more than the typical U.S. worker.[4] Thirty years earlier, that multiple was 42.[5] Executive

[1] Randall S. Thomas et al., *Dodd-Frank's Say on Pay: Will it Lead to a Greater Role for Shareholders in Corporate Governance?*, 97 CORNELL L. REV. 1213, 1228 (2012).
[2] *See Empowering Shareholders on Executive Compensation: Hearing on H.R. 1257 Before the H. Comm. on Fin. Servs.*, 110th Cong. 68 (2007) (testimony of David A. Scott, U.S. Representative for Georgia's 13th congressional district, pg. 4), (testimony of Michael N. Castle, Governor of Delaware from 1985 to 1992 and the U.S. Representative for Delaware's At-large congressional district from 1993 until 2011, pg. 5), (written testimony of Lucian A. Bebchuk,William J. Friedman and Alicia Townsend Friedman Professor of Law, Economics, and Finance, Harvard Law School), (Letter from the California State Teachers' Retirement System (CalSTRS), at 151) *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg35402/pdf/CHRG-110hhrg35402.pdf.
[3] Lucian Bebchuk & Jesse Fried, *Pay Without Performance: Overview of the Issues*, 30 J. CORP. L. 647 (2005).
[4] Leslie Kwoh, *Firms Resist New Pay-Equity Rules*, WALL ST. J., June 26, 2012, http://online.wsj.com/article/SB10001424052702304458604577490842584787190.html.
[5] *Id*. James B. Stewart, Pulitzer Prize winning writer for the New York Times, remarked that the gap is only getting wider. *In a Weak Economy, Why is CEO Pay on the Rise* (Oct. 4, 2011) http://www.pbs.org/newshour/bb/business/july-dec11/ceopay_10-04.html ("The last numbers I saw from the Bureau of Labor Statistics, which I think covered through the end of 2010, indicated that in 2010, CEO pay on average went up over 27 percent, and for the average non-supervisory worker, it was hovering down around 2 percent."). Similarly, between 1979 and 2005, the inflation-adjusted, after tax income of middle class Americans rose 21% while from 1970 to 1999, the average annual real compensation of the top 100 CEO's increased by over 2800% while the average annual salary in the US increased by approximately 10%. *See* Paul Krugman, *For Richer*, N.Y. TIMES, Oct. 20, 2002, http://www.nytimes.com/2002/10/20/magazine/for-richer.html?pagewanted=all&src=pm. Additionally, 97 percent of companies paid their executives bonuses in 2011, even if company performance fell below the median level of their industry peers. Nell Minow, *Executive Decisions: Why CEO Pay Spun Out of*

compensation not only has increased at an incredibly disproportionate rate from the average worker's salary but indeed, CEO compensation also increased more than 725 percent between 1978 and 2011, nearly two times greater than stock market growth over the same period.[6]

Enter Dodd-Frank's Say-on-Pay

It was against this backdrop that Dodd-Frank's Say-on-Pay provision became a necessary means to create transparency regarding executive compensation. Barney Frank, member of the U.S. House of Representatives and former chairman of the House Financial Services Committee, introduced a Say-on-Pay bill to the House of Representatives in February of 2006, seeking to address excessive executive pay by providing shareholders of U.S. companies the ability to cast an advisory vote on executive compensation.[7] Meanwhile, also in 2006, the American Federation of State, County, and Municipal Employees ("AFSCME") sponsored eight shareholder proposals calling for boards to implement a policy providing shareholders with an advisory vote on executive compensation.[8] By 2008, some companies began voluntarily submitting their executive compensation to an advisory shareholder vote.[9] One year later, Say-on-Pay proposals constituted the largest category of shareholder-sponsored proposals.[10]

Beginning in 2009, Congress required Say-on-Pay votes for all financial firms receiving Troubled Asset Relief Program ("TARP") funds.[11] All the while, advocates of a Say-on-Pay vote anticipated that providing shareholders with an advisory vote on executive compensation would stop executive pay from spiraling out of control.[12] AFSCME, for example, expected that a Say-on-Pay vote might reduce excesses in executive pay.[13] Lucian Bebchuk, Harvard Law School professor, projected that Say-on-Pay votes would make directors more attentive to shareholder views and could potentially deter some egregious compensation arrangements.[14] Members of Congress similarly anticipated the potential positives that could flow from these votes, such as transparency, an ability to put a halt to pay structures that encourage excessive risk taking and the potential alignment of pay with financial performance.[15] With this backdrop of seeking transparency and accountability, the Say-on-Pay requirement was extended to all public companies when the Congress passed the Dodd-Frank Wall Street Reform and Consumer

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Control, THE NEW REPUBLIC, Feb. 8, 2012, http://www.tnr.com/article/magazine/100519/ceo-bonus-inequality-securities-crisis-severance#.

[6] *See* Lawrence Mishel & Natalie Sabadish, *CEO Pay and the Top 1%: How Executive Compensation and Financial-Sector Pay Have Fueled Income Inequality*, May 2, 2012, Economic Policy Institute, http://www.epi.org/publication/ib331-ceo-pay-top-1-percent/.

[7] Challie Dunn & Carol Bowie, *Evaluating U.S. Company Management Say on Pay Proposals: Four Steps for Investors*, Mar. 16, 2009, RiskMetrics Group 5, http://www.shareholderforum.com/sop/Library/20090316_RiskMetrics.pdf. While the bill passed in the House, the companion bill never made its way out of the Senate. *Id.*

[8] *Id*. at 4.

[9] Thomas, *supra* note 1, at 1218.

[10] *Id*. at 1217-18.

[11] *Id.* These mandatory votes were the result of Connecticut Senator Christopher Dodd's amendment to President Barack Obama's stimulus bill. Dunn, *supra* note 7, at 5.

[12] Thomas, *supra* note 1, at 1232.

[13] *Id.*

[14] *See id*. at 1232-33.

[15] *Id.* at 1235.

Protection Act in 2010.[16] While legislation concerning executive pay continues to evolve in the United States and around the world, the United Kingdom recently unveiled legislation that would give investors a binding vote on executive pay. A reader poll, asking if shareholders should have an annual binding vote on executive pay, accompanied the Wall Street Journal article online and over 80% of the nearly 10,000 votes were in favor of such a measure.[17] It remains to be seen whether a binding vote on executive pay represents the next step taken in the United States to curb excessive executive pay.

Evolution of Disclosure Requirements

Shareholders have started to challenge the disclosures made in connection with Say-on-Pay votes in the proxy statements of certain public companies as not disclosing sufficient material information upon which shareholders can properly decide how to vote on executive compensation. Such lawsuits, filed in state court, generally allege that the directors of a company breached fiduciary duties, particularly the duty of candor, as shareholders have not been apprised of all material information which was reviewed and relied upon by the board of directors upon making their recommendations that shareholders approve executive pay. While some defense lawyers have argued, incorrectly, that these lawsuits belong in federal courts,[18] the requirement that directors disclose all material information in connection with shareholder communications is well recognized in Delaware.[19] Delaware has thus played, and continues to play, a central role in setting corporate governance rules and standards for the country's publicly traded companies.[20]

In 1977, the Supreme Court of Delaware decided *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. 1977), self-described by the court as "[t]he genesis of Delaware law regarding disclosure obligations."[21] There, in the context of a self-dealing transaction, the court recognized the fiduciary duty of "complete candor," of "complete frankness" under which "[c]ompletenesss, not adequacy, is both the norm and the mandate[.]"[22] This duty, which is actually simply "the application in a specific context of the board's fiduciary duties of care, good faith and loyalty,"[23] has evolved over time and has been applied in many contexts. The importance of complete disclosure of material information is easy to comprehend in the context of a merger, a context in which it is often applied. The Delaware Court of Chancery explained this importance in *Maric Capital Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1178 (Del. Ch. 2010),

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[16] *See* Thomas, *supra* note 1, at 1218.
[17] Cassell Bryan-Low, *U.K. Unveils Plan on Executive Pay*, WALL ST. J., June 20, 2012, http://online.wsj.com/article/SB10001424052702304765304577478172485959522.html#articleTabs%3Darticle.
[18] The basis asserted is the fact that Dodd-Frank is a federal statute.
[19] Delaware is home to a majority of the United States' publicly traded companies and 63% of the country's Fortune 500 companies. Jeffrey W. Bullock, Delaware Division of Corporations, 2011 Annual Report, p. 1, available at http://corp.delaware.gov/2011CorpAR.pdf.
[20] Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553 (2002). Delaware's Court of Chancery, the country's oldest business court, was established in 1792. Donald F. Parsons Jr. & Joseph R. Slights III, *The History of Delaware's Business Courts: Their Rise to Preeminence*, 17 BUS. L. TODAY 4, Mar./Apr. 2008, *available at* http://apps.americanbar.org/buslaw/blt/2008-03-04/slights.shtml.
[21] Arnold v. Soc'y for Sav. Bancorp, 650 A.2d 1270, 1276 (Del. 1994).
[22] *Lynch*, 383 A.2d at 281.
[23] *See* Malpiede v. Townson, 780 A.2d 1075, 1086 (Del. 2001).

succinctly stating that the "question that [] investors should be asking in determining whether to vote for the cash merger is clear: is the price being offered now fair compensation for the benefits I will receive as a stockholder from the future expected cash flows of the corporation if the corporation remains as a going concern?" Indeed, as Vice Chancellor Laster stated, "[t]his is it. This is the end. This is the only opportunity where you can depend upon your fiduciaries to maximize your share of that value."[24]

However, Delaware courts have also recognized the ultimate importance of the shareholders' right to vote on issues of corporate governance.[25] Indeed, the Supreme Court of Delaware has held that, through informed voting, "the stockholders control their own destiny" and that "[t]his is the highest and best form of corporate democracy."[26] To downplay the significance of a shareholder's need for full, fair and accurate disclosure simply because it is outside of the context of a merger not only unnecessarily diminishes the role of a shareholder, but it also mischaracterizes, or at least attempts to avoid, legal precedent. The Delaware courts have held time and again that the duty of full and fair disclosure extends to material[27] information even when no shareholder action is requested.[28] In *Malone v. Brincat*, the Supreme Court of Delaware held that "[w]henever directors communicate publicly or directly with shareholders about the corporation's affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty."[29] Thus, courts have recognized that, under state law, directors owe a fiduciary duty of honesty or complete candor in their communications to shareholders – including proxy statement communication[30], and therefore communications regarding the Say-on-Pay advisory vote – regardless of whether shareholder action is required.

Some defense firms, intent to rely on their belief that cases challenging the adequacy of proxy statement disclosures regarding Say-on-Pay are preempted by federal law, have removed these cases to federal court. Whether used as a tactic to stall in the face of an impending shareholder vote or out of a good faith belief that Delaware law does not apply in such cases, removal has not been successful. Three United States District Court Judges, two in the Northern District of California and one in the Southern District of New York, have had the opportunity to

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[24] Steinhardt v. Howard-Anderson, C.A. No. 5878-VCL (Del. Ch. Jan. 24, 2011) (Preliminary Injunction Hearing Transcript at *6).
[25] Mainiero v. Microbyx Corp., 699 A.2d 320, 324 (Del. Ch. 1996).
[26] Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996).
[27] Delaware follows the federal standard for materiality. If there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available," it is material and must be disclosed. *Arnold*, 650 A.2d at 1277. A plaintiff need not show that disclosure of the information would change their vote. David P. Simonetti Rollover IRA v. Margolis, No. 3694-VCN, 2008 Del. Ch. LEXIS 78, at *19 (Del. Ch. June 27, 2008). Rather, a fact is material and must be disclosed "if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote." Skeen v. Jo-Ann Stores, Inc., 750 A.2d 1170, 1172 (Del. 2000).
[28] Ciro, Inc. v. Gold, 816 F. Supp. 253, 266 (D. Del. 1993); Marhart, Inc. v. CalMat Co., No. 11,820, 1992 Del. Ch. LEXIS 85 (Del. Ch. Apr. 22, 1992); *Malone*, 722 A.2d at 10.
[29] *Malone*, 722 A.2d at 10.
[30] *See* Knee v. Brocade Comm'ns Sys., Inc., No. 1-12-CV-220249, slip op. at 2 (Cal. Super. Ct. Santa Clara Cnty. Apr. 10, 2012) (Kleinberg, J.) (enjoining the 2012 shareholder vote because certain information relating to projected executive compensation (as related to an equity plan share increase that had a potential dilutive effect on shareholders) was not properly disclosed in the proxy statement).

rule on plaintiffs' subsequent remand motions following removal and all three have remanded the cases back to state court, recognizing that the claims are grounded in common law, not in federal law as defendants argue.[31]

Quite simply, as described above, directors are subject to the fiduciary duties of due care, good faith and loyalty. The court in *Malone* further reasoned that this triad of fiduciary duties "is the constant compass by which all director actions for the corporation and interactions with its shareholders must be guided."[32] Thus, Plaintiffs' claims are governed by the notion that directors have an ever-present fiduciary duty to shareholders to deal with their stockholders honestly about the Company's corporate affairs.[33] Accordingly, federal laws are simply not at issue regarding state law claims alleging breach of fiduciary duty in Say-on-Pay disclosure claims.

The Missing Link

Corporate Boards of Directors generally review – and rely upon – a host of detailed, material analyses, often conducted by compensation consultants, prior to recommending shareholder approval of executive compensation. These analyses often include, for example, benchmarking analyses, competitive pay analyses and performance analyses that compare a given company's executive pay and performance metrics to its peer companies. Such analyses are vital, and indeed material, to shareholders because they allow the company's shareholders to determine if the company's executive pay and executive pay practices not only properly fell in line with its peer companies, but also if the company is following the benchmarking practices that it purports to use in setting executive pay. These analyses are also material because they allow shareholders to determine if the company's performance is in line with peer company performance, and thus, whether the performance is similarly in line with the resulting pay data.

It has been hypothesized that peer benchmarking is one of the main forces behind the ever-rising executive salaries.[34] It is often professed that there exists significant competition to attract and retain executive talent. This competition, whether real or perceived, ultimately has the effect of inefficient benchmarking, with firms seeking to pay more and more while performance remains stagnant. This "leapfrog effect" is the result of companies targeting compensation levels at a certain percentile of their peer companies' executive pay, which inevitably leads to overpayment.[35] The "leapfrog effect" is the resultant carry-through of one company's overpayment as it works its way through the market and simply leads to peer

[31] *See* Hutt v. Martha Stewart Living Omnimedia, Inc., No. 1-12-cv-03414 (S.D.N.Y. May 10, 2012); Rice v. Ultratech, Inc., No. 3-12-cv-03290 (N.D. Cal. July 2, 2011) (granting motion to remand); Boxer v. Accuray Inc., No. 4-12-cv-05722 (N.D. Cal. Nov. 29, 2012) (remanding action).
[32] *Malone*, 722 A.2d at 10.
[33] *See id*.
[34] *See* Charles M. Elson & Craig K. Ferrere, *Executive Superstars, Peer Groups and Over-Compensation – Cause, Effect and Solution*, J. CORP. L. (forthcoming Spring 2013). *See also* Thomas A. DiPrete, Greg Eirich and Matthew Pittinsky, *Compensation Benchmarking, Leapfrogs, and the Surge in Executive Pay*, 115 AM. J. SOC. 1671 (2010), *available at* http://www.ssc.wisc.edu/soc/faculty/docs/diprete/frog11302009.pdf; Geoffrey Colvin, *The Great CEO Pay Heist*, FORTUNE, June 25, 2001, http://money.cnn.com/magazines/fortune/fortune_archive/2001/06/25/305448/index.htm.
[35] *See id.*

companies then offering even higher compensation to executives to out-do the first company. This fact alone necessitates the disclosure of peer benchmarking analyses, so that shareholders can assess and determine the efficacy of the given analyses.[36]

The Advisory Nature of the Say-on-Pay Vote Does Not Alter its Significance

Defense counsel, in recent published work, have generally argued that a fair summary of the materials relied upon prior to recommending that shareholders approve executive compensation is unnecessary when considered in the context of an advisory vote. Such an argument may rely on the notion that the vote is merely advisory and will not require any actual action to be taken in response to a negative vote, therefore rendering the resulting "say" insignificant and hollow. Such a dismissive attitude, however, would ultimately render the purpose of the vote meaningless and eliminate the need for shareholders' informed say on executive pay.

Most companies generally declare within their proxy statements that while the Say-on-Pay vote is indeed not binding, the compensation committee of the board and the board value shareholders' opinions and will consider the outcome of the Say-on-Pay vote when establishing pay practices and making future compensation decisions. However, without disclosure of all material information to shareholders, the Say-on-Pay vote can potentially have the unintended effect of establishing and/or entrenching inefficient pay practices. Indeed, companies are currently required to disclose how they considered the results of the prior-year's Say-on-Pay vote in determining compensation policies and decisions and how the compensation policies and decisions were ultimately affected.[37] This underlies the significance of the Say-on-Pay vote and demonstrates that genuine changes to corporate governance may result from the vote. In order to be meaningful, however, it is necessary to ensure that shareholders are not relying on incomplete information when voicing their opinions on executive compensation.

Others have pointed to the dismissal of cases that were brought post-vote as derivative cases regarding Say-on-Pay as an indication that cases regarding Say-on-Pay proxy disclosures will suffer a similar fate. The cases and the context are quite different.[38] The post-vote cases have generally challenged the efficacy of a given company's executive compensation practices, not the pre-vote disclosures made to shareholders. These cases have sought to cause corporate change regarding executive pay practices.[39] It simply does not follow that because reform cannot be forced upon a board following an advisory vote, that recognized fiduciary duties can

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[36] Of course, every company is different and directors will review and rely upon different analyses prior to recommending shareholder approval of executive compensation. Thus, the information which must be disclosed will generally vary.

[37] Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Securities Act Release No. 9178, Exchange Act Release No. 63,768, 2011 WL 231597, at *25 (Jan. 25, 2011).

[38] Delaware courts have stated a preference for having proxy-related disclosure claims brought prior to the shareholder vote; once the vote has occurred on incomplete information, further disclosure may be of no use. Globis Partners, L.P. v. Plumtree Software, Inc., No. 1577-VCP, 2007 Del. Ch. LEXIS 169, at *37-38 (Del. Ch. Nov. 30, 2007).

[39] *See* Assad v. Hart, No. 11cv2269 WQH (BGS), 2012 U.S. Dist. LEXIS 2366, at *5-6 (S.D. Cal. Jan. 6, 2012) (Plaintiffs alleged that defendants breached their fiduciary duties by failing to amend or alter executive compensation in connection with a negative Say-on-Pay vote).

simply be ignored and that shareholders need not be provided all material information in a proxy statement, as is always the requirement. Quite simply, the advisory nature of the vote and the inability to force change upon a board does not alter the legal requirements that proxy disclosures include all material information.

A further argument is that an advisory vote does not properly provide a company with the specific insight necessary to address particular shareholder concerns arising from the vote. However, this ignores the positives that can flow from the non-binding Say-on-Pay vote. While a "yes" or "no" vote cannot signal specific shareholder concerns, it can alert a board that shareholders are dissatisfied with executive compensation and thus open the lines of communication. Joseph A. Grundfest, Stanford professor and corporate governance expert, opined that the voice of disapproval, even in a non-binding setting, is symbolic, and symbols "have consequences."[40] Negative Say-on-Pay votes, non-binding and symbolic as they may be, can have the effect of creating a dialogue between a board and company shareholders and can potentially provide the "impetus for incumbent directors to improve corporate [governance]."[41]

Another oft-used argument is that independent board members are in place to ensure that executive interests are not misaligned with shareholder interests. However, evidence establishes that executive pay and the use of equity-based compensation actually increases as the number of outsiders on the board increases.[42] Thus, Kevin J. Murphy argues, "[t]he evidence is therefore consistent with the hypothesis that directors – paying with shareholder money and not their own – prefer better-aligned incentives but are not particularly interested in restraining pay levels."[43] This research further demonstrates that simply placing a majority of disinterested board members on a company's board will not have the effect of perfectly aligning the interests of the executives and shareholders. Given this phenomena, it is therefore imperative that complete disclosure of all material information on executive compensation, as provided to and reviewed by the directors of a company in making their recommendation to shareholders, be made in the annual proxy statement so that shareholders can have their informed say on executive pay.

In the same vein, some have argued that executive pay is generally driven and set by market forces. Those market forces, however, may well be the result of a market operating inefficiently. Harvard Law School Professors Lucian A. Bebchuk and Jesse M. Fried performed an analysis that revealed "that market factors are neither sufficiently finely tuned nor sufficiently powerful" to compel outcomes similar to what may be expected to result from arm's length bargaining.[44] Their concern is that "executives have partly taken over the compensation machine, leading to arrangements that fail to provide managers with desirable incentives."[45] It therefore exemplifies the need for complete disclosure of all material information so that

[40] Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857, 865-66 (1993).
[41] *See id.*
[42] Kevin J. Murphy, *Executive Compensation: Where We are, and How We Got There*, George Constantinides, Milton Harris and René Stulz (eds.), HANDBOOK OF THE ECONOMICS OF FINANCE, Elsevier Science North Holland (Forthcoming) (August 12, 2012), *available at* http://ssrn.com/abstract=2041679 or http://dx.doi.org/10.2139/ssrn.2041679.
[43] *Id.*
[44] Lucian, *supra* note 3.
[45] *Id*. at 8.

shareholders can have their informed say on executive pay, rather than relying on independent board members, inefficient market forces or incomplete information[46].

Recent Backlash

Recent articles addressing the Say-on-Pay disclosure litigation have generally challenged the legitimacy of this type of litigation with a complete lack of context.[47] Perhaps in an attempt to sway public opinion, some make mention that while some lawsuits have provided additional disclosure upon which shareholders can base an informed Say-on-Pay vote, shareholders have not received any cash as a result of the litigation. Such a suggestion ignores the claims asserted in the litigation and the nature of the relief sought. These lawsuits seek the substantial benefit of achieving the disclosure of all material information so that shareholders can have their informed vote on executive compensation. Monetary damages cannot vindicate a shareholder's right to cast an informed vote. The Delaware Court of Chancery has made clear its preference for supplemental disclosures to be made in advance of a vote because such a remedy "gives stockholders the choice to think for themselves on full information, thereby vindicating their rights as stockholders to make important voting and remedial decisions based on their own economic self-interest."[48] Indeed, Delaware courts have also recognized that the lack of monetary relief does not detract from the significance of non-monetary relief received in cases that achieve additional disclosure.[49] It is thus disingenuous to suggest that shareholders are not benefitted by additional disclosure of material information. While such lawsuits may not provide an immediate inflow of cash to shareholders, an informed vote on Say-on-Pay may very well have the effect of better aligning shareholder-executive interests, improving corporate governance, reducing agency costs and leading to long-term increased value to the company and its shareholders.

The current dismissive attitude regarding the Say-on-Pay vote due its advisory nature essentially pilfers from shareholders the ability to signal their content or discontent with

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[46] A study performed by Farient Advisors, an executive compensation and performance advisory firm, demonstrated that 35% of the time investors cast advisory votes against executive compensation in their 37 company sample, it was because of poor disclosures. Robin Ferracone & Dayna Harris, *Say on Pay: Identifying Investor Concerns*, Council of Institutional Investors 16 (Sept. 2011), http://www.cii.org/UserFiles/file/resource%20center/publications/Say%20On%20Pay%20-%20Identifying%20Investor%20Concerns.pdf. One year later, Farient found that disclosures in 2012 proxies "often were poor, confusing, inadequate, or just plain inaccurate." Robin Ferracone & Jack Zwingli, *Pay Definitions: What Works Best in Pay for Performance Analysis*, Farient Advisors, Nov. 2012, *available at* http://www.farient.com/wp-content/uploads/2012/11/20121101-Farient-Advisors-Pay-Definitions-White-Paper.pdf.

[47] Certain articles have included assertions that are blatantly untrue. For example, a recent article authored by David F. Larcker, Stanford Law Professor, and Brian Tayan, a researcher with Stanford's Center for Leadership Development and Research, states that one law firm has filed 33 Say-on-Pay disclosure lawsuits in 2012. Their research, which they attach to their article, contradicts the assertion, showing that only half (17 of 33) that number has been filed. They also assert that one lawsuit in particular against Microsoft called for the disclosure of "all internal memos regarding discussions about executive compensation[,]" an assertion that has no basis in reality. David F. Larcker & Brian Tayan, *Shareholder Lawsuits: Where is the Line Between Legitimate and Frivolous?*, Stanford Closer Look Series, Nov. 27, 2012, available at www.gsb.stanford.edu/sites/default/files/documents/29_Lawsuits.pdf.

[48] *See* In re Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 208 (Del. Ch. 2007).

[49] *See* San Antonio Fire & Police Pension Fund v. Bradbury, C.A. No. 4446-VCN, 2010 Del. Ch. LEXIS 218, at *50 (Del. Ch. Oct. 28, 2010).

executive pay practices, thus making the vote far less likely to lead to potentially necessary and constructive pay reforms. Indeed, the Delaware Court of Chancery has held that "[t]he strengthening of shareholder interest in monitoring the activities of officers and directors only further emphasizes the importance of the shareholder franchise as the bedrock foundation upon which the legitimacy of directorial power rests."[50] Thus, shareholders must not be deprived of their right to cast an informed vote on a company's executive compensation.

[50] State of Wisconsin Inv. Bd. v. Peerless Sys. Corp., No. 17637, 2000 Del. Ch. LEXIS 170 (Del. Ch. Dec. 4, 2000).