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The Latest Results and Trends after Second Month of Say-on-Pay Voting

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It has now been two months since shareholders were able to render advisory votes on the executive compensation provided at their publicly-held companies in accordance with rules adopted by the Securities and Exchange Commission ("SEC") in January 2011 ("Say-On-Pay"). These rules were promulgated under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Reform Act"). Our Say-On-Pay Site provides periodic blogs on Say-on-Pay developments, along with an overview of the applicable rules and requirements, and there are also Say-On-Pay voting results and statistics which we have been updating and posting on a daily basis.

Of the 185 Say-On-Pay votes which have been reported through March 20, 2011, the shareholders at two companies, Jacobs Engineering Group Inc.and Beazer Homes USA, Inc., have voted against approving the executive compensation of their named executive officers. A third company, IsoRay, Inc., reported that its "*stockholders did not approve, on an advisory basis, the compensation of IsoRay's named executive officers*" even though it also reported that there were more "For" votes than "Against" votes on its Say-On-Pay proposal. We note that Beazer also announced earlier this month that its Chief Executive Officer had reached a settlement with the SEC whereby he would repay back to Beazer approximately $6.5 million of previously received compensation, along with company shares and stock units. As reported by the SEC, the disgorged amounts represented the CEO's entire fiscal year 2006 incentive bonus. Beazer had previously restated its 2006 financial statements and the forfeiture was required under the clawback provisions of the Sarbanes-Oxley Act which mandates that a CEO repay incentive compensation that was received as a result of the company's erroneous financial statements.

One element of the Say-On-Pay rules is that shareholders also get to vote on how frequently the Say-on-Pay vote will be conducted at their company ("Say-On-Frequency"). In particular, shareholders can provide an advisory vote that states their wishes as to whether the Say-on-Pay vote should occur every one, two or three years. In soliciting the Say-On-Frequency vote, a company's board of directors can provide its recommendation (or it can provide no recommendation) as to which frequency it believes shareholders should support.

Last month we reported in our February 22, 2011 "Trends Developing after First Month of Say-On-Pay Votes" blog that there was a trend which indicated that shareholders preferred annual Say-On-Frequency voting at least with respect to companies which are not smaller reporting companies. This trend has continued as annual frequency has received the most shareholder votes at over 60% of the companies that have reported on their Say-On-Frequency votes (and at over 70% if smaller reporting company results are excluded). This preference for annual voting is particularly evident with respect to those companies which are "Large Accelerated Filers", as such term is defined under SEC rules (i.e., public companies with a market value of at least $700 million), with the shareholders at 84% of such companies supporting annual voting. A biennial frequency continues to be the ignored "middle child" as such frequency has received the most votes at only 4% of reporting companies.

Moreover, as illustrated in the voting results tables, with just one exception at a smaller reporting company, whenever a board of directors has recommended an annual Say-On-Pay vote, the company's shareholders have so far always voted in support of such recommendation. Furthermore, even when a board of directors at a large accelerated filer has recommended triennial voting, the company's shareholders have voted against such recommendation in favor of a more frequent vote at close to 80% of the time.

"Smaller Reporting Companies" (i.e., those public companies with less than $75 million of public float) have had more success garnering support for triennial voting but, as we noted last month, we expect that going forward more/most smaller reporting companies will take advantage of the two year exemption from Say-On-Pay that was provided by the SEC in its final rules (i.e., smaller reporting companies therefore will not conduct a Say-On-Pay vote until required in 2013). This two year delay for smaller reporting companies represented a change from the SEC's proposed ruleswhich did not provide any such transitional relief for smaller reporting companies. Those smaller reporting companies that have conducted Say-On-Pay votes in early 2011 presumably had already filed their proxy statements (in accordance with the Reform Act and the SEC's proposed rules) for their annual meeting of shareholders prior to the release of the SEC's final rules which relaxed the Say-On-Pay requirements for smaller reporting companies. We have included their results even though technically they do not have to comply with Say-On-Pay until 2013. We note that since March 8,2011, only one smaller reporting company has reported a Say-On-Pay vote and we would expect this trend to continue as fewer smaller reporting companies will include a Say-On-Pay proposal in its annual proxy statement.

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