



Negative Say on Pay Vote Litigation

Posted by Paul Rowe, Wachtell, Lipton, Rosen & Katz, on Tuesday February 7, 2012

Editor's Note: [Paul Rowe](#) is a partner in the Litigation Department at Wachtell, Lipton, Rosen and Katz. This post is based on a Wachtell Lipton memorandum by Mr. Rowe, [Edward D. Herlihy](#), [Jeremy L. Goldstein](#), and [Jasand Mock](#).

In a decision reaffirming directors' authority to determine executive compensation, the United States District Court for the District of Oregon has ruled that a suit against bank directors arising out of a negative "say on pay" vote should be dismissed. The court determined that plaintiffs failed to raise a reasonable doubt that the challenged compensation was a reasonable exercise of the board's business judgment. This is the first federal court decision to dismiss such an action, a number of which have been filed in state and federal courts across the country in the wake of the Dodd-Frank Act. *Plumbers Local No. 137 Pension Fund v. Davis*, Civ. No. 03:11-633-AC (Jan. 11, 2012).

At issue in *Davis* was a decision by the compensation committee of Umpqua Holdings Corporation to pay increased compensation to certain executive officers for 2010 — a year in which the bank's performance had improved and met predetermined compensation targets, but total shareholder return was allegedly negative. In a subsequent advisory "say on pay" vote, a majority of the shares voted disapproved of the 2010 compensation. Plaintiffs claimed that it was unreasonable for the Umpqua board of directors to increase compensation and that the shareholder vote rejecting the compensation package was prima facie evidence that the board's action was not in the corporation's or shareholders' best interest.

The court rejected both of plaintiffs' arguments. Applying Delaware and Oregon law, the court determined that plaintiffs' "essential position . . . that if a simple comparison reveals a level of compensation inconsistent with general corporate performance, the business judgment presumption is necessarily overcome, [is] a position that is unsupported by the applicable standards." The court also held that the Dodd-Frank Act did not alter directors' fiduciary duties and that a negative "say on pay" vote alone does not suffice to rebut the business judgment protection for directors' compensation decisions. In so holding, the court expressly declined to follow a prior federal court decision which had denied a motion to dismiss in a "say on pay" action

in the Southern District of Ohio, *NECA-IBEW Pension Fund v. Cox*, No. 11-451 (S.D. Ohio, Sept. 20, 2011).

Davis is a powerful reminder that directors of both financial and non-financial companies may base compensation on long-term goals and choose the yardsticks by which to measure executive performance with confidence that courts will respect their good faith business judgment.