Say-on-Pay Litigation: Part Deux

Posted by William Savitt, Wachtell, Lipton, Rosen & Katz, on Tuesday December 11, 2012

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In recent months, several public companies have been subjected to lawsuits by plaintiffs alleging inadequacy of executive compensation disclosure for purposes of the non-binding advisory shareholder vote on executive compensation ("say-on-pay") required by the Dodd-Frank Act. In some cases, the complaints regarding say-on-pay disclosure have accompanied complaints regarding disclosure of amendments to equity compensation plans requiring shareholder approval. These new lawsuits follow earlier and largely unsuccessful fiduciary duty challenges brought against directors of companies that failed their say-on-pay votes; however, in contrast to the earlier cases, these new suits are actions brought as soon as companies file their proxies and seek to enjoin the shareholder vote from taking place.

The lawsuits that have been brought against companies holding say-on-pay votes are generally brought on the ground that their compensation disclosure is inadequate for shareholders to make an informed decision about the compensation resolution. Allegations in these actions frequently have included disclosure claims relating to (1) peer group selection, (2) compensation consultants, or (3) the particular mix of salary, cash incentive, and equity incentive compensation granted to executives. Allegations in actions regarding equity compensation plans frequently concern disclosure of the potential dilutive effects of the proposed amendments. In certain instances, plaintiffs have obtained settlements requiring companies holding votes on equity compensation plans to supplement their compensation disclosure and pay attorney's fees.

In a positive development last month, in separate cases, federal and state courts refused to grant injunctions on say-on-pay claims. In *Noble v. AAR Corp.*, the United States District Court for the Northern District of Illinois denied the plaintiff's motion for a temporary restraining order enjoining the shareholder vote, noting that the plaintiff could not cite any law requiring the requested disclosures. And in *Gordon v. Symantec Corp.*, a California state court likewise denied an

injunction after the defendants submitted an expert report establishing that the allegedly omitted information was rarely, if ever, included in the filings of peers in the defendant's industry.

While this new litigation trend is potentially troubling for public companies, the *AAR Corp.* and *Symantec* decisions suggest that courts will be properly cautious about letting litigation interfere with annual meetings. Companies should continue to carefully review their compensation disclosure to ensure that it fulfills the requirements of the securities laws, paying particular attention to areas on which the plaintiffs have focused to date. In addition, companies should be prepared for the possibility of having a similar suit filed against them this proxy season and should develop a litigation strategy in anticipation of this risk.