

February 25, 2013

Recent Decisions Stress Potential Disclosure-Based Litigation Claims

With the 2013 proxy season now well underway, two recent decisions emphasize the potential litigation risks public companies face under federal and state disclosure law. These decisions highlight the need for companies to focus on disclosure requirements as they prepare their proxy statements.

In a highly anticipated opinion issued this past Friday, the federal court for the Southern District of New York has enjoined a vote on a management-sponsored proposal at Apple's upcoming annual shareholder meeting. [*Greenlight Capital, L.P. v. Apple, Inc., No. 13 Civ. 900 \(RJS\) \(S.D.N.Y. Feb. 22, 2013\)*](#). Two of Apple's shareholders (including an activist shareholder seeking to draw additional attention to his challenge to Apple's capital allocation policies) argued that the company's proxy statement violated SEC "unbundling" rules by lumping together several proposed charter amendments in a single proposal. Specifically, the shareholders objected to the lack of separate votes on a set of proposed amendments that would do away with the board's power to unilaterally issue preferred stock, facilitate majority voting in director elections, and assign a par value to Apple shares. Apple argued that its proxy statement followed market practice by listing all proposed charter amendments together, and the company stressed that the SEC had cleared the proxy statement and that all of the proposed changes were shareholder-friendly and immaterial. The court, however, was not persuaded by these arguments and interpreted the unbundling rules to strictly require distinct votes on each proposed substantive change to the company's charter. The court emphasized that the unbundling rules protected the exercise of "fair corporate suffrage," and it found that this concern outweighed the burdens and expense that an injunction would pose on the company.

As part of the same decision, the federal court rejected a challenge to the sufficiency of Apple's disclosures concerning executive compensation. As we discussed in an [earlier memo](#) and [article](#), the latest barrage of say-on-pay lawsuits has focused on disclosures, and this suit—like others before it—sought additional information about Apple's compensation processes, the data the company used, and the company's peer compensation group. The court rejected this challenge, concluding that Apple's detailed, 16-page compensation disclosures adequately informed shareholders of all material information.

In the same vein, the California Superior Court for Santa Clara County dismissed a shareholder's challenge to Symantec's say-on-pay disclosures last week as well. [*Gordon v. Symantec Corp., No. 1-12-CV-231541 \(Cal. Sup. Ct. Feb. 21, 2013\)*](#). As in the *Apple* case, the lawsuit offered scattershot disclosure claims seeking more information about the work Symantec's compensation consultant performed, additional details about Symantec's peer group, and various data considered in connection with setting compensation. But, in a succinct and clear opinion, the California court applied well-settled principles of Delaware disclosure law to dismiss the suit outright. First, the court concurred with and adopted the Delaware Court of Chancery's view that, in general, disclosure claims are extinguished once the shareholder vote has transpired. Thus, because Symantec's "shareholders approved the advisory 'say-on-pay'

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proposal on October 23, 2012 . . . there is no longer any direct disclosure claim available.” Second, and more substantively, the court systematically examined and rejected the plaintiff’s contentions regarding the compensation disclosures. Stressing that plaintiffs must bear the not insignificant burden of explaining “how” the allegedly missing information “would have been viewed as significantly altering the total mix of information already made available” to shareholders, the court concluded that the “minute details” plaintiff alleged were missing did not rise to the level of material information.

The *Apple* and *Symantec* decisions offer poignant reminders that many companies will likely face shareholder disclosure challenges this proxy season. Companies should carefully consider the risks posed by these potential challenges in crafting their proxy disclosures.

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