PRYOR CASHMAN LLP

LEGAL UPDATE

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HOUSE APPROVES LEGISLATION REQUIRING SAY-ON-PAY AND COMPENSATION COMMITTEE INDEPENDENCE

On July 31, 2009, the United States House of Representatives voted 237-185 to approve the Corporate and Financial Institution Compensation Fairness Act of 2009 (the "Fairness Act"), which, among other things, would (i) require all publicly traded companies to give shareholders a non-binding "say-on-pay" vote on executive compensation packages on an annual basis and in connection with certain acquisition transactions, and (ii) take steps to ensure that compensation committees are independent in fact, not just in name. The say-on-pay and compensation committee independence provisions contained in the Fairness Act are substantially similar to the analogous sections of the Investor Protection Act of 2009 that the U.S. Treasury Department delivered to Congress on July 16, 2009 (the "Investor Protection Act"). It is anticipated that the Senate will consider similar legislation when it returns from the August recess.

SAY-ON-PAY

The Fairness Act would require all public companies to include a non-binding shareholder vote on named executive officer compensation as disclosed in the proxy statement at the company's annual meeting (or special meeting in lieu thereof). Proxy disclosure would include the compensation committee report, the compensation discussion and analysis, the compensation tables and any related materials. The Fairness Act requires the Securities and Exchange Commission (the "SEC") to promulgate final regulations to implement say-on-pay within six months after enactment of the Fairness Act into law, with those regulations becoming applicable for all annual meetings of shareholders occurring on or after the date that is six months after the date on which such final rules are issued (such date, the "Implementation Date"). As a result, it is unlikely that issuers would be required to include a say-on-pay proposal in their proxy statement for the 2010 proxy season, but it is possible that say-on-pay could be effective later in 2010.

The Fairness Act would also require all public companies, at meetings held on or after the Implementation Date that seek shareholder approval of an acquisition, merger, consolidation or sale of all or substantially all assets, to include a non-binding shareholder vote on all named executive officer golden parachute arrangements. The proxy materials for such meetings would be required to disclose, in a clear and simple form in accordance with regulations to be promulgated by the SEC, any agreements or understandings between the executive officer and either the issuer or the acquirer, as applicable, concerning any type of compensation that is based on or otherwise relates to the acquisition transaction. The disclosure would also state the total compensation that may be paid or become payable to or on behalf of such executive officer, as well as the conditions for any such payments. A shareholder vote would not be required if shareholders had already voted on such arrangement or understanding as part of the annual say-on-pay vote.

The say-on-pay requirements of the Fairness Act would not apply to foreign private issuers. In addition, the SEC, when issuing final rules, has the authority to exempt additional categories of issuers, taking into account considerations such as the potential impact on smaller companies.

Finally, the Fairness Act would require institutional investment managers subject to Section 13(f) of the Securities Exchange Act of 1934 (the "Exchange Act") (generally, institutional investment managers that exercise investment discretion with respect to accounts holding equity securities having an

aggregate fair market value on the last trading day in any of the preceding twelve months of at least $100 million), to report at least annually how they voted on say-on-pay votes.

COMPENSATION COMMITTEE INDEPENDENCE

To ensure that compensation committees are independent of, and that they possess the tools necessary to bargain effectively with, management, the Fairness Act would add a new Section 10B to the Exchange Act. This new section would require the SEC, within nine months after the enactment of the Fairness Act, to direct the national securities exchanges (e.g., the New York Stock Exchange, NYSE Amex and NASDAQ) to prohibit the listing of an issuer that is not in compliance with the enhanced standards applicable to compensation committees. Since these enhanced standards would be implemented through action by the national securities exchanges, they would apply only to listed companies, and not to companies whose securities are merely published for quotation (e.g., OTCBB and Pink Sheets).

Specifically, the Fairness Act would require compensation committees to be composed entirely of independent members who have not accepted any consulting, advisory or other compensatory fee from the issuer other than in their capacity as board or committee members. This is a higher independence standard than is currently applicable to members of compensation committees under NYSE, NYSE Amex and NASDAQ rules, which generally permit payment of up to $120,000 in compensation to independent directors during any 12-month period during the three years preceding the independence determination. As a result, it may be more difficult for issuers to find directors willing and qualified to serve on their compensation committee.

The Fairness Act would also require that compensation consultants meet standards for independence to be promulgated by the SEC. These standards must be "competitively neutral" among categories of consultants and preserve the ability of compensation committees to retain the services of members of any such categories. Unlike earlier versions of the Fairness Act and the proposed Investor Protection Act, there is no requirement that independence standards be set for legal counsel.

Furthermore, the Fairness Act provides that compensation committees be given the authority and appropriate funding to retain and obtain the advice of independent compensation consultants, legal counsel and other advisers as necessary to assist them in the oversight of the issuer's executive compensation practices. This is similar to the authority that most public companies already provide to compensation committees in their committee charters, and thus does not represent a departure from current practice.

Issuers would be required to disclose, in any proxy statement for an annual meeting of shareholders (or special meeting in lieu thereof) occurring one year after the enactment of the Fairness Act, whether their compensation committee retained and obtained the advice from an independent compensation consultant. However, unlike earlier versions of the Fairness Act and the Investor Protection Act, there is no requirement that an issuer explain why the compensation committee did not use an independent compensation consultant if it elected not to do so.

As is the case with the say-on-pay proposals, the Fairness Act authorizes the SEC to exempt particular categories of issuers, including smaller companies, from these enhanced compensation committee standards.

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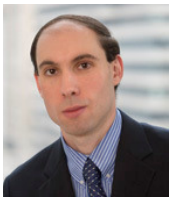
The foregoing is intended to summarize the principal issues relating to the Corporate and Financial Institution Compensation Fairness Act and does not constitute legal advice. Please contact the Pryor Cashman attorney with whom you work with any questions you may have. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Michael Campoli at (212) 326-0468.

ABOUT THE AUTHOR



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Mr. Campoli devotes his practice to counseling public and private companies on a broad range of corporate matters, including Securities and Exchange Commission and self-regulatory organization reporting and compliance, corporate formation and governance, mergers and acquisitions, public and private debt and equity financing transactions, and limited liability company and partnership counseling.

Mr. Campoli's work at Pryor Cashman has included:

- Representation of MDRNA, Inc. (NASDAQ: MRNA) as outside general counsel in connection with its equity financings, and SEC and NASDAQ reporting and compliance requirements
- Representation of Javelin Pharmaceuticals, Inc. (NYSE - Amex: JAV) as outside general counsel in connection with its equity financings, and SEC and NYSE - Amex reporting and compliance requirements
- Represented Briad Restaurant Group in its prevailing tender offer for Main Street Restaurant Group, Inc., the largest T.G.I. Friday's franchisee
- Represented Open Range Communications Inc. in connection with a $380 million financing that consisted of the issuance of a $270 million promissory note to the U.S. Department of Agriculture and preferred stock to private investors
- Represented The Kushner Companies in connection with its acquisition of the office building located a 666 Fifth Avenue, New York, New York
- Represented Implantable Vision, Inc. (OTCBB: IMVS) as outside general counsel in connection with SEC compliance and reporting matters
- Represented a privately-held alternative media company in connection with general corporate matters and its acquisition of a coffee sleeve advertising business
- Represented a private medical devices manufacturer in connection with equity and debt offerings for aggregate gross proceeds of up to $4,000,000
- Represented a private life sciences company in connection with the issuance of $15 million of convertible notes
- Represented a private television production company in connection with the issuance of $3.5 million of equity securities