

## CLIENT ALERT

### Navigating Compensation Governance

## Shareholder Proposal Seeks Binding Say on Director Pay Requirement

**Activist investors have brought a novel shareholder proposal that would require subject companies to provide an annual binding shareholder vote on director compensation.**

According to a blog posting by activist investor Michael Levin, he has partnered with another activist investor, John Chevedden, to submit a shareholder proposal at twelve companies which would subject director compensation to an annual binding shareholder vote. Several companies have successfully excluded the shareholder proposal from their proxies through no-action relief. The following five companies did not seek no-action relief; and therefore, the proposal will be subject to a shareholder vote during this proxy season: Alphabet, Inc., Devon Energy Corp., Fortive Corp., NiSource Inc. and PayPal Holdings.

### Terms of Binding Say on Director Pay Proposal

The shareholder proposal is structured as a binding bylaw amendment. Therefore, if the shareholder proposal is approved by a majority of a company's voting shareholders, the subject company would be required to adopt a bylaw provision that mandates an annual director pay vote. The annual Say on Director Pay would be required to comply with the following process:

- The company discloses director compensation in advance of the upcoming fiscal year.
- The company submits such director compensation to a shareholder vote in an annual or special meeting proxy statement.
- A majority of shareholders voting need to approve the director compensation.
- If the company loses the shareholder vote, then director compensation would be fixed at \$1.00 for the fiscal year or the company would have to resubmit a new director pay program for shareholder approval.

Proponents of the shareholder proposal argue that the director Say on Pay vote is necessary to address an inherent conflict arising out of directors designing and approving their own pay, without oversight and approval from the shareholders they have been elected to represent.

## ISS Opposition to Shareholder Proposal

Notably, Institutional Shareholder Services has recommended shareholders vote **against** the proposal at four companies<sup>1</sup> (Devon Energy, Fortive, NiSource and PayPal). ISS found the proposal to be unwarranted because directors are already accountable for governance issuance by their direct election by shareholders. ISS also based its opposition to the shareholder proposal on a number of additional factors, including:

- The need to compensate directors at competitive rates.
- The administrative burden associated with the implementation of a Say on Director Pay vote.
- The quality of director pay.
- The prevailing market practice, which does not include a segregated vote for director pay.

Taken as a whole, ISS found that there was not a compelling argument for what it deemed to be a novel and potentially disruptive shareholder proposal.

## Meridian Comment

The shareholder proposal appears to be a solution in search of a problem. Neither the process for setting director compensation, nor the amount of such compensation, has drawn the significant scrutiny or shareholder criticism that is more typically associated with executive compensation. Other than a handful of Delaware court cases (now several years old), none of which were decided on the merits, legal challenges to director compensation are relatively rare. Nonetheless, the shareholder proposal serves as a reminder that boards should follow a rigorous and documented process in setting the form and level of director compensation.

The *Client Update* is prepared by Meridian Compensation Partners' Governance and Regulatory Team led by Donald Kalfen. Questions regarding this Client Update or executive compensation technical issues may be directed to Donald Kalfen at 847-347-2524 or [dkalfen@meridiancp.com](mailto:dkalfen@meridiancp.com).

*This report is a publication of Meridian Compensation Partners, LLC, provides general information for reference purposes only, and should not be construed as legal or accounting advice or a legal or accounting opinion on any specific facts or circumstances. The information provided herein should be reviewed with appropriate advisors concerning your own situation and issues. [www.meridiancp.com](http://www.meridiancp.com)*

---

<sup>1</sup> ISS has yet to issue its proxy report on Alphabet, Inc.