NDI Executive Exchange

NATIONAL DIRECTORS INSTITUTE

Pay for Performance: Current Trends and Best Practices

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FOLEY

FOLEY & LARDNER LLP

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Panelists

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Pay for Performance

Pay for Performance

- What Does "Pay for Performance" Mean in Practice?
  - Measuring pay
    - "Real" or "realizable" pay versus Summary Compensation Table
    - Relative – selection of peers
  - Measuring performance
    - Total shareholder return
    - Operational/financial measures
    - Economic value added (EVA)
    - Other measures
    - Relative – selection of peers

ISS and Pay for Performance

- Quantitative Pay for Performance Screen
  - Relative degree of alignment (3-year CEO v. TSR performance compared with ISS-selected peer group)
  - Multiple of median (1-year CEO pay as multiple of median CEO pay for ISS-selected peer group)
  - Pay-TSR alignment (5-year absolute alignment between CEO annual pay and value of investment in company)
  - Financial performance assessment (3-year percentile rank of CEO pay v. 3 or 4 financial metrics relative to ISS-selected peer group)
- Qualitative Analysis
  - Used if the quantitative screen indicates a pay and performance disconnect
  - Consists of open-ended consideration of whether pay programs encourage value creation and alignment of interests

Economic Value Added (EVA) as a Performance Measure

- EVA is not new, but there has been more attention focused on EVA recently, especially since ISS has been giving it increasing prominence in its research reports
- EVA = NOPAT – (WACC*capital invested)
  - NOPAT = net operating profit after tax
  - WACC = weighted average cost of capital
  - Capital invested = equity + long-term debt
- Intended to measure the profitability of projects undertaken by the business

Pay for Performance Disclosure

- How should "pay for performance" be presented to shareholders (CD&A)?
  - Use of charts or other graphics
  - Location in proxy statement
  - Establishing workable precedent
  - SEC requirements:
    - GAAP presentation or reconciliation
    - Not materially misleading (balance)

SEC Rulemaking Update

Hedging Disclosure - Final Rules Approved

- The SEC approved final hedging disclosure rules in late December 2018. There were required to be adopted by Section 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act
- Most issuers need to comply in their proxy or information statements for the election of directors during fiscal years beginning on or after July 1, 2019
- However, smaller reporting companies and emerging growth companies do not need to comply until they file a proxy or information statement for election of directors during fiscal years beginning on or after July 1, 2020

SEC Hedging Disclosure - Requirements

- Can find the requirements under new Item 407(i) of Regulation S-K
- Requires disclosure of any policies or practices the company has adopted regarding the ability of its employees (including officers) or directors to purchase securities or otherwise engage in transactions that hedge or offset a decrease in the market value of shares of the company's stock granted as compensation
- A company could satisfy this requirement by either providing a fair and accurate summary of the practices or policies that apply, including the categories of persons they affect and any categories of hedging transactions that are specifically permitted or specifically disallowed, or, alternatively, by disclosing the practices or policies in full
- If the company does not have any such practices or policies, the rule will require the company to disclose that fact or state that hedging transactions are generally permitted

SEC Rulemaking on Proxy Advisors

- Timing
  - Proposed rules issued November 5, 2019
- Scope
  - Would require proxy voting advisors to give preview of their voting recommendations to companies and others soliciting proxies
  - Would require disclosure of conflicts of interest
  - Would allow companies and others soliciting proxies to request that proxy voting advisors include hyperlinks to statements of their positions on the proxy voting advice

SEC Rulemaking on Clawbacks

- Timing
  - Proposed rules issued July 1, 2015
- Scope
  - Stock exchanges would adopt rules requiring listed companies to adopt compensation recovery policies
  - Rules would generally apply to all issuers with a class of securities listed on a national securities exchange or association, including foreign private issuers, controlled companies, smaller reporting companies and emerging growth companies

Proposed Clawback Rules

- Policy would be triggered by an accounting restatement required to correct an error that is material to previously issued financial statements
- Policy would apply to incentive-based compensation received by current or former executive officers during the three fiscal years preceding the date on which the issuer is required to prepare the accounting restatement
- Incentive-based compensation subject to the clawback would include compensation received due to achievement of a goal based on accounting principles or on stock price or total stockholder return (TSR)
  - Stock options that are granted, earned and vested based solely on continued employment would not be subject to the policy

Proposed Clawback Rules

- Amount of the recovery would be the excess of the amount of incentive-based compensation the executive officer actually received over the amount the executive officer would have received based on the restated numbers
  - Determined on a pre-tax basis
  - Where the incentive compensation is based on stock price or TSR, reasonable estimates could be used to calculate the excess amount
- It would not be relevant whether there is any fault on the part of the executive officer who received the compensation or whether the officer was involved in preparing the financial statements subject to the restatement

Proposed Clawback Rules

- Mandatory
  - Enforcement of the clawback policy required except in narrowly defined exceptions: generally only where the cost of enforcement would exceed the amount of the recovery or the recovery would be illegal under home country law
  - Issuers would not be allowed to indemnify officers or pay for insurance to cover clawback amounts
- Disclosure
  - Clawback policy must be filed as an exhibit to annual report
  - Issuers would be required to disclose certain information about their enforcement of their clawback policies in proxy statements, information statements and Form 10-K in specified circumstances

SEC Rulemaking on Mandatory Pay for Performance Disclosure

- Mandatory pay for performance disclosure
  - SEC proposed rules for comment in April 2015
- Rules as proposed would require disclosure of:
  - The relationship between executive compensation actually paid to the registrant's executive officers and the cumulative TSR of the registrant; and
  - The relationship between the registrant's TSR and the TSR of a peer group chosen by the registrant

Pay for Performance Rules

- Under the proposed rules, the required disclosure consists of two components:
  - The following table covering the preceding 5 years (3 years for smaller reporting companies), using XBRL:

Year (a)	Summary Compensation Table Total For PEO (b)	Compensation Actually Paid to PEO (c)	Average Summary Compensation Table Total for non-PEO Named Executive Officers (d)	Average Compensation Actually Paid to non-PEO Named Executive Officers (e)	Total Shareholder Return (f)	Peer Group Total Shareholder Return (g)

  - A graph or narrative (or both) providing a "clear description" of (1) the relationship between executive compensation actually paid and registrant TSR, and (2) the relationship between registrant TSR and peer group TSR

Pay for Performance Rules

- Under the proposed rules, compensation “actually paid” would be based on Summary Compensation Table, but with a few differences:
  - Value of equity awards included at time of vesting rather than grant
  - Pension plan value would be limited to changes attributable to the applicable year of service

Pay for Performance Rules

- Smaller reporting companies would be permitted to provide scaled disclosure:
  - Required to disclose only the three most recently completed fiscal years;
  - Not required to disclose amounts related to pensions; and
  - Not required to present a peer group TSR
- Emerging-growth companies and foreign private issuers would be exempt
- Transition period to phase in full disclosure (3 years initially)

Tax Cuts and Jobs Act (“Tax Reform”) Changes to Code Section 162(m)

Code Section 162(m) Before Tax Reform

- Section 162(m) of the Internal Revenue Code of 1986 imposed a $1 million limit on publicly-traded company tax deductions for most compensation payments made by the company to its “covered employees” in a particular fiscal year
- The most important exception to this rule, prior to Tax Reform, was that all performance-based compensation that qualified under the Code Section 162(m) rules was fully deductible, no matter the amount
- A publicly-traded company subject to these rules was a corporation that issued a class of common equity securities required to be registered under Section 12 of the Securities Exchange Act of 1934

Code Section 162(m) Before Tax Reform

- A “covered employee” was an employee who, on the last day of the company’s fiscal year, was either the Chief Executive Officer (or equivalent) or one of the highest three paid officers (other than the Chief Financial Officer) whose compensation was required to be reported in the summary compensation table of the company’s proxy
- The Chief Financial Officer (or equivalent) was not a covered employee

Section 162(m) After Tax Reform

- Who is a Covered Employee?
  - A “covered employee” will now be anyone who has ever been the CEO, CFO or one of the three most highly compensated officers in any fiscal year beginning after December 31, 2016, <u>regardless of whether the executive officer is serving at the end of the publicly held corporation’s taxable year</u>

    **Said another way, this means that a company’s “top three” officers for 162(m) covered employee purposes may be different from the officers that are actually reported in the company’s Summary Compensation Table for such year.

  - The new rule is essentially “once a covered employee, always a covered employee”

Section 162(m) After Tax Reform

- Because an individual never loses his or her status as a covered employee, all compensation paid to that individual – including payments made after termination (and payments to the individual's beneficiaries following the individual's death) – will be subject to the $1 million deduction limit (unless grandfathered as described below)
  - Thus, severance pay, deferred compensation payments, supplemental retirement payments, and similar types of post-termination employment payments to a covered employee are now subject to the annual $1 million deduction limit

Section 162(m) After Tax Reform

- Repealed Exception for Performance-Based Compensation
  - Unless grandfathered as described below, performance-based compensation is no longer exempt from the $1 million deduction limit
  - Thus, all performance-based compensation paid to a covered employee, including performance share units, stock options and annual bonuses, will now be subject to the $1 million annual deduction limitation
- Expansion of Employers Subject to Code Section 162(m)
  - The companies subject to the new Code Section 162(m) rules are expanded to include entities required to file reports under Section 15(d) of the Securities Exchange Act of 1934

Section 162(m) After Tax Reform

- Practical Considerations:
  - Employers will want to be careful about inadvertently bumping an executive into their top three highest compensated officers for a particular fiscal year due to one-off payments (such as signing bonuses or other special one-time payments)
  - Employers need to start keeping an ongoing list of all “covered employees” going forward and the compensation arrangements that apply to such individuals

Grandfathered 162(m) Arrangements

- The changes described in the preceding slides do not apply to compensation paid to a covered employee that is provided pursuant to a written binding contract that was in effect on November 2, 2017, and which is not modified in any material respect on or after such date
  - Thus, payments to a covered employee that would have been previously deductible under Code Section 162(m), such as payments made under performance-based compensation arrangements that comply with Code Section 162(m) or payments of severance made under an employment agreement, will remain deductible if they are paid under a written binding contract in effect on November 2, 2017

IRS Guidance on 162(m) Grandfathering

- What Constitutes a "Written Binding Contract?"
  - For compensation to be grandfathered, it must be provided pursuant to a "written binding contract" in effect on November 2, 2017

IRS Guidance on 162(m) Grandfathering

- “Binding” Means Obligated Under Law
  - The IRS guidance clarified that compensation is payable under a written binding contract in effect on November 2, 2017, only to the extent the company is obligated under “applicable law” to pay that compensation, as long as the employee performs any required future services or satisfies applicable vesting conditions
  - In many cases, “applicable law” will be state contract law
- The grandfathered compensation is therefore limited to the amount of the company’s obligation as of November 2, 2017; additional amounts will not be grandfathered

IRS Guidance on 162(m) Grandfathering

- Impact of Discretion
  - Under the IRS guidance, if a contract gives the company the discretion to reduce the amount of compensation payable, and applicable law takes that negative discretion into account, then any amount that could be reduced will not be treated as grandfathered (even if the company does not exercise that negative discretion)

IRS Guidance on 162(m) Grandfathering

- Renewals
  - Any grandfathered employment agreement or other written binding contract will lose its grandfathered status if the agreement is renewed
  - If a contract is terminable or cancelable by the company without the employee's consent, then it is treated as renewed as of the date that any termination or cancellation could be effective if the company had taken action

IRS Guidance on 162(m) Grandfathering

- What Constitutes a "Material Modification?"
  - A grandfathered compensation arrangement will lose its grandfathered status (and become subject to the new Section 162(m) rules) if the arrangement is "materially modified" after November 2, 2017
  - Amounts paid before the modification will remain grandfathered (and subject to the old Section 162(m) rules), but all amounts paid after the modification date are subject to the new Section 162(m) rules to determine deductibility

IRS Guidance on 162(m) Grandfathering

- Basic Definition of Material Modification: Amendment that Increases the Amount of Compensation
  - In general, any amendment to increase the amount of compensation payable to the employee will be treated as a material modification
  - There is a limited exception for supplemental payments that are no more than a reasonable cost-of-living increase over a payment made in the preceding year under the contract
- Acceleration is a Material Modification Unless Discounted
  - If a grandfathered arrangement is modified to accelerate the payment of compensation, then it is treated as materially modified unless the amount paid is discounted to reasonably reflect the time value of money

IRS Guidance on 162(m) Grandfathering

- Deferrals are Not Material Modifications Unless Amount Increased Beyond Reasonable Interest or Investment Return
  - If a grandfathered arrangement is modified to defer when the compensation is payable, then the arrangement will be treated as materially modified unless the amount paid is increased only by a reasonable rate of interest or the return on a predetermined actual investment (which must reflect decreases as well as increases in the investment)
- Substitutions
  - If the company and the employee enter into a separate agreement that provides for increased or additional compensation related to the compensation payable under a grandfathered arrangement, then the IRS will evaluate whether the new arrangement should be treated as materially modifying a grandfathered arrangement on a facts and circumstances basis

CEO Pay Ratio

CEO Pay Ratio Overview

- Requires disclosure of ratio of median compensation of all employees to the compensation of the principal executive officer
- Disclosure is required for compensation for full fiscal years beginning on and after January 1, 2017
- For calendar year issuers, pay ratio disclosure was first required in proxy or information statement for the 2018 annual meeting, based on 2017 compensation

A Comparison of the First Two Years of Disclosure

- 2019 results are fairly similar to 2018
- Among the S&P 500 and Russell 3000, the Median CEO pay ratio increased by 1% and 2%, respectively, compared to 2018

Median Ratio		
	2018	**2019**
S&P 500	165:1	169:1
Russell 3000	72:1	77:1

Use of Alternate Ratios

- Approximately 10% of companies disclosed a supplemental ratio in 2018 and 2019
- Most frequently disclosed reason for alternative ratios were to:
  - Exclude one-time awards for the CEO (such as sign-on awards)
  - Show only U.S. employees
  - Show only full-time or corporate employees

Source: Equilar Institute; Semler Brossy 2019 Say On Pay Report (October 2019)

Reminders for the Third Year of Disclosure

1. You may be able to use your same median employee as last year, but you must recalculate his or her pay
   - The median employee only needs to be identified once every three years, unless there was a change in either the employee population or employee compensation arrangements that the company reasonably believes would significantly affect the pay ratio disclosure
   - If the company uses the same median employee for multiple years, it must disclose that fact and describe the basis for its reasonable belief that no changes have occurred that would significantly affect the pay ratio disclosure
   - The median employee's median pay must be recalculated each year
2. If your median employee left (or was promoted), identify a substantially similar employee
   - SEC rules provide that if there is a change in the median employee's circumstances that the company reasonably believes would result in a significant change in its pay ratio disclosure, the company may use another employee whose compensation is substantially similar to the original median employee based on the CACM used to select the original median employee

Reminders for Third Year of Disclosure cont.

3. If you recalculate your median employee this year, you must disclose if you change your "determination date" or calculation methodology and the reasons for the change
   - Any date during the three month period may be used for purposes of identifying the median employee. But, under SEC rules, if the date selected by the company changes from year to year, the company must explain the reason for the change.
   - Changes to methodology, which may include changes in CACM or any assumptions or estimates you used in prior year's calculation, must also be disclosed

SEC Enforcement Actions & Liability

- As predicted, no enforcement actions were brought by the SEC with respect to pay ratio in 2018 or 2019
  - As a reminder, SEC interpretive guidance acknowledges that pay ratio disclosures will involve a degree of imprecision and that use of estimates will not provide the basis for enforcement action unless the disclosure lacks a reasonable basis or was provided other than in good faith
- But, also remember that the Pay Ratio is “Filed”
  - Pay ratio disclosure is considered “filed,” and not merely “furnished,” for purposes of liability under the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act)
  - Filed information is subject to liability under Section 18 of the Exchange Act, which imposes liability for misleading statements in reports or documents filed with the SEC, and is subject to automatic incorporation by reference into the company’s Securities Act registration statements, which could give rise to liability under Section 11 of the Securities Act

Overview of Pay Ratio Process

- **Step 1**: Determine whether you will exclude any non-U.S. employees from the calculation under the *de minimis* exception and, if so, which employees
  - The *de minimis* exception allows companies to exclude non-U.S. employees that account for 5% or less of its total employee population
    - If the company's non-U.S. employees account for 5% or less of the company's total employees, then it must exclude all non-U.S. employees
    - If the company's non-U.S. employees account for more than 5% of the company's total employees, then the issuer may exclude employees from one or more non-U.S. jurisdiction that, in total, account for 5% or less of the company's total employees. If a company excludes any non-U.S. employee from a particular jurisdiction, then it must exclude all non-U.S. employees in that jurisdiction
  - If a company uses the *de minimis* exception, it must disclose the jurisdictions from which employees are being excluded, the approximate number of employees excluded from each jurisdiction, the total number of U.S. and non-U.S. employees and the total number of U.S. and non-U.S. employees used in calculating the 5 percent limit

Overview of Pay Ratio Process

- **Step 2**: Evaluate compensation measures available to use in identifying the median employee.
  - The appropriate measure will depend on a number of considerations, including which compensation measures are currently available in your existing systems (payroll, HR, tax) and which of the available measures can be consistently applied across all jurisdictions in which the company and its consolidated subsidiaries have employees that must be included in the median employee calculation
  - For many companies, total cash compensation may be an appropriate measure. Another alternative would be taxable wages.
  - Whichever measure is selected should be one that acts as a reasonable proxy for annual total compensation. Companies may not rely exclusively on hourly or annual rates of pay
  - For most companies, calculating total Summary Compensation Table compensation for all employees would be a manual process and, as a result, a last resort

Overview of Pay Ratio Process

- **Step 3**: Verify whether existing systems will capture all of the employees required to be considered in the median employee determination, or if manual or other changes will be needed
  - The employees who must be covered are all full-time and part-time employees and all seasonal and temporary employees who are employed by the company and its consolidated subsidiaries on a single date, excluding any non-U.S. employees covered by the exemption described in Step 1.
  - May exclude independent contractors (generally, anyone who receives a Form 1099)
- **Step 4**: Select a "determination date"
  - Consider whether any particular determination date within the last three months of a fiscal year will be more desirable than another for the calculation of the ratio, keeping in mind that individuals not employed on the determination date will not be included in the calculation of the ratio
  - If you change your determination date from prior year, must disclose such fact and the reason for the change

Overview of Pay Ratio Process

- **Step 5**: Calculate compensation of all employees employed on the determination date selected in Step 4 based on CACM selected in Step 2, and then identify the Median Employee
  - Can annualize compensation all permanent full-time and part-time employees who were employed for less than the full fiscal year
  - May not make any full-time adjustments for part-time workers or annualization for temporary or seasonal employees
  - If your CACM results in multiple median employees, you can select the individual that you think best reflects your median employee (or who is most likely to be employed next year)

Overview of Pay Ratio Process

- **Step 6**: Calculate the ratio of CEO’s annual total compensation to the Median Employee’s annual total compensation
  - CEO and Median Employee’s annual total pay should generally be calculated according to the Summary Compensation Table rules
  - However, personal benefits aggregating less than $10,000 and compensation under non-discriminatory benefit plans may be included in the median employee’s annual compensation <u>so long as the items are also included in the CEO’s annual compensation</u>
    - Any material difference between the CEO’s annual compensation used in the pay ratio disclosure and the compensation shown in the Summary Compensation Table will need to be explained
  - A company may use reasonable estimates to determine the Median Employee’s pay, but not to determine the CEO’s total pay

Overview of Potential Pay Ratio Process

- **Step 7**: Prepare the required disclosure
  - Disclosure of the ratio must include:
    - CEO’s total compensation calculated according to Step 6
    - Median employee’s total compensation calculated according to Step 6
    - Ratio of CEO to Median Employee pay, expressed either as a ratio in which the Median Pay is one (*e.g.*, 1 to 100) or in narrative as a multiple (*e.g.*, “our CEO’s pay for 2018 was 100 times the median of the total compensation of all of our employees (other than our CEO) for 2018”)

Overview of Potential Pay Ratio Process

- **Step 7 cont:**
- Must also disclose the methodology used to identify the median employee and disclose any material assumptions, adjustments or estimates that are used to identify the median employee or to determine any elements of the median employee’s total compensation
  - Estimated amounts will need to be clearly identified
  - Explanation required for any change in methodology from year to year, including the reason for the change and an estimate of its impact on the median and the ratio
- **Step 8**: Consider whether to include any supplemental disclosures, such as explanations for the ratio or alternative ratios (e.g., U.S. employees only; excluding one-time CEO equity grants; full-time employees only)

2019 Say on Pay and Equity-Plan Proposal Results

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Say on Pay – 2019 Proxy Season Results*

- Overall results broadly similar to 2018
  - Average support was 90.5% across all companies
    - 91% of companies received greater than 70%
    - 76% of companies received greater than 90%
  - 56 failed votes (2.7%)
- Almost 1/3 of S&P 500 companies have received say on pay support below 70% at least once since 2011
- ISS has lower “against” recommendation rate in 2019 (12.7%) compared to 2018 (13.9%)

*Statistics courtesy of Semler Brossy, 2019 Say on Pay and Proxy Results (October 2019)

Say on Pay – Consequences of a Failed Vote

- The consequences of a failed “say on pay” vote include the following:
  - Although all companies will be required to address the “say on pay” vote and any responsive actions in CD&A, this disclosure takes on greater importance for companies with failed “say on pay” votes
  - Proxy advisory services may recommend withholding votes from directors if remedial measures not satisfactory
  - Potential for litigation

Equity Plan Proposals

- Significant decrease in the amount of Equity Plan Proposals in 2018 and 2019 over prior years, likely due to elimination of 162(m) provision that required shareholder approval of performance goals every five years
  - 558 total votes in 2018 and 526 votes in 2019 as of October 1, 2019, compared to 829 proposals in 2017
- 88.5% approval in 2019, which is consistent with 2018 results. However, a greater % of equity plan proposals received over 90% support in 2019 (64%) compared to 2018 (60%)

*Statistics courtesy of Semler Brossy, 2019 Say on Pay and Proxy Results (October 2019)

Say on Pay and Equity Plan Proposals – Constituent Engagement

- Company engagement with shareholders on say on pay and equity plan issues
  - Timing: prior to proxy season
  - Methods:
    - Surveys
    - Group meetings
    - One-on-one meetings
    - Conference calls
    - E-Forums
    - Additional soliciting material
  - Designation of compensation “spokesperson”
- Consider engaging with ISS as well

Director Compensation Concerns and Shareholder Litigation

ISS Director Pay Evaluation

- Beginning in 2018, ISS implemented a policy under which it may issue adverse vote recommendations for the re-election of directors responsible for approving excessive director compensation for 2 or more consecutive years without a compelling rationale
- ISS compares individual non-employee director compensation to the median of all non-employee directors at companies in the same index and industry to identify companies with directors whose compensation is among the top 5% of all comparable directors

Shareholder Litigation on Compensation – Director Pay

- Director pay, as well as executive pay, has been the subject of shareholder litigation
- *In re Investors Bancorp, Inc. Stockholder Litigation*, Case No. 169
  - In December 2017, the Delaware Supreme Court held that the court will not apply the deferential "business judgment rule" in reviewing shareholder challenges to compensatory awards to directors under stockholder-approved equity plans
  - Instead, the awards will be subject to the less deferential "entire fairness" standard of review
  - The ruling increases the likelihood that plaintiffs will be able to survive a company's motion to dismiss and potentially involve the company in expensive litigation and discovery

Shareholder Litigation on Compensation – Director Pay

- *In re Investors Bancorp* follows *Calma v. Templeton* (the "Citrix" case)
  - In April 2015, the Delaware Court of Chancery Court refused to dismiss a breach of fiduciary duty claim brought by shareholders against the Board of Directors arising from equity compensation awards that Citrix Systems, Inc. had granted to its non-employee directors
  - The fact that Citrix's shareholders had approved individual award limits in the equity plan under which the directors' awards were granted did not secure business-judgment-rule deference with respect to the amount of the director pay because the limits in the plan were not "meaningful"
  - Instead, director defendants would have to show that their compensation was "entirely fair"

Shareholder Litigation on Compensation – Director Pay

- Citrix settlement approved in 2016
  - Company agreed to:
    - Amend omnibus plan to limit annual equity compensation grants for non-employee directors ($795,000, which is 2-3x historical or actual award amounts) and specify terms
    - Submit amendments to shareholder approval of amendments
    - Provide enhanced disclosures on director compensation practices
    - Amend compensation committee charter to specify duties relating to director compensation
  - Company paid $425,000 in legal fees and expenses to plaintiffs' counsel

Shareholder Litigation on Compensation – Director Pay

- Other recent cases similar to *In re Investors Bancorp* and *Citrix*
  - Clovis Oncology, Inc. and OvaScience, Inc. recently agreed to settle director pay lawsuits
  - An excessive compensation lawsuit was filed in 2014 against the officers and directors of Facebook
- **Recommendations**:
  - Work with consultants or other advisors to conduct peer review and obtain advice on reasonable levels of compensation
  - Carefully document process and consider disclosures in proxy statement
  - Include separate director award limits, and consider using a formula for director compensation, in a shareholder-approved plan

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