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Smith Anderson Obtains Dismissal of Dodd-Frank Act “Say on Pay” Claims

In a groundbreaking new decision, the United States District Court for the Eastern District of North Carolina has dismissed “say on pay” claims against officers and directors of Dex One Corporation. Smith Anderson served as the sole outside counsel for Dex One and the officers and directors throughout the litigation. The Court rejected the Plaintiff’s claims in their entirety, describing them at one point as “sensationalized and meritless.”

The lawsuit accused Dex One’s officers and directors of breaching their fiduciary duties in connection with the “say on pay” provisions of the Dodd-Frank Act, which require public companies to submit their executive compensation plans to their shareholders periodically for an advisory vote. A wave of similar actions has been filed against prominent companies around the country following shareholder “no” votes, including a still-pending action against Citigroup CEO Vikram Pandit and other Citigroup officers and directors.

In the Dex One case, the plaintiff alleged that Dex One’s officers and directors made false and misleading statements in proxy filings, failed to follow a “pay for performance” policy, and failed to respond to a negative “say on pay” vote. During the litigation, the plaintiff asserted an additional claim against the officers and directors for failing to disclose the ongoing litigation in the company’s post-suit public filings. The plaintiff also sought to enjoin the company’s May 2012 shareholder meeting based on this omission, but the court denied that request after full briefing from both parties. After the request for injunctive relief was denied, the case was stayed pending a decision on the comprehensive motion to dismiss filed by Smith Anderson on behalf of the defendants.

On September 25, 2012, the court issued a lengthy decision granting the defendants’ motion to dismiss. In its decision, the court thoroughly analyzed the company’s proxy materials and concluded that the plaintiff had mischaracterized those materials, misrepresented the structure, components, nature, and purposes of the executive compensation at issue, and failed to state any valid legal claim. In reaching this conclusion, the court cited the plain language of the Dodd-Frank Act, which states that shareholder “say on pay” votes are non-binding and do not impose any new duties on a board, and held that the statute does not impose any duty to respond to a negative shareholder vote. This new decision is one of the first to squarely address “say on pay” claims on the merits, and should serve as a roadmap for other companies faced with baseless “say on pay” challenges.

In a discussion that likely will be of interest to many companies subject to SEC filing requirements, the court also rejected the claim that the ongoing shareholder litigation was material information that should have been disclosed in the company’s post-suit proxy materials. First, the court held that there was no need to disclose the litigation because the company had already publically disclosed all the underlying facts at issue in the litigation. Second, the court stated that even if the fact of litigation had been material, the directors were under no duty to engage in “self-flagellation” by disclosing the “sensationalized and meritless allegations” in the complaint.

The case is *Haberland ex rel. Dex One Corp. v. Bulkeley*, No. 5:11-CV-464-D. A copy of the court’s decision is available [here](#).

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About the Attorneys

[Alan Parry](#) has broad experience in complex commercial litigation and alternative dispute resolution, including substantial experience litigating insurance coverage disputes and counseling clients regarding insurance coverage issues. Mr. Parry is also certified by the NC Dispute Resolution Commission to conduct Superior Court mediations.

[Donald Tucker](#) is the firm's Team Leader for Commercial Litigation. He has over 25 years of complex commercial litigation experience, including multi-party cases, class actions, claims under the federal securities laws, shareholder and partnership disputes and contract disputes of many types. He has represented a wide variety of corporations, including financial institutions and insurance companies; pharmaceutical development companies; contract research organizations; issuers of securities; corporate trustees; directors and officers; professional advisors; agricultural cooperatives; and buyers and sellers of both businesses and of goods and services.

[Isaac Linnartz](#) focuses his practice on employment litigation and commercial litigation. Prior to joining Smith Anderson, Mr. Linnartz served as Law Clerk to Chief Judge David B. Sentelle of the United States Court of Appeals for the District of Columbia Circuit in Washington, DC.

About Smith Anderson

Founded in 1912, Smith Anderson celebrates its 100th anniversary this year. Since its inception, Smith Anderson has grown to become the largest Raleigh-based law firm, and one of the largest in North Carolina. The Firm represents a diverse and dynamic group of local, national and international clients. Smith Anderson has a rich tradition of professional and public service, and our lawyers and staff remain dedicated to the principles of professionalism, excellence and service to our clients and community.