

Delaware Court Finds Informal NYSE Guidance Unpersuasive

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Delaware Chancery Court Judge Leo Strine ruled earlier this month that the lawsuit against Simon Property Group regarding the CEO's compensation can proceed. The suit, brought by the Louisiana Municipal Police Employees Retirement System, alleged among other things that the company failed to obtain shareholder approval before amending an equity plan that allowed the board to grant a retention bonus to the CEO of over \$120 million. The company's counsel argued, without success, that the company had received informal guidance from the NYSE that approval was not required.

The plan, adopted in 1998, required that performance units granted must be tied to financial performance. The board amended the plan in 2011 and immediately awarded the CEO with units that only contained time-based vesting criteria. The plaintiffs challenged the board's decision, arguing that the change constituted a material amendment that should have been subject to shareholder approval under IRS Section 162(m) and NYSE listing standards.

Plaintiff's complaint cites a set of NYSE FAQs regarding the need to seek shareholder approval of amendments to equity plans that includes as an example of a material revision "an expansion of the types of awards available." As previously reported by the [New York Times](#) when the suit was brought last year, company counsel's defense included correspondence with the NYSE. In an email, the NYSE indicated that they agreed with the company's analysis that changing the award's vesting conditions so that no performance metrics were required does not add a new type of award. That article prompted the Council of Institutional Investors to [express](#) its concerns to the NYSE Chairman with respect to the meaning of "material revision" under the NYSE listing rules and also the absence of a formal and transparent process for the NYSE when interpreting its own standards.

In making his decision, the judge stated that the company had previously informed shareholders when they adopted the plan in 1998 that the plan included units based on performance goals and that material changes would be subject to shareholder vote, and also pointed to the company's statements regarding pay for performance. It appears he found the NYSE interpretation too informal to be given sufficient weight, and also that the written record does not show that the NYSE was provided with information regarding the 1998 plan and the board's intent to grant the CEO the retention bonus.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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