California Corporate & Securities Law

Was Your Option Plan Approved? Corporate Law May Say "Yes", But The Securities Law May Say "No"

By Keith Paul Bishop on November 3, 2011

On Friday, I'll be part of a panel at the National Association of Stock Plan Professionals' 19th Annual Conference. My topic will be devoted to the question "Did it pass?". Here's a brief preview of some of the subtleties in this question.

California law requires shareholder approval of compensatory option or security purchase plans when: (i) the issuer is seeking qualification of the offer and sale of the securities (Corporations Code § 25110); or (ii) the issuer is relying on the exemption pursuant to Corporations Code § 25100(o). In either case, the issuer must comply with either Rule 260.140.41(g) (option plans) or Rule 260.140.42(e) (purchase or bonus plans).

Example: A corporation has 1,000 shares issued and outstanding with each share entitled to 1 vote. The holders of 600 of these shares are present at the meeting and applicable law imposes a quorum requirement of a majority of the shares entitled to vote. In the absence of a contrary specification in the articles (certificate) of incorporation or bylaws,

- As few as 301 affirmative votes will constitute stockholder approval of the plan under the Delaware General Corporation Law (8 Del. Code § 216(2);

- As few as 1 affirmative vote *could* constitute approval under Nevada's Private Corporation Law (NRS 78.320(1)(b) (requiring that the number of votes cast in favor exceed the number of votes cast against). *N.B.* This assumes that the other 599 votes abstain.

For purposes of Rules 260.140.41(g) and 260.140.42(e), however, a total of 501 affirmative votes will be required (*i.e.*, a majority of the outstanding securities). Further, California does not permit counting towards the required vote any securities issued (*e.g.,* on exercise of options) before shareholder approval.

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