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INVESTORS BANCORP: STRUCTURING AND APPROVING NON-EXECUTIVE DIRECTOR COMPENSATION TO AVOID JUDICIAL REVIEW

In the recent Investors Bancorp case, the Delaware Supreme Court clarified that advance stockholder approval of a compensation plan may only “ratify” future grants if the plan is self-executing, i.e., it left the board with no discretion, and enumerated specific grants or a formula for calculating specific grants. The authors discuss the case and, in light of it, suggest steps in structuring and approving plans that directors may take to avoid protracted stockholder litigation.

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In most cases, decisions regarding non-executive director compensation will be inherently conflicted such that, if challenged under Delaware law, the directors will bear the burden of proving that their compensation was “entirely fair” under the exacting entire fairness standard. Prior to the Delaware Supreme Court’s ruling in *In re Investors Bancorp, Inc. Stockholder Litigation*,¹ several opinions of the Delaware Court of Chancery indicated that such decisions could instead be reviewed under the deferential business judgment rule if a grant is made under a stockholder-approved compensation plan with “meaningful limits” on the awards that could be granted to directors.² In *Investors Bancorp*, the Court of

Chancery followed these decisions and dismissed challenges to director compensation grants under a discretionary stockholder-approved equity incentive plan with limits the court deemed meaningful.³ On appeal, however, the Supreme Court reversed the Court of Chancery’s decision and the line of cases on which it relied, clarifying that advance stockholder approval of compensation plans may only “ratify” future grants if the plan is self-executing. In light of this decision, boards of public Delaware corporations without self-executing

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¹ 177 A.3d 1208 (Del. 2017).

² See, e.g., *In re 3COM Corp. S’holders Litig.*, 1999 WL 1009210 (Del. Ch. Oct. 25, 1999); *Seinfeld v. Slager*, 2012 WL 2501105

(Del. Ch. June 29, 2012); *Calma v. Templeton*, 114 A.3d 563 (Del. Ch. 2015).

³ 2017 WL 1277672 (Del. Ch. Apr. 5, 2017), *rev’d*, 177 A.3d 1208.

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