General Counsel Update

DAVIS POLK & WARDWELL May 28, 2008

The Consequences of Majority Voting Policies

Given the increasing number of companies that are adopting majority voting for the election of directors, it was likely inevitable that each proxy season will find companies struggling with the consequences of directors failing to receive majority support from shareholders. According to ISS, over half of S&P 500 companies have implemented majority voting either through charter or bylaw amendments or director resignation policies, whereby directors who do not receive a majority of affirmative votes must tender their resignation for the board's consideration.

Recently, all three directors at Axcelis Technologies up for election failed to receive a majority of shareholder support. The company had faced increasing pressure to declassify its staggered board, and recently was the target of an unsolicited takeover bid that it initially dismissed. A shareholder proposal to declassify the board received majority support in 2007, and in this year's proxy statement the company submitted a declassification proposal to shareholders without taking a position on the matter. ISS recommended that Axcelis shareholders withhold votes for these directors because they failed to recommend a proposal to declassify the board, while Glass Lewis made the same recommendation as a result of the company's rejection of the takeover bid without submitting the matter to shareholder vote.

At the company's 2008 annual meeting, the declassification proposal did not receive the necessary support of at least 75% of the outstanding shares required to become effective, and none of the directors received majority support. In a letter to shareholders in early May, after the annual meeting, the company noted that it believed the director election results were directly attributable to ISS recommendations to withhold votes from these directors due to the staggered board, and that the directors would tender their resignations to the nominating committee for consideration under its majority vote policy. Last Friday, Axcelis announced that its board has decided not to accept any of the directors' resignations, noting that the three directors are "experienced and knowledgeable" about the company, and that it would otherwise be left with only four remaining directors. The board's decision has been criticized; one news account stated that its "justification is one that any board can provide to support a refusal to accept a director's resignation" and analyzed the possibility of a shareholder lawsuit against the board for taking this action. The company also noted, as part of its announcement, the importance of having the directors continue in their positions in order to begin discussions with the hostile suitor, and that the board would consider recommending in favor of a declassification proposal at its next annual meeting.

The situation at Axcelis may evidence not only the consequences of adopting a majority voting policy, but also that declassification proposals can have a demonstrable impact on shareholder support for directors. While over 52% of S&P 500 companies are reported to have staggered boards in place, in 2007 proposals at 46 companies averaged over 60% in support. In a similar situation with respect to the impact of a declassification proposal, the four directors at Boston Properties up for election at its annual meeting failed to win majority support, receiving greater than 50% opposition. The company had faced a shareholder proposal to declassify its board for several years, which in 2007 received over 82% support. While the company does not have majority voting in any form, it has been reported that the United Brotherhood of Carpenters and Joiners are asking these directors to resign from the board.

Please call your Davis Polk contact if you'd like to discuss these issues.