

Spotlight on Shareholder Proposals: Independent Chairs - July 2011

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As of July 2010, 43% of S&P 500 companies have separate CEO and chairman positions, but only about half of those companies have an independent chair. The debate about the value of having an independent chair continues, including through shareholder proposals.

Only a small percentage of the proposals submitted to vote succeed, and usually by narrow margins. In 2001, only 4 (about 17% of the total) passed, none of the 45 proposals in 2010 received sufficient majority support, and 4 in 2009 (about 10% of the total) and about 5% of the over 160 proposals from 2005 to 2008, won shareholder approval. In the instances where the proposals pass, companies generally respond promptly. Looking at 2009 results, Bank of America lost an unusual binding bylaw proposal and appointed a new independent chair. Weyerhaeuser also elected an independent chair at its annual meeting.

In recent years, many boards with executive chairman have appointed lead directors to provide countervailing independent board leadership. Having a lead director with specified responsibilities is one of the factors that could lead ISS to recommend against a shareholder proposal calling for an independent chairman. Evidencing their view that stock price is tied to board structure, another required factor for this ISS policy and one that cannot be as easily managed by companies, is the requirement that a company's total shareholder return exceeds peers (as defined by ISS).

It has been reported that over 50% of S&P 500 companies now have lead directors. Unfortunately, the absence of clear distinctions between the use of the terms "presiding" director vs. "lead" director means little discernible correlation between the presence of a lead director and the voting results of these shareholder proposals. Some presiding directors only lead executive sessions, as required by the NYSE, while others have similar responsibilities as directors designated as "lead directors." There is also a range of duties among those named as lead directors.

Although the board had a lead director, in 2011 Moody's lost the shareholder proposal (56% in support). At Vornado Realty Trust, where the company had a separate, but non-independent, chairman, the proposal received slightly above 50%. The recent requirement by the SEC that companies with combined CEO and chair positions also indicate whether there is a lead director, may have caused some change in roles.

There are slight variations among the proposals. While much less common, some shareholder proposals ask for the designation of a lead director rather than an independent chair. This season, the SEC staff determined a proposal seeking a lead director was sufficiently duplicative with another proposal calling for an independent chair, so that only one needed to be presented in the proxy. Some companies that already have independent chairmen, such as Whole Foods, received proposals asking that the structure be made permanent.

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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