

Interested Shareholders File Soliciting Materials on Annual Meeting Ballot Items

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An increasing number of shareholders are filing solicitation materials advocating for a particular position on a voting matter at annual meetings, the flip-side to our recent [discussion](#) of companies filing additional soliciting materials to support management proposals. Some companies that are not accustomed to the practice may be surprised that the shareholder materials are filed under the company's EDGAR record, as a Notice of Exempt Solicitation. As permissible under Rule 14a-6(g)(1) and Rule 14a-2(b)(1), the solicitation is exempt from requiring the proponents to file accompanying proxy statements.

Since March 1st, shareholders have made over 30 such filings. More than half were filed by the proponents that submitted shareholder proposals being voted on at the meeting. The others generally focus on voting against director nominees. Recently, a coalition of state pension funds, including CalPERS and CALSTRS, urged shareholders to vote against the two directors up for re-election at [Hospitality Properties Trust](#). Their letter states that they are taking this "extraordinary action" for several reasons, including the adoption of a poison pill by the company without shareholder approval and the absence of efforts to declassify its board after receiving more than majority support for shareholder proposals seeking annual elections for three consecutive years. Yesterday, the company announced that one of the directors received only 42% in support and resigned as a result. However, as the board determined that the low vote was not due to the director's "personal failings" but rather the board's disagreement with CalPERS, the board re-appointed the same director to the vacancy that his resignation created, and the director accepted. The composition of the board remained the same.

At Wellpoint, CtW Investment Group filed three separate letters to shareholders asking them to withhold support for two director nominees because of perceived lack of oversight for political spending. The [most recent](#) criticizes not only the company but also takes issue with ISS' support for the election of those directors and the advisory firm's recommendation to vote against a shareholder proposal on political contributions disclosure. CtW also asked [Sotheby's](#) shareholders to vote against its nominating and governance committee for their "failure to take decisive action and break with James Murdoch," a former board member. In another action directed at board members, the Comptroller of the City of New York encourages shareholders to vote against several director nominees at [Wal-Mart](#) for independence and compliance issues related to recent allegations of bribery at the company.

Proponents who submitted shareholder proposals are using these materials as another way to hype their proposals, without being restricted by the 500-word limit imposed on supporting statements. They also use them to rebut the company's opposition statement in the proxy statement. The most prolific shareholders include Trillium Asset Management, urging support for their proposals asking that boards of directors adopt policies prohibiting the use of corporate funds for political purposes at [3M](#) and [Bank of America](#) as well as proposals at [Verizon](#) and [AT&T](#) to commit to operate its network consistent with principles of network neutrality, which at 10 pages (with footnotes) was one of the longest. Most soliciting materials are from advocates of environmental and social issues, with a few covering executive compensation proposals. In addition, Amalgamated Bank filed a letter urging shareholders of [Chevron](#) to vote for its proposal to repeal an exclusive forum bylaw.

In early April, Norges Bank Investment Management filed a presentation on the proxy access proposals that it had submitted to six companies, including [Wells Fargo](#). Norges had taken part in a Glass Lewis-sponsored proxy talk. Besides explaining the terms of the proposal, the presentation provides the reasons why it focused on these particular companies, citing issues ranging from stock price performance to governance matters such as combined CEO and chair positions, the absence of the right to call special meetings or the adoption of the right to call special meetings at higher

thresholds than the 10% supported by a majority of shareholders, the existence of classified boards or the boards' rights to amend bylaws without shareholder approval. The claims are sufficiently wide-ranging as to make it difficult to predict what companies would not be targets.

The results at Hospitality Properties Trust is likely due to its fairly unusual fact pattern, and the ability of these shareholder soliciting materials to affect vote results is probably not meaningful for the most part. However, as a relatively simple and inexpensive means of shareholder communication, the use of these exempt filings could continue to appeal to these types of shareholder activists.

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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