

Examining Apple's Disputed Proposal to Amend its Charter

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There has been much in the press about David Einhorn's lawsuit seeking an injunction against Apple over a proposal in its annual meeting proxy statement, with various reports indicating that Einhorn is focused on Apple's vast cash position and the possibility of the company distributing preferred stock to its shareholders. The suit also alleges that Apple improperly bundled several matters into one proposal in violation of Rule 14a-4(a)(3).

Apple's proposal as described in its proxy [statement](#) seeks shareholder approval to amend the company's charter to (a) implement majority voting for the election of directors; (b) eliminate "blank check" preferred stock; (c) establish a par value for the company stock and (c) make conforming changes. Apple discloses that the majority voting amendment is needed to conform to the California Corporation Code that applies to companies that have adopted majority voting. Unlike Delaware, the California statute provides that the term of an incumbent director in an uncontested election who fails to be elected shall end the earlier of 90 days after voting results are determined or when the vacancy is filled.

David Einhorn and Greenlight Capital filed a [notice](#) of exempt solicitation on February 5th announcing its lawsuit, and included a copy of the letter it sent to Apple shareholders asking them to vote against this proposal because it "would eliminate preferred stock from Apple's charter and thus restrict the Board's ability to unlock the value on Apple's balance sheet." The notice states that they have had ongoing discussions with Apple about the possibility of distributing perpetual preferred stock to shareholders, which Apple rejected definitively in September 2012. Greenlight then initiated the lawsuit after Apple informed them recently that while it will continue to evaluate Greenlight's ideas, it will not withdraw the charter amendment and also refused to unbundle the proposal.

In response, Apple filed additional soliciting materials on the same day reiterating its commitment to thoroughly evaluate Einhorn's proposal and emphasizing that its proposal would not prevent the company from issuing preferred stock, but only requires that shareholders must approve such issuances. Since Apple's proposal would be in line with what activists of a different stripe would consider "good governance," it is not surprising that CalPERS also filed a [notice](#) of exempt solicitation to support the company.

Because of the management proposal, Apple filed a preliminary proxy statement first with the SEC. There is no indication whether the SEC staff reviewed it before the final proxy materials were distributed. A majority of the company's outstanding shares are needed to approve the proposal at the meeting scheduled for February 27th.

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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