

Fifth Circuit Upholds Decision Against Chevedden as More Companies Seek 14a-8 Relief from Courts

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The Fifth Circuit has upheld a Texas federal district court decision from last May granting summary judgment to Waste Connections allowing the company to exclude a shareholder proposal submitted by John Chevedden. In the district court case, the company argued numerous grounds under Rule 14a-8 against a declassification shareholder proposal, including that the rule does not permit Chevedden to sponsor a proposal based on a “proxy” from shareholders. Chevedden himself did not own stock in the company but was designated the proponent by two shareholders who submitted the requisite proof of ownership. The district court did not issue a formal opinion explaining its decision so it is unclear which grounds were persuasive. Chevedden appealed on the basis that his stipulation not to sue the company for excluding the proposal deprived the company of standing, but the appeals court disagreed since the decision whether to exclude a proposal could still expose the company to SEC enforcement action and implicates its duties to all of its shareholders.

There are at least four lawsuits pending against Chevedden so far this year, seeking relief far beyond Texas courts, with complaints bearing similar arguments to those that SEC staff have rejected in the no-action letter process. Chipotle filed suit in Colorado federal district court making the same “proposal by proxy” argument as Waste Connections did last year. In addition, the company alleges that its proposal seeking simple majority vote (or elimination of supermajority provisions) is vague and the supporting statements are false and misleading because of references to GMI Ratings and statements that are either irrelevant to the topic or incorrect. In Missouri district court, Express Scripts argues that the independent chair proposal it received from Chevedden is replete with false and misleading statements concerning executive compensation, the companies’ policies and individual directors, including erroneous assertions that the company has plurality voting standards and does not have a clawback policy.

[Omnicom Group](#) has notified the SEC staff that it has initiated a lawsuit in the Southern District of New York with respect to Chevedden’s controversial “confidential voting” proposal, which we previously discussed [here](#). Other companies with this proposal have sent in no-action letters citing to same basis under Rule 14a-8 as Omnicom does in its complaint, including that the proposal is unlawful, vague and implicates the ordinary business of running annual meetings. It will be interesting to see how the SEC staff and the court decide identical arguments in interpreting a new proposal under Rule 14a-8 at the same time.

While some companies bypassed the SEC process altogether when heading to the courts because they assumed it would be futile, EMC filed a [complaint](#) in district court in Massachusetts after being denied no-action relief on a proposal seeking an independent chairman submitted by Chevedden. Similar to Chipotle, EMC argued that the proposal can be excluded because Rule 14a-8 does not permit proposals by proxy and refers to GMI Ratings, and in addition, the reference to “independence” is vague.

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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