

Court Decides False Content in Supporting Statement is Material and Allows Exclusion of Shareholder Proposal

February 25, 2014 | Client Update | 3-minute read

In the first decision of the cases challenging John Chevedden's shareholder proposals for this season, the first outside of a Texas court and reviewing a new issue, the District Court in the Eastern District of Missouri agreed with Express Scripts that it may exclude a shareholder proposal on the basis of false and misleading supporting statements.

The original proposal submitted to Express Scripts in November 2013 seeking an independent chair contained several statements of the type that will be familiar to other companies that have received proposals from Chevedden over the years. In particular, the statements included allegations of (a) \$51 million paid to the CEO, (b) no clawback policy, (c) a member of the board received the "highest negative votes" and (d) plurality voting for election of directors. Over the period of a month, the company sent Chevedden two deficiency letters in which it notified him that these statements were inaccurate and asked him to provide support for them or make revisions. The company later extended the deadline for Chevedden to change his proposal, noting from its own public disclosures the corrections to these four statements.

After the company filed a complaint with the court and past the deadline previously extended by the company, Chevedden adjusted the statements in question, including noting that (a) \$51 million of *realized pay was given to the CEO according to GMI*, (b) there was no clawback policy *until 2013*, (c) a member of the board received the "highest negative votes" *in 2011* and (d) there was plurality voting for election of directors *until 2012*. Even these changes proved to be incorrect, as the company demonstrated using its public filings.

The court determined that the original proposal from November was the only one properly before the court, but even if Chevedden's revised proposal could be considered timely, as he argued, given that the SEC staff at times permits the correction of what it deems to be minor defects, the later proposal still contained substantial inaccuracies. The court held that when viewed in the context of soliciting votes in favor of a proposed corporate governance measure, statements in proxy materials regarding the company's existing corporate governance practices are important to a shareholder's decision on whether to vote in favor of the proposal, and therefore the misstatements in the supporting statements are material and not in compliance with Rule 14a-8.

The court's holding is contrary to the SEC staff's position, which we previously [discussed here](#). While it is unlikely to persuade the SEC staff to modify its views on no-action letter requests, perhaps it may lead to fewer of these statements in shareholder proposals due to the threat of litigation, a change companies would welcome.

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.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.