

Spotlight on Shareholder Proposals: Special Meetings

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As a result of targeted activism in the last few years, more than half of the S&P 500 companies now allow shareholders to call special meetings. The number of shareholder proposals relating to special meetings declined this year, to 28 in 2011 from 54 in 2009.

The decline can be attributed in part to companies submitting management proposals in order to exclude the shareholder proposals from their proxy statements. Shareholder proposals generally seek the ability of 10% or more shareholders to call special meetings, but if companies include a management proposal giving shareholders the same right, but at a different ownership level (for example, 40% for EMC and 25% for Weyerhaeuser), then the SEC staff permits the shareholder proposal to be excluded from a company's proxy statement on the basis that the company is submitting a conflicting proposal under Rule 14a-8(i)(9).

This now well-recognized method of excluding special meeting shareholder proposals doesn't mean that the same proposal won't continue to be submitted after the company adopts a provision, in an attempt to get the ownership threshold ratcheted down to 10%. But these proposals can often be defeated at companies that already allow some percentage of shareholders to call special meetings. This year, most companies where the proposals failed had minimum ownership thresholds at 25% (Citigroup, Goldman Sachs, DuPont and Office Depot) with some higher (Amazon at 30%) or lower (Pepsi at 20%). At Home Depot, however, the shareholder proposal received majority support although the company already provides the ability of 25% or more shareholders to call special meetings.

The coalescence around these preferred ownership percentages by shareholders do not seem to result from individual analysis of a particular companies' holdings, but rather seems to reflect a "one-size-fits-all" approach. Almost all shareholder proposals seek the right to call special meetings at ownership levels of 10% or more, even at companies like Wal-Mart which has more than 40% insider control. Verizon implemented a bit of a creative approach by providing the threshold at 10% for a single shareholder, or 25% ownership for multiple shareholders.

While companies are rightly concerned about adopting provisions that may result in significant board and management time and expense, it may be worth noting that special meeting provisions generally include necessary procedural safeguards and qualifications to minimize those costs. The requirements include certain notice and possibly certifications for shareholders, and restrictions on the time period and manner for calling special meetings, especially if another annual or special meeting covering the same subject matter has just passed or is upcoming in the near future. In fact, the ISS 2011-2012 policy survey inquires about a fairly recent phenomenon that it declares only a "handful" of companies have adopted: the requirement that the ownership threshold be held in a net-long position.

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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