

Bucking the Trend of S&P 500 Companies

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Governance surveys indicate that the S&P 500 companies have largely dismantled their takeover defenses and have established so-called “good” governance practices, but that is not the case for all of the large-cap companies. Netflix recently held its annual meeting where a nearly unprecedented five governance shareholder proposals were on the ballot. While none of the proposals’ sponsors actively campaigned, not even filing any notices of exempt solicitations, almost all of the proposals won by a vast majority that was far above the average vote results. The outcomes were particularly high given that insiders own more than 9% of the company.

A proposal to declassify the board received 89% in support. A proposal asking the board to adopt majority voting in director elections won 81%, while another seeking a simple majority vote as the criteria for shareholder approval was favored by 81% of shareholders. In what may be the strongest vote on this proposal, 73% of shareholders endorsed having an independent chair. Only a retail version of a proxy access proposal failed to garner majority support. In addition, likely in response to putting in place a poison pill last year without shareholder approval, 2 directors barely received a majority of votes for their election while one director received a little over 49%.

These results may be somewhat surprising in light of the well-publicized acquisition of Netflix shares by Carl Icahn in the fall, which led the company to adopt the poison pill and presumably argues for maintaining its available defenses. In addition, more than an 80% increase in the company’s stock performance since the beginning of the year did not seem to persuade shareholders to vote with the board’s recommendations.

As the company has faced similar results before without making changes, it is not clear that it will be following the majority of S&P 500 companies after this meeting. In 2011 a majority vote proposal received 73% support, while in 2012 both a proposal to declassify the board and give shareholders the right to call special meetings passed. According to SharkRepellent, Netflix is among only 7% of S&P 500 companies with a poison pill in force, 15% with a classified board, and 8% that have not adopted a majority or plurality-plus vote standard to elect directors. It is also in the minority in not giving shareholders the right to call special meetings and requiring a supermajority vote to amend certain charter and bylaw provisions.

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

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