

Independent Chair Proposals and the Relevance of Supporting Statements

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So far this season 44 shareholder proposals asking companies to appoint independent chairs of boards are on annual meeting ballots. None of the ones voted on have passed, although eight have received support over 40%, an increase from 2016. This includes several companies with robust lead directors. In the meantime, the number of large-cap companies that combine the chairman and CEO roles have grown, to about 50% of the S&P 500 compared to 43% last year.

In recent years, few companies have submitted no-action requests to exclude these shareholder proposals, since the text of those resolutions and the arguments against them have largely been settled.

In March, the SEC staff denied a company's efforts to exclude such [a proposal](#) on vagueness and personal grievance grounds. However, the staff permitted the company to omit paragraphs in the supporting statement regarding neonics that the staff agreed were irrelevant to a consideration of the subject matter of the proposal, since there is a "strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote."

The company had argued that nearly half of the supporting statement discussed the company's decision to sell produce treated with neonics, and the products it sells are not related to whether the chairman of the board is independent. The proposal gives shareholders a misleading impression that supporting it would have an impact on what products the company decides to include in its stores.

The proponent in turn contended that stronger board oversight is designed to help companies address particular challenges, and at this company, one of those challenges is the sale of products treated with neonics. It was necessary for the supporting statement to devote significant explanation to this issue given shareholders' likely unfamiliarity with the topic.

The staff's decision to permit the company to remove the paragraphs relating to the use of a certain type of insecticide contrasts with [its prior decision](#) that did not agree that criticisms about board members' independence and tenure, executive compensation and state takeover law were objectively misleading or simply irrelevant to a proposal on an independent chair.

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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