

2010 Proxy Season Early Trends: More Proposals, and More Exclusions

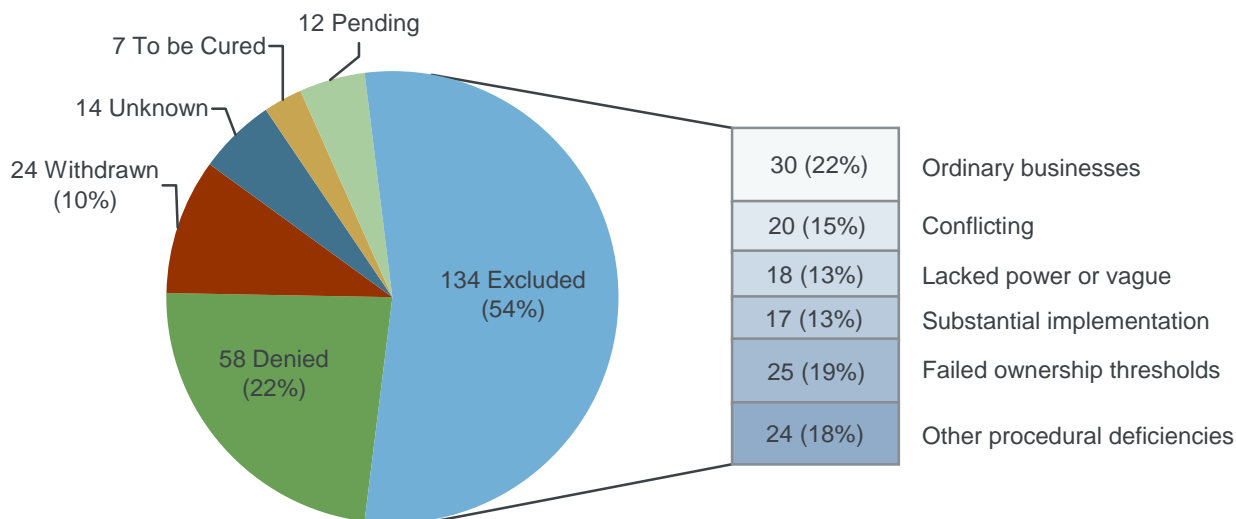
While the 2010 proxy season is far from over, one phase is complete for most calendar year companies: the SEC Staff review of no-action letters seeking exclusion of shareholder proposals from proxy materials. Last year's Staff Legal Bulletin 14E restricted the grounds on which proposals could be excluded, which led some to predict the virtual demise of the 14a-8 no-action letter request. But based on the returns so far it appears that this demise has been exaggerated. Properly framed 14a-8 no-action letters can continue to be effective for excluding shareholder proposals.

No-Action Letter Requests Increased This Year

Click [here](#) for charts in the Appendix illustrating the range of proposals that have been submitted this year.

According to RiskMetrics, more exclusion requests have been filed this year than in any of the past three years. Companies challenged 249 shareholder proposals, or 31% of the total. Not counting proposals later withdrawn by the proponents, the SEC staff agreed with companies 68% of the time, which is largely consistent with prior years.

249 No-Action Letter Challenges*



*As of April 7, 2010

Several trends emerge from a review of this season's process:

Old Arguments Don't Always Work Again, but New Ones Can Prevail

Say on Pay. Perhaps acknowledging the zeitgeist, the Staff reversed course this year and rejected arguments that certain types of say on pay proposals could be excluded as "vague" and "indefinite": arguments that had succeeded in 2008. The Staff offered a thin explanation based on the absence of one sentence that had been in the supporting statement of the 2008 precedent. Our takeaway is that say on pay, almost regardless of the form of the proposal, is here to stay.

Conflicting Proposals. One way to seek to exclude a proposal is to claim that it conflicts with the company's own proposal. For example, many companies this year are proposing charter or bylaw amendments allowing shareholders to call special meetings, setting the minimum percentage at 25% or even as high as 40%. This trend is a response to last year's shareholder proposals recommending a 10% threshold which received majority support in many cases. The Staff has this year concurred with companies in their no-action letter requests that shareholder proposals seeking lower thresholds can be excluded because they would conflict with the management proposals. This may be a short-term tactic, but it appears to be successful for now.

In a similar vein, companies who have made their own proposals to eliminate supermajority provisions have succeeded in excluding shareholder proposals on the same subject, even though the company proposals would have required the vote of a majority of outstanding shares, while the shareholder proposals would have required simply a majority of votes cast.

But the conflicting proposal argument is less successful when the two proposals have more than strict numerical differences. The Staff has, for example, refused to concur that a shareholder proposal seeking an annual say on pay vote conflicts with a company's proposal for a vote in 2010.

Novel Proposals Foreshadow Emerging Governance Trends

New forms of shareholder proposals are a good barometer of governance concerns. Compensation continues to be a prime focus, and this year has seen a rise in proposals seeking retention of equity awards past retirement, and requiring companies to report to shareholders on pay disparity between executives and employees. We are also seeing an increased focus on compensation below the executive officer level, reaching into a more broadly-defined category of "management" or a certain number of top-earners. Proposals that go beyond executive compensation are still excludable as an ordinary business matter, but the Staff is reported to be reevaluating that line of reasoning.

The impact of SLB 14E was felt most strongly by companies that received proposals to adopt and disclose a written and detailed succession planning policy, which is no longer excludable as an ordinary business matter. A few companies argued that they had already substantially implemented the proposal by addressing the subject in their governance guidelines and charters, but the Staff rejected these arguments.

If At First You Don't Succeed (You'll Probably Fail Again)

Companies and (more often) proponents are increasingly employing the tactic of seeking reconsideration of Staff decisions. Some of this activity was likely inspired by the *Tyson* letter in the early part of this season, where the Staff originally permitted the company to exclude a proposal related to the use of antibiotics in livestock production but then reversed itself less than a month later in response to a reconsideration request by the proponents. The Staff's reasoning for the reversal was curious, as it cited a ban in the European Union and bills introduced in Congress on the topic, both of which the proponent had already raised before the Staff made its first determination.

Although Rule 14a-8 contains several highly technical requirements and strict deadlines, the process for reconsiderations highlights the lack of formal procedures after the initial submission of the no-action letter. Additional letters back and forth may be written by both sides, and reconsideration requests can be made after the Staff renders its view, without adhering to any particular timing. Over 35 such requests have been decided by the Staff in 2010 so far, all of which other than *Tyson* were rejected. While reconsideration is a low-yield tactic, it is also low cost, and so we may expect it to continue unless there are procedures to address the issue.

The Lawsuit as an Alternative – Lessons from Apache

The recent Apache vs. Chevedden decision is a reminder that litigation is also an option for excluding proposals. John Chevedden is a well-known retail activist, and it has been reported that he and his cohorts submitted more than 125 proposals to 85 companies in 2008.

To prove ownership of Apache securities, Mr. Chevedden had submitted a letter from Ram Trust Services (RTS). RTS, as an “introducing broker”, was neither a record holder of Apache securities nor a DTC participant. Mr. Chevedden later provided a letter from Northern Trust, which acted as the DTC participant for RTS, but only after the deadline for curing the deficiency had passed. The court rejected the company’s position that a letter from DTC was required to prove eligibility, but held that even so Apache could exclude Mr. Chevedden’s proposal to eliminate supermajority voting because it was not required to rely on RTS’s letter and because the Northern Trust letter was untimely.

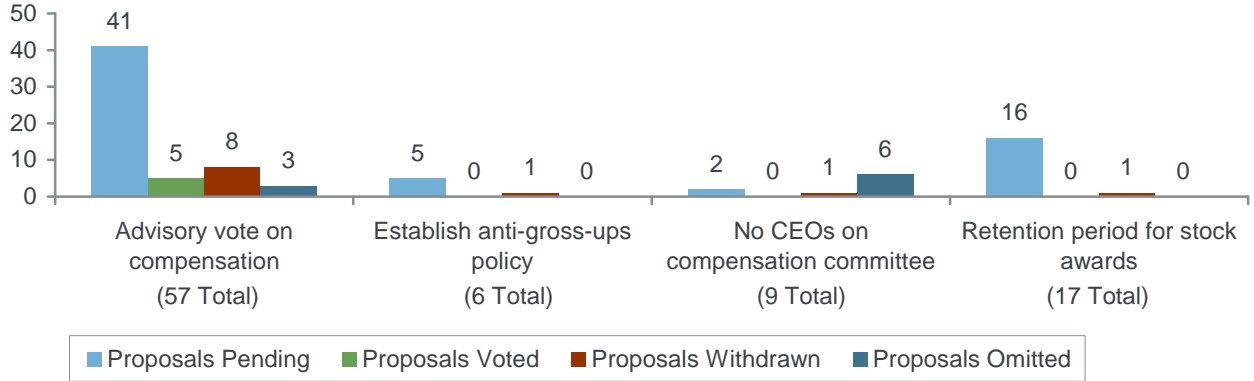
Who won here? Apache won the case, but the precedent may be of limited value. The Staff had previously taken a position in *Hain Celestial* (2008) that a written statement from an introducing broker is sufficient. Since the court case was handed down, the SEC has stuck to its position, denying exclusion when Mr. Chevedden again only provided a letter from RTS. All in all this may seem like much ado about not very much, but it illustrates that procedural deficiencies continue to provide sufficient grounds for exclusion in many situations. Companies should carefully examine the materials accompanying proposals and follow the technical process to be able to cite those compliance failure if they exist.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact:

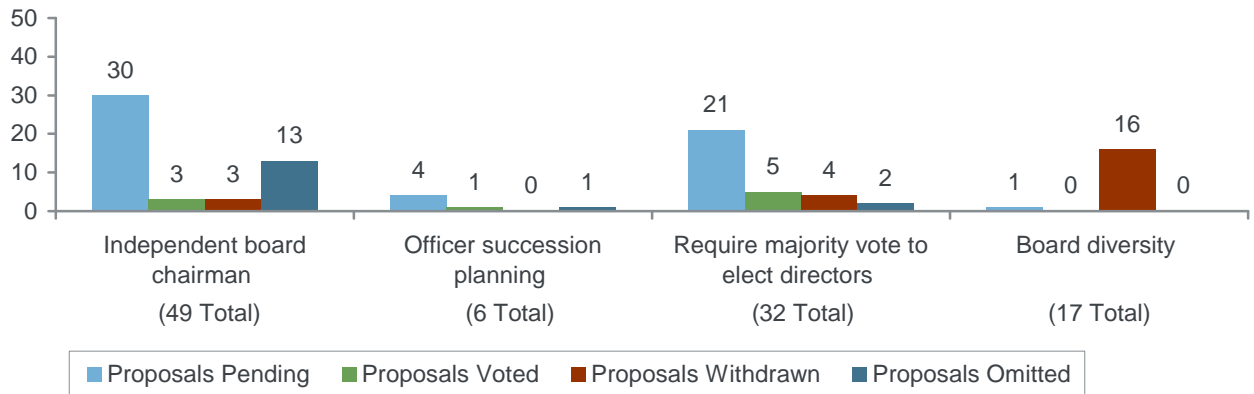
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Appendix - A survey of major governance proposals, according to RiskMetrics Group

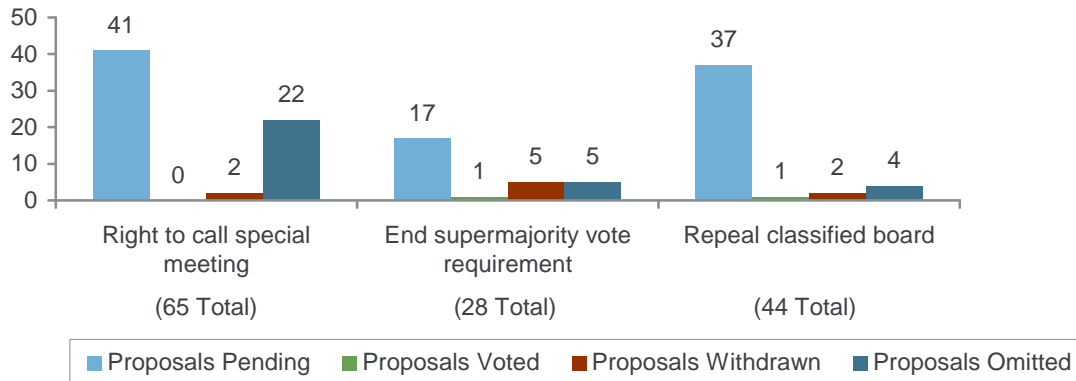
Executive Pay Proposals*



Board Proposals*



Takeover Defenses/Other Proposals*



* Data as of April 8, 2010