

Navigating the Waters of Special Meetings and Written Consent Proposals *By Shirley Westcott*

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Although executive compensation is the centerpiece of this year's proxy season, annual meetings are still replete with the usual docket of shareholder resolutions. High in the count, both in number and corporate frustration level, are proposals sponsored by gadfly activists John and Ray Chevedden, William and Kenneth Steiner and the Rossi family to expand shareholders' ability to take action between annual meetings via special meetings or written consent.

This year's vote tallies, however, point to two emerging trends on these proposals which may give companies a brief sigh of relief: (1) opinions of proxy advisors, particularly ISS, are having less of an impact on the vote outcomes, and (2) investors, like the corporate community, are growing weary of these resolutions.

This article offers insights regarding how written consent and special meeting proposals are shaping up this year and ways in which companies can approach them.

Special Meetings

This marks the fourth year of the proponents' exhaustive campaign to enhance shareholders' right to call special meetings. Even though many companies complied with earlier versions of the proposal and adopted a 25% ownership requirement for invoking this right, the resolutions continued to resurface seeking a further reduction to 10%.

According to data from SharkRepellent.net, only about half of S&P 1500 companies currently allow shareholders to call special meetings at all. Of these companies, 28% have a minimum ownership threshold of 10% (in part due to state laws), 26% have minimum ownership thresholds of between 15% and 25% (primarily 25%), and 46% have minimum ownership thresholds of 30% or more.

Investors want some ability to call special meetings, but their comfort level as to how far to extend this right has topped off somewhere between 15% and 25%. The proponents themselves are recognizing this. This year they are trying out different ownership levels in their submissions, particularly at companies where their 10% proposals failed last year: 15% at Boeing, Citigroup, Colgate-Palmolive, Home Depot, Interpublic Group, NV Energy and Verizon; 20% at American Express, Caterpillar and Waste Management; and 25% at McGraw-Hill. (The latter two were ultimately omitted.)

Proxy advisors ISS and Glass Lewis favor minimum ownership thresholds of 10% and 10-15%, respectively, though both state in their policies that they take into account other factors in reviewing shareholder resolutions on special meetings, such as the company's size, investor base, responsiveness to other shareholder matters, and current provisions for calling special meetings. In practice, ISS has supported all of the shareholder resolutions so far this year, as it did in 2010, irrespective of the minimum ownership level advocated in them. Statistics are not available on Glass Lewis's recommendations.

While companies should be aware of the proxy advisors' policies, their recommendations haven't swayed this year's votes on special meeting proposals. Of the 23 shareholder proposals where vote results have been reported to date, only three have received majority support: Citigroup and NV Energy (which both received the 15% proposal) and NYSE Euronext (which prohibits shareholders from calling special meetings). In contrast, 12 of the 43 shareholder proposals on ballots last year won majority support.

Companies are clearly better served by consulting their own investors in establishing the parameters for allowing shareholders to call special meetings. In addition to the minimum ownership requirement, companies should be mindful of other potential pitfalls:

Restrictive Provisions

This year over a dozen companies omitted the shareholder proposals by advancing their own resolutions to give shareholders' greater ability to call special meetings, most often for holders of 20% or 25% of the shares. While these are passing handily, several companies have gotten caught in an ISS tripwire for including restrictive covenants in their certificate and bylaw amendments, such as limits on the timing and agenda of special meetings or mandates that the ownership requirement be met through a net long position. ISS took issue with these provisions at Marathon Oil, Mattel, and Southwestern Energy and opposed their management proposals, but oddly didn't object when similar provisions were tucked into nine other companies' proposals this year. ISS also rejected a reincorporation proposal at Williams-Sonoma (May 25 annual meeting), until the company removed its restrictions relating to special meetings. So far, investors haven't shown disapproval of such procedural safeguards, or possibly they haven't noticed them. The proposals at Marathon Oil, Mattel, and Southwestern Energy all passed.

Repeat Majority Votes

Boards that fail to respond to shareholder proposals that receive majority support in multiple years face the prospect of high opposition votes to their reelection. However, regarding the issue of special meetings, shareholders appear to be more flexible than the proxy advisors as to what constitutes a satisfactory response. ISS, for example, expects companies to implement the letter of the proposal and this year recommended against the boards of Marathon Oil and Allstate for not adopting the proponents' 10% ownership threshold after two years of majority support, even though both companies proposed certificate and bylaw amendments to adopt 20% ownership requirements for calling special meetings. Despite the ISS recommendation, shareholders ultimately approved Marathon Oil's and Allstate's proposals and board reelection.

Written Consent

After a successful debut in 2010, the proponents are back in force this year with their companion proposals to allow shareholder action by written consent. Since many of these are resubmissions (12 of the 35 on ballots through June), targeted companies may need to

start planning how to address any that receive majority support. Below are some factors to consider.

Complying with Proxy Advisor Policies

ISS and Glass Lewis largely support shareholder proposals to adopt written consent. Although ISS revised its policy this year to give companies credit for having a "low-risk, shareholder-friendly" governance structure, the hurdles are rigorous: an annually elected board, majority voting in director elections, no non-shareholder approved poison pill, and an "unfettered" right for holders of 10% of the shares to call special meetings. So far this year, the only companies that have met ISS's conditions for not supporting the shareholder proposal are Sempra Energy and Kohl's.

Adopting the Proposal

Relatively few companies allow shareholders to act by less than unanimous written consent (28% of the S&P 1500 according to SharkRepellent.net), because it can deny some shareholders the opportunity to be informed about and vote on the proposed business.

This year Home Depot is proposing to adopt written consent after a shareholder proposal received majority support in 2010. However, the company's articles contain a clearly delineated process to limit overuse and ensure adequate advance notice before any consent action may be taken. This includes requirements that holders of at least 25% of the shares must first request that the board set a record date to determine which shareholders are entitled to act by written consent, and that consents must be solicited from all shareholders. Although the proxy advisors have yet to weigh in on Home Depot's proposal, it may serve as guidance for other companies which decide to accord shareholders this right.

Gauging Shareholder Interest

As with the proposals on special meetings, shareholders appear to be backing off from written consent this year. Of the 24 shareholder resolutions where vote results have been reported to date, only eight have received majority support (at Alcoa, Allstate, Amgen, AT&T, CVS Caremark, International Paper, Liz Claiborne, and NYSE Euronext), compared to 13 out of 18 proposals in 2010.

Waning shareholder interest in written consent prompted Alaska Air Group to take a novel approach to the issue this year. After a 2010 shareholder proposal was supported by a majority of outstanding shares, the company consulted a number of its investors and found that 13% of those who supported the shareholder resolution last year would not do so again if it were resubmitted in 2011. On this basis, the company has decided to conduct an *advisory* vote at its May 17 annual meeting (which the board is recommending against) to reaffirm whether or not its shareholders want the ability to act by written consent.

Alaska Air's approach may present an alternative avenue for companies dealing with majority-supported shareholder resolutions on this issue and possibly others. Both ISS and Glass Lewis concluded that the company's advisory vote was an acceptable response to last year's shareholder referendum and, accordingly, refrained from recommending against the Alaska Air board. On the proposal itself, ISS (and ultimately shareholders) sided with the board's position against allowing written consent.

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