

July 9, 2013

## **SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2013 PROXY SEASON**

To Our Clients and Friends:

Shareholder proposals continued to attract significant attention during the 2013 proxy season. This client alert provides an overview of shareholder proposals submitted to public companies during the 2013 proxy season, including statistics, notable decisions from the staff (the "Staff") of the Securities and Exchange Commission (the "SEC") on no-action requests<sup>[1]</sup> and other Staff guidance, majority votes on shareholder proposals and litigation seeking to exclude shareholder proposals.

### **1. Shareholder Proposal Statistics and Voting Results**

According to data from Institutional Shareholder Services ("ISS"), shareholders submitted approximately 820 proposals to date for 2013 shareholder meetings, up from approximately 739 proposals submitted for 2012 shareholder meetings.<sup>[2]</sup> The most common 2013 shareholder proposal topics, along with the approximate number of proposals submitted, were:

- political contributions and lobbying (115 proposals),
- board declassification (79 proposals),
- independent chair (70 proposals),
- elimination of supermajority vote requirements (48 proposals) and
- limitations on accelerated vesting of equity awards (45 proposals).

The most common 2012 shareholder proposal topics were:

- political contributions and lobbying (116 proposals),
- board declassification (73 proposals),
- independent chair (48 proposals),
- majority voting in director elections (41 proposals) and
- shareholder ability to call special meetings (34 proposals).

Shareholder proponents withdrew approximately 28% of the proposals submitted for 2013 shareholder meetings to date, compared to approximately 26% of the proposals submitted for 2012 meetings.

## a. Shareholder Proposal No-Action Requests

Just as the number of shareholder proposals increased in 2013, there also was an uptick in the number of no-action requests submitted to the Staff. The following table summarizes the responses to no-action requests that the Staff issued between October 1, 2012 and June 24, 2013 and during the same period in 2011–2012:

	2012–2013	2011–2012
Total Staff responses issued	331	310
No-action requests withdrawn	68	47
Responses granting or denying exclusion	263	263
Exclusion granted	173 (66%)	196 (75%)
Exclusion denied	90 (34%)	67 (25%)

Based on a review of the no-action requests for which no-action relief was granted, shareholder proposals were excluded for the following principal reasons:

- 28% based on procedural arguments, such as timeliness or defects in the proponent's proof of ownership;
- 18% because the shareholder proposal conflicted with a company proposal that was to be submitted for a vote at the same meeting;
- 18% based on ordinary business arguments;
- 14% because the proposal was vague or false and misleading; and
- 10% because the company had substantially implemented the proposal.

Of the shareholder proposals for which no-action relief was denied, 63% were challenged as being either vague or false and misleading under Rule 14a-8(i)(3), making these arguments the most frequently rejected arguments. Other arguments made were that the company substantially implemented the proposal (30% of denials), that the proposal relates to the company's ordinary business operations (19% of denials), and that the proposal is contrary to applicable law or the company otherwise lacks the power or authority to implement the proposal (16% of denials).[3]

## b. Shareholder Proposal Voting Results

**Overview.** The vast majority of shareholder proposals voted on during 2013 did not receive majority support. Based on the 423 shareholder proposals for which ISS provides voting results, proposals averaged support of 34.4% of votes cast. Three proposal topics that received high shareholder support were:

- Board declassification, averaging 80.4% of votes cast, compared to 81.3% in 2012;
- Elimination of supermajority vote requirements, averaging 70.4% of votes cast, compared to 65.9% in 2012; and
- Adoption of majority voting in director elections, averaging 58.8% of votes cast, compared to 62.5% in 2012.

In addition to board declassification and majority voting shareholder proposals, support for several other types of governance proposals decreased compared to 2012. For example, independent chair shareholder proposals averaged support of 31.2% in 2013, compared to 35.6% in 2012. The most high-profile example was the independent chair proposal at JPMorgan Chase & Co.'s 2013 annual meeting, which received 32.4% of votes cast, compared to 40.2% of votes cast on a similar proposal in 2012. Also, shareholder proposals to provide shareholders the ability to act by written consent averaged support of 41.4% in 2013, compared to 45.8% in 2012.

**Majority-supported shareholder proposals.** Based on the 423 shareholder proposals for which ISS provides voting results for 2013 shareholder meetings, 19% received support from a majority of votes cast, compared to 21% in 2012. The table below shows the principal topics addressed in proposals that received a majority of votes cast at a number of companies, indicating that many of the proposal topics were the same in 2012 and 2013:

	2013 Majority Votes	2012 Majority Votes
Board declassification	27	37
Majority voting in director elections	16	15
Elimination of supermajority vote requirements	16	9
Independent chair	4	1
Shareholders' ability to call special meetings	3	4
Shareholders' ability to act by written consent	3	4
Proxy access	3	2

In a controversial move that reinforced concerns over whether proxy advisory firms wield undue influence, ISS's 2013 U.S. Proxy Voting Guidelines heightened the significance of a proposal being

supported by a majority of votes cast. Under those guidelines, ISS announced that, beginning in 2014, it will recommend "against" or "withhold" votes for "individual directors, committee members, or the entire board of directors as appropriate if . . . the board failed to act on a shareholder proposal that received the support of a majority of the shares cast in the previous year" (i.e., 2013). Prior to this change, ISS recommended "against" or "withhold" votes if a board failed to act on a shareholder proposal that either (1) received the support of a majority of shares *outstanding* in the previous year, or (2) received the support of a majority of shares cast in the last year *and* one of the two years prior to that.

For purposes of this voting guideline, ISS will treat a company as having "act[ed] on a shareholder proposal" upon "full implementation" of the proposal or, if the requested action requires shareholder approval, if the company submits implementation of the proposal for approval at the next shareholders' meeting. ISS also will consider "[r]esponses that involve less than full implementation . . . on a case-by-case basis, taking into account:

- the subject matter of the proposal;
- the level of support and opposition provided to the resolution in past meetings;
- disclosed outreach efforts by the board to shareholders in the wake of the vote;
- actions taken by the board in response to its engagement with shareholders;
- the continuation of the underlying issue as a voting item on the ballot (as either shareholder or management proposals); and
- other factors as appropriate."<sup>[4]</sup>

The revised voting policy increases pressure on companies to implement shareholder proposals or to actively engage with shareholders on the topic of the proposal in advance of their next shareholders' meeting. Companies facing shareholder proposals that may receive significant shareholder support but that the company's board views as not appropriate for the company should proactively consider ways to address such proposals. Among the actions that should be considered are conducting outreach to address shareholder concerns before they lead to submission of a proposal, negotiating the withdrawal of a proposal after submission, seeking to exclude a proposal through the no-action process (including by seeking shareholder approval of a company proposal that substantially implements or conflicts with the shareholder proposal) or actively soliciting against a proposal. Some of these measures, such as taking steps that partially but do not fully implement the proposal, may be determined acceptable by both a company's board and shareholders and thereby enable a company to avoid a majority vote on the shareholder proposal, even though those same actions, if taken after a majority vote on the proposal, may not be viewed by ISS as sufficient to "full[y] implement[]" the proposal under its new policy.

## 2. 2013 Shareholder Proposal Developments

### a. Staff Guidance on Shareholder Proposal Procedural Issues

No-action letter responses during the 2013 proxy season bore out the statements in SEC Staff Legal Bulletin No. 14G (Oct. 16, 2012) ("SLB 14G"),<sup>[5]</sup> signaling a heightened standard for companies' deficiency notices that alert shareholder proponents of the failure to provide adequate proof of ownership.

For example, one common problem with proof of ownership letters is a failure to confirm ownership of company stock for the full one-year period preceding and including the date the shareholder proposal is submitted, as required by Rule 14a-8(b). SLB 14G states that the Staff will concur in the exclusion of a shareholder proposal due to this deficiency only if the company's deficiency notice: (1) "identifies the specific date on which the proposal was submitted"; and (2) "explains that the proponent must obtain a new proof of ownership letter verifying continuous ownership of the requisite amount of securities for the one-year period preceding and including such date to cure the defect."

Companies that followed SLB 14G's guidance for drafting deficiency notices were able to exclude proposals under the Staff's heightened standards. For example, in *PepsiCo, Inc. (Albert)* (avail. Jan. 10, 2013)\*, the shareholder proponent submitted a proof of ownership letter that failed to verify ownership for the requisite one-year period because the letter was dated before the date upon which the proponent submitted the proposal to the company. When this deficiency remained unresolved after the company provided a deficiency notice that included the information specified in SLB 14G, the Staff concurred that the company could exclude the proposal. *See also Bank of America Corp. (Brown)* (avail. Jan. 16, 2013, *recon. denied* Mar. 14, 2013)\*.

The Staff also signaled in SLB 14G that it would scrutinize deficiency notices relating to "other specific deficiencies that the company has identified." For example, in *Entergy Corp. (Recon.)* (avail. Feb. 27, 2013), the Staff reversed its decision to grant no-action relief to the company because the proponent's submission of ownership of "Entergy Services, Inc." stock rather than "Entergy Corporation" stock "could be attributed to the manner in which the [deficiency notice] was phrased" by the company. Specifically, the Staff noted that the company's deficiency notice was printed on "Entergy Services, Inc." letterhead and requested that the proof of ownership letter be mailed to an "Entergy Services, Inc." mailing address. In contrast, in *Transocean Ltd.* (avail. Mar. 15, 2013) the Staff concurred in the exclusion of a shareholder proposal when the proponent's proof of ownership letter erroneously verified ownership of "Transocean Management Ltd." stock rather than "Transocean Ltd." stock. The Staff's response letter specifically noted that "this error could not be reasonably attributed to the information provided by Transocean Ltd. in either its [deficiency notice] or its 2012 proxy materials."

While the *Entergy* and *Transocean* decisions remind companies that they should carefully draft deficiency notices, the Staff affirmed that there are responsibilities that remain with the proponent, and mistakes by a proponent can lead to exclusion. For example, in *Alpha Natural Resources, Inc. (Recon.)* (avail. Mar. 15, 2013), the Staff granted no-action relief for lack of adequate proof of

ownership when a proponent submitted its proof of ownership to a fax number that was not at the company's principal executive office, since the shareholder had relied on a third party source, the New York Stock Exchange, for that information, instead of requesting it directly from the company.

## **b. Independent Chair Shareholder Proposals**

Shareholders submitted approximately 70 proposals for 2013 shareholder meetings requesting the adoption of a policy requiring that the company's board chair be an independent director, compared to approximately 48 submitted for 2012 meetings. Fifty-five such proposals have been voted on in 2013, averaging 31.2% support.

As in the 2012 proxy season, some companies challenged these proposals as vague under Rule 14a-8(i)(3), arguing that the proposals did not provide a definition of the term "independent." The success of these arguments depended on the language of the proposal being challenged. For example, in *KeyCorp* (avail. Mar. 15, 2013)\*, the Staff concurred in the exclusion of a proposal requesting that the company "establish a policy requiring that the Board's chairman be an 'independent director,' as defined by the rules of the New York Stock Exchange, and who has not previously served as an executive officer of KEYCORP." In its response letter, the Staff stated that the New York Stock Exchange definition of director independence was a "central aspect" of the proposal, yet the proposal "does not provide information about what this definition means." The Staff similarly concurred in the exclusion of other independent chair shareholder proposals that referred to the New York Stock Exchange or NASDAQ independence standards without describing those standards. *See McKesson Corp.* (avail. Apr. 17, 2013); *Ashford Hospitality Trust, Inc.* (avail. Mar. 15, 2013); *Chevron Corp.* (avail. Mar. 15, 2013)\*; *Comcast Corp.* (avail. Mar. 15, 2013).

On the other hand, the Staff denied exclusion of an independent chair shareholder proposal when the proposal did not prescribe a specific independence standard or refer to an external definition. For example, in *Dean Foods Co.* (avail. Mar. 7, 2013), the company argued that an independent chair proposal was vague because it "fail[ed] to include any standard of independence at all, merely a naked reference to the concept of an 'independent director,' and the supporting statement provide[d] no assistance to a stockholder trying to determine what such standard would be." As with other proposals discussed below, the varying results of the independent chair proposals demonstrate the importance of paying close attention to the wording of specific proposals, as the ability to exclude them is likely to depend on the precise language.

## **c. Political Contributions and Lobbying Shareholder Proposals**

Political contributions and lobbying proposals again were frequent shareholder proposal topics, with shareholders submitting 115 such proposals for 2013 shareholder meetings to date, compared to 116 proposals for 2012 meetings. ISS also reported that "[f]or the second year, political issues have surpassed environmental concerns as the top environmental and social . . . subject that shareholders will be asked to vote on at annual meetings."<sup>[6]</sup> ISS reported that these proposals received average approval of 29.0%, an increase of 7.3 percentage points over 2012.



Following precedent from the 2011 and 2012 proxy seasons that acknowledged the overlap of lobbying proposals and political contributions proposals, companies that received both types of proposals submitted no-action requests arguing for the exclusion of the later-received proposal as substantially duplicative of the earlier-received proposal. In 2012, the Staff had concurred with all of the no-action requests making this argument. *See, e.g., Union Pacific Corp.* (avail. Feb. 1, 2012, *recon. denied* Mar. 30, 2012)\*. However, in 2013, the Staff denied no-action relief in *CVS Caremark Corp.* (avail. Mar. 15, 2013) where the proposals at issue were drafted in a manner that sought to avoid overlap: the lobbying proposal specifically stated that it did not include "efforts to participate or intervene in any political campaign or to influence the general public or any segment thereof with respect to an election or referendum." Likewise, the political contributions proposal specifically stated that "[p]ayments used for lobbying are not encompassed by this proposal." In contrast, the Staff continued to find a lobbying proposal as substantially duplicative of a political contributions proposal when the proposals were not drafted in the precise manner of the *CVS Caremark* proposals. *See WellPoint, Inc.* (avail. Feb. 20, 2013)\*.

#### **d. Proxy Access Shareholder Proposals**

Shareholders submitted proxy access proposals to 17 companies to date for 2013 shareholder meetings, compared to 22 submitted for 2012 meetings. Proxy access shareholder proposals voted on at 11 companies averaged 32.2% support in 2013, though the level of support varied significantly depending on the share-ownership and holding-period thresholds in the proposals.

In 2012, several companies won exclusion of proxy access proposals due to the way the proposals were drafted. Proponents remedied these defects for proposals this season: eight companies submitted no-action requests arguing for the exclusion of proxy access proposals in 2013, but the Staff did not grant any of the requests. Four were denied, and the other four were withdrawn.

While eight proxy access shareholder proposals that were voted on during 2013 failed to receive a majority of votes cast, majority support was obtained at three companies: Nabors Industries Ltd., Verizon Communications Inc. and CenturyLink, Inc.[7] All three of these proposals were non-binding and sought a proxy access right for shareholders who have held at least 3% of the company's stock for at least three years, mirroring the thresholds in the SEC's now-vacated Rule 14a-11. Although shareholders have submitted proxy access proposals prescribing stock-ownership and holding-period thresholds at less than 3%/3-years,[8] no shareholder proposal with these lower thresholds received majority support during either 2012 or 2013.

Notable proxy access developments also occurred at three other companies during the 2013 proxy season:

- The Western Union Company unilaterally amended its bylaws to grant a proxy access right to shareholders who satisfy a 3%/3-year threshold. Western Union had initially intended to present its bylaw amendment for shareholder approval at its annual meeting, and it had submitted a no-action request to the SEC to exclude a proxy access shareholder proposal it had received from Norges Bank prescribing a 1%/1-year threshold, arguing that the Norges Bank

proposal conflicted with the company's proposal. Western Union then effected its bylaw amendment unilaterally, and Norges Bank withdrew the shareholder proposal.

- Two companies, Hewlett-Packard Company and Chesapeake Energy Corporation, submitted company-sponsored proxy access proposals for shareholder approval at their annual meetings. Both companies proposed a 3%/3-year threshold. Hewlett-Packard agreed to submit its 2013 proposal in exchange for the withdrawal of a 2012 proxy access shareholder proposal. The 2013 proposal was approved by holders of 68% of the company's outstanding shares. Chesapeake Energy included its proposal after a proxy access shareholder proposal had garnered majority support at the company's 2012 annual meeting. However, Chesapeake Energy's 2013 proposal was not approved; it received the affirmative vote of approximately 60% of the shares outstanding but required approval of at least 66 2/3% of shares outstanding.

## **e. Executive Compensation Shareholder Proposals**

**Limitations on accelerated vesting of equity awards.** Proposals seeking to limit the acceleration of vesting of equity awards upon a change of control were a frequent topic in 2013, with 45 proposals submitted, many of which were from John Chevedden. The 27 proposals that were voted on averaged support of 33.4% of votes cast.

As with 2012, the Staff concurred that some of these proposals were excludable as vague and indefinite under Rule 14a-8(i)(3). These excludable proposals provided that "any unvested awards may vest on a pro rata basis as of the day of termination," and companies pointed out, among other things, that it was unclear how to apply this "pro rata" vesting provision. *See, e.g., PepsiCo., Inc. (Steiner)* (avail Jan. 10, 2013)\*. However, similar proposals that also provided the compensation committee discretion to apply the "pro rata" provision were not excludable under Rule 14a-8(i)(3). *See, e.g., Walgreen Co. (Amalgamated Bank's LongView Large Cap 500 Index Fund)* (avail. Oct. 4, 2012).

Several companies submitting equity compensation plans for a vote at their annual meetings successfully argued for the exclusion of accelerated vesting shareholder proposals under Rule 14a-8(i)(9) as conflicting with their equity compensation plans. The plans proposed by these companies required vesting that differed from that of the proposal. *See, e.g., Pitney Bowes Inc.* (avail. Jan. 22, 2013)\*; *Union Pacific Corp.* (avail. Jan. 15, 2013)\*.

**Executive stock retention.** Proposals seeking to require executives to retain a percentage of their stock awards for a period of time, typically through retirement age, also were a frequent topic in 2013. Again, many of these proposals were submitted by John Chevedden. Thirty-four such proposals have been voted on to date, receiving average support of 24.4%.

The Staff appeared to take a strict view on whether stock retention shareholder proposals could be excluded under Rule 14a-8(i)(10) based on policies that companies already had in place. For example, in *Bank of America Corp. (Chevedden) (Recon.)* (avail. Mar. 14, 2013)\*, the Staff concurred that the company had substantially implemented a proposal requesting that executives retain a significant percentage of stock acquired through equity pay programs until reaching "normal retirement age" when



the company's board of directors had adopted a policy requiring executive officers to hold at least 50% of their shares from future equity awards "until retirement" (and until one year following retirement in the case of the CEO). However, the Staff did not concur that stock ownership policies requiring executives to own a number of shares determined as a multiple of their annual salaries substantially implemented these shareholder proposals, even when the companies demonstrated that the policies resulted in ownership levels that compared favorably with those sought in the proposals. *See, e.g., Bank of America Corp. (Chevedden)* (avail. Feb. 15, 2013)\* (denying exclusion for the proposal referenced above; company later amended its policy and received no-action relief on reconsideration).

As in 2012, several companies were unsuccessful in asserting that stock retention shareholder proposals were vague or misleading under Rule 14a-8(i)(3). For example, in *Celgene Corp.* (avail. Mar. 25, 2013), the Staff did not concur with the company's argument that it could exclude the proposal because the proposal did not adequately define its prescribed retention threshold of "25% of net after-tax shares" and because the proposal was unclear as to whom the retention policy would apply.

**Triennial say on pay.** Another executive compensation shareholder proposal of note in the 2013 proxy season concerned the frequency and content of say-on-pay votes and was submitted by the United Brotherhood of Carpenters and Joiners of America to at least 22 companies. This proposal asked each company to hold a say-on-pay vote every three years, with separate votes on (1) the company's overall compensation plan, (2) annual incentive compensation, (3) long-term incentive compensation, and (4) post-employment compensation.

Many companies submitted no-action requests to exclude these proposals, but all the proposals were withdrawn before the Staff issued any responses to the no-action requests. A representative of the Carpenters stated that its "withdrawal of the [p]roposal[s] is based on its recognition that there is little interest among [p]roposal recipients to allow a new say-on-pay frequency vote at this time."

## **f. Climate Change Shareholder Proposals**

Climate change has been a frequent shareholder proposal topic in the recent past, and the most notable development regarding such proposals in the 2013 proxy season was the Staff's February 13, 2013 no-action letter to The PNC Financial Services Group, Inc. PNC Financial Services Group, Inc. sought exclusion of a shareholder proposal asking the company's board to report to shareholders on the company's assessment of greenhouse gas emissions resulting from its lending portfolio and its exposure to climate change risk in its lending, investing and financing activities. The company argued that its "day-to-day business consists primarily of lending, investing, and financing activities," but the Staff did not concur in the exclusion of the proposal and indicated in its response that the proposal focuses on the "significant policy issue of climate change."

Some have commented that the Staff's response in *PNC* is a reversal from prior precedent that permitted banks to exclude shareholder proposals targeting the operations of the banks' lending customers. *See, e.g., Bank of America Corp. (Trillium Asset Management Corp.)* (avail. Feb. 24, 2010) (concurring in exclusion of a proposal requesting a report on the company's policy regarding funding

of companies engaged predominantly in mountain top removal coal mining). However, an SEC spokesman indicated that the decision "does not represent a view on the need for the financial sector to consider the issue of climate change," but rather was based on the particular facts surrounding the company's no-action request, "including the nature of [PNC's] own lending criteria and public statements." [9] Thus, it is unclear whether this precedent represents an expansion of what falls into the climate change policy issue, or only reflects application of the requirement that there be "a sufficient nexus . . . between the nature of the proposal and the company" for a proposal to avoid exclusion under the ordinary business argument. [10]

## **g. Shareholder Proposals Requesting Transactions Involving the Company**

During the 2013 proxy season, several companies received shareholder proposals requesting that they engage, or explore engaging, in a transaction to enhance shareholder value.

At The Timken Company, a non-binding shareholder proposal submitted by the California State Teachers' Retirement System requesting that the company hire an investment banking firm to spin off its steel business segment into a separate public company received 53% of votes cast. In response, The Timken Company's board "formed a Strategy Committee [consisting of all independent and non-Timken family Board members] to evaluate a potential separation of the company's steel business from its other businesses and to review the company's corporate governance and capital allocation strategy." [11] The company's lead director, who chairs the Strategy Committee, stated that "[t]he company expects to report on the results of the Committee's evaluation by the end of the third quarter."

Four large financial services companies also received shareholder proposals requesting that the companies appoint a "Stockholder Value Committee" to explore "extraordinary transactions." Such proposals typically are not excludable as relating to a company's ordinary business operations if they relate solely to "extraordinary" transactions (such as a merger or sale of the company) as opposed to encompassing "non-extraordinary transactions" (such as changes in organizational structure). However, the Staff concurred with the exclusion of the four proposals as vague and indefinite. The companies argued that the proposals were unclear because they defined "extraordinary transaction" as a transaction for which shareholder approval would be required, but the proposals' supporting statements discussed various transactions that would not require shareholder approval, making it unclear what types of transactions the committee was to explore. In granting exclusion, the Staff noted that neither shareholders nor the companies would be able to determine what actions or measures the proposals required. *See, e.g., Bank of America Corp.* (avail. Mar. 12, 2013)\*.

## **3. Shareholder Proposal Litigation**

There were three notable lawsuits addressing Rule 14a-8 during the 2013 proxy season and a fourth case that, while not asserting a Rule 14a-8 cause of action, addressed political contributions disclosure, a popular shareholder proposal topic.

**a. *Bebchuk v. Electronic Arts, Inc.***

In *Bebchuk v. Electronic Arts, Inc.*[12], the District Court for the Southern District of New York held that a company has a right to use discretion in considering whether to exclude a shareholder proposal, adhering (upon remand from the U.S. Court of Appeals for the Second Circuit) to a 2008 decision that it had reached. The case involved a non-binding proposal asking the company to include in its proxy materials any "Qualified Proposal," defined in relevant part as a submission that is (i) made on behalf of shareholders owning at least 5% of the company's stock, (ii) valid under applicable state law, and (iii) not related to the company's ordinary business operations. The district court held in 2008 that the proposal was excludable under Rule 14a-8(i)(3) as contrary to the proxy rules, specifically Rule 14a-8(i) itself, the SEC's shareholder proposal rule. The court stated that Rule 14a-8(i) provides 13 bases under which companies "may" exclude a proposal, yet the shareholder proposal sought to eliminate this discretion by requiring companies to include all Qualified Proposals regardless of whether they were excludable under one or more of the 13 grounds.

The plaintiff appealed to the U.S. Court of Appeals for the Second Circuit, and while the appeal was pending, the SEC adopted Rule 14a-11, which was subsequently vacated, and amended Rule 14a-8(i)(8) to no longer allow exclusion of proxy access shareholder proposals. The Second Circuit remanded the case so that the district court could determine the relevance of these changes to this case.[13] On remand in 2013, the district court held that the amendments did not affect its original holding because that holding was based on Rule 14a-8(i)(3) and not Rule 14a-8(i)(8). The plaintiff has again filed a notice of appeal with the Second Circuit for this decision.

**b. *Waste Connections, Inc. v. Chevedden***

In *Waste Connections, Inc. v. Chevedden*, the District Court for the Southern District of Texas granted summary judgment to the company, allowing it to omit a shareholder proposal received from John Chevedden on behalf of James McRitchie. An initial proposal from these individuals requested a right for 10% shareholders to call special meetings, which they then replaced with a board declassification proposal that included an instruction "to complete th[e] transition [to a single class of directors] within one-year." Mr. Chevedden himself owned no shares of the company's stock, but he had obtained a "proxy" to submit the proposal from Mr. McRitchie, who had submitted proof of ownership under the rules.

The company sought a declaratory judgment that it could exclude the proposal, and it argued that it was entitled to summary judgment on four separate grounds:

1. Rule 14a-8(i)(8)(ii), because the board declassification proposal would cut short the terms of directors currently serving on the classified board.
2. Rule 14a-8(h), because a shareholder is not permitted to grant a proxy to another individual to submit a shareholder proposal for inclusion in the company's proxy statement.
3. Rule 14a-8(e)(2), because although Mr. Chevedden submitted the replacement proposal on a timely basis, the actual shareholders (Mr. McRitchie and Ms. Myra K. Young) did not provide

the company documentation showing that they had authorized the replacement proposal until after the deadline for submitting shareholder proposals.

4. Rule 14a-8(b), because the proof of ownership was unreliable and confusing, and therefore insufficient. Specifically, the company argued that Mr. McRitchie's proof of ownership letter, which documented ownership of "no less than 337 shares" since December 2003, was inconsistent with a letter supporting a shareholder proposal the previous year, which documented ownership of "no less than 300" shares since November 2010.

The court noted that the company's "motion for summary judgment is unopposed"--Mr. Chevedden had declined to contest the merits of the company's arguments--and it concluded that the company had "met its burden of demonstrating that there is no genuine dispute as to the material facts." It therefore granted the company's motion for summary judgment and held that the shareholder proposal "may be excluded from [the company's] proxy statement." The court has not issued a formal opinion explaining its decision. Messrs. Chevedden and McRitchie and Ms. Young have filed a notice of appeal with the U.S. Court of Appeals for the Fifth Circuit.

**c. *National Fuel Gas Co. v. Massachusetts Pension Reserves Investment Management Board***

National Fuel Gas Co. v. Massachusetts Pension Reserves Investment Management Board focused on the eligibility of a shareholder proponent that submitted a board declassification proposal. Seeking a declaratory judgment from the District Court for the Western District of New York, the company argued that the proponent, a public pension fund, had delegated investment control over its company shares to a third party (its investment manager) and had not retained the power to vote or trade those shares. As a result of this delegation of authority, the proponent (i) could not show that it had continuous ownership of shares entitled to be voted by the proponent at the annual meeting, and (ii) could not affirm that it would continue to hold these shares through the annual meeting, each as required by Rule 14a-8(b). The company ultimately dismissed the lawsuit pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure<sup>[14]</sup> after the proponent withdrew the proposal.

**d. *New York State Common Retirement Fund v. QUALCOMM Incorporated***

The New York State Common Retirement Fund (the "Fund") in 2013 adopted a new approach to seeking disclosure of a company's political spending. After submitting 27 political spending shareholder proposals in 2011 and 2012<sup>[15]</sup>, the Fund bypassed Rule 14a-8 in 2013 with respect to QUALCOMM Inc. and instead filed a lawsuit against QUALCOMM in the Delaware Chancery Court. In its lawsuit, the Fund sought to assert its right as a shareholder to inspect the company's records on political spending under the books-and-records provision (Section 220) of the Delaware General Corporation Law. The Fund claimed that increased corporate political spending in the wake of the Supreme Court's *Citizens United* decision poses significant risks to shareholders because company officials may make political contributions to pursue personal or political objectives or otherwise invest in ventures that do not create shareholder value. Without disclosure of these political

contributions, the Fund stated that "it is not possible for shareholders to assess the level of risk to their investments in a given company."

The Fund ultimately withdrew the lawsuit after QUALCOMM publicly posted a Political Contributions and Expenditure Policy, under which it will disclose contributions to political candidates and parties, payments to trade associations and Section 501(c)(4) organizations, and information about the company's efforts to influence ballot measures.

## Conclusion

The developments discussed above demonstrate the continued significance and complexity of the shareholder proposal process and reflect important lessons from the 2013 proxy season that companies should keep in mind as they begin to look toward 2014. Specifically:

- Majority-supported shareholder proposals: ISS's revised Voting Guidelines will put increased pressure on companies to prevent shareholder proposals from receiving a majority vote and to implement shareholder proposals that receive majority support. Nevertheless, boards of directors must act in a manner consistent with their fiduciary duty to act in the best interests of the company and its shareholders.
- Litigation: Although it is unclear whether the court cases that were brought or decided during the 2013 proxy season will have a significant impact on the interpretation of Rule 14a-8, companies appear to be increasingly willing to litigate over shareholder proposal matters.
- The importance of language: The Staff's published guidance and its responses to no-action requests reinforce the importance of companies carefully reviewing the shareholder proposals and proof of ownership letters that they receive from proponents and the deficiency notices that they send to proponents. The Staff's decisions on several types of proposals--such as those relating to political contributions and lobbying, accelerated vesting of equity awards and independent chairs--demonstrate that the excludability of shareholder proposals often depends on minor nuances in a proposal's language.

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[1] Gibson, Dunn & Crutcher LLP assisted companies in submitting the shareholder proposal no-action requests discussed in this alert that are marked with an asterisk (\*).

[2] All data in this client alert on shareholder proposals submitted, withdrawn and voted on comes from the ISS shareholder proposals database and ISS publications as of June 2013. Other data was derived from no-action letters on the SEC's website.

[3] The total exceeds 100% because many no-action requests assert more than one argument for exclusion.

[4] Please see our January 29, 2013 client alert for more information about the ISS 2013 policy changes.

[5] Please see our October 16, 2012 client alert describing SLB 14G in further detail.

[6] ISS, U.S. Proxy Season Preview: Environmental and Social Issues (Mar. 7, 2013), *available at* <http://www.issgovernance.com/files/private/2013ISSPreviewES.pdf>.

[7] Although it received more "for" votes than "against" votes, the Nabors Industries shareholder proposal was not approved pursuant to the applicable vote standard described in the company's proxy statement. Under that standard, abstentions and broker non-votes "have the same effect as a vote against a proposal," causing the approval percentage to be less than 50%.

[8] For example, Norges Bank submitted proposals with a 1%/1-year threshold, and various individual investors submitted proposals with a 1%/2-year threshold. These latter proposals additionally sought a proxy access right for any group of at least 50 shareholders each of whom satisfies a \$2,000/1-year threshold and who collectively own between 0.5% and 5% of the company's stock.

[9] "PNC May Not Exclude Proposal Seeking Information on Climate Change Risk," 11 Corp. Accountability Rep. 195 (BNA) (Feb. 22, 2013), *available at* [http://news.bna.com/caln/CALNWB/split\\_display.adp?fedfid=29775330&vname=carenotallissues&jd=a0d6p2d0f4&split=0](http://news.bna.com/caln/CALNWB/split_display.adp?fedfid=29775330&vname=carenotallissues&jd=a0d6p2d0f4&split=0).

[10] *See* Staff Legal Bulletin No. 14E (Oct. 27, 2009), *available at* <http://www.sec.gov/interps/legal/cfslb14e.htm>.

[11] Press release, "The Timken Company Establishes Board Strategy Committee To Evaluate Separation of Steel Business" (June 10, 2013), *available at* <http://news.timken.com/index.php?s=12504&item=136827>.

[12] 2013 U.S. Dist. LEXIS 59776 (S.D.N.Y. Apr. 25, 2013).

[13] *See Bebachuk v. Electronic Arts, Inc.*, 2010 U.S. App. LEXIS 27387 (2d Cir. Sept. 10, 2010).

[14] This rule allows a plaintiff voluntarily to dismiss an action without a court order by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment."

[15] *See* Press Release, "DiNapoli Seeks Disclosure Of Political Spending At Qualcomm" (Jan. 3, 2013), *available at* <http://www.osc.state.ny.us/press/releases/jan13/010313.htm>.



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