



BNA's

Corporate Counsel Weekly

CORPORATE PRACTICE SERIES

VOL. 21, NO. 3

JANUARY 18, 2006

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Focus

Shareholder Proposals

SEC Rejects Company's Argument That Majority Voting Policy Substantially Implements Majority Vote Shareholder Proposal

BY DAVID B.H. MARTIN
AND KEIR D. GUMBS

On Jan. 5, the Securities and Exchange Commission staff denied Hewlett-Packard's request to exclude from its proxy materials a shareholder proposal seeking to establish a majority vote standard for the election of directors. The proposal, submitted by the United Brotherhood of Carpenters Pension Fund, requested that Hewlett-Packard's board of directors "initiate the appropriate process" to amend Hewlett-Packard's governance documents to provide that director nominees be elected by the affirmative vote of the majority of votes cast.

Hewlett-Packard sought confirmation from the SEC staff that it would not recommend enforcement action against Hewlett-Packard if the company excluded the proposal from its proxy materials in reliance on Rule 14a-8(i)(10). This rule allows a company to exclude a shareholder proposal that it has substantially implemented. Hewlett-Packard's argument was based on the fact that it had adopted a "majority voting policy," under which a director who receives a greater number of votes "withheld" from his or her election than votes "for" such election is required to tender his or her resignation for consideration by Hewlett-Packard's Nominating and Corporate Governance Committee. Hewlett-Packard argued that its majority voting policy com-

pared favorably with the shareholder proposal on the grounds that it would lead to results that are substantially similar to those called for by the proposal.

The SEC staff rejected Hewlett-Packard's arguments and denied no-action relief. As is its practice, the staff did not specify why. It remains unclear, therefore, whether the staff rejected Hewlett-Packard's arguments based on some substantive aspect of the policy, or based on the fact that the company's policy is not part of the company's governance documents as requested by the proponent. In either case, the no-action position raises significant considerations for the growing number of companies that have adopted (or are considering adopting) majority vote policies in response to increasing shareholder support for majority vote elections.

Location Matters

A conservative reading of the staff's response is that location matters. The proposal in question requested a policy to be incorporated into the company's corporate instruments, a location that affords the principle of majority vote elections more formality and standing under state law than may attend a voluntary board policy adopted by discrete resolution. It would appear that the staff's view was that the adoption of a policy, in the absence of the requested amendment to Hewlett-

Packard's governance documents, undermined Hewlett-Packard's argument that it had substantially implemented the proposal. This, of course, would not be an entirely new position. The staff has taken similar positions in responding to previous no-action letter requests involving confidential voting and independent directors.

Assuming this to be the basis of the SEC staff's position, it has significant implications for the future of majority vote policies. For one thing, companies that have voluntarily adopted majority voting policies in hopes of foreclosing shareholder debate may nonetheless find themselves vulnerable to proposals in this area. For another, companies that are considering the adoption of majority voting must understand that such adoption may need to be codified in corporate instruments. And this could lead to yet another result, one that might make hollow any celebration by governance advocates of the Hewlett-Packard ruling. The staff's response to the Hewlett-Packard no-action letter request might lead to fewer companies adopting majority voting policies than if the staff had concurred in the company's views.

In the "you can't win for trying" department, companies that might otherwise have voluntarily adopted majority voting may now be discouraged if there is a need to amend corporate instruments in order to satisfy the governance community. This doesn't mean that the staff's response was wrongly conceived—only that it may work ironic results.

Hewlett-Packard has not announced whether it will seek reconsideration or Commission review of the staff's denial of the no-action request.

David B.H. Martin is co-head of Covington & Burling's corporate practice area and head of its securities practice group. Prior to joining Covington & Burling, Mr. Martin was at the Securities and Exchange Commission for seven years, where he was the immediate past director of the Division of Corporation Finance. He also served as special counsel to the chairman. Keir D. Gumbs, now with Covington & Burling in Washington, D.C., was also formerly with the SEC. He was a member of the SEC's shareholder proposal taskforce from 2000 through 2004. He is also a co-author of BNA's Corporate Practice Series Portfolio No. 83, "Shareholder Proposals."