



Shareholder Proposals: Different Challenges, Different Results

May 12, 2014

Reading Time : **2 min**

In Massachusetts, EMC Corporation filed suit in U.S. District Court seeking declaratory judgment to exclude Chevedden's independent chair proposal from its proxy materials after the SEC denied EMC's no action request to exclude the proposal. The court considered and reached a different decision from the Fifth Circuit's unpublished opinions in the lawsuits against Chevedden filed by Waste Connections, Incorporated earlier this year and by KBR in 2012, both of which found in favor of the companies. Like the court in Omnicom, the court found that EMC faced no imminent injury. The court also found there was no redressability because any decision by the court would not bar other suits from the SEC or others. The court expressed hesitation over "essentially reversing the statutory scheme" by issuing a declaratory judgment without hearing from the SEC first on all of the issues presented and also supported shareholders' interests in "having an appropriate opportunity" to resolve disputes through the SEC process and avoiding lengthy and costly litigation. The court denied the declaratory judgment and granted Chevedden's motion to dismiss. Similar results followed in the U.S. District Court of Colorado's finding against Chipotle Mexican Grill, Inc.

Express Scripts Holding Company appears to be the only company that was victorious in its lawsuit against Chevedden this proxy season, with the U.S. District Court for the Eastern District of Missouri (Eastern Division) finding that the shareholder proposal contained material misstatements and could properly be excluded from the company's proxy materials.

EMC and Chipotle ultimately included Chevedden's shareholder proposals in their proxy materials. In contrast, following the Omnicom decision, Omnicom submitted a no-action request to the SEC to exclude Chevedden's proposal from its proxy materials. The SEC granted no-action relief on the basis that the proposal was vague and indefinite, which was consistent with its no-action decisions granted to other companies who had challenged

similar interim vote results proposals from Chevedden. Omnicom ultimately excluded the proposal from its proxy materials.

This outcome seems to support the Massachusetts court's opinion that arguments over shareholder proposals should first be decided by the SEC. The recent decisions will have a chilling effect on court challenges to shareholder proposals, particularly following a recent campaign led by Northstar Asset Management, Inc. that "question[s] the motives and effect of these lawsuits on both shareholder value and corporate governance" as discussed [here](#). These events will likely empower the continued growth in shareholder activism from shareholder activists such as Chevedden, for example, whose stockholder written consent proposal at Allergan last year influenced the company to include its own stockholder written consent proposal at this year's stockholders meeting.

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