



North Dakota Adopts Law to Expand Investor Rights

On April 10, North Dakota became the most shareholder-friendly U.S. state after adopting new legislation that provides for proxy access, majority voting in board elections, and annual shareholder votes on executive pay.

The North Dakota Publicly Traded Corporations Act creates a new section (Chapter 10-35) of the state's Century Code. Under the new law, which takes effect July 1, public companies incorporated in North Dakota will be able to voluntarily submit to the new governance requirements.

Chapter 10-35's largest promoter was the new **North Dakota Corporate Governance Council**. One of the council's board members, William Clark, a partner at the law firm of **Drinker Biddle & Reath**, drafted the legislation. According to the council, the new law "gives shareholders greater rights than they currently have under other state laws. It has been designed to reflect the best thinking of institutional investors and governance experts and addresses each of the current hot topics in corporate governance."

While the state's two publicly traded firms will be exempt from the new law, North Dakota is seeking to attract out-of-state companies that want to appeal to governance-minded investors. "The hope is that companies will begin moving to North Dakota, either voluntarily or at the request of their shareholders," Clark said.

While shareholder advocates wait for the Securities and Exchange Commission to address proxy access, the North Dakota law allows director nominations from investor groups that own at least 5 percent of the company's outstanding shares for at least two years. In addition, if a company disallows cumulative voting in board elections, then directors would be elected by the affirmative vote of a majority of votes cast. The new North Dakota law also provides for reimbursement of proxy contest expenses paid by dissident candidates who are elected.

A company that chooses to submit to Chapter 10-35 may not have a classified board, unilaterally change the size of the board to fend off a proxy contest, or have a combined chairman/CEO position.

The law also addresses "say on pay"--one of the most contentious topics this proxy season. Chapter 10-35 provides shareholders the right to cast an advisory vote on an annual report prepared by the compensation committee.

The legislation does allow boards the flexibility to adopt takeover defenses of a limited duration. For example, boards may unilaterally adopt a "poison pill" plan, but the pill will expire after one year or 90 days following an announcement that a majority of shares have been tendered to an acquirer. If the board obtains shareholder approval, then the pill can be effective for up to two years. The law also requires that pills have a minimum ownership trigger of 20 percent of the company's outstanding shares. Finally, pill plans may not include "dead hand," "no hand," or "slow hand" provisions that limit the ability of future directors to dismantle the defense. These provisions contrast with the approach of some U.S. states, such as Pennsylvania, that allow companies to adopt onerous takeover defenses.

The law also bars firms from adopting supermajority voting and quorum requirements to pass resolutions at board, committee, and shareholder meetings. Shareholders owning at least 10 percent of the company's voting shares may call special meetings. --*Andrea Musalem*