

Two Companies Adopt Proxy Access Provisions in Response to Shareholder Proposals

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Western Union recently submitted a [no-action letter](#) to the SEC Staff seeking to exclude a binding proxy access shareholder proposal from Norges Bank, arguing under Rule 14a-8(i)(9) that the company is submitting a conflicting management proposal to amend their bylaws allowing for proxy access. The Norges Bank proposal sought to provide proxy access to shareholders who own at least 1% of shares for a year, while Western Union's provision would permit shareholders to make nominations if they own 5% for at least 3 years.

Another company, KSW, has already amended its bylaws to allow for shareholder nominations by shareholders who own 5% or more shares for at least one year, in response to a different binding shareholder proposal it received seeking to give proxy access rights to shareholders who own 2% for one year. KSW is arguing exclusion of the shareholder proposal on the basis of Rule 14a-8(i)(10), that it has substantially implemented the essential elements of the [shareholder proposal](#).

Both no-action letters can be considered against the backdrop of similar efforts to exclude special meeting shareholder proposals, which usually ask companies to allow shareholders owning 10% or more to call special meetings. Companies that have adopted, or plan to adopt, similar provisions but at higher thresholds of ownership (usually 25%) have argued substantial implementation (unsuccessfully) and conflicting proposals (successfully). The downside of making the exclusion argument on the basis of a conflicting proposal is that the proponent may submit the same proposal to the company next year.

While we believe the SEC Staff will likely grant Western Union's no-action letter request, what is more interesting is that two companies have taken the steps of adopting, or will soon adopt, proxy access in response to these untested shareholder proposals, given that there is still a great deal of uncertainty as to the level of support the proposals will receive from institutional investors. Even at these higher ownership thresholds, supporters of proxy access may still view these actions as quite positive in response to the first year that proxy access shareholder proposals have been submitted, when none have been voted on yet. There have been fewer than 20 proxy access proposals submitted this year, but these actions may motivate proponents to submit many more for next season.

Several other companies (Textron, Bank of America and Goldman Sachs among them) are arguing to exclude the proposal on numerous other grounds that do not call for implementing the proposal in any form.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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