

Western Union Seeks to Exclude Norges Bank Proxy Access Shareholder Proposal by Submitting Its Own Version

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In what may be a first, Western Union is seeking to exclude a proxy access shareholder proposal from Norges Bank by arguing in a [no-action letter request](#) that the company is submitting its own conflicting management proposal. The Norges Bank shareholder proposal urges the board to adopt a bylaw amendment so that a shareholder, or a group of shareholders, owning 1% or more of company stock continuously for a year would be able to include their board candidates in the company's proxy statement.

The company argues that, pursuant to Rule 14a-8(i)(9), the shareholder proposal should be excluded because it would directly conflict with the company proposal that it intends to include in its 2013 proxy materials, which would ask shareholders to vote on a bylaw amendment permitting shareholders who own 3% or more of company stock continuously for 3 years to nominate directors for inclusion on the company's proxy. The company's letter cites numerous precedents of other no-action letters that succeeded under Rule 14a-8(i)(9) related to shareholder proposals asking for shareholders' ability to call special meetings, changes to simple majority vote provisions and the right for shareholders to act by written consent.

A proliferation of letters making Rule 14a-8(i)(9) arguments, which form the most common (and usually the only) basis for excluding those types of governance shareholder proposals, have dominated the SEC shareholder proposal no-action letter process in the last few years. Western Union concludes that the same reason that the SEC staff granted exclusion in those cases, namely because the company proposal seeks to provide shareholders with the same right sought in the shareholder proposal, but at a different ownership threshold, should also apply to its no-action letter, since its proxy access ownership threshold is different (and therefore "conflicting") from the threshold sought in the Norges Bank shareholder proposal.

Interestingly, it appears that Norges Bank has changed the form of proxy access shareholder proposal that it submitted to numerous companies in 2012 by no longer making the bylaw immediately binding upon approval, but instead making the proposal precatory, or advisory, as is the general norm for shareholder proposals.

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.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

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