

Investors Seeks to Influence the SEC's Rule 14a-8(i)(9) Conflicting Proposal Review

May 29, 2015 | Client Update | 2-minute read

Seven companies this proxy season are offering investors with alternative management and shareholder proposals on proxy access. The two competing proposals provide different ownership thresholds for when a shareholder can make a proxy access nomination. Some of the management proposals are binding, while the shareholder proposals are always precatory. Four of the proposals have come to a vote so far, with mixed result.

Providing alternative proposals became necessary after the SEC shut down the availability of Rule 14a-8(i)(9) as a basis to exclude shareholder proposals, which we previously discussed [here](#). In past proxy seasons, the inclusion of a management proposal with different ownership thresholds than what the shareholder proposal asks for would likely have caused the shareholder proposal to be excluded from the proxy statement. The SEC staff is currently evaluating the rule and is expected to provide guidance later this year on the future of Rule 14a-8(i)(9).

The companies that presented both options to shareholders provided clear disclosure about the voting process and the possible impact based on the ultimate vote results. On this basis, CalPERS and CalSTRS have sent [a letter](#) to Keith Higgins, the director of the Division of Corporation Finance, asking that Rule 14a-8(i)(9) should permit the submission of alternative management and shareholder proposals, unless neither alternative is precatory, rather than cause the shareholder proposal to be excluded.

The letter pointedly focuses on the reasons that Rule 14a-8(i)(9) has traditionally been allowed to exclude shareholder proposals, which is a concern that multiple proposals on the same ballot addressing the same topics could provide for inconsistent and ambiguous results, such that a board of directors would not know what shareholders wanted. The two investors noted in the letter that based on the "real world examples" this season, having competing management and shareholder proposals did not cause investor confusion, and the vote results were fairly unambiguous. They indicate that this reflects the fact that "[s]hareowners in 2015 are increasingly sophisticated...have access to more information than ever" and that the voting results at the four companies so far "is testament to the common sense of the investor community."

The letter urges that this guidance should not be limited to proxy access. If that approach is adopted, this could also mean that companies would no longer be able to exclude shareholder proposals asking for shareholders owning at least 10% of the company to be able to call special meetings by instead providing for a management proposal with a different ownership level, which has become a fairly standard response to special meeting 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

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.