

CII List of “Don’ts” for Proxy Access Bylaws

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As another example of how proxy access has entered into an advance stage of the governance dialogue, we are now wading into discussions regarding specific bylaw provisions, first with the ISS policy survey discussed [here](#), and now with the issuance of [CII’s best practices for proxy access](#).

ISS notes that about 5% of the S&P 500 have adopted, or committed to adopting, proxy access, leading many to compare proxy access to majority voting and board declassification in terms of perhaps becoming another inevitable mainstream governance practice. But proxy access is much more complex. It establishes an entire alternative director nomination mechanism, adding several pages to a company’s bylaws.

CII highlights seven provisions that it finds troublesome and refers frequently to the SEC rule that was vacated by the courts. As the [WSJ](#) noted, one or more of these has been adopted by virtually every company that has made proxy access available.

- *Ownership threshold of 5%.* CII research indicates that the 10 largest pension funds would not be able to meet this threshold for any company.
- *Less than two board seats.* CII believes that there should be at least the possibility of two proxy access nominees on a board.
- *Limit on the number of shareholders who can aggregate to form a group.* CII does not want any limits or caps on the number of shareholders in any nominating group. Most companies that have adopted proxy access have imposed a cap at 20. CII indicates that even the 20 largest pension funds would not meet the 3% criteria at most companies.
- *Unclear whether loaned shares could count toward ownership thresholds.* CII believes loaned shares should count, so long as the nominating stockholder has the right to recall those shares and will vote them at the meeting.
- *Continue to hold after the annual meeting.* CII believes it should be sufficient to represent that the nominating stockholders will hold until the meeting. Most companies have adopted that requirement, and only some extend the period to beyond the meeting.
- *Restrictions on re-nominations when the nominee fails to receive a specified percentage of votes.* CII opposes this because it is not applicable to company nominees.
- *Prohibition on third-party compensation.* CII opposes prohibitions but supports disclosure of third-party compensation arrangements.

The list is helpful as a guidepost for companies. As we previously discussed, the ISS policy survey also asks questions about the appropriateness of specific proxy access provisions, with a few important differences. ISS is mainly concerned with companies that have lost a proxy access shareholder proposal and is now trying to evaluate how those companies responded. In addition, ISS’ questions suggest that a limit on the number of shareholders that form a group could be suitable, so long as it is not below 20, which is the level that the vast number of companies have adopted. A reasonable cap could provide an orderly and efficient process while still allowing for meaningful access rights.

CII urges companies to talk to their shareholders about the approach they prefer, and the largest investors may also have views on specific proxy access provisions.

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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