

SEC Staff Rejects No-Action Letter Request on Proposal to Revise Existing Proxy Access Bylaw

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In what appears to be the first of its kind, the SEC staff has [determined](#) that a company cannot exclude a proposal that a board amend its existing proxy access bylaw on the basis of substantial implementation.

The company adopted a proxy access bylaw in July 2015 with fairly common terms permitting shareholders owning 3% or more of shares for at least three years to make nominations, and received a proposal to revise that bylaw in March 2016. The key points in the proposal and the company's rebuttal were:

- One shareholder or an unrestricted number of shareholders should be able to form a group. The company argued that a limitation on the number of shareholders that may form a group to 20 shareholders did not foreclose no-action relief in prior Staff precedents.
- The number of shareholder nominees should be one quarter of the directors or two, whichever is greater. The company had set the limit at 20% of the board, rounded down, and argued that, with 10 directors currently, the proposal's objectives have been met. The proponent contended that if the number of directors were reduced, only one nominee would be allowed.
- There should be no limit on the denomination of shareholder nominees based on the votes received in any election. The company's provision would exclude nominees who previously withdrew or received less than 25% of the votes cast from being eligible for the next two meetings.
- Loaned securities should be counted toward the ownership threshold. The company permitted loaned shares to be counted if they could be recalled on three business days' notice. The proponent noted that while three business days' recall may be common, so is five business days' recall, and the bylaw should only require the legal right to recall without a deadline.

In the correspondence, Jim McRitchie, the proponent of the proposal, provided some interesting background. He stated that due to concerns that citing to the vacated Rule 14a-11 for bylaw terms could be a basis for excluding the proposal, and with the primary objective of beginning a "tidal wave" of adoptions (even "flawed adoptions"), fairly general proposals were initially filed without a lot of specific details. As he noted, "quality was not as important as quantity" in the beginning.

Then proposals with additional requirements, including no limit on aggregation of shareholders, were later submitted in order to "strengthen our hand in negotiations and...win better terms for an agreement to withdraw." According to McRitchie, in February 2016, the "Staff drop[ed] a bomb" when they issued no-action letters permitting substantial implementation where a proposal requested proxy access and a company adopted the essential elements of 3% ownership for three years.

In terms of the group limit, McRitchie argued that "[t]here is a world of difference between a group of twenty...and an unlimited group," given that research by CII concludes that it cannot be reached by its members at most companies, and "[p]roxy access bylaws that cannot be implemented serve no purpose other than to provide an illusion."

The company's opposition statement on this point counters that having no limit on the number of shareholders may result in excessive administrative burden and expense, and allowing a limited number makes proxy access available for those

who have a sufficient financial stake to cause their interests to be aligned with the interest of all shareholders.

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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