

Status of SEC Staff Decisions on Proxy Access Shareholder Proposals and Aggregation Limits on Nominating Shareholder Groups

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SEC staff decisions for no-action letters seeking relief from proxy access shareholder proposals have divided between companies being asked to adopt proxy access for the first time and companies being asked to amend existing bylaws. Now they have taken a further twist based on the requests in those proposals to amend proxy access bylaws.

Adopt Proxy Access Proposals. Consistent with last year, this season the SEC staff has continued to affirm that shareholder proposals asking companies to adopt proxy access bylaws are considered to be substantially implemented if companies provide terms permitting shareholders that own 3% or more for at least three years to nominate the greater of two directors, or 20%, of the board. The staff has held steadfast in these decisions even if companies impose additional restrictions in the bylaws, such as limiting the number that can form a nominating group to 20 shareholders, when the proposals request that no limits be placed on the group size. In keeping with prior SEC staff positions, substantial implementation does not mean exact implementation.

The staff continues to rule favorably for companies being asked to adopt proxy access for the first time notwithstanding being faced with proposals that are phrased entirely differently. One such proposal asked a company to adopt proxy access with only one specific term, instead of the usual four or five different conditions. That one term required that there should be no limit on the number of shareholders that can form a nominating group. The company was able to exclude the proposal by adopting proxy access with standard market provisions, including an aggregation limit of 20 shareholders.

Amend Proxy Access Proposals. The aggregation limit seems to be the remaining battleground for several retail shareholders. The season began with proposals asking companies that have already adopted proxy access bylaws to change several of the terms. Removing the restriction on the number of shareholders that can aggregate to form a group was only one of the provisions that these initial proposals requested.

As we previously discussed [here](#) and [here](#), the SEC staff did not allow companies to exclude those types of proposals. The staff rejected arguments that companies adopting standard market terms, including imposing aggregation limits of 20 shareholders, had substantially implemented those proposals, and also denied relief for companies that argued vagueness or multiple proposals.

However, shareholders were not terribly persuaded that companies needed to amend their bylaws, as that proposal so far has been defeated at the polls at H&R Block (30%), Microsoft (27%), United Natural (27%), Walgreens (25%) and Whole Foods (37%).

Late last year, proposals asking for amendments to proxy access bylaws changed. Companies with later deadlines received new proposals to amend their proxy access bylaws that asked instead for modification of a single term: that boards amend the 20-shareholder aggregation limit to allow 50 (or in some cases 40 or 50) shareholders to form a group instead.

Last week, the SEC staff permitted some companies with 20-shareholder aggregation limits in their proxy access bylaws that did not make any changes to exclude those proposals, on the basis that their existing bylaws have already substantially implemented them. While the reasoning is not completely clear since the staff does not explain its decisions, it appears that the staff may have been persuaded that a 50-shareholder aggregation limit does not materially enhance the ability of shareholders to use proxy access.

As one of the letters noted, the 50-shareholder aggregation limit does not more than double the number of shareholders that may group together for purposes of proxy access, since any combination of shareholders possessing the minimum ownership threshold may form a group, including just one shareholder alone, 20 shareholders evenly owning .15% each or any number of variations in between those two examples. It appears then that a company that allows 20 shareholders, rather than 50 shareholders, to form a group could be viewed as having met the essential objectives of the proposal.

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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