

Chairman Clayton Suggests Potential for Shareholder Proposal Rule Reform, Invoking the Quiet Shareholder, as the Chamber of Commerce Makes Specific Recommendations

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The Center for Capital Markets Competitiveness, part of the Chamber of Commerce, issued seven recommendations for shareholder proposal reform. On the same day, SEC Chairman Jay Clayton spoke to the Chamber about a range of issues. He questioned the viability of continuing to load up on the disclosure system, likening it to a football coach giving the ball to a good running back over and over because he can, and whether increased amounts of disclosure corresponds to useful disclosure.

He spoke about the proxy advisory firms, noting that while he does not have a definitive view at this point, he recognizes that some entities have a “fair amount of influence” on public company governance, and developments that have an impact on the markets are something regulators should examine. On shareholder proposals, he acknowledged that many proposal items on the proxy have received majority support and “[w]e have a democratized public company system and that is good.” However, from his perspective, “[a]nytime you have a deeply held view by a few people but it gets spread over a lot of people, you have a tendency to not look at who’s bearing those costs,” musing about “the cost[s] that the quiet shareholder, the ordinary shareholder, bear for idiosyncratic interests of others.”

A recording of the discussion [is available here](#).

The notion that the shareholder proposal process has been hijacked by shareholders with specific agendas is also present in the Chamber report, which argues that minority interests unrelated to a company’s long-term performance end up too often on proxy ballots. The Chamber takes issue in particular with social or policy proposals, as well as the individual proponents who account for a disproportionate share of submissions.

Other than the resubmission thresholds for recurring proposals, the Chamber’s recommendations deviate from the provisions in the CHOICE Act, [which we previously discussed here](#), in particular by not recommending changes to the shareholder ownership requirement necessary to submit a proposal. Several items in fact relate simply to the SEC staff’s review of no-action letters seeking to exclude proposals. The report recommends that the SEC:

Amend the Resubmission Rule to raise the thresholds for support that proposals must receive in order to be eligible for resubmission. Similar to the CHOICE Act, the Chamber urges the SEC to adopt the rulemaking proposal made in 1997 regarding when proposals can be submitted again. The 1997 rule sought to exclude proposals that, in the past five years, received less than 6% of favorable support once, 15% if proposed twice and 30% if proposed three times. The current rule allows resubmission if a proposal received more than 3%, 6% and 10%, respectively, which means a proposal that receives more than 10% can be sent to a company indefinitely.

The SEC should withdraw Staff Legal Bulletin 14H (CF), issued in October 2015, in order to restore certainty under the Rule 14a-8(i)(9) exemption. 14a-8(i)(9) allows the exclusion of a proposal if it conflicts with one of the company’s own proposals. In 2015, the SEC staff issued this legal bulletin after Whole Foods was permitted to exclude a proxy access

shareholder proposal by arguing successfully that it intends to ask shareholders to vote instead on a “conflicting” management proposal that would permit any shareholder (but not a group of shareholders) owning 9% or more of the company’s stock for five years to make proxy access nominations, limited to the greater of (a) one director or (b) 10% of the board. We previously [discussed the legal bulletin here](#). It is unclear whether and how the widespread adoption of proxy access bylaws would be impacted if this recommendation is goes forth.

Offer more transparency to investors by requiring proponents to provide sufficient disclosure regarding their economic interests and objectives. Instead of suggesting that proposals by proxy be eliminated entirely, the Chamber recommends that proponents should be required to provide more information about their economic interest in the shares, as well as descriptions of any arrangements the proponent has with another person related to any benefits derived from submission of proposals. The beneficial owner, if not the proponent, should be required to make similar disclosures.

The Commission should reassert the “relevance rule” under 14a-8(i)(5) by allowing excludability of a proposal if the subject matter impacts less than 5% of a company’s total assets and 5% of net earnings. As noted in the report, the SEC staff has rarely permitted exclusions on this basis.

Prohibit the use of images, photos, or graphs as part of proposals, while maintaining the ability of proponents to include a hyperlink for a website they wish to include. The Report is concerned about recent SEC staff decisions allowing images in certain instances, arguing that could be a “slippery slope” that could lead proponents to include false and misleading imagery.

The SEC should provide market participants with more certainty regarding its policing of 14a-8(i)(4), which deals with proposals that relate to a redress of a personal claim or grievance. The Report states that the SEC staff should provide guidance on its policies for this exclusion, given that a number of questions around when the exclusion is permitted remain unanswered.

The SEC must allow for the exclusion of proposals that include materially false or misleading statements. Companies have argued unsuccessfully in the past that statements in proposals were materially false or misleading, in particular if the statements were not central to the proposal topic. The SEC staff has appeared reluctant to wade into determining whether a statement is material, even if demonstrably false.

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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