

SEC Staff Decides Special Meeting Shareholder Proposal to Lower Ownership Threshold to 10% of Shares Conflicts with Management Proposal to Ratify Bylaw Set at 25% Ownership Threshold

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[The SEC has agreed](#) with a company that it can exclude a shareholder proposal that asks the board to amend its existing bylaw to lower the ownership threshold from 25% to 10% of the company's outstanding shares for calling a special meeting because it conflicts with a management proposal.

The company argued that under Rule 14a-8(i)(9), the shareholder proposal would conflict with a management proposal that it intends to include at its next annual meeting that seeks shareholder ratification of the current 25% ownership threshold included in the company's bylaws. The staff concurred that the shareholder proposal conflicts because "a reasonable shareholder could not logically vote in favor of both proposals."

In 2015, after some controversy with proxy access shareholder proposals, the SEC staff issued Staff Legal Bulletin No. 14H (SLB 14H). SLB 14H gives examples of conflicting proposals. For example, proposals would be viewed as conflicting where a company seeks shareholder approval of a merger, and a shareholder proposal asks shareholders to vote against the merger. Similarly, a shareholder proposal that asks for the separation of the company's chairman and CEO would directly conflict with a management proposal seeking approval of a bylaw provision requiring the CEO to be the chair at all times.

SLB 14H also indicated, however, that it would not view two proposals as directly conflicting if a shareholder could vote for both, although he may prefer one proposal over the other. The example provided in the bulletin for this proposition was proxy access, where the shareholder proposal would permit a shareholder or group of shareholders holding at least 3% of the company's outstanding stock for at least 3 years to nominate up to 20% of the directors, while a management proposal would allow shareholders holding at least 5% of the company's stock for at least 5 years to nominate up to 10% of the directors. The reason explained in the SLB 14H that these two proposals are not conflicting is because "both proposals generally seek a *[sic]* similar objectives... and the proposals do not present shareholders with conflicting decisions such that a reasonable shareholder could not logically vote in favor of both 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

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