

A Look Back at Access Shareholder Proposals in 2007

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As we prepare for the upcoming proxy season and the answer to the question of whether we will see many, any, or only a few targeted, proxy access shareholder proposals ([see the Davis Polk memo](#)), we look back to the last time when proponents had the opportunity to make access proposals. In 2007, two major companies, Hewlett-Packard and United Healthcare, received proxy access proposals after facing allegations of stock options backdating, and in H-P's case, highly public scandals involving its board. Proponents were emboldened after the Second Circuit sided with AFSCME in its challenge of the SEC staff's decision to allow AIG to exclude an access proposal, ignoring prior SEC precedents.

It was also AFSCME that submitted a binding proposal to amend H-P's bylaws to include persons in H-P's proxy statement who are nominated by shareholders owning at least 3% of H-P's stock for at least two years. Each "Nominator," as so named in the bylaws, could nominate up to two candidates at a meeting, without limitations on the number of Nominators. CalPERS' proposal to United Healthcare contained the same provision, but due to a requirement in Minnesota state law that only shareholders owning 3% or more of a company may propose a bylaw amendment, CalPERS changed its proposal to a precatory one, seeking a request of the board to adopt an access bylaw instead.

H-P sought to exclude the proposal, arguing to the SEC staff that the AIG decision is not binding outside of the Second Circuit and therefore inapplicable to the company. H-P also cited an extensive list of prior SEC staff decisions that permitted the exclusion of the same proposal, based on the SEC's views that such a proposal, "rather than establishing procedures for nomination or qualification generally, would establish a procedure that may result in contested elections of directors" which would not comply with the SEC proxy rules. Ultimately, the SEC staff indicated to H-P that it is unable to dispute or concur in the view that the AIG decision would not apply to the company, and declined to express any view on whether H-P may exclude the proposal. UnitedHealth had also made a similar argument to the staff since the company was also outside the Second Circuit, but after the staff's decision in H-P, withdrew its no-action request.

As a binding bylaw amendment, H-P asserted that the proposal would need 66 2/3% of the outstanding shares in order to pass, rather than the majority of votes cast that usually applies to shareholder proposals. While both proposals failed, there was enough support (43% at H-P and 45% at United Healthcare) that shareholder activists declared the efforts to be significant victories as "landmark votes," anticipating the filing of a horde of proposals at other companies as a result. But in December 2007, the SEC adopted rules that reinstated the election exclusion under Rule 14a-8, ending the era of permissible access shareholder proposals, until now.

So much has changed since 2007 that it is difficult to say whether those proposals act as any kind of predictor for the upcoming proxy season. Shareholder proposals have evolved to include a multitude of topics and proponents. One constant, however, is that proxy access continues to be unnecessary as a means to effect stronger board accountability. For one, shareholders have other tools to express dissatisfaction with a board's oversight, such as withholding or voting against in director elections. The comment letters for the proxy access rule proposal and the subsequent debate highlight a significant amount of investor concern which remains valid, as to whether proxy access leads to better governance, or permanently distracting and burdening companies. The risk with targeted shareholder proposals is the possibility that some of those proposals pass because they act only as a referendum on a company's circumstance at a specific point of time, but with immutable consequences.

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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