

SEC Staff Permits Exclusion of "Retail" Version of Proxy Access Proposals on Two Grounds

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The SEC Staff has agreed that several companies can exclude their proxy access shareholder proposals that were modeled on a template provided by the United States Proxy Exchange, which also became known as the "retail" version because they were generally submitted by retail shareholders.

- For Sprint, MEMC and Chiquita, the Staff agreed the proposal is vague or indefinite for referring to "the SEC Rule 14a-8(b) eligibility requirements," since the proposal doesn't describe the specific requirements and they are a "central aspect of the proposal." The Staff went on to say that "while we recognize that some shareholders voting on the proposal may be familiar with the eligibility requirements of Rule 14a-8(b), many other shareholders may not be familiar with the requirements and would not be able to determine the requirements based on the language of the proposal." The basis for this decision may be a bit surprising given that the Staff *disagreed* this season with companies that had argued that proposals that request the board to have an independent board chairman, by the standard of the New York Stock Exchange, are vague or indefinite by referencing the NYSE standard without sufficiently describing them.

- For Textron, Goldman Sachs and Bank of America which included the procedural argument, the SEC Staff agreed that the access proposal consists of multiple proposals because paragraph 6 raises a "separate and distinct" proposal relating to events that would not constitute a change of control, while the other paragraphs (1-5 and 7) contained a proposal related to shareholder nominations.

In addition, as suspected, the Staff rejected KSW's argument that they had substantially implemented a binding proposal that had a threshold of 2% ownership requirement by adopting a bylaw with a 5% ownership requirement.

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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