

## BRT Urges Restraint by ISS and Glass Lewis for Proxy Access and Other Proposals if Companies Rely on the SEC Rule without Benefit of No-Action Letters

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The recent statement from Chair White that the SEC staff will not issue any decisions this season on no-action letters asking to exclude shareholder proposals on the basis that a company will be including its own conflicting proposal in its proxy statement, which we discussed [here](#), has thrown into turmoil about 53 companies that have existing requests outstanding. According to a [statement](#) from the City Comptroller of New York after the SEC's announcement, about 18 of those address proxy access proposals. More were probably going to be filed in the coming weeks.

As these companies evaluate their options, we understand that guidance may be forthcoming from ISS as to how the influential proxy advisory firm may view company actions that fall short of simply including the shareholder proposal.

The Business Roundtable (BRT) has [written](#) to the CEOs of both ISS and Glass Lewis to stress that the SEC's determination does not impact a company's ability to rely on Rule 14a-8(i)(9) and does not indicate a change to the legal effect of the rule. The letter argues that companies should continue to be able to exclude a shareholder proposal if they instead put forth a conflicting management proposal, as the rule allows.

In addition, the letter emphasizes that the SEC's announcement does not affect the right to resort to court action, either by companies or shareholders. The BRT is concerned, however, that companies may not have time to litigate the matter before finalizing their proxy materials.

BRT states that they believe it would be "inappropriate" for ISS and Glass Lewis to make proxy voting recommendations based on a company's own reliance on the rule without an SEC no-action letter. They urge the proxy advisors to "proceed in a deliberate fashion and exercise restraint" in assessing a company's decision to exclude the shareholder proposal and substitute instead its own management proposal.

We will find out shortly the factors that proxy advisory firms will consider in deciding how to make voting recommendations for these situations, including whether they will distinguish between proxy access proposals and other proposals that, unlike for proxy access, have the benefit of a long line of no-action letters, such as special meeting proposals. We note that it does not appear that the proxy advisory firms have in the past given much weight to a company's legal right to take action. For example, both advisory firms will recommend voting against boards for adopting charter or bylaw amendments without shareholder approval if they believe that those board actions materially harm shareholder rights, without consideration for a board's legal right to make these judgments.

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](mailto:ning.chiu@davispolk.com)

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