

Proxy Access Developments

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Two press releases announced that the New York City Comptroller has agreed to withdraw proxy access shareholder proposals at [Staples](#) and [Abercrombie & Fitch](#). Agreements have also been reached with Big Lots and Whiting Petroleum.

Staples will include a management proposal to amend its bylaws to be voted on at its 2016 meeting. The press release includes a quote from Staples' CEO indicating that the agreement is a result of ongoing discussions with the company's shareholders. Comptroller Stringer stated that "[t]he momentum for proxy access is evident and we expect more companies to follow Staples' lead."

The terms of the agreement with Staples permit a group of no more than 25 shareholders holding at least 3% of the shares for 3 years to nominate up to 20% of the directors if the board has 10 or more directors, or 25% of the directors if the board has 9 or fewer directors. Limitations on the size of the total group have ranged from 10 to 20 in some of the bylaws already adopted. Nominations may also be limited to an individual shareholder or group (a) whose formerly-nominated candidate is serving on the board for less than two consecutive terms or (b) whose candidate failed to garner a minimum of 15% of the votes within the previous two years. Some current bylaws restrict future nominations for a period if the director does not receive, for example, at least 25% support. The provision in Staples' bylaw would also carve-out loaned shares for purposes of fulfilling the continuous ownership requirement.

Besides negotiating for withdrawal, companies have responded to proxy access shareholder proposals in a number of other ways. Many companies are opposing the proposals in their proxy statements, while at least one company has included the proposal, but with the board in favor of it. Most opposing the proposal are arguing against the need for proxy access at all, or have indicated a willingness to adopt access, but at a higher ownership threshold.

At least one company, Coca-Cola, disclosed that "[W]hat seems clear to us is that there is broad agreement among our shareowners about the need for a proxy access right. It also seems clear that many companies will begin to adopt proxy access," but given the variety of viewpoints on the topic, the company intends to continue to engage with shareholders "to develop a measured and thoughtful approach based on broad-based shareowner feedback."

Other companies are offering shareholders a choice between a management proposal (either binding or precatory) along with a shareholder proposal, with different ownership thresholds for the two types of proposals.

– Join us on TheCorporateCounsel.net for a webcast on proxy access next Tuesday.

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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