

SEC Staff Agrees Company Proposal to Retain Supermajority Provisions Directly Conflicts with Simple Majority Vote Shareholder Proposal

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Since the SEC staff substantially narrowed the use of Rule 14a-8(i)(9) as a basis to exclude shareholder proposals in Staff Legal Bulletin 14H back in October 2015, which we previously discussed [here](#), that argument has not been used this season, until now.

A company has [successfully demonstrated](#) how its own proposal can conform to the legal bulletin that requires it to “directly conflict” with a shareholder proposal.

In response to a fairly common shareholder proposal asking the board to take the necessary steps to change voting requirements from supermajority, in this case 66 2/3%, to a majority of votes cast to effect amendments to its charter and bylaws, the board decided to submit its own proposal asking shareholders instead to ratify those supermajority provisions. The company’s proposal is also advisory.

The company argued in its no-action letter to the SEC staff that its own proposal seeking shareholder ratification of the retention of certain provisions in its charter and bylaws that require a vote of 66 2/3% to take action to change them directly conflicts with the shareholder proposal that requests elimination of those same provisions. Shareholders could not vote to approve both proposals – one to eliminate and one to retain.

Notwithstanding some angry rebukes from the proponent that a positive SEC decision would mean that governance proposals can be kept off the ballot by asking shareholders to ratify the opposite action, namely, maintaining the company’s status quo, the SEC staff agreed with the company.

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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