

SEC Staff Continues to Reject Attempts to Exclude Proposals to Amend Existing Proxy Access Bylaws

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The SEC staff has denied [another no-action letter](#) seeking to exclude a shareholder proposal to amend an existing proxy access bylaw on the grounds of substantial implementation, similar to its decision on the H&R Block proposal, which we previously discussed [here](#). H&R Block's proposal has been voted on and received about 30% support, with ISS recommending in favor and Glass Lewis opposing.

In this case, Microsoft adopted a proxy access bylaw in August 2015. The proposal that Microsoft received this summer requested an "enhancement package" to the existing bylaw that included: (a) the number of candidates not to exceed the greater of one quarter of the directors then serving or two; (b) no limit on the number of shareholders that can aggregate their shares to achieve the ownership threshold; (c) no limit on shareholder re-nomination based on the support received in a prior election; and (d) the board should defer decision about the suitability of nominees to the vote of shareholders.

By comparison, the company's bylaw, similar to a great majority of other proxy access bylaws that have been adopted, would allow proxy access candidates to be nominated for up to the greater of two or 20% of board seats, permit a group of only 20 shareholders to aggregate their ownership and prohibit a candidate who did not receive more than 25% support from being re-nominated the next year (this was recently changed by the company to 15% to align with its plans to amend the special meeting provision).

The company argued in the no-action letter that the 20-shareholder limit achieves the essential purpose of ensuring that shareholders are able to use proxy access, given that the company's 20 largest shareholders hold more than 40% of the company's common stock. Five of the top 20 shareholders individually own more than 3% of the common shares. The provision has also been widely adopted by numerous other companies. As the company's letter noted, the standard for substantial implementation is not whether a company implemented a proposal exactly but where the essential objective has been satisfied, and this provision does not prevent the bylaw from being available for use.

In response, the proponent rebutted that only three "known activists" are in the company's top shareholder list, and that they hold up to 1.25% of the shares. The top shareholders also do not include any of the major types of shareholders that would normally submit shareholder proposals, who may be the shareholders most inclined to use proxy access.

But as the company contended, this line of reasoning by the proponent is speculative. Proxy access is new and no nominations in the U.S. have been made under the bylaws that have now been adopted by over 40% of the S&P 500 companies. It is unclear what type of shareholders would decide to submit nominations, and even those who are not inclined to initiate proxy access nominations may still be persuaded to join a group of other shareholders under what they view as the appropriate circumstances.

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

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