

Business Roundtable Urges Improvements to Rule 14a-8 and Related Processes

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The Business Roundtable recently issued [a paper](#) on Modernizing the Shareholder Proposal Process, focused on improving how shareholder proposals are submitted under Rule 14a-8.

The organization argues that the rules that were originally intended to replicate attendance and participation by shareholders at annual meetings are now outdated, as the current process is dominated by a few individuals who file common proposals across a range of companies pursuing “special interests.” The Roundtable claims that the shareholder proposal process costs companies tens of millions of dollars and countless hours of management time, including negotiating with proponents, seeking SEC no-action relief and preparing opposition statements.

Ownership threshold is too low. The SEC imposed minimum ownership requirements in 1983, and currently, a shareholder must have continuously held at least \$2,000 in market value or 1% of the company’s stock for at least one year as of the date the shareholder submits the proposals. According to the Roundtable, three shareholders and related members submitted nearly 22% of proposals to Fortune 250 companies in 2016. For one of the three shareholders, using data from the 2014 proxy season, his ownership at companies that he targeted for proposals ranged from \$2,172 to \$16,433, or .000003% to .00008% in percentage ownership.

The Roundtable proposes a holding requirement based on the percentage of stock owned, similar to proxy access rights, with required ownership set at .15% for proposals submitted to the largest companies and 1% for proposals sent to smaller companies. If the proposal was being submitted by a group or a proponent acting as a designated proxy on behalf of a shareholder, the ownership threshold should be increased to 3%. Proponents should be required to hold for three years, instead of one year.

Resubmission thresholds are too low. As long as a proposal receives 10% of favorable votes, it may be submitted indefinitely. The Roundtable urges that the thresholds be increased from their current levels, which only disallow resubmission if in the past five years the proposal received more than 3% once, more than 6% if proposed twice, and more than 10% if proposed three or more times. In 1997, the SEC had proposed that those thresholds be increased to 6%, 15% and 30%, respectively.

Absence of transparency about the proponents. The Roundtable wants the rules to require proponents owning less than 5% to disclose their “motivations, goals, economic interests and holdings” in the company’s securities and any similar proposals they have submitted at other companies, rather than simply their names and addresses.

SEC no-action process is too vague. The Roundtable criticized several aspects of the SEC’s procedures for determining whether no-action relief should be granted to allow companies to exclude proposals on one of the 13 bases permitted in the rules. The Roundtable wants a better definition of the criteria for applying the ordinary business exclusion, in particular for proposals that raise social policy issues which transcend ordinary business and seem to shift over time, arguing that the Staff is “granted wide discretion” and, as a result, “a number of dubious proposals are allowed each year.” Expanded review and oversight procedures would “prevent whimsical changes in direction.”

The SEC should reinstate the previous standard for the conflicting proposal exclusion rather than following the 2015 Staff legal bulletin that “dramatically limits” the availability of this exclusion, as that bulletin was adopted without rulemaking. The Roundtable also challenges the Staff’s analysis of Rule 14a-8(i)(3), which requires showing that even unsupported or incorrect factual assertions in proposals do not render the proposal excludable, unless the company can demonstrate that it is objectively “materially false and misleading.”

The Roundtable urges the SEC to revise its current system of a “decentralized, issue by issue, review” by the Staff, and recommends that the SEC issue advisory opinions instead on major policy issues rather than decide no-action letters, or that it establishes enhanced review and oversight mechanisms.

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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