

Status of SEC Staff Decisions on Proposals to Amend Proxy Access Bylaws

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Since the SEC staff first decided that a shareholder proposal asking to amend several terms of an existing proxy access bylaw could not be excluded from a proxy statement, which we previously discussed [here](#), not much has changed.

The SEC staff has since made similar rulings in several other no-action letters whenever a company had already adopted a market standard 3/3/20/20 proxy access bylaw, and a shareholder proposal asked that company to amend parts of the bylaw. In the situations addressed by the staff so far, the proposals have sought to eliminate the provision that limits to 20 the number of shareholders who can form a nominating group. Other requests to change the bylaws vary, and included amendments to the maximum number of board seats up for nomination, elimination or reduction of the threshold that a nominee must receive in order to be re-nominated in the future, the parameters of counting loaned shares toward the ownership threshold and disclosure regarding holding shares after the meeting.

In the responses to the no-action requests, the SEC staff has repeatedly rejected arguments that a market standard proxy access bylaw substantially implements shareholder proposals to change, or “fix,” the existing bylaw terms. The staff has also declined to agree when companies argued that the proposal actually represented multiple proposals and a procedural deficiency existed.

There was a flurry of excitement when the SEC staff took a different position and allowed a “fix-it” shareholder proposal to be excluded based on substantial implementation. In that case, however, and another one like it since then, the companies in question had not adopted market standard proxy access bylaws in the first place. Both had set the nominating shareholders’ ownership thresholds at 5%. Among the bylaw terms that the shareholder proposals asked to change was amending 5% to a market standard of 3%. In both cases, the companies agreed. Both companies also made other amendments in conformity with the shareholder proposals, but neither eliminated the provision that limited nominating groups to 20 shareholders.

It appears that it will be easier to argue that a company successfully substantially implemented a “fix-it” shareholder proposal to amend an existing bylaw, and meets the essential objective of that proposal, if a key term like the ownership threshold is changed in response to the proposal. That will be of little comfort to the vast majority of companies that have already adopted market standard proxy access bylaws with 3% ownership thresholds. Very few of the “fix-it” proposals have come to a vote yet, but recently the proposal at Microsoft received 27% support.

The letter-writing exercise to the SEC staff may soon stop, and not only because of the precedents so far. Proposals seeking to change existing proxy access bylaws may in the future target only a single bylaw term, which will be more difficult to argue on a holistic basis.

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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