

The Proxy Access Battlefront for Next Season? SEC Staff Rejects Attempt to Exclude Proxy Access Shareholder Proposal

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The 2017 season that just passed witnessed two kinds of proposals asking companies to amend existing proxy access bylaws. The first type sent to companies earlier in the season sought to amend several provisions, including requesting that the number of board seats available for nomination increase to 25% of the board instead of 20%, and also that an unlimited number of shareholders be allowed to aggregate their holdings to form a nominating group. Companies that had adopted the standard proxy access formulation of permitting a shareholder or a group of no more than 20 shareholders owning 3% or more for three years to nominate up to 20% of the board (known by the shorthand “3/3/20/20”) were denied no-action relief on the basis of substantial implementation. None of the proposals received majority support when voted on at annual meetings.

A second type came around to companies with later deadlines. For the most part, these proposals simply asked that the aggregation limit to form a group for proxy access nominations in company bylaws be changed from 20 to 40 or 50 shareholders. Companies were more successful in having the SEC staff agree that these proposals can be excluded on the basis of substantial implementation when they were able to demonstrate, through providing information on their current shareholder base, that their existing proxy access bylaws essentially allowed for similar rights. In that case, there was no meaningful difference in what the shareholder proposal sought and the rights under the bylaws already in place. In addition, none of the proposals that were voted on instead received majority support.

Now another form of shareholder proposal asking to change an existing proxy access bylaw has appeared. Like the later season proposals, this type also asks that a company amend the restrictions on the size of the nominating group, but this time from 20 shareholders to an unlimited number of shareholders, and without any other proposed revisions.

The SEC staff recently [rejected a company's request](#) for no-action relief on the basis of substantial implementation, after extensive correspondence between the parties involving 5 letters from the issuer and what must be an unprecedented 21 letters from the proponent. The volume of correspondence likely led to the staff's taking more than three months from receipt of the initial no-action letter to publish a decision.

In other [proxy access news](#), a different company changed its aggregation limit to 50 to negotiate a withdrawal on a similar proposal.

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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