

Alert

SEC Disclosure and Corporate Governance

Heads Up for the 2016 Proxy Season Companies See Victory on Excluding “Substantially Implemented” Proxy Access Proposals

Companies that have adopted proxy access and those that are considering whether, and on what terms, to adopt proxy access now have greater clarity on when they may exclude proxy access proposals submitted by shareholders. The Staff of the SEC Division of Corporation Finance has granted no-action relief to 15 companies under SEC Rule 14a-8(i)(10) on the basis that the companies had already “substantially implemented” the shareholder proposal.¹ These no-action letters suggest that the Staff will grant relief even when the company’s bylaw deviates from the shareholder proposal in one or both of the following respects:

- the company’s bylaw limits the number of shareholders permitted to aggregate (e.g., no more than 20 shareholders), while the shareholder proposal expressly requires “unrestricted aggregation”²; and
- the company’s bylaw limits the maximum number of proxy access candidates to 20% or 25% of the board of directors (rounding down) without also setting a minimum number of access candidates that the company must include, while the shareholder proposal expressly requires that the company include access candidates representing the greater of a percentage of the board or a minimum number (e.g., the greater of 25% of the board or 2).

The Staff did *not* grant no-action relief to three companies whose bylaw provided for an ownership threshold of 5% where the shareholder proposal sought a threshold of 3%.³

While we anticipate that companies will continue to face pressure from some shareholder proponents and ISS with respect to other granular issues, including those have been identified by ISS as “problematic,” it appears that the proxy access formulation adopted by and large during the 2015 season -- 3% ownership for a 3-year holding period, with a 20 shareholder aggregation limit, and a cap of 20% of the board -- will continue to dominate the proxy access landscape. In our recent Alerts of [October 21, 2015](#), [December 21, 2015](#) and [January 26, 2016](#), we provide a strategic roadmap to help companies and their boards consider whether and, if so, on what terms to adopt proxy access, including an analysis of access bylaws adopted and a discussion of the provisions considered by ISS to be “problematic.”

ENDNOTES

¹ The 15 companies that were granted relief all received proposals from John Chevedden. They are: Alaska Air Group, Baxter International Inc., Capital One Financial, Cognizant Technology Solutions Corp., Dun & Bradstreet Corp., General Dynamics Corp., Huntington Ingalls Industries, Inc., Illinois Tool Works Inc., Northrup Grumman Corp., PPG Industries, Science Applications International Corp., Target Corp., Time Warner Corp., United Health Group, Inc. and Western Union Corp.

² The form of proxy access proposal submitted by John Chevedden, expressly required an “unrestricted aggregation limit.” *See, e.g.*, Alaska Air Group, No Action Letter (avail. Feb. 12, 2016). The proxy access proposal submitted to General Electric Company by Kevin Mahar in 2015, for which GE successfully obtained no-action relief under (i)(10), was silent on whether GE’s proxy access bylaw could include an aggregation limit. *See* General Electric Company, No Action Letter (avail. March 3, 2015).

³ The three companies that were not granted relief are: Flowserve Corp., NVR Inc. and SBA Communications. FlowerServe received a proposal from John Chevedden. NVR and SBA proposals were follow-on proposals received from the NYC Comptroller seeking revisions of previously adopted proxy access bylaws. The NVR and SBA proposals requested that the companies’ proxy access bylaw be revised to (i) eliminate the aggregation limit (20 shareholders in the case of NVR; 10 shareholders in the case of SBA), (ii) reduce the required shareholding for the nominating group from 5% to 3%, (iii) increase the number of days for which a shareholder has the power to recall loaned shares from three to five business days in order for such shares to be considered “owned” for the purposes of the ownership threshold, and (iv) in the case of SBA, increase the maximum number of proxy access candidates from 20% to 25% of the board.

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If you have any questions on these matters, please do not hesitate to speak to your regular contact at Weil, Gotshal & Manges LLP or to any member of Weil’s Public Company Advisory Group:

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We thank our colleague Kaitlin Descovich for her contribution to this alert.

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