

Client Alert

March 2012

SEC Issues No-Action Responses for Proxy Access Proposals

On March 7, 2012, the Staff of the Securities and Exchange Commission (the "Staff") issued [responses](#) to a series of no-action requests seeking to exclude shareholder proxy access proposals. These no-action responses represent the first significant guidance from the Staff following the [2011 amendments to Rule 14a-8](#) that permit inclusion of proxy access proposals. The Staff permitted six companies to exclude precatory proposals that were based on a model prepared by a coalition of shareholders called the "United States Proxy Exchange."¹ The Staff did not permit exclusion, however, of a binding proposal submitted by Norges Bank Investment Management. That proposal would provide access to holders of 1% of a company's stock for one year. In addition, the Staff did not agree that a company that had voluntarily adopted a proxy access bylaw could exclude a proposal on the basis that it had been substantially implemented.

With respect to the six precatory proposals sought to be excluded, the Staff agreed with the companies on one of the following two grounds:

- *Multiple Proposals.* The Staff found that three companies could exclude precatory proposals under Rule 14a-8(c), which provides that a proponent may submit only one proposal per meeting of shareholders. The Staff noted that each proposal included a proposal relating to the inclusion of shareholder nominations for director in the company's proxy material and a proposal that a change in board composition would not be considered a "change in control." The Staff concurred with the three companies that these constituted separate and distinct proposals; therefore, by submitting two proposals the proponent had run afoul of Rule 14a-8(c).
- *Vague and Indefinite.* The Staff concluded that the other three precatory proposals could be excluded under Rule 14a-8(i)(3) as vague and indefinite. The proposals stated that the companies' "proxy materials shall include the director nominees of shareholders who satisfy the 'SEC Rule 14a-8(b) eligibility requirements.'" The proposals did not describe the ownership requirements for a proposing shareholder to satisfy under Rule 14a-8(b). The Staff noted that while some shareholders voting on the proposals may be familiar with the eligibility requirements of Rule 14a-8(b), other shareholders voting on the proposals may not. These shareholders would not be able to determine the eligibility requirements based on the language of the proposal. As such, the Staff believed that "neither shareholders nor [the company] would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires."

¹ The United States Proxy Exchange's model proposal provides access to any shareholder who has continuously held 1% of the company's voting stock for two years or to "any party of shareholders of whom one hundred or more satisfy SEC Rule 14a-8(b) eligibility requirements."

With respect to the binding proposals submitted by Norges Bank Investment Management, the Staff did not agree that all or portions of those proposals could be excluded as materially false and misleading. Specifically, those proposals included a hyperlink to a website that was to contain more information regarding the proposals. Three companies argued that the proposals or this reference could be excluded under Rule 14a-8(i)(3), which permits the exclusion of a proposal or a portion of a proposal if it is materially false or misleading. The Staff noted that the proponents had provided the companies with the information that would be included on the website, the companies had not asserted that the content was false or misleading, and the proponents had represented that they intended to include the information on the referenced website when the companies filed their 2012 proxy materials. Accordingly, the companies were not permitted to exclude the proposals from their 2012 proxy materials. This may lead future proponents to disseminate information through similar websites.

The Staff also disagreed with an issuer seeking to exclude a binding 2%/one-year proposal on the grounds that the proposal had been substantially implemented. Following its receipt of the shareholder proposal, the issuer amended its bylaws to grant proxy access to any 5% shareholder. The issuer then requested a no-action letter on the basis that the shareholder's proposal had been substantially implemented. In rejecting the request, the Staff noted "the differences between KSW's bylaw and the proposal, including the difference in ownership levels required for eligibility to include a shareholder nomination for director in KSW's proxy materials."

These simultaneously released no-action responses highlight the importance of the specific language of the proposals and the manner in which companies craft their arguments. Another important lesson from these responses is the Staff's reaction to the "substantially implemented" argument, showing that adopting a bylaw amendment with some version of proxy access may not shield companies from having to include in their proxy statements a shareholder proposal requesting a less restrictive version of proxy access (e.g., a lower threshold or ownership duration).

It is important to note that the Staff has not yet addressed whether a company can exclude a shareholder proposal as a conflicting proposal under Rule 14a-8(i)(9) where the company's management proposes its own proxy access bylaw to be voted upon by the shareholders. One company initially requested no-action relief on this basis, but then it withdrew management's planned proposal. Another company that received a shareholder proposal has decided to propose its own proxy access bylaw, which prompted the shareholder to withdraw its proposal.

To date, 19 proxy access [proposals](#) have been submitted in the 2012 proxy season. Eight of those proposals are in the form of binding bylaw amendments, while the rest are precatory. Since the deadline for 2012 shareholder proposals has passed for most companies, the Staff's responses will not have a great effect on future proposals this year. To the extent it does, the Staff's responses will provide proponents with helpful guidance. More importantly, shareholder activists will undoubtedly learn from these no-action responses and alter the language of their 2013 proposals accordingly.

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