SEC Issues No-Action Letters Regarding Shareholder Proposals Contested on 'Substantial Implementation' Grounds

By Bruce Newsome | March 10, 2016

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On February 12, 2016, the Securities and Exchange Commission (the "SEC") issued 18 no-action letters concerning requests to exclude proxy access shareholder proposals from proxy materials pursuant to Rule 14a-8(i)(10) of the Securities Exchange Act of 1934, as amended. Rule 14a-8(i)(10) permits a company to exclude shareholder proposals from its proxy materials if the company has already "substantially implemented" such proposals. The SEC granted no-action relief in 15 of the 18 requests thereby shedding light on the contours of the "substantially implemented" basis for shareholder proxy access proposal exclusion.

Shareholder Proposals

Of the 18 shareholder proxy access proposals addressed in the February 12th no-action letters, John Chevedden submitted 16 of them. His proposals requested a "3/3/25/unlimited" structure allowing shareholders who hold at least 3 percent of the company's shares for a minimum three-year period to nominate the greater of two directors or 25 percent of the directors of the Board. His proposals further called for allowing an unlimited number of shareholders to aggregate their shares to reach the 3 percent ownership threshold. The NYC Comptroller submitted the other two shareholder proxy access proposals requesting amendments to pre-existing company proxy access bylaws. The NYC Comptroller proposals called for (i) a reduction of the ownership threshold from 5 percent to 3 percent, (ii) the elimination of the aggregate group limit, and (iii) in one of the two proposals, an increase in the number of proxy candidates available for nomination from 20 percent to 25 percent of the directors of the Board.

Existing Company Bylaws

Ten of the companies involved in the February 12th no-action letters had adopted a 3/3/20/20 proxy access bylaw permitting shareholders who own at least 3 percent of the company's shares for a minimum three-year period to nominate two directors or 20 percent of the directors of the Board (as described below), provided that such shareholders could not form groups of more than 20 shareholders to aggregate their shares to reach the ownership threshold. The bylaws of such companies provided that the number of candidates available for nomination would equal either (i) the greater of two directors or 20 percent of the directors of the Board or (ii) 20 percent of the directors of the Board (rounded down to the nearest whole number). Five of the other companies had adopted bylaws with slightly varied formulations, but each had a 3 percent and three-year ownership requirement. Finally, three companies had bylaws with at least 5 percent ownership and minimum three-year ownership period requirements and aggregate group sizes ranging from 10 to 20 shareholders. These last three companies had nomination thresholds that ranged between (i) 20 percent of the directors of the Board, (ii) 20 percent of the directors of the Board but no less than one director; and (iii) the greater of 20 percent of the directors of the Board or two directors.

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SEC Action

The SEC granted no-action relief to the 15 companies that had adopted proxy access bylaws whose ownership threshold and ownership period matched those proposed by the shareholder (3 percent and three years). Requests that called for unlimited aggregate group sizes for ownership threshold purposes were nonetheless excludable because the companies had already "substantially implemented" such proposals with bylaws which permitted groups of no more than 20 shareholders with a 3 percent ownership threshold and three-year ownership period. Similarly, the SEC found that companies whose bylaws contained a 3 percent ownership threshold and three-year ownership period, but only permitted shareholders to nominate up to 20 percent of the directors of the Board had already "substantially implemented" shareholder proposals that called for the ability to nominate up to 25 percent of the directors of the Board.

The SEC only denied no-action relief to the three companies whose bylaws required a 5 percent ownership threshold rather than the 3 percent proposed by the shareholders, thus potentially requiring them to include a new proposed bylaw amendment in their proxy materials. A requested decrease in the required ownership threshold from 5 percent to 3 percent could give additional shareholders access to the proxy materials.

Potential Impact

The SEC's response in the no-action letters issued February 12th should provide guidance for those companies considering the implementation of a proxy access bylaw or the amendment of their current proxy access bylaw from a 5 percent to a 3 percent ownership threshold. The no-action letters suggest that, at a minimum, the SEC considers the companies that have a 3/3/20/20 proxy access bylaw to have already substantially implemented shareholder proposals calling for 3/3/25/unlimited structures, notwithstanding differences regarding aggregate group size or number of directors available for nomination.

If you are considering adopting or amending a proxy access bylaw or have any questions about this topic, please contact a member of our Capital Markets and Securities Practice Group.

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