

February 18, 2016

SEC Staff Issues No-Action Letters Regarding the Exclusion of Shareholder Proxy Access Proposals on the Basis of “Substantial Implementation”

On February 12, 2016, the staff of the Division of Corporation Finance of the Securities and Exchange Commission issued eighteen no-action letters involving requests to exclude shareholder proxy access proposals on the basis that the proposals had already been “substantially implemented” (Rule 14a-8(i)(10)). The staff granted relief with respect to fifteen requests and denied the three others. While the staff’s no-action positions depend on facts and circumstances, the staff signaled that a company-adopted bylaw that has implemented the same stock ownership requirements as the shareholder proposal will provide a basis for exclusion even if other terms, such as the number of nominees or limitations on group size, differ from the proposal. This Alert discusses the staff’s recent no-action letters and the potential implications for companies that are evaluating proxy access.

In October 2015, the Division of Corporation Finance issued Staff Legal Bulletin No. 14H (SLB No. 14H), which, as discussed in a previous Ropes & Gray [Alert](#), significantly limited a company’s ability to exclude a shareholder proxy access proposal on the basis that the proposal “directly conflicts” with a proxy access bylaw proposed by the company. Following SLB No. 14H, the battleground turned to efforts to exclude a shareholder proxy access proposal based on a company having already adopted a proxy access bylaw (albeit with some different terms than the proposal put forth by the shareholder). Under staff guidance under Rule 14a-8(i)(10), when a company has already taken action to address the underlying concerns and essential objectives of a shareholder proposal, the proposal has been “substantially implemented” and may be excluded. The eighteen no-action letters issued on February 12th provide additional guidance on how closely the terms of a company-adopted proxy access bylaw needs to mirror the terms of a shareholder proxy access proposal in order for the SEC staff to deem the proposal to be “substantially implemented” and excludable under Rule 14a-8(i)(10).

Proxy access proposals generally cover the following key components:

- **Ownership Threshold:** Requiring that a shareholder hold a minimum percentage ownership of the company’s stock;
- **Ownership Period:** Requiring the shareholder to have held the minimum ownership threshold for a certain period of time and commitment to hold through the date of the next shareholder meeting;
- **Aggregation:** Provisions allowing a group of shareholders to act together to aggregate holdings to meet minimum ownership thresholds (including whether there are any limits on the size of the group); and
- **Nomination Threshold:** Provisions limiting the number of candidates that may be nominated to a number of candidates equal to a fixed and/or percentage number of directors that will be elected.

Sixteen of the eighteen shareholder proxy access proposals involved in the February 12th no-action letters were submitted by John Chevedden. The remaining two proxy access proposals were re-proposals by the NYC Comptroller’s office. A chart summarizing the key terms adopted by the companies seeking no-action relief to exclude shareholder proxy access proposals is set forth in Exhibit A.

Notably, the staff denied relief to those companies (Flowserve Corporation, NVR, Inc., and SBA Communications Corporation) that had adopted an ownership threshold higher than the ownership threshold that was being proposed by the shareholder (i.e., adopted a 5% stock ownership threshold as compared to a proposed 3% stock ownership

threshold) but granted relief in those situations where the substantive terms relating to ownership thresholds (e.g., three percent) and ownership periods (e.g., three years) contained in the shareholder proposals were reflected in the proxy access bylaws that had been previously adopted at each of the companies, even where the company's proxy access bylaw contained other terms different than the proposal. Differences included aggregation or nomination thresholds. The SEC staff, for example, permitted many of the companies to exclude shareholder proposals that requested proxy access for shareholders to nominate **up to 25%** of the directors by **groups of unlimited** shareholders, despite the fact that the company-adopted bylaw permitted shareholders to nominate **up to only 20%** of the directors by **groups of no more than twenty** shareholders. Furthermore, many of these companies' proxy access bylaws also contained additional restrictions that were not applicable to all board nominees (e.g., provisions relating to director independence, conflicts with organizational documents or listing rules, competitor conflicts, and "bad actor" disqualification), even though the shareholder proposals required that no such restrictions be imposed. These no-action letters are consistent with the staff's position in *General Electric Company* (avail. Mar. 3, 2015), where the staff concurred that the company had substantially implemented the shareholder proposal by adopting a proxy access bylaw, even though the company proxy access bylaw included a 20 shareholder cap on aggregation to satisfy the 3% ownership threshold (the shareholder proposal would have allowed unlimited aggregation).

In the wake of the February 12th no-action letters, companies have new guideposts regarding the meaning of "substantial implementation" as it relates to proxy access and the contours of the Rule 14a-8(i)(10) exclusion. While we expect that many companies will continue to follow a "wait and see" approach with respect to proxy access, some companies may choose to adopt a proxy access bylaw, particularly if they have previously received a shareholder proxy access proposal. Given the popularity of the proxy access formulation of 3% stock ownership for three years, with the ability to nominate two members or 20% of the board and a cap on group size of 20 shareholders, companies should anticipate that the adoption of proxy access provisions with higher stock ownership thresholds would likely diminish their ability to exclude shareholder proxy access proposals under Rule 14a-8(i)(10).

Please feel free to contact any member of Ropes & Gray's [securities & public companies](#) practice group or your usual Ropes & Gray contact with any questions about this Alert.

**Exhibit A
Summary of Key Proxy Access-Related Terms**

Company	Proponent's Proxy Access Proposal (% Ownership/Holding Period/ No. of Nominees/Group Size)	Proxy Access Terms Adopted by the Company
SEC No-Action Relief: Granted		
Alaska Air Group, Inc.	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/2 or 20%/Group of 20
Baxter International Inc.	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/2 or 20%/Group of 20
Capital One Financial Corporation	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/2 or 20%/Group of 20
Cognizant Technology Solutions Corporation	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/2 or 25%/No limit
The Dun & Bradstreet Corporation	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/2 or 20%/Group of 20
General Dynamics Corporation	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/20%/Group of 20
Huntington Ingalls Industries, Inc.	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/2 or 25%/Group of 20
Illinois Tool Works Inc.	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/2 or 25%/Group of 20
Northrop Grumman Corporation	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/2 or 20%/Group of 20
PPG Industries, Inc.	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/2 or 20%/Group of 20
Science Applications International Corporation	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/2 or 25%/Group of 20
Target Corporation	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/2 or 20%/Group of 20
Time Warner Inc.	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/2 or 20%/Group of 20
UnitedHealth Group, Inc.	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/20%/Group of 20
The Western Union Company	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	3%/3-Yrs/20%/No limit
SEC No-Action Relief: Denied		
Flowerserve Corporation	3%/3-Yrs/Greater of 2 or 25%/No limit (John Chevedden)	5%/3-Yrs/2 or 20%/Group of 20
NVR, Inc.	Change 5% to 3% / - / - /Eliminate cap on group (NYC Comptroller)	5%/3-Yrs/20%/Group of 20
SBA Communications Corporation	Change 5% to 3% / - /Increase nominees to up to 25%/Eliminate cap on group size (NYC Comptroller)	5%/3-Yrs/1 or 20%/Group of 10