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SEC Provides Guidance on Proxy Access Shareholder Proposals

The Staff of the SEC last week responded to a set of 10 no-action requests seeking exclusions of proxy access shareholder proposals (out of a total of 14 such requests this proxy season). These no-action responses represent the SEC's first significant guidance on proxy access shareholder proposals since the changes to Rule 14a-8 permitting private ordering took effect in September 2011, and will likely influence the development of future proxy access proposals.

Notably, it appears that the SEC Staff may be unwilling to permit exclusion of proposals on the basis of substantial implementation (under Rule 14a-8(i)(10)) where a company has adopted its own version of proxy access that differs in a significant respect from that proposed by the shareholder. [KSW, Inc.'s](#) request to exclude a shareholder proposal on such grounds was rejected by the SEC, which noted that the ownership threshold in the proxy access mechanism adopted by KSW management (5%) was higher than that included in the shareholder proposal (2%). Although the SEC did not address it in this set of no-action responses, we expect some companies to seek exclusion under Rule 14a-8(i)(9) where management has submitted a competing proxy access proposal with different thresholds for shareholder approval. The SEC has permitted exclusion on this basis in other areas, such as proposals to allow shareholders to call a special meeting, even when management set a different threshold in its proposal than that specified in the shareholder proposal.

A number of exclusions were permitted by the SEC Staff on other grounds, including [vagueness under Rule 14a-8\(i\)\(3\)](#) and improper [submission](#) of [multiple proposals](#) under Rule 14a-8(c). It is likely that future proponents of proxy access proposals will try to craft their proposals to avoid these particular grounds for exclusion.

The SEC was not receptive, however, to arguments that [proposals](#) that [referenced websites](#) could be excluded under Rule 14a-8(i)(3) as being potentially materially false or misleading. In refusing to exclude, the SEC noted that the proponent had shared the proposed contents of the website with each company in advance, and the companies had not alleged it to be materially false or misleading. This may lead to an increased use of activist website campaigns (which tend to be inexpensive) and issuer allegations of false and misleading materials.

[We have always maintained](#) that shareholders have multiple opportunities to influence boards of directors, and that proxy access will not lead to improved corporate governance. Nonetheless, through the 2012 proxy season, companies should carefully monitor developments to adjust to the realities of the new private ordering landscape. Companies should also remember that ISS policy is to approach proxy access proposals on a case-by-case basis, and it will consider ownership thresholds as part of such evaluation. Going forward, many issuers may receive proxy access shareholder proposals even though the activist community approached this first year of the new 14a-8 regime cautiously. Exclusions may be available on grounds that the SEC has addressed or others that it has not yet addressed, such as state law issues or competing proposal arguments. In many cases, however, companies will be faced with the options of attempting to resist such proposals either by arguing against the concept of proxy access, or by adopting and defending their own versions of proxy access.

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