SEC Responds to Proxy Access No-Action Requests

March 15, 2012

On March 7, 2012, the staff of the Division of Corporate Finance of the Securities and Exchange Commission (the "Staff") published highly anticipated responses to no-action letter requests regarding proxy access proposals submitted by shareholders under revised Rule 14a-8 in the first proxy season following the expiration of the Securities and Exchange Commission's ("SEC") voluntary stay on the effectiveness of the new amended Rule.

In the initial wave of investor-sponsored efforts to expand proxy access through Rule 14a-8, investors presented twenty shareholder proposals to different companies calling for the adoption of proxy access bylaws.[1] The most commonly used form was presented in non-binding proposals to Chiquita Brands, Inc., Dell, Inc., Goldman Sachs Group, Inc., MEMC Electronic Materials, Inc., Princeton National Bancorp., Textron Inc., Ferro Corporation, Sprint Nextel Corporation and Bank of America Corporation. These proposals, based on the model created by United States Proxy Exchange, would grant board nomination privileges to investors who own 1% of company shares for two years or a group of one hundred or more investors who each own $2,000 in market value of company shares for one year.

Norges Bank Investment Manager ("NBIM") presented binding proposals to The Charles Schwab Corporation, Wells Fargo and Company, the Western Union Company, Staples, Inc., Pioneer Natural Resources Company and CME Group Inc. Under these proposals, shareholders who owned 1% or more of company shares for one year would be permitted to nominate no more than 25% of company directors. Two other variations were submitted to KSW Mechanical Services, Inc. and Microwave Filter Company, Inc. The KSW shareholder proposal would allow an investor or a group of investors who beneficially owned 2% of KSW shares for one year or more to nominate directors (with no cap on the total number of nominees). The suggested bylaw for Microwave Filter Co. would grant an investor or a group of no more than five investors who owned 15% of company shares for at least one month nomination rights for no more than 33% of board seats.

In response to these proposals, thirteen companies submitted no-action letters to the Staff requesting permission to omit them from their proxy materials. The Staff concurred with justifications presented in six cases. Bank of America, Goldman Sachs and Textron argued that the submitted proposals violated Rule 14a-8(c), which states that a proponent may submit no more than one proposal. The Staff pointed out that all of the provisions in the proponents' submissions related to the inclusion of shareholder director nominations in the corporations' proxy materials, except one paragraph which contained a proposal relating to events that would not be considered a change of control. The Staff agreed that this paragraph could be considered a separate and distinct matter from the shareholder director nomination provisions.

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[1] Based on data published by Institutional Shareholder Services ("ISS").

Additionally, the Staff agreed that Chiquita Brands, MEMC Electronic Materials and Sprint Nextel's basis for omission had merit. These companies argued to exclude the proxy access proposals under Rule 14a-8(i)(3) because they were vague and indefinite. The Staff noted that the proposals provided that the companies' proxy materials should include the director nominees of shareholders who satisfy the SEC Rule 14a-8(b) eligibility requirements, but the proposals failed to specify the particular eligibility requirements. The Staff concluded that not all shareholders would be familiar with these conditions, and many would not be able to ascertain the requirements based on the proposal's language. Due to this ambiguity, the Staff agreed that these companies could omit the proposals from their proxy materials.

Four companies failed to obtain no-action relief. In its no-action request, KSW sought permission to omit the proponent's proposal requiring the company to include in its materials director nominations from a shareholder or a group of shareholders who beneficially owned 2% or more of the company's outstanding common stock for one year or more. Since it had earlier this year adopted a bylaw that allows a shareholder who owns 5% or more of its outstanding common stock to nominate a director, the company asserted under Rule 14a-8(i)(10) that the proposal could be excluded as it had been substantially implemented. The Staff did not agree, however, due to the differences between the adopted bylaw and the proposal, placing emphasis on the differing ownership levels required for eligibility.

The Staff also disagreed with the assertions of Charles Schwab, Wells Fargo, and Western Union regarding its proposals. Charles Schwab and Wells Fargo had argued for exclusion of a reference to NBIM's website under Rule 14a-8(i)(3), while Western Union had argued for exclusion of the entire proposal under the same rule. The rule permits omission of a proposal or a portion of a proposal if the proposal is false or materially misleading. The Staff indicated that NBIM had provided the content that would be included on the website and that the companies had not demonstrated that the content was false or materially misleading.

The Staff has not yet published responses for all the no-action letters it has received regarding proxy access bylaws. Staples submitted a no-action request to the SEC, arguing that NBIM's proposal conflicts with its bylaws. As of March 14, 2012, the Staff had not issued a response. Dell has also filed a request for no-action, asserting that the proponent's proposal violates Rule 14a-8(i)(7). The Rule permits the exclusion of a shareholder proposal that deals with a matter relating to the company's ordinary business operations. The company is awaiting a response.

Rather than submit no action requests to the Staff, other companies have chosen to include proxy access bylaws in their proxy materials and put them to vote at annual shareholder meetings. In exchange for Amalgamated Bank's withdrawal of its shareholder proposal, Hewlett Packard Co. has agreed to present a proxy access bylaw for a shareholder vote at its 2013 annual meeting. This bylaw would grant shareholders who own at least 3% of company shares for at least three years the right to nominate up to 20% of the company's directors. Meanwhile, investors are expected to vote on proxy access bylaw proposals at the following companies' 2012 annual shareholder meetings: Microwave Filter Co., CME Group and Princeton National Bancorp. According to ISS, Ferro Corporation and Pioneer Natural Resources also received company proposals but so far have not sought no-action relief.

Thus far, we have seen a relatively small number of investor-sponsored proposals, and at this stage, it remains unclear how shareholder proxy access proposals will fare when submitted to a vote at shareholder meetings. In the coming months, as votes are taken on access proposals, we will have a better sense of shareholder appetite for proxy access. We will continue to monitor the situation and will present meaningful results when available.

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This memorandum is for general information purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.

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