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The 2015 Proxy Season: The Year of Proxy Access

During the 2015 proxy season, shareholders filed over one hundred proxy access proposals, and dozens of companies have adopted proxy access bylaw provisions. The recent wave of proxy access shareholder proposals has significant implications for companies and may impact shareholder voting, governance policies, and bylaw provisions for years to come.

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Five years ago, the U.S. Securities and Exchange Commission (SEC) adopted proxy access rules in answer to decades-long efforts by shareholders and shareholder groups. The centerpiece of the proxy access rules was Rule 14a-11, which would have required that a public company include in its proxy materials board nominees from a shareholder who continuously owned at least three percent of the company's securities for three years. Under Rule 14a-11 a shareholder would have been able to nominate up to 25 percent of the board. To complement Rule 14a-11, the SEC amended Rule 14a-8, the shareholder proposal rule, to provide that companies could no longer exclude proxy access shareholder proposals on the basis that they relate to an election of directors.[1] These changes were a major milestone, as the SEC has grappled with proxy access since at least 1942.[2]

The victory for shareholders was short lived, however, as the mandatory proxy access rule was vacated one year later in *Business Roundtable and Chamber of Commerce v. Securities and Exchange Commission*.[3] Although the *Business Roundtable* case invalidated Rule 14a-11, the Rule 14a-8 amendments left in place remain a viable mechanism to achieve proxy access.

Historically, the SEC had taken the position that proposals seeking to nominate persons to the board or create processes by which shareholders may nominate persons to the board were excludable under Rule 14a-8(i)(8) on the basis that such proposals relate to the election of directors.[4] Now, Rule 14a-8(i)(8) no longer provides a basis for excluding proxy access shareholder proposals solely on these grounds. Instead, such proposals are treated like any shareholder proposal that seeks to establish election procedures, which generally may not be excluded solely on the basis that they relate to the election of directors, but may be subject to exclusion under other bases set forth in Rule 14a-8.

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Proxy Access Shareholder Proposals since *Business Roundtable*

Many observers speculated that the changes to the shareholder proposal rule would lead to the submission of hundreds of proxy access shareholder proposals. This, of course, did not happen. For example, shareholders submitted only 22 proxy access proposals in 2012, 17 in 2013, and 17 again in 2014. In 2015, however, there has been a sharp increase in the number of proxy access shareholder proposals—as of July 8, 2015 at least 108 proxy access shareholder proposals have been submitted. Most of the proxy access shareholder proposals submitted this year are modeled after Rule 14a-11—they request bylaw amendments that give a group of shareholders who hold 3 percent of a company's outstanding stock for 3 years the ability to nominate up to 25 percent of the company's board.

Various shareholder groups have made a coordinated effort to present proxy access shareholder proposals. The New York City Pension Funds (NYCPF) submitted proxy access proposals to 75 companies. The California Public Employees' Retirement System (CalPERS) and the California State Teachers' Retirement System (CalSTRS) announced plans to target 33 energy companies during the 2015 proxy season, instead of submitting shareholder proposals, TIAA-CREF sent a letter to the top 100 companies in which it invests, asking those companies to implement proxy access. Lastly, James McRitchie and other individual investors have submitted a number of proxy access shareholder proposals.

The majority of institutional investors that have expressed public views on the topic support some type of proxy access. Based primarily on the shareholder proposals that have been submitted to date, as well as shareholder votes on proxy access proposals to date, shareholders appear to generally favor proxy access rights for shareholders that own three percent of a company's shares for three years. There are, however, some exceptions to the rule—Vanguard supports proxy access for 5 percent shareholders, while BlackRock has expressed support for proxy access but has indicated that it will review such proposals on a case-by-case basis.[5] Fidelity is the only institutional investor that publicly opposes proxy access.

Treatment of Proxy Access Shareholder Proposals under the Shareholder Proposal Rule

While proxy access shareholder proposals may be excludable on a number of bases under Rule 14a-8, prior no-action letters suggest that companies cannot rely on Rule 14a-8 to exclude well-drafted proxy access shareholder proposals unless they have either adopted or propose to adopt their own proxy access bylaw provisions.

A company that has already adopted a proxy access bylaw provision could argue that a proxy access shareholder proposal has been "substantially implemented," and exclude the proposal based on Rule 14a-8(i)(10). To succeed on a challenge on this basis, a company must demonstrate that its proxy access proposal compares favorably with the shareholder proposal.[6] Over time, this has come to mean that the SEC will not recommend enforcement action if a company excludes a shareholder proposal on the basis that its policies, practices or other actions have addressed the "essential objective" of the proposal.[7] In practice, however, this may mean that a company must have implemented all of the material elements of a shareholder proposal in order to obtain no-action relief, which can make it very difficult for companies seeking no-action relief on this basis.[8]

A company that submits its own proxy access proposal to shareholder vote could argue under Rule 14a-8(i)(9) that a proxy access shareholder proposal "directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting."[9] For Rule 14a-8(i)(9)

to apply, the proposals need not be "identical in scope or focus," meaning that a management-proposed proxy access bylaw could set standards that are more restrictive than a proposed proxy access shareholder proposal.[10]

Until recently, it was expected that a number of companies would rely on Rule 14a-8(i)(9) to exclude proxy access shareholder proposals from their proxy materials. In fact, in December 2014, the SEC agreed with Whole Foods Market, Inc., that it could exclude a proxy access shareholder proposal on the basis that Whole Foods' own proxy access proposal directly conflicted with a proxy access shareholder proposal.[11] Following investor backlash, however, on January 16, 2015, SEC Chair Mary Jo White issued a statement that SEC staff would review Rule 14a-8(i)(9) "[d]ue to questions that have arisen about the proper scope and application of [the rule]."[12] At the same time, the SEC's Division of Corporation Finance withdrew its prior no-action response to Whole Foods and announced that it would no longer express any view with respect to arguments under Rule 14a-8(i)(9) during the current proxy season.[13]

Implications of the Change in the SEC's Approach to Rule 14a-8(i)(9)

The change in the SEC's approach to Rule 14a-8(i)(9) raised two significant concerns for companies that had been considering relying on the rule to exclude shareholder proposals. First, companies now had to think about how shareholders would respond if a shareholder proposal were excluded under Rule 14a-8(i)(9). Second, companies now had to consider the legal and other risks associated with excluding a proxy access shareholder proposal in the absence of a no-action letter.

Shareholder Responses to the SEC's Changed Approach

Shareholder responses to the SEC's change in approach to Rule 14a-8(i)(9) were fast and furious. Anne Simpson, the senior portfolio manager for CalPERS was quoted as saying that CalPERS would "take [its] votes to the boardroom" if companies did not respond constructively to shareholder proxy access proposals.[14] Similarly, Aeisha Mastagni, investment officer at CalSTRS said that CalSTRS would "take action against directors" of companies that decide to exclude proxy access proposals from their proxy materials.[15] TIAA-CREF, as well as the Connecticut and Florida state pension plans, publicly indicated that they may consider voting against directors at companies that exclude proxy access proposals from their proxy materials.[16]

In addition, both Glass Lewis & Co. (Glass Lewis) and Institutional Shareholder Services (ISS) issued guidance indicating that they would consider how companies respond to proxy access proposals. Glass Lewis will not recommend a vote against directors *solely* because the company proposed a management proposal in lieu of a proxy access shareholder proposal, but will assess the reasonableness of a company's response to proxy access proposals to determine whether it "would thwart the intent of the shareholder proposal."[17] In making its analysis, Glass Lewis will consider the following factors:

- Whether a company's proposal varies materially from the shareholder proposal in minimum ownership threshold, minimum holding period and maximum number of nominees;
- The company's performance and overall governance profile, the board's independence, leadership, responsiveness to shareholders and oversight and the opportunities for shareholders to effect change; and
- The nature of the proponent.

Glass Lewis also has indicated that it will review the rationale provided by a company in explaining its response to a shareholder proposal. "[I]n limited cases," Glass Lewis may recommend voting against a company's directors if the company's rationale is deemed to be insufficient.[18]

Unlike Glass Lewis, however, ISS has stated that it generally will recommend a vote against one or more directors if a company omits a properly submitted shareholder proposal without obtaining (1) a voluntary withdrawal from the proponent, (2) no-action relief from the SEC or (3) a U.S. District Court ruling that allows it to exclude the proposal from its ballot. ISS's recommendation will follow even if the company includes a similar management proposal on the ballot. However, "if the company has taken unilateral steps to implement [a management] proposal," ISS will factor into its assessment the degree of such implementation and any material restrictions added to it.[19]

Risks Associated with Excluding a Proposal without a No-Action Letter

Despite the statements from SEC Chair White and the Division of Corporation Finance, a company may still rely on Rule 14a-8(i)(9) if it proposes to include a management-proposed proxy access proposal in its proxy materials. There is no requirement that a company submit a no-action request or receive a favorable response to such a request before omitting a shareholder proposal from its proxy materials. Rule 14a-8 only requires that companies "file their reasons" with the SEC.

Notwithstanding technical compliance with Rule 14a-8, excluding a shareholder proposal in the absence of a no-action letter is risky. If the SEC disagrees with a company's interpretation of Rule 14a-8(i)(9), it could bring an enforcement action against that company. Realistically, however, this risk is remote; the SEC's approach to arguments under Rule 14a-8(i)(9) is well-established. The real risk relates to the threat of litigation from an aggrieved shareholder, who may sue to enjoin a company from distributing proxy materials that omit a shareholder proposal. Such litigation can be costly and could inject uncertainty into the annual meeting process, particularly since there is no case law that addresses the application of Rule 14a-8(i)(9) in general or in these specific circumstances.

Company Responses to Proxy Access Shareholder Proposals Following the SEC's Change in Approach

As of July 8, 2015, companies have responded to proxy access shareholder proposals in four different ways.

Including the proxy access shareholder proposal in the company's proxy materials. So far, in the 2015 proxy season, 86 companies that have received shareholder proxy access proposals have chosen to include the proposal in their proxy materials. As of July 8, 2015, two companies have followed this approach and recommended that shareholders vote in favor of the proposal, while 84 companies have recommended against the proposal.

Including a management proxy access proposal in lieu of a proxy access shareholder proposal. Two companies have chosen to include a management proxy access proposal in their proxy materials in lieu of a proxy access shareholder proposal.[20] As discussed above, this approach poses governance-related and legal risks. ISS or Glass Lewis may recommend votes against a company's board, while aggrieved shareholders or the SEC may litigate the exclusion of the shareholder proposal. While the risk of an SEC enforcement action is very low, the risk of a shareholder lawsuit is slightly higher, particularly if the company in question is one of a few that excludes a shareholder proposal under Rule 14a-8(i)(9) without obtaining a no-action letter. For these reasons we expect very few companies to follow this approach.

Including a proxy access shareholder proposal and a competing management proxy access proposal in the same proxy materials. Seven companies have chosen to include both a proxy access shareholder proposal and a competing management proxy access proposal in their proxy materials. Some groups may view this approach as a

mechanism by which a company can evaluate shareholder support for different approaches to proxy access and avoid any adverse responses from shareholders. There are some potential negative consequences from this approach, however. First, including both proposals could be confusing to shareholders and to companies—company disclosures will have to be very clear about the differences between the proposals and the consequences of approving one or both proposals. This is especially true if both proposals are approved.

Second, how companies should respond to votes on competing proposals is unclear. If the shareholder proposal is approved, the company must respond to avoid a negative vote recommendation from proxy advisory firms, but it is not clear how shareholders would respond if the company responds by adopting its proxy access proposal that was also approved by shareholders. Further, management may find it difficult to justify adopting management's proxy access approach if it is approved by a lower percentage than the shareholder proposal.

As of July 8, 2015, shareholders at all seven companies that took this approach have voted on both shareholder and management proxy access proposals. None of these companies had shareholders approve both proposals, but shareholders at one company rejected both proposals. At three companies, the shareholder proposal passed, but the management proposal failed. By contrast, at three companies, the management proposal passed, but the shareholder proposal failed.[21]

Adopting a management proxy access bylaw. In the 2015 proxy season, 21 companies have adopted a management supported proxy access bylaw or announced plans to adopt a proxy access bylaw in response to proxy access activism. The biggest benefit to this approach is that it puts a company in front of a governance issue that is only likely to pick up more steam. The biggest negative associated with this approach is that the company may not have the opportunity to react to proxy access developments. Adopting a proxy access bylaw also may allow a company to exclude a shareholder proposal on the basis that the proposal has been substantially implemented under Rule 14a-8(i)(10). To obtain no-action relief from the SEC, however, a company must implement all of the material elements of a shareholder proposal, including with respect to the minimum ownership amount and the number of directors to be nominated, which is an area where companies and shareholders have disagreed.[22] Therefore, companies may find it difficult to receive a no-action letter under Rule 14a-8(i)(10).

Shareholder Votes Regarding Proxy Access Proposals

As of July 8, 2015, shareholders at 83 companies have voted on proxy access shareholder proposals. Forty-nine of these proposals, or 59 percent, were approved, and the remaining 34, or 41 percent, were not approved. [23] Additionally, shareholders at 12 companies have voted on proxy access management proposals. Six such proposals have been approved, while the remaining six were not.[24]

Company Actions on Proxy Access

Given the number of proxy access proposals that have been submitted to date, as well as the significant level of shareholder interest in the topic, companies would be well advised to consider what their approach to proxy access will be, whether they receive a shareholder proposal or decide to implement proxy access independently. From the investor perspective, proxy access provisions should not present overly onerous hurdles such as excessive restrictions on groups of shareholders working together or introduce minimum ownership calculation methods open to abuse. Below are some of the key features that companies and investors should consider as they evaluate a proxy access bylaws. In addition, the

chart below provides a snapshot of how selected companies have implemented some of these features in their proxy access regimes.

Minimum Ownership Requirements

The minimum ownership threshold for a nominating shareholder is one of the most important factors that investors consider in evaluating proxy access proposals. At this point, shareholder proposals and management proposals generally have converged on 3 percent for three years minimum ownership requirement, although some companies have adopted the 5 percent threshold that is supported by some institutional investors. Management proposals that impose longer or more significant ownership requirements are likely to be met with criticism.

Proxy Access Regimes for Selected Companies

Company	Ownership Threshold	Ownership Holding Period	Percent of Board that May be Elected	Aggregation of Shareholders
American Railcar Industries	5%	2 years	Bylaws do not define limit	Bylaws do not address aggregation
Arch Coal, Inc.	5%	3 years	20%	Up to 20
Bank of America	3%	3 years	20%	Up to 20
Biogen	3%	3 years	25%	Up to 20
Boston Properties	3%	3 years	25%	Up to 5
Cabot Oil & Gas	5%	3 years	20%	Up to 10
CenturyLink	3%	3 years	20%	Up to 10
CF Industries Holdings, Inc.	5%	3 years	20%	Up to 20
Chesapeake Energy	3%	3 years	25%	Bylaws do not address aggregation
General Electric	3%	3 years	20%	Up to 20
HCP, Inc.	5%	3 years	20%	Up to 10
Hewlett-Packard	3%	3 years	20%	Up to 20
Kilroy Realty	5%	3 years	25%	Up to 10
Marathon Oil	5%	3 years	20%	Up to 20
New York Community Bancorp	5%	3 years	20%	Up to 10
Priceline Group, Inc.	5%	3 years	20%	Up to 20
Prudential Financial	3%	3 years	20%	Up to 20
Rite Aid	3%	3 years	20%	Up to 20
United Therapeutics	3%	3 years	20%	Up to 20
Verizon Communications	3%	3 years	20%	Up to 20
Western Union	3%	3 years	20%	Not specified

Many proxy access bylaws impose holding period requirements beyond the 3-year holding period prior to a nomination. For instance, many bylaws require nominating shareholders to hold their shares through the date of the annual meeting. Some companies have considered adopting more stringent requirements, such as provisions that would require nominating shareholders to hold their shares through the end of the term of any directors they nominate. If a company is incorporated in Delaware and has a classified board, this provision would effectively require shareholders to hold their shares for three years.[25] We expect that investors would object vigorously to such a requirement.

Aggregation

Most proxy access bylaws and proposals to date have permitted shareholders to aggregate their shares in order to satisfy the minimum ownership requirements for nominations, but included a maximum number. For example, many bylaw provisions and proposals limit aggregation to groups of no more than 20 shareholders.[26] Other companies, taking cues from the SEC's mandatory access rule, do not impose any restrictions on aggregation, instead relying on beneficial ownership concepts. Glass Lewis explicitly identifies aggregation as a factor it considers in evaluating management-proposed proxy access regimes.

Qualifying Ownership

To ensure that the interests of nominating shareholders are aligned with the interests of other shareholders, some companies have adopted qualifying ownership provisions. Under such provisions, a nominating shareholder would be considered to own only the shares for which the shareholder possesses full voting and investment rights and the full economic interest.[27] Shares that are loaned are commonly considered to be "owned" for these purposes.

The Number of Board Seats Subject to the Access Procedure

The number of board seats subject to the access procedure is also one of the most significant features considered by investors and proxy advisory firms in evaluating proxy access proposals. Public pension plans have strongly preferred proxy access proposals that allow the nomination of up to 20 percent of a company's board. Shareholder proposals generally have proposed that shareholder access bylaws allow the nomination of up to 25 percent of the board, while company proposals and current proxy regimes generally have limited the proxy access right to 20 percent of the directors in office at the time of the nomination.[28] If the 20 percent calculation does not result in a whole number, the proposal or bylaws often specify that the maximum number of shareholder-nominated candidates will be the closest whole number below 20 percent.

In addition, companies and investors should consider the effect on the number of shareholder-nominated candidates if the size of the board is reduced. In such a case, a company might, for example, apply the 20 percent calculation to the reduced size of the board. However, this might disqualify one or more shareholder-nominated directors if the size of the board is reduced after the nomination deadline has passed.

Director Qualification Provisions

Delaware law is fairly permissive with respect to director qualification bylaw provisions.[29] The Delaware Court of Chancery has indicated that it would uphold reasonable director qualification bylaw provisions that are applied consistently and are not applied retroactively to prevent an otherwise-qualified nominee from being seated.[30]

Since Delaware law provides significant latitude with respect to crafting director qualification provisions, companies often impose qualifications that will ensure that any proxy access

nominee meets the same requirements that would be expected for a board nominee. For example, some bylaws disqualify from board service candidates who (1) do not own a sufficient amount of company stock, (2) do not satisfy minimum requirements for experience in the company's industry, (3) are executives at a company's competitor, (4) have been convicted of certain securities violations or (5) possess comparably undesirable characteristics. Before moving forward with changes to director qualification provisions, a company should make sure that the standards it adopts are reasonable and would not preclude its board from nominating candidates who otherwise may be in the company's best interests.

To strengthen the validity of director qualification bylaw provisions, companies could consider seeking shareholder approval of such provisions. A director qualification provision that is ratified by shareholder vote is likely to be viewed more favorably by shareholders and by courts than a provision that is adopted without shareholder approval.[31]

Disclosure Requirements

Proxy access bylaws often impose minimal disclosure requirements on nominating shareholders and director candidates who have been nominated. These requirements are in addition to those imposed by the SEC, although bylaws also may include mention of the SEC requirements as well. These provisions often require information such as the following:

- proof that a nominating shareholder meets the minimum ownership requirements,
- an agreement to maintain qualifying ownership through the date of the meeting,
- the information required by Schedule 14N, which is required to be filed with the SEC,
- the written consent of the shareholder nominee to being named in the proxy statement and serving as a director, if elected,
- any information required by the advance notice provision of the company's bylaws.
- representations as to the lack of intent to effect a change of control,
- representations that the nominating shareholder is only participating in the solicitation of their nominee,
- representations that there are not any compensatory arrangements with their nominee, and
- representations that the nominating shareholder will comply with the proxy rules.

Along similar lines, proxy access bylaws often require certain representations from the board nominee, including representations that the nominee:

- will act in accordance with duties under Delaware law,
- will not enter into a voting commitment,
- is not party to any compensation arrangements in connection with nominee's candidacy for director,
- will not enter into any special compensatory arrangements with individuals or entities other than the company for his or her service as a director, and
- will comply with applicable law and stock exchange requirements and the company's policies and guidelines applicable to directors

Nomination Procedures

Many companies require shareholders to submit proxy access requests well in advance of the company's annual meeting. For example, a bylaw could require companies to receive shareholders' requests no earlier than 150 days and no later than 120 days before the anniversary of the date that the company issued the previous year's proxy statement. Although several advance notice provisions have beginning and end points of 90 and 120 days respectively, the 120 and 150 day beginning and end points are more common among proxy access bylaws.

Disqualification Provisions

Many proxy access bylaws include provisions that bar unsuccessful shareholder nominees from

running in successive years. Some provisions bar a nominee from reappearing on the ballot in the next two years if the nominee has failed to obtain more than 25 percent of the vote. Such provisions also commonly bar nominees who are included in the company's proxy materials but subsequently withdraw from or become ineligible for election at the meeting.

Conclusion

As noted above, both the increase in the number of proxy access shareholder proposals being submitted, as well as the change in the SEC's approach to Rule 14a-8(i)(9), have had significant implications for shareholder groups and companies. While a company previously had the ability to rely on Rule 14a-8(i)(9) to exclude a shareholder proxy access proposal after obtaining no-action relief, companies now must evaluate whether to include shareholder proposals or to proceed with their own proxy access bylaws after engaging with shareholders. The developments in early 2015 have the potential to radically change the governance landscape and could result in a scenario where proxy access becomes as commonplace as majority voting in the election of directors.

Notes

1. *See* Securities and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Comm. on Interstate and Foreign Commerce, 78th Cong., 1st Sess., at 17-19 (1943) (testimony of Chairman Ganson Purcell).

2. *See e.g.,* Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, Division of Corporation Finance (Jul. 15, 2003); SEC Rel. No. 34-13482 (Apr. 28, 1977); *see also* SEC Rel. No. 34- 13901 (Aug. 29, 1977); SEC Rel. No. 34-31326 (Oct. 16, 1992); Security Holder Director Nominations SEC Rel. No. 34-48626 (Oct. 14, 2003); SEC Rel. No. 34-56161 (Jul. 27, 2007); Shareholder Proposals, SEC Rel. No. 34-56160 (Jul. 27, 2007); SEC Rel. No. 33-9136 (Aug. 25, 2010) (Adopting Release).

3. *See* Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

4. *See, e.g.,* Amoco Corp., SEC No-Action Letter (Feb. 14, 1990) (excluding a proposal that shareholders representing over $100,000 in market value be allowed to nominate directors).

5. *See* BlackRock, Proxy voting guidelines for U.S. securities, available at *https://www.blackrock.com/corporate/en-fi/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf*

6. *See, e.g.,* Texaco, Inc., SEC No-Action Letter (Mar. 28, 1991) (agreeing, upon reconsideration, that Texaco had substantially implemented a proposal that requested it subscribe to the Valdez Principles) and Walmart, Inc., SEC No-Action Letter (Mar. 27, 2014) (agreeing that Walmart had substantially implemented the proposal because its policies and practices compared favorably with the proposal).

7. *See, e.g.,* General Electric Company, SEC No-Action Letter (Mar. 3, 2015) (agreeing that General Electric's proxy access bylaw already addressed the essential objective of the shareholder proposal).

8. General Dynamics Corporation, SEC No-Action Letter (Jan. 24, 2011) ("We are unable to concur in your view that General Dynamics may exclude the proposal under rule 14a-8(i)(10). We note that the proposal specifically seeks to allow shareholders to call a special meeting if they own, in the aggregate, 10 percent of the company's outstanding common stock, whereas General Dynamics' bylaw requires a special meeting to be called at the request of a group of shareholders only if the group owns, in the aggregate, at least 25 percent of General Dynamics' outstanding voting stock. We are therefore unable to conclude that the bylaw adopted by General Dynamics substantially implements the proposal.").

9. *See* 17 C.F.R. § 240.14a-8(i)(9) (2010).

10. Southwestern Energy Co., SEC No-Action Letter (Feb. 28, 2011) ("There appears to be some basis for your view that Southwestern Energy may exclude the proposal under Rule 14a-8(i)(9). You represent that matters to be voted on at the upcoming shareholders' meeting include a proposal sponsored by Southwestern Energy to amend Southwestern Energy's Bylaws to reduce the percentage of shareholder vote required to call a special meeting to 20 percent. You indicate that the proposal and the proposal sponsored by Southwestern Energy directly conflict and would present alternative and conflicting decisions. You also indicate that inclusion of both proposals in the proxy materials could present conflicting results to the company, such as in the event that a shareholder voted in favor of both proposals.").

11. Whole Foods' proxy access proposal allowed holders of 9 percent of the company's stock for five years to nominate 10 percent of the board, while the shareholder proposal called for a 3 percent, three-year threshold and an ability to nominate up to 20 percent of the board. Whole Foods Market, Inc., SEC No-Action Letter (Dec. 1, 2014).

12. Mary Jo White, *Statement from Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Access Proposals*, U.S. Securities & Exchange Commission (Jan. 16, 2015), available at *http://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html.*

13. *Id.* ("In light of Chair White's direction to the staff to review Rule 14a-8(i)(9) and report to the Commission on its review, the Division of

Corporation Finance will express no views on the application of Rule 14a-8(i)(9) during the current proxy season.").

14. Kaja Whitehouse, *Stockholders Threaten Boards over 'Proxy Access,'* USA TODAY (Jan. 27, 2015), available at *http://www.usatoday.com/story/money/business/2015/01/27/proxyaccess-investors-businessroundtable-wholefoods/22234271.*

15. *Id.*

16. *Id.*

17. Bob McCormick, *Glass Lewis' Views on Proxy Access Developments*, GLASS, LEWIS & CO., LLC (Jan. 28, 2015), available at *http://www.glasslewis.com/blog/glass-lewis-views-proxy-access-developments*

18. *Id.*; *See also An Overview of the Glass Lewis Approach to Proxy Advice*, GLASS, LEWIS & CO., LLC (2015), available at *http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_United_States.pdf* and *An Overview of the Glass Lewis Approach to Proxy Advice: Shareholder Initiatives*, GLASS, LEWIS & CO., LLC (2015), available at *http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_Shareholder_Initiatives.pdf*

19. *2015 Benchmark U.S. Proxy Voting Policies*, INSTITUTIONAL SHAREHOLDER SERVICES (Feb. 19, 2015), available at *http://www.issgovernance.com/file/policy/2015faquspoliciesonselectedtopics.pdf.*

20. FirstMerit's shareholders approved the management proposal that was submitted to a vote. Both Glass Lewis and ISS recommended in favor of the proposal and did not recommend a vote against any directors. Whole Foods, who similarly excluded the shareholder proposal in favor of a management proposal, has postponed its annual meeting until September 2015.

21. At AES Corporation, Cloud Peak Energy and Visteon Corp., the management proposal failed, but the shareholder proposal passed. At Exelon, SBA Communications and Expeditors International of Washington, the shareholder proposal failed, but the management proposal passed. Shareholders at Chipotle did not approve either the management or the shareholder proposal.

22. General Dynamics Corp., SEC No-Action Letter (Jan. 24, 2011) ("We are unable to concur in your view that General Dynamics may exclude the proposal under rule 14a-8(i)(10). We note that the proposal specifically seeks to allow shareholders to call a special meeting if they own, in the aggregate, 10 percent of the company's outstanding common stock, whereas General Dynamics' bylaw requires a special meeting to be called at the request of a group of shareholders only if the group owns, in the aggregate, at least 25 percent of General Dynamics' outstanding voting stock. We are therefore unable to conclude that the bylaw adopted by General Dynamics substantially implements the proposal.").

23. The following 37 companies have approved proxy access shareholder proposals: Monsanto, EQT Corp., American Electric Power Company, AES Corporation, TCF Financial, Citigroup, Marathon Oil, HCP, Inc., EBay, Apartment Investment & Management Company, EOG Resources, Occidental Petroleum, CBL & Associates Properties, St. Jude Medical, Hess, Avon Products, DTE Energy, Duke Energy, ConocoPhillips, Murphy Oil, Anthem, Kohl's, Anadarko Petroleum, CF Industries Holdings, Republic Services, Cimarex Energy, Cloud Peak Energy, FirstEnergy, Apache, Hasbro, Alpha Natural Resources, Range Resources, McDonalds, PPL Corporation, Southwestern Energy, AvalonBay Communities, and Chevron. The following 23 companies have not approved proxy access shareholder proposals: Apple, CSP, Inc., VCA Inc., PACCAR, Domino's Pizza, Cabot Oil & Gas, Arch Coal, Coca Cola Company, Exelon, Noble Energy, NVR, Inc., Consol Energy, Peabody Energy, Alexion Pharmaceuticals, Chipotle, Westmoreland Coal Company, Expeditors International of Washington, Level 3 Communications, Community Health Systems, Pioneer Natural Resources, United-Guardian, SBA Communications, and ExxonMobil.

24. First Merit, Exelon, Expeditors International of Washington, and SBA Communications have approved proxy access management proposals. By contrast, AES Corporation, Chipotle, Cloud Peak Energy, and Boston Properties have not approved proxy access management proposals.

25. *See* DEL. CODE ANN. tit. 8, § 141(d) (2015).

26. *See, e.g.* the proxy access bylaw adopted by General Electric (*http://www.sec.gov/Archives/edgar/data/40545/000004054515000012/ge8kbylawse3.htm*).

27. *See, e.g.* the proxy access bylaw adopted by Bank of America (*http://www.sec.gov/Archives/edgar/data/70858/000007085815000026/bac-exhibit31032015.htm*)

28. *See, e.g.*, the proxy access bylaws adopted by Hewlett-Packard, General Electric, and Prudential Financial.

29. DEL. CODE ANN. tit. 8, § 141(b) (2015) ("The certificate of incorporation or bylaws may prescribe other qualifications for directors.").

30. Stroud v. Grace, 606 A.2d 75, 93 (Del. 1992); Kurz v. Holbrook, 989 A.2d 140, 157 (Del. Ch.), *rev'd in part on other grounds sub nom.* Crown Emak Partners, LLC v. Kurz, 992 A.2d 337 (Del. 2010).

31. *Stroud*, 606 A.2d at 94-95.