

**SIDLEY UPDATE**

## SEC Grants No-Action Relief for “Substantially Implemented” Shareholder Proxy Access Proposals – With Some Exceptions

Matching Proponent’s Ownership Threshold Appears to Be Key in Obtaining No-Action Relief

On February 12, 2016, the Staff of the SEC’s Division of Corporation Finance granted no-action relief to 15 companies that had sought to exclude shareholder proxy access proposals from their 2016 proxy statements on the grounds that they had been “substantially implemented” by the company. The SEC Staff granted no-action relief under Exchange Act Rule 14a-8(i)(10) to those companies, each of which adopted its own proxy access bylaw with an ownership threshold mirroring the threshold requested by the proponent (3% of the outstanding common stock), even though the terms of the company-adopted proxy access bylaws differed from the specific terms of the shareholder proxy access proposals in various other respects. On the same day, the SEC Staff denied no-action relief to three companies that implemented proxy access with a different ownership threshold (5%) than that sought by the proponent (3%). This development provides much-anticipated clarity to companies concerning their ability to exclude shareholder proxy access proposals by adopting their own proxy access provisions.

### **Background**

Under the SEC’s proxy rules, a company may exclude a shareholder proposal from its proxy materials if the proposal fails to meet any of the procedural and substantive requirements of Rule 14a-8. Substantial implementation under Rule 14a-8(i)(10) is the primary basis of exclusion asserted by companies when seeking no-action relief to exclude proxy access proposals received for their 2016 annual meetings.<sup>1</sup>

In the past year, as proxy access bylaws and proxy access proposals have come to include more detailed terms, it has been unclear whether the SEC Staff would grant no-action relief on the basis of substantial implementation if the proxy access bylaw adopted by the company varied considerably from the terms of the shareholder proxy access proposal. In March 2015, the SEC Staff granted General Electric Company (GE) no-action relief to exclude a proxy access proposal on the grounds that it had already been substantially implemented by the company in spite of certain differences between the shareholder proxy access proposal and the proxy access bylaw adopted by GE.<sup>2</sup> The proposal provided for an ownership threshold of “3% for 3 years” for shareholders to be eligible to

<sup>1</sup> In previous years, companies seeking to exclude a shareholder proxy access proposal often relied on the grounds that the proposal directly conflicts with a management proposal under Exchange Act Rule 14a-8(i)(9), but the SEC Staff issued guidance in October 2015 making it more difficult for a company to obtain no-action relief on that basis. See our previous [Sidley Update](#) for more information.

<sup>2</sup> General Electric Company, SEC No-Action Letter (Mar. 3, 2015), [available here](#).

nominate up to 20% of the board's seats but was silent on the number of shareholders that could comprise a nominating group. GE adopted a proxy access bylaw with the same "3% for 3 years" threshold for up to 20% of board seats, but limited to 20 the number of shareholders that could comprise a nominating group.

### Recent Requests for No-Action Relief Under Rule 14a-8(i)(10)

In recent months, a number of companies have approached proxy access in a manner similar to GE, seeking to exclude proxy access proposals received from John Chevedden by adopting their own proxy access bylaws and arguing that their proxy access bylaws "compare favorably to," and implement the "essential objective" of, Mr. Chevedden's proposal even though the contours of the proxy access bylaw contemplated by his proposal differed in certain respects (e.g., no limit on the size of the nominating shareholder group, a higher percentage of board seats subject to proxy access, and no restrictions on proxy access nominees that are not applicable to other director candidates). Two companies with existing proxy access bylaws with an ownership threshold of "5% for 3 years" received more targeted proxy access proposals from the Comptroller of the City of New York seeking a reduction in the ownership threshold to "3% for 3 years."

The table below lists the companies that sought to exclude shareholder proxy access proposals from their 2016 proxy statements on the basis of substantial implementation under Rule 14a-8(i)(10) that have received a response from the SEC Staff to date. The table identifies the shareholder proponents, summarizes the key terms of the company-adopted proxy access bylaw as compared to the key terms of the shareholder proposal, with key differences highlighted, and indicates the SEC Staff's determination.<sup>3</sup>

Company	Terms of Company Proxy Access Bylaw	Proponent	Terms of Shareholder Proxy Access Proposal	SEC Staff Determination
<b>Proposals Requesting Adoption of Proxy Access</b>				
Alaska Air Group, Inc.	Ownership: 3% / 3 yrs % of Board: 20% (≥ 2) Group Limit: 20	John Chevedden	Ownership: 3% / 3 yrs % of Board: <b>25%</b> (≥ 2) Group Limit: <b>None</b>	Exclusion permitted
Baxter International Inc.	Ownership: 3% / 3 yrs % of Board: 20% (≥ 2) Group Limit: 20	John Chevedden	Ownership: 3% / 3 yrs % of Board: <b>25%</b> (≥ 2) Group Limit: <b>None</b>	Exclusion permitted
Capital One Financial Corporation	Ownership: 3% / 3 yrs % of Board: 20% (≥ 2) Group Limit: 20	John Chevedden	Ownership: 3% / 3 yrs % of Board: <b>25%</b> (≥ 2) Group Limit: <b>None</b>	Exclusion permitted
Cognizant Technology Solutions Corporation	Ownership: 3% / 3 yrs % of Board: 25% (≥ 2) Group Limit: None	John Chevedden	Ownership: 3% / 3 yrs % of Board: 25% (≥ 2) Group Limit: None	Exclusion permitted
The Dun & Bradstreet Corporation	Ownership: 3% / 3 yrs % of Board: 20% (≥ 2) Group Limit: 20	John Chevedden	Ownership: 3% / 3 yrs % of Board: <b>25%</b> (≥ 2) Group Limit: <b>None</b>	Exclusion permitted

<sup>3</sup> The Coca-Cola Company and Kimberly-Clark Corporation had requested no-action relief from the SEC Staff under Rule 14a-8(i)(10) to exclude proxy access proposals received from John Chevedden (on behalf of Myra K. Young and James McRitchie) but withdrew their requests in January 2016 after the proposals were withdrawn.

Company	Terms of Company Proxy Access Bylaw	Proponent	Terms of Shareholder Proxy Access Proposal	SEC Staff Determination
General Dynamics Corporation	Ownership: 3% / 3 yrs % of Board: 20% Group Limit: 20	John Chevedden	Ownership: 3% / 3 yrs % of Board: <b>25%</b> (≥ 2) Group Limit: <b>None</b>	Exclusion permitted
Huntington Ingalls Industries, Inc.	Ownership: 3% / 3 yrs % of Board: 25% (≥ 2) Group Limit: 20	John Chevedden	Ownership: 3% / 3 yrs % of Board: 25% (≥ 2) Group Limit: <b>None</b>	Exclusion permitted
Illinois Tool Works Inc.	Ownership: 3% / 3 yrs % of Board: 25% (≥ 2) Group Limit: 20	John Chevedden on behalf of William Steiner	Ownership: 3% / 3 yrs % of Board: 25% (≥ 2) Group Limit: <b>None</b>	Exclusion permitted
Northrop Grumman Corporation	Ownership: 3% / 3 yrs % of Board: 20% (≥ 2) Group Limit: 20	John Chevedden	Ownership: 3% / 3 yrs % of Board: <b>25%</b> (≥ 2) Group Limit: <b>None</b>	Exclusion permitted
PPG Industries, Inc.	Ownership: 3% / 3 yrs % of Board: 20% (≥ 2) Group Limit: 20	John Chevedden	Ownership: 3% / 3 yrs % of Board: <b>25%</b> (≥ 2) Group Limit: <b>None</b>	Exclusion permitted
Science Applications International Corporation	Ownership: 3% / 3 yrs % of Board: 25% (≥ 2) Group Limit: 20	John Chevedden on behalf of Kenneth Steiner	Ownership: 3% / 3 yrs % of Board: 25% (≥ 2) Group Limit: <b>None</b>	Exclusion permitted
Target Corporation	Ownership: 3% / 3 yrs % of Board: 20% (≥ 2) Group Limit: 20	John Chevedden	Ownership: 3% / 3 yrs % of Board: <b>25%</b> (≥ 2) Group Limit: <b>None</b>	Exclusion permitted
Time Warner Inc.	Ownership: 3% / 3 yrs % of Board: 20% (≥ 2) Group Limit: 20	John Chevedden on behalf of Kenneth Steiner	Ownership: 3% / 3 yrs % of Board: <b>25%</b> (≥ 2) Group Limit: <b>None</b>	Exclusion permitted
UnitedHealth Group, Inc.	Ownership: 3% / 3 yrs % of Board: 20% Group Limit: 20	John Chevedden	Ownership: 3% / 3 yrs % of Board: <b>25%</b> (≥ 2) Group Limit: <b>None</b>	Exclusion permitted
The Western Union Company	Ownership: 3% / 3 yrs % of Board: 20% Group Limit: None	John Chevedden	Ownership: 3% / 3 yrs % of Board: <b>25%</b> (≥ 2) Group Limit: None	Exclusion permitted
Flowserve Corporation	Ownership: 5% / 3 yrs % of Board: 20% (≥ 2) Group Limit: 20	John Chevedden	Ownership: <b>3%</b> / 3 yrs % of Board: <b>25%</b> (≥ 2) Group Limit: <b>None</b>	Exclusion <b>not</b> permitted
<b>Proposals Requesting Specific Changes to Existing Proxy Access Bylaw</b>				
SBA Communications Corporation	Ownership: 5% / 3 yrs % of Board: 20% (≥ 1) Group Limit: 10	Comptroller of the City of New York	Ownership: <b>3%</b> / 3 yrs % of Board: <b>25%</b> Group Limit: <b>None</b>	Exclusion <b>not</b> permitted
NVR, Inc.	Ownership: 5% / 3 yrs % of Board: 20% Group Limit: 20	Comptroller of the City of New York	Ownership: <b>3%</b> / 3 yrs % of Board: 20% Group Limit: <b>None</b>	Exclusion <b>not</b> permitted

## Practical Implications

Based on the no-action letters issued to date, it appears that the SEC Staff is taking the position that if a shareholder proposal seeks proxy access with an ownership threshold of “3% for 3 years,” then a company will be deemed to have “substantially implemented” the proposal pursuant to Rule 14a-8(i)(10) by adopting a proxy access bylaw at “3% for 3 years,” even if there are other differences between the proposal’s terms and the proxy access bylaw adopted by the company (e.g., group size limitations, percentage of board seats that are subject to proxy access, and details regarding procedural and informational requirements that were contemplated by, but not specified in, the proposal, such as the timeframe for providing notice of a proxy access nomination). However, if the proposal seeks proxy access at “3% for 3 years” but the company adopts a higher minimum ownership threshold of “5% for 3 years,” then the bylaw will not “compare favorably” to the proposal and the company will not be able to rely on the substantial implementation basis for exclusion. These letters suggest that companies will have some flexibility to adopt proxy access bylaws tailored to their particular circumstances so long as the ownership threshold matches the proposal’s, without having to deal with a shareholder proposal on each term or condition in the bylaws. This should continue to be the case even if, in the future, shareholder proponents narrow their proposals to seek only the modification or removal of a certain limitation or term of a company’s proxy access bylaw, but not the ownership threshold.

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

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## Sidley Corporate Governance and Executive Compensation Practice

Lawyers in Sidley’s Corporate Governance and Executive Compensation practice regularly advise corporate management, boards of directors and board committees on a wide variety of corporate governance matters, including shareholder activism and engagement, fiduciary duties, board oversight responsibilities, board investigations and special committees, SEC disclosure, legal compliance, corporate responsibility, board evaluation, board and committee structures and issues arising under Sarbanes-Oxley and Dodd-Frank. Our advice relates to the procedural aspects as well as the legal consequences of corporate and securities transactions and other corporate actions, including takeover defenses, proxy contests, SEC filings and disclosure issues, stock option issues and general corporate law matters. Our broad client base allows us to provide advice regarding best practices and trends in such matters as directors’ and officers’ responsibilities, board and committee practices, disclosure controls and procedures, internal controls, executive compensation and other matters.

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