

## [Securities Regulation Daily Wrap Up, PROXIES—SEC says Microsoft's proxy access bylaw does not substantially implement shareholder proposal, \(Oct. 4, 2016\)](#)

Securities Regulation Daily Wrap Up

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Microsoft Corporation may not omit from its proxy materials a proxy access shareholder proposal based on the staff's conclusion that the company's bylaw does not compare favorably with the guidelines in the proposal. Microsoft's bylaw has a 20-shareholder limit for forming a nominating group while the proposal has no limits on the size of the group. Shareholders want proxy access bylaws that can actually be implemented, the proponent explained. Their goal is not to obtain a watered down version of proxy access.

**Shareholder proposal.** The shareholder [proposal](#) seeks amendments to Microsoft's existing proxy access bylaw, which was adopted prior to receiving the proposal. The proposal outlines what the proponent considers essential elements for substantial implementation of a proxy access bylaw, which includes no limitation on the number of shareholders that can aggregate their shares to achieve the three percent of outstanding shares entitled to vote in the election of directors.

**Troublesome bylaw.** The proponent notes that even if the 20 largest public pension funds were to aggregate their shares, they would not meet the three percent criteria at most of the companies examined in a Council of Institutional Investors study. Microsoft's bylaw includes provisions that impair shareholders' ability to use it, in the proponent's view, which renders it unworkable.

**Microsoft's argument.** Microsoft sought the staff's concurrence that its proxy access bylaw compared favorably and that it substantially implemented the proposal. The bylaw achieved the proposal's essential purpose, in Microsoft's view. If the staff did not concur with this view, Microsoft warned that it would result in endless nitpicking and impossible line-drawing over aspects of company bylaws.

With respect to allowing an unlimited number of shareholders to form a nominating group, Microsoft said such an unwieldy group would raise administrative concerns. Microsoft added that the staff has found identical 20-shareholder group provisions to have implemented the essential elements of other proposals which also requested that proxy access be available to an unrestricted number of shareholders forming a group.

Microsoft also cited CII's findings that at most of the companies it looked at, the holders of the largest 20 pension plans would not be sufficient to meet the three percent ownership threshold, but noted that its 20 largest shareholders in the aggregate hold more than 40 percent of its shares. The 20-shareholder nominating group is a widely embraced standard among companies that have adopted proxy access, according to Microsoft, and it is reasonably designed to ensure the availability of proxy access without creating an overly complex process.

**Proponent's argument.** The proponent countered that Rule 14a-8(i)(10) says a proposal can be excluded from the proxy if it has been substantially implemented, not because a company has chosen a popular alternative. While Microsoft's 20 largest shareholders hold more than 40 percent of its shares, the proponent said most of them have never filed a shareholder proposal and it is unlikely they would do so. Most proxy proposals come from a category known as corporate gadflies, including the proponent, and Microsoft's top 40 investors do not include any of these shareholders, according to the proponent.

With respect to Microsoft's argument that allowing a large group of shareholders to aggregate their shares would be difficult, the proponent asked why the company would object, given the difficulty. The proponent added that most of the no-action decisions on proxy access proposals were decided based on arguments by the companies

without the benefit of counter arguments by the proponents. In this case, the proponent said Microsoft has not met the burden of proof that limiting shareholder groups to 20 will not impair the implementation of proxy access.

**Staff position.** The staff advised that, based on the information presented, it was unable to conclude that Microsoft's proxy access bylaw compares favorably with the guidelines included in the proposal. Accordingly, the proposal may not be omitted from its proxy materials in reliance on Rule 14a-8(i)(10).

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