

## [Securities Regulation Daily Wrap Up, STRATEGIC PERSPECTIVES— Companies adopt proxy access bylaws that allow exclusion of shareholder proposals, \(Feb. 24, 2016\)](#)

Securities Regulation Daily Wrap Up

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The SEC has seen a flurry of proxy access proposals in recent weeks, most of which the staff allowed registrants to omit on the basis that the provisions had been substantially implemented. Most of the companies reported that they had adopted amendments to their bylaws in recent months to implement a proxy access provision, the majority of which would permit shareholders or groups of up to 20 shareholders who have held 3 percent of the outstanding shares for at least three years to nominate the greater of two or 20 percent of the directors.

**Failed proposals.** Fifteen of the proposals were submitted by perennial proponent John Chevedden, either individually or as the proxy on behalf of another shareholder. His proposal requested that the companies adopt a proxy access bylaw to permit any shareholder or group of shareholders to nominate candidates for election to the board as long as they held at least 3 percent of the outstanding common shares, including callable loaned shares, continuously for at least three years before submitting the nomination. The number of shareholder-nominated candidates may not exceed the greater of 2 and 25 percent of the directors then serving.

**Substantially implemented.** In seeking to omit the proposal, most of the companies cited the staff position in General Electric Company (available March 3, 2015) in which the staff concurred that the company had substantially implemented a shareholder proposal by adopting a proxy access bylaw that was consistent with the proposal in most respects, but also imposed additional restrictions, including a 20-shareholder cap on the number of shareholders that may aggregate to satisfy the 3 percent ownership threshold.

**Successful proposals.** Out of the 15 identical proposals submitted, Chevedden succeeded in only one. The staff advised that it was unable to concur with Flowserve Corporation's view that the proposal could be omitted under Rule 14a-8(i)(3), as being contrary to the proxy rules or under Rule 14a-8(i)(10) as having been substantially implemented. Flowserve adopted a proxy access bylaw that would permit a shareholder or a group of shareholders that have owned at least 5 percent of the shares for at least three years the right to nominate the greater of two or 20 percent of the directors then serving on the board.

The staff responded to Flowserve's [no-action](#) request that its policies, practices, and procedures did not appear to compare favorably with the guidelines of the proposal so, in the staff's view, Flowserve had not substantially implemented the proposal.

New York City's Employees' Retirement System, Fire Department Pension Fund, Teachers' Retirement System, and Police Pension Fund succeeded in getting their proxy access proposals included in the proxy materials of NVR, Inc. and SBA Communications Corporation. The pension funds' [proposal](#) seeks to amend NVR's bylaws to reduce the ownership requirement from 5 percent to 3 percent and to eliminate the aggregation requirement of no more than 20 shareholders. The proposal would also increase from three days to five days the recall period required to count loaned shares as eligible.

SBA also had a 5 percent proxy access bylaw and a 10-person group limit. The pension funds' proposal seeks an amendment to allow shareholders owning 3 percent of the outstanding shares for at least three years to nominate candidates constituting up to 25 percent of the board. The proposal also seeks to eliminate the group size limit and ensure that loaned shares for which a shareholder has the power to recall on five days' notice be counted as eligible toward the ownership requirement.

The staff [advised](#) that SBA's procedures did not compare favorably with the guidelines in the pension funds' proposal and, accordingly, the proposal could not be omitted as having been substantially implemented.

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