

Memorandum

SEC Staff Permits Exclusion of Proxy Access “Revision” Proposal Due to “Substantial Implementation”

November 15, 2016

In recent months, the staff of the Securities and Exchange Commission (“SEC”) declined to grant no-action relief to at least three companies – H&R Block, Microsoft, and Apple – with regard to a shareholder proposal that requested several specific revisions to the company’s existing proxy access bylaw.¹ In each of these cases, the Staff rejected arguments that the company “substantially implemented” the shareholder proposal by virtue of its previous adoption of proxy access at the three-percent/three-year thresholds. On November 4, 2016, the Staff determined, for the first time, that a shareholder proposal seeking to amend a company’s existing proxy access bylaw may be excluded as “substantially implemented” under Rule 14a-8(i)(10).²

The shareholder proposal at issue, which was submitted to Oshkosh Corporation, sought “an enhancement package for the company’s bylaws allowing shareholder nominated candidates to be included in the company’s proxy materials.” The proposal requested six revisions to the company’s proxy access bylaw:

1. **Ownership Threshold.** The proposal requested that the ownership threshold necessary for exercising proxy access be reduced from five percent to three percent of the company’s common stock.
2. **Cap on Shareholder Nominees.** The proposal requested that the cap on shareholder-nominated candidates be set at the greater of 25% of the board or two directors (rather than the greater of 20% of the board or two directors).

¹ See [H&R Block, Inc.](#) (avail. July 21, 2016); [Microsoft Corp.](#) (avail. Sept. 27, 2016); [Apple Inc.](#) (avail. Oct. 27, 2016). For more information about the Staff’s no-action denial to H&R Block, see Simpson Thacher & Bartlett LLP, “[SEC Staff Denies No-Action Relief With Regard to 3/3 Proxy Access Proposal Challenged on ‘Substantial Implementation’ Grounds](#)” (Aug. 2, 2016). For more information about the Staff’s no-action denial to Microsoft, see Simpson Thacher & Bartlett LLP, “[SEC Staff Confirms Its Approach to ‘Substantial Implementation’ In the Context of Proxy Access](#)” (Oct. 13, 2016).

² See [Oshkosh Corp.](#) (avail. Nov. 4, 2016).

3. **Group Size.** Targeting the bylaw's provision that up to 20 shareholder may aggregate to form a group for the purpose of reaching the ownership threshold, the proposal requested that no limitation be placed on the number of shareholders that can aggregate their shares to reach the ownership threshold.
4. **Re-nomination of Shareholder Nominees.** The proposal requested that no limitation be placed "on the re-nomination of shareholder nominees based on the number or percentage of votes received in any election."
5. **Statement of Intent.** According to the proposal, the company's proxy access bylaw "shall not require that a nominator provide a statement of intent to continue to hold the required percentage of shares after the annual meeting."
6. **Loaned Shares.** The proposal stated that loaned shares should be "counted as belonging to a nominating shareholder if the shareholder represents it: (a) has the legal right to recall those securities for voting purposes, (b) will vote the securities at the shareholder meeting and (c) will hold those securities through the date of the annual meeting."

Several weeks after receiving this shareholder proposal, Oshkosh's board of directors amended the company's proxy access bylaw to:

1. reduce the share ownership threshold from five percent to three percent;
2. "eliminate the requirement that a proxy access nominee receive at least 25% of the votes cast at an annual meeting to be eligible for re-nomination at one of the next two annual meetings"; and
3. eliminate the requirement that the nominating shareholder represent its intentions with respect to continuing to hold the minimum number of shares of the company's common stock for at least one year following the annual meeting.

In its no-action request to the Staff, Oshkosh argued that, with these three revisions, its amended proxy access bylaw "satisfies the Proposal's essential objective – expanding the ability of shareholders to use proxy access, including by providing a shareholder or group of shareholders that have owned 3% or more (rather than 5% or more) of the Company's common stock continuously for at least three years the ability to include no fewer than two director nominees in the Company's annual meeting proxy materials." Citing a no-action letter issued to NVR, Inc. in the first quarter of this year, OshKosh explained that "the Staff has previously agreed that amending a 5% proxy access bylaw to a 3% proxy access bylaw while retaining a 20-person aggregation limit substantially implements a proposal seeking to amend a 5% proxy access bylaw to a 3% proxy access bylaw and to remove aggregation limits (among other things)."³

³ *Id.* (citing *NVR, Inc. (granted on recon.*, Mar. 25, 2016)).

The Staff concurred in the exclusion of the proposal, noting that “it appears that Oshkosh’s policies, practices and procedures compare favorably with the guidelines of the proposal and that Oshkosh has, therefore, substantially implemented the proposal.”

Implications of the Staff’s No-Action Letter

While the shareholder proposal submitted to Oshkosh was substantially similar to the one submitted to H&R Block, Microsoft and Apple, Oshkosh’s situation differed meaningfully, as it was the only one of these issuers that revised its proxy access bylaw in any way after receiving the shareholder proposal. The letter issued to Oshkosh illustrates that a shareholder proposal seeking amendments to an existing proxy access bylaw can, in certain circumstances, be deemed “substantially implemented” if the company indeed revises its bylaw. Notably, the Oshkosh letter clarifies that a company need not implement every revision requested in the shareholder proposal to “substantially implement” the proposal. Rather, it seems that where a shareholder proposal requests, among other things, that the company reduce the applicable ownership threshold from five percent to three percent of the company’s common stock, adopting this requested revision may allow the company to exclude the proposal under Rule 14a-8(i)(10).

Significant questions remain, however, as to the applicability of the guidance provided in the Oshkosh letter to the vast majority of companies with proxy access, which have adopted proxy access at the three-percent threshold. If one of these companies were to receive a shareholder proposal asking the company to revise several aspects of its proxy access bylaw, it remains unclear which and how many of these changes the company must implement for its bylaw to “compare favorably with the guidelines of the proposal” under Rule 14a-8(i)(10).

If you have any questions or would like additional information, please do not hesitate to contact **Yafit Cohn** at +1-212-455-3815 or yafit.cohn@stblaw.com, or any other member of the Firm’s Public Company Advisory Practice.

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