

**ALERT:****The SEC Weighs in on Proxy Access Proposals**

This week the SEC rendered decisions on whether or not 10 proxy access proposals submitted by various shareholders could be excluded from ballots. The biggest losers were retail investors affiliated with the U.S. Proxy Exchange (USPX), who saw six of their non-binding resolutions ejected for two types of deficiencies. Proponent victors included Norges Bank Investment Management (NBIM) and Daniel Rudewicz's Furlong Fund, whose proposals will move forward to a vote.

In the case of the USPX resolution, the SEC concurred with Chiquita Brands, MEMC Electronic Materials, Textron and Sprint Nextel that the proposal was vague and indefinite because it did not adequately explain one of the eligibility requirements for nominating directors, namely SEC Rule 14a-8(b). The resolution stipulated that holders of 1% of the shares for two years and/or 100 holders who met 14a-8(b) eligibility requirements could nominate up to 12% of the board. The SEC concluded that, as framed, neither the companies nor their shareholders would be able to determine with any reasonable certainty what actions or measures the proposal required.

The SEC also sided with Bank of America and Goldman Sachs that the USPX resolution was excludable because it constituted multiple proposals dealing with both proxy access and a change in control. Specifically, one section of the proposal dictated that it would not be considered a change in control if a majority of board seats were filled by individuals nominated by the board or by a nominating shareholder.

As a result of these rulings, only two USPX proposals will appear on a spring annual meeting ballot—at Ferro and Princeton National Bancorp, which did not seek to omit the resolution. Companies with later-year meetings, such as Dell, should have no difficulties excluding the proposal since they now have precedents to follow. The proponents, for their part, are already contemplating how best to revise their proxy access template for the 2013 proxy season.

Separately, the SEC denied Charles Schwab, Wells Fargo and Western Union no-action relief from NBIM's bylaw resolution, which would permit a holder of 1% of the shares for one year to nominate up to 25% of the board. The companies had argued that the proposal was false and misleading because it referenced a non-operational website link. The proponent, however, corrected the deficiency to the SEC's satisfaction. NBIM's other targets include CME Group, which did not challenge the proposal, and Staples, which is seeking omission of the proposal from its June annual meeting ballot.

KSW took the riskier approach of adopting its own proxy access bylaw in the hopes of omitting a more lenient binding resolution from the Furlong Fund. Unfortunately, the tactic failed. The SEC ruled that the company's eligibility requirement for shareholder nominations (5% of the shares for one year) was too divergent from the proponent's (2% of the shares for one year) to consider the shareholder resolution to be substantially implemented. Because KSW shareholders will be choosing between two versions of proxy access, their vote will provide issuers with the first clear guidance of what level of ownership is preferred by investors and proxy advisors for adopting a proxy access regime.

## Status of Proxy Access Proposals

Company	Proponent	SEC Decision	Annual Meeting
Bank of America	USPX	Omitted	
Charles Schwab	NBIM	Allowed	May
Chiquita Brands	USPX	Omitted	
CME Group	NBIM	-	June
Dell	USPX	-	July
Goldman Sachs Group	USPX	Omitted	
Hewlett-Packard	Amalgamated Bank	Withdrawn	
Ferro	USPX	-	April
KSW	Furlong Fund	Allowed	May
MEMC Electronic Materials	USPX	Omitted	
Microwave Filter	Furlong Fund	-	March
Nabors Industries	Coalition of public pension funds	-	June
Pioneer Natural Resources	NBIM	Withdrawn	
Princeton National Bancorp	USPX	-	May
Sprint Nextel	USPX	Omitted	
Staples	NBIM	-	June
Textron	USPX	Omitted	
Wells Fargo	NBIM	Allowed	May
Western Union	NBIM	Allowed	May