



California Corporate & Securities Law

California Corporation Fails To Persuade SEC That Cumulative Voting Proposal Can Be Excluded Under Rule 14a-8

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Although Rule 14a-8 is a federal rule, its application often turns on state corporate law. In most cases, the state law in question is the Delaware General Corporation Law because companies subject to the SEC's proxy rules are most commonly incorporated in the Blue Hen State. Thus, I've decided to devote today's post and a few upcoming posts to some recently filed Rule 14a-8 requests involving questions of California law.

Last month, [Oak Valley Bancorp](#) unsuccessfully sought to exclude a shareholder proposal submitted by Robert P. Laukat requesting the Board to take the necessary steps to provide cumulative voting in the election of directors. The company argued that it could exclude Mr. Laukat's proposal under Rule 14a-8(i)(2) because adoption of the proposal would cause the company to violate state law.

Interestingly, California has a strong historical attachment to cumulative voting. In fact, Corporations Code Section 708 grants shareholders the right to cumulate their votes in the election of directors except as provided by Section 301.5 or Section 708.5. Section 301.5 allows "listed corporations" (as defined) to eliminate cumulative voting. If a listed corporation has eliminated cumulative voting pursuant to Section 301.5, then Section 708.5 allows it to amend its articles of incorporation or bylaws to provide that in "uncontested elections" (as defined) directors must be elected by "approval of the shareholders" (See Section 153).

Oak Valley Bancorp's no-action request noted that it had adopted "majority voting" for uncontested elections. It also noted that Mr. Laukat had not requested elimination of majority voting. Thus, it argued that it could not adopt cumulative voting when it already has majority voting. The staff, however, was not persuaded. The staff's position is surprising because in 2008 the staff agreed that [PG&E Corporation](#), a California corporation, had some basis under Rules 14a-8(i)(2) and 14a-8(i)(6) for excluding a proposal to adopt cumulative voting when it had adopted majority voting.

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