

September 6, 2019

SEC Revises Approach to Requests to Exclude 14a-8 Shareholder Proposals

The Division of Corporation Finance of the Securities and Exchange Commission [announced](#) today that, starting with the 2019-2020 proxy season, the SEC Staff may determine to respond orally, instead of in writing, to some no-action requests from companies seeking to exclude Rule 14a-8 shareholder proposals.

Notably, the SEC Staff's announcement specifically indicates that, if the Staff declines to take a view on any particular exclusion request, "the interested parties should not interpret that position as indicating that the proposal must be included . . . and the company may have a valid basis to exclude the proposal under Rule 14a-8." Companies may interpret this statement to exclude Rule 14a-8 shareholder proposals where there is a valid basis for doing so, even if the SEC staff has not taken a view, positive or negative, with respect to the request for relief, particularly where the risk of litigation from proponent shareholders is viewed to be low. As noted by the SEC Staff, the parties always have the option to "seek formal, binding adjudication on the merits of the issue in court." There is a possibility that some shareholder proponents and proxy advisory firms may take advantage of situations where the SEC Staff declines to take a view, by seeking to withhold votes from directors even if proposals are properly excluded.

Some uncertainty may reasonably be anticipated for the upcoming proxy season, as companies, shareholder proponents and proxy advisory firms determine how to best address oral guidance from the SEC Staff and circumstances where the SEC Staff declines to take a view. The impact of today's announcement will depend in significant part on the frequency with which the SEC Staff declines to take a view with respect to requests for relief. In addition, as the SEC continues to review proxy mechanics, there may well be substantive changes to the Rule 14a-8 shareholder proposal rules and process.

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