

SEC's Corporate Finance Staff Narrows Grounds for Excluding Shareholder Proposals Under Rule 14a-8

On September 15, 2004, the Corporate Finance Staff issued Staff Legal Bulletin No. 14B in which it narrowed the grounds upon which it will agree with company requests to exclude all or part of a shareholder's Rule 14a-8 proposal or supporting statement on the basis that it is false or misleading in violation of Rule 14a-8(i)(3). Rule 14a-8(i)(3) provides that a company may exclude a proposal if "the proposal or supporting statement is contrary to any of the Commission's proxy rules, including §240.14a-9, which prohibits materially false or misleading statements in proxy materials."

Nearly half of company no-action requests received by the staff during the 2004 proxy season asserted that the proposal or supporting statement was wholly or partially excludable under Rule 14a-8(i)(3).

- Company objections under Rule 14a-8(i)(3) have generally been based on:
 - Vagueness;
 - Impugning statements;¹
 - Irrelevant statements;
 - Opinions presented as fact; and
 - Statements without factual support.
- On the basis that only the shareholder proponent and not the company is responsible for the content of a Rule 14a-8 proposal, the staff narrowed the basis upon which it will in the future agree that a company may exclude supporting statement language and/or an entire proposal in reliance on Rule 14a-8(i)(3). Specifically, the staff does not believe that it would be appropriate for companies to exclude:
 - Proposals and supporting statements (or portions thereof) on the basis that they contain statements made without factual support;
 - Statements that may be disputed or countered so long as they are not materially false or misleading;
 - Factual assertions that may be interpreted in a manner unfavorable to the company, its directors, or its officers; and/or
 - A statement that represents the opinion of the proponent or a referenced source, but is not identified as such.

The staff urged companies to address these types of issues in their statement of opposition.

¹ Note (b) to Rule 14a-9 provides the following example of a statement that, depending on the facts and circumstances, may be misleading: "Material which directly or indirectly impugns character, integrity or personal reputation or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation."

- Situations where the staff will still consider a no-action request include:
 - Proposals or supporting statements that contain impugning statements;
 - Proposals or supporting statements that contain factual statements that a company “objectively” demonstrates are materially false or misleading;
 - Where the proposal is so inherently vague that neither the stockholders voting on the proposal nor the company would be able to determine with any reasonable certainty exactly what measures the proposal requires; and
 - Where substantial portions of the supporting statement are irrelevant, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter he/she is being asked to vote upon.
- SLB No. 14 also:
 - Advises companies that an appropriate notice of defect in a shareholder proponent’s proof of ownership under Rule 14a-8(b) must address the specific requirements of Rule 14a-8(b) and the company must attach a copy of Rule 14a-8(b) to the notice;
 - Clarifies that the staff will not necessarily take enforcement action if a company does not wait 80 days to file its definitive proxy materials if the company can demonstrate good cause for failing to make its 14a-8(b) submission at least 80 days before the intended filing of its definitive proxy materials (for example, where the company did not receive the shareholder proposal until after expiration of the 80-day deadline);
 - Describes issues that counsel to companies should consider in supplying an opinion in support of a company plan to exclude a proposal on the basis that it is improper under state law (Rule 14a-8(i)(1)), would cause the company to violate state, federal or foreign law (Rule 14a-8(i)(2)), or would cause the company to breach existing contractual provisions (Rule 14a-9(i)(2) or (6));
 - Cautions companies that in considering no-action requests, the staff will consider only written materials and that it will not discuss the substantive nature of no-action requests with either the company or the shareholder proponent; and
 - Suggests that a company should include on its correspondence a fax number for itself and the proponent shareholder so that they will receive the staff’s response before it becomes available on-line (which may happen quite quickly).

Contact Information

If you have any questions or would like to learn more about this new development, please contact your usual legal advisor at Ropes & Gray.

