

September 9, 2019

SEC Staff Announces Change to Its Process for Rule 14a-8 No-Action Requests

On September 6, 2019, the SEC's Division of Corporation Finance announced a change to how it will handle company requests to exclude a shareholder's proposal from a company's proxy materials. Beginning in the 2019-20 proxy season, the Staff may respond *orally* to such a request, instead of in writing, and intends to issue written responses where it believes doing so would provide value. It cited as one such instance broadly applicable guidance about complying with Exchange Act Rule 14a-8. This is an important change that the Staff has been previewing for the past several months.

The Division's announcement notes that the Staff's response to a request for no-action relief could be that the Staff concurs, disagrees or declines to state a view with respect to the company's asserted basis for exclusion. The Staff may express its views either orally or in writing. If the Staff declines to express a view, the announcement makes clear that companies and proponents should not interpret this position as indicating that the proposal must be included in the company's proxy materials.

The announcement also reaffirmed the Division's recent guidance on shareholder proposals articulated in Staff Legal Bulletins 14I and 14J and reminded companies that the inclusion of a board's analysis of a particular issue is helpful to the Staff in its consideration of a company's request for exclusion on the grounds of "economic relevance" (Rule 14a-8(i)(5)) or "ordinary business" (Rule 14a-8(i)(7)) (see our previous Ropes & Gray client alerts on Staff Legal Bulletins 14I and 14J [here](#) and [here](#), respectively).

It is important to note that the Staff's responses to no-action requests reflect only informal views. The announcement reminded parties of their ability to seek formal, binding adjudication of a particular matter in court.

A copy of the Staff's full announcement is available [here](#).

Practical Considerations

If a company intends to exclude a shareholder proposal, it must submit a letter stating that intention and the reasons for exclusion. It appears that the Staff will continue to review all such letters, that proponents will be able to submit their views, and that the Staff will communicate its views to both the company and the proponent. We do not expect the change in the Staff's review procedure to have a material impact on the substance of the review. When the Staff chooses to inform the company and the proponent of its inclusion/exclusion view, we would expect that the form of that communication – oral versus written – would not change the way that companies treat the Staff's informal views.

Where, however, the Staff declines to express a view, a company will be put to the courage of its convictions on the basis for exclusion. It can decide not to include the proposal in the proxy statement. In doing so, it will need to consider how this action will be viewed by other constituencies, such as employees, institutional investors and the proxy advisory firms. The Staff no-action letter process brought a company a measure of certainty – often at the price of getting an answer it did not want. That assurance may no longer be available. The new policy could increase the influence of the proxy advisory firms in situations where companies omit proposals that have significant support among institutional investors and other constituencies.

The announcement gives no hint of the types of proposals on which the Staff might decline to express a view. One likely candidate is the type of proposal that proponents see as transcending "ordinary business" because it raises a "significant policy issue." Critics of the shareholder proposal process have long believed that the Staff should not be in the business

of divining what constitutes a significant policy issue. That may now be the case, but it remains to be seen what happens when the Staff gets out of that business.

The announcement is also silent on issues of transparency and timing and how the new process may change from current practice. At present, the Staff posts all Rule 14a-8 incoming letters shortly after receipt. Only when the Staff issues its no-action letter, however, is the back-and-forth correspondence between company and proponent made public. Presumably, the Staff will continue to make public all the relevant correspondence, but the announcement does not say how or when. Nor does the announcement say how oral communications will be publicly disclosed to other than the company and the proponent. In addition, under the current process the Staff endeavored to time its responses to accommodate a company's schedule for printing proxy materials. If the Staff decides it will decline to express a view on a company's request, but does so late in the process, there may be insufficient time for the company to pursue alternatives such as going to court. We hope in the near future that the Staff will clarify how it expects to handle these transparency and timing issues under the new procedure.

If you have any questions about this Alert, please contact your usual legal advisor at Ropes & Gray.