

Legal Update

SEC Announces Significant Changes to Shareholder Proposal Process

On September 6, 2019, the Division of Corporation Finance (Division) of the US Securities and Exchange Commission (SEC) announced¹ a significant change to its process with respect to reviewing no-action requests submitted to the Division pursuant to Rule 14a-8 promulgated under the Securities Exchange Act of 1934, as amended. The Division said it changed the policy to allow the staff to focus “on how it could most efficiently and effectively provide guidance.”

The SEC has not made any changes to Rule 14a-8 itself. Issuers can continue submitting no-action requests asking the Division to concur with the issuer’s position that it can exclude a shareholder proposal from its proxy statement. The staff of the Division will also continue to inform the proponent and the issuer of its position on the request, “which may be that the staff concurs, disagrees or declines to state a view” with respect to the issuer’s reasons for making the no-action request.

The significant change addressed in the announcement is that, starting with the 2019-2020 shareholder proposal season, the staff of the Division will no longer automatically provide a written response of its views to all no-action

requests. Instead, the staff may respond orally to some of the requests. The staff intends to issue a written response where it believes doing so would provide value, such as to a request that deals with more broadly applicable guidance about complying with Rule 14a-8.

The Division also noted that if the staff declines to state a view on a particular request, the interested parties should not interpret that as indicating that the issuer must include the proposal in its proxy statement. However, the issuer will need to decide whether it is comfortable excluding the shareholder proposal from its proxy statement without any direct guidance from the staff or whether to take other steps, such as going to court, if it would like additional comfort before excluding the proposal from its proxy statement. Improperly excluding a shareholder proposal from the proxy statement could subject the issuer to litigation from the proponent of the proposal or to enforcement action from the SEC.

The Division did not provide any guidance as to how it intends to make decisions on whether it will respond in writing or orally or as to whether it intends to increase the frequency at which it declines to state a view on submitted requests.

It also didn't indicate whether it was going to change its current policy of posting on all incoming shareholder proposal no-action letters on the SEC's website. This absence of guidance creates a higher level of uncertainty leading into the upcoming shareholder proposal season.

Issuers that regularly receive shareholder proposals or are concerned that they might receive shareholder proposals should begin considering sooner rather than later if this change in Division policy will impact how they will react and respond to shareholder proposals in general or to certain types of shareholder proposals, including whether any internal process changes are necessary. Going forward, there will be fewer no-action letter precedents to guide issuers and their counsel as they consider how to respond to shareholder proposals.

For more information about the topics raised in this Legal Update, please contact the author, Michael L. Hermsen, any of the following lawyers or any other member of our Corporate & Securities practice.

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Endnotes

¹ <https://www.sec.gov/corpfin/announcement/announcement-rule-14a-8-no-action-requests>

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