SEC Staff Announces New Policy for Rule 14a-8 No-Action Requests

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Staff may not take a position or may respond orally to some no-action requests

On September 6, the SEC staff **announced** a new policy regarding its administration of the shareholder-proposal rule, Rule 14a-8 under the Securities Exchange Act of 1934. As before, the staff will monitor and provide informal guidance regarding shareholder proposals submitted pursuant to Rule 14a-8. Where a company seeks to exclude a proposal by submitting a no-action letter request, the staff will continue to review the request.

Under the new policy, instead of responding in writing that it concurs or disagrees, in some cases the staff may respond only orally. It may also, orally or in writing, decline to state a view with respect to the company's reasons for excluding the proposal. Where the staff declines to take a view on a no-action letter request, the interested parties should not interpret that position as indicating that the proposal should or should not be included in the proxy statement for shareholder vote. The announcement made clear that under those circumstances, the staff is not weighing in on the merits of the argument and the company may have a valid legal basis on which to exclude the proposal. The parties may choose to seek adjudication of the issue in court.

The staff indicated that it will continue to provide written responses in cases where it believes that doing so would provide value, such as in "more broadly applicable" guidance about complying with Rule 14a-8. The staff also reemphasized its belief in the usefulness of an analysis by a company's board when seeking to exclude a shareholder proposal under the ordinary business or relevance arguments.

Going forward: more questions than answers

We expect that where the staff declines to take a position, some companies may be hesitant to exclude the shareholder proposal from their proxy statements until there is clarity around whether negative consequences will result from proxy advisory firms or other shareholders. The announcement does not provide any specific details on how the staff will convey oral responses. While the announcement states that the staff will inform the proponent and the company of its position, it is unclear whether the oral responses will be made publicly available, in summary or other form.

While the new policy suggests litigation is an alternative, the cost and the timing of litigation during the compressed timeframe of an annual meeting would likely be a deterrent. And while the announcement reiterates the staff's view that a board analysis can be useful, given the limited basis on which this argument has succeeded during the past two seasons, companies may be discouraged from engaging their boards for this purpose.

Part of the impetus for this announcement may be the concern identified by Chairman Clayton last September regarding limitations on the applicability of staff views. Chairman Clayton highlighted the distinction between staff statements and the Commission's rules and regulations, emphasizing that staff positions are nonbinding and do not create enforceable legal rights or obligations of the Commission or other parties. Commissioner Peirce went a step further earlier this year and analogized staff guidance, however necessary and important to the functioning of the SEC, as a "body of secret law" that binds market participants but is immune to review. The Rule 14a-8 review process, which perhaps ironically now includes this new policy, has sometimes been identified as an example of quasi-legislative rulemaking at the staff level.

Whatever the catalyst, when the staff informally raised the possibility of taking this new approach on no-action letters a few months ago, both investors and companies raised numerous concerns about the change since the staff has played a longstanding and active role, however imperfect, as the arbiter of shareholder proposals, providing a level of certainty and finality that informs a complex process. The impact of the announcement is too early to determine, but at a minimum the analysis of shareholder proposals this season may be more difficult for all parties.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Maurice Blanco	**212 450 4086**	**maurice.blanco@davispolk.com**
Joseph A. Hall	**212 450 4565**	**joseph.hall@davispolk.com**
Michael Kaplan	**212 450 4111**	**michael.kaplan@davispolk.com**
Sarah K. Solum	**650 752 2011**	**sarah.solum@davispolk.com**
Richard D. Truesdell, Jr.	**212 450 4674**	**richard.truesdell@davispolk.com**
Ning Chiu	**212 450 4908**	**ning.chiu@davispolk.com**
Betty Moy Huber	**212 450 4764**	**betty.huber@davispolk.com**
Elizabeth Weinstein	**212 450 3889**	**elizabeth.weinstein@davispolk.com**
