

SEC Reporting & Compliance Alert

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SEC Staff Announces Changes to Shareholder Proposal No-Action Request Process

On September 6, 2019, the Division of Corporation Finance (Staff) of the Securities and Exchange Commission (SEC) published a statement regarding no-action requests to exclude shareholder proposals under Exchange Act Rule 14a-8. Specifically, the Staff announced the following changes:

- **Responses May Be Oral:** Starting with the 2019-20 shareholder proposal season, the Staff may respond orally instead of in writing to some no-action requests. The Staff noted that it “intends to issue a response letter where it believes doing so would provide value, such as more broadly applicable guidance about complying with Rule 14a-8.”
- **Responses May Not Be Issued at All:** In the past, the Staff has attempted to respond to all no-action requests. Starting with the 2019-20 shareholder proposal season, however, the Staff may decline to weigh in on certain no-action requests. The Staff noted that if it does not take a view on any particular request, “the interested parties should not interpret that position as indicating that the proposal must be included,” and that the company may indeed have a valid legal basis to exclude the proposal. The Staff also reminded parties that “as has always been the case, the parties may seek formal, binding adjudication on the merits of the issue in court.”

In addition, as it has done in the past, the Staff encouraged companies to include a board analysis when seeking to exclude a proposal on the grounds of ordinary business (Rule 14a-8(i)(7)) or economic relevance (Rule 14a-8(i)(5)). The concept of a board analysis, first introduced in [Staff Legal Bulletin No. 14I](#) and expanded upon in [Staff Legal Bulletin No. 14J](#), has been a [source of confusion](#) over the past two shareholder proposal seasons.

The recent changes announced by the Staff come in the wake of a shareholder proposal season hindered by a month-long U.S. federal government shutdown. When the government reopened, the Staff addressed outstanding no-action requests, as it has always done. After the shareholder proposal season concluded, however, the Staff publicly floated the idea of changing its shareholder proposal no-action process.

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Although the long-term effects of these changes are uncertain, this season companies should plan to continue to pursue no-action relief whenever viable arguments exist to exclude a proposal.¹ In instances where the Staff renders a decision orally,

¹ The Staff's announcement does not change any of the requirements of Rule 14a-8, including the notice requirement of Rule 14a-8(j) that if a company intends to exclude a shareholder proposal from its proxy materials, it must notify the SEC no later than 80 calendar days before it files its definitive proxy statement and must simultaneously provide the shareholder proponent with a copy of its submission.

it is unclear whether the decisions will be recorded, if at all, which may limit the precedential value of no-action requests in the future. Further, in cases where the Staff declines to respond, companies will be left to decide whether to include or exclude a proposal and will need to consider, among other things, the potential reaction of investors and proxy advisory firms.

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