

Alert

SEC Disclosure and Corporate Governance

Heads Up for the 2016 Proxy Season SEC Staff Updates its Guidance on Rule 14a-8 Shareholder Proposals

Yesterday, the SEC Division of Corporation Finance issued guidance that will make it more difficult for companies to exclude certain shareholder proposals from their proxy statements. The Staff Legal Bulletin No. 14H (CF) is available [here](#).

Rule 14a-8(i)(9) - Conflicting Proposals Exclusion

Prior to the 2015 proxy season, companies were able to use SEC Rule 14a-8(i)(9) to exclude a shareholder proposal by submitting a conflicting, and often more company-friendly, management proposal. In connection with the battle over conflicting proposals on proxy access, and in the face of an influx of no-action requests on the basis of (i)(9), the Staff announced in January 2015 that it would express “no view” on the application of (i)(9) requests for relief relating to proxy access or any other subject matter during the 2015 proxy season. We provide a strategic roadmap to proxy access in our Alert available [here](#).

Under the new guidance issued yesterday, a company will not be able to exclude a shareholder proposal based on (i)(9) unless the shareholder proposal “directly conflicts” with the management proposal. A proposal will not be found to “directly conflict” unless “a reasonable shareholder could not logically vote in favor of both proposals” – meaning that a vote for one proposal would be equivalent to a vote against the other proposal. The Staff provided four examples of when a “direct conflict” would or would not exist:

No Direct Conflict – Company Cannot Exclude Based on (i)(9)

- A proxy access shareholder proposal requiring 3% ownership for 3 years, with a 20% cap on the number of board nominees would *not* directly conflict with a management proposal requiring 5% ownership for 5 years, with a 10% cap on the number of board nominees.
- A shareholder proposal asking the compensation committee to implement a policy for equity awards to have no less than four-year annual vesting would *not* directly conflict with a management proposal seeking to approve an incentive plan that provides the compensation committee with the discretion to set the vesting provisions for equity awards.

Direct Conflict – Company May Be Able to Exclude Based on (i)(9)

- A shareholder proposal seeking separation of the Chairman/CEO roles would directly conflict with a management proposal seeking approval of a bylaw provision requiring the CEO to be the Chair at all times.
- A company proposal seeking approval of a merger would directly conflict with a shareholder proposal seeking a vote against the same merger.

We expect that this guidance will severely limit the use of (i)(9) as a method to exclude shareholder proposals. This guidance may also breathe new life into proposals calling for shareholder rights to call special meetings, which companies had previously been able to exclude pursuant to (i)(9) by simply proposing a different ownership threshold (e.g., a shareholder proposal at 10% was previously excludable as conflicting with a management proposal at 20%).

Rule 14a-8(i)(7) - Ordinary Business Operations Exclusion

The guidance issued yesterday reaffirms the Staff's historical interpretation of (i)(7) that proposals that focus on a significant policy issue transcend a company's ordinary business operations and are therefore *not* excludable under Rule 14a-8(i)(7).

The Staff took on a review of (i)(7) in light of the *Trinity Wall Street v. Wal-Mart Stores, Inc.* case. The Wal-Mart litigation arose from the Staff agreeing that Wal-Mart could omit, on ordinary business grounds, a shareholder proposal requesting that a committee charter be amended to provide for oversight by the committee of policies and standards governing Wal-Mart's decisions on whether to sell guns. On appeal to the Third Circuit from the district court's ruling in favor of the shareholder proponent, a three-judge panel ultimately ruled in favor of Wal-Mart's ability to exclude the proposal. While the Staff agrees with the majority opinion that Wal-Mart may exclude the shareholder proposal, it disagrees with the majority's use of a two-part test in reaching the decision.

The Staff believes that proposals focusing on significant policy issues are appropriate for a shareholder vote. In the case of Wal-Mart, the Staff granted relief because the proposal related to Wal-Mart's ordinary business operations and did not focus on a significant policy issue.

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If you have any questions on these matters, please do not hesitate to speak to your regular contact at Weil, Gotshal & Manges LLP or to any member of Weil's Public Company Advisory Group:

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