Hogan Lovells

# SEC Update

October 3, 2019

*This is a commercial communication from Hogan Lovells. See note below.*

## SEC staff announces changes to processing of shareholder proposal no-action requests

The SEC's Division of Corporation Finance recently announced changes to its process for responding to no-action requests that seek exclusion from proxy materials of shareholder proposals submitted under Exchange Act Rule 14a-8.

Starting with the 2019-2020 proxy season, the staff may respond orally, rather than in writing, to a no-action request. In an additional change to its past practice, the staff announced that it may decline in its response to state a view on the company's arguments for exclusion, instead of indicating whether it agrees or disagrees with the arguments. The Division cautions that the company and the shareholder proponent should not interpret a staff decision declining to state a view as indicating that the company must include the proposal in its proxy materials. The company may exclude the proposal if it has a valid legal basis to do so.

The staff's announcement is available here.

### Background

The Division's announcement signals an important departure from the way in which it historically has administered the no-action letter process under Rule 14a-8. The Division acts as the arbiter of disputes between a company and a shareholder proponent over whether the company may exclude the proponent's proposal from its proxy materials on eligibility or procedural grounds or on the basis of one or more of the substantive exclusions specified in Rule 14a-8(i). The staff performs this function through the issuance of no-action letters advising both the company and the proponent whether the staff concurs or disagrees with the company's arguments. Either party dissatisfied with the staff's position may ask the Commission to review the position, or may file suit in federal court to obtain a judicial resolution of the issue.

The staff's practice generally has been to respond in writing to no-action requests and to make the response letters available on the SEC's website. The staff has declined to express a view on a no-action request only in rare circumstances.

The staff previously indicated that it might modify this process. Division Director William Hinman noted in July of this year that the staff was considering whether every no-action request under Rule 14a-8 warrants a written response, or any response at all. "If we don't think we're adding value or we have something to add, we may not issue a letter," Hinman said at the time.

### Considerations for the 2019-2020 proxy season

The Division's guidance does not alter a company's obligation under Rule 14a-8(j) to inform the staff no later than 80 calendar days before filing a definitive proxy statement of its intention to omit a shareholder proposal. According to the announcement, the staff will continue to issue written response letters to no-action requests "where it believes doing so would provide value," such as where a written response would afford registrants and shareholder proponents with "more broadly applicable guidance about complying with Rule 14a-8." The announcement otherwise does not shed any light on the circumstances in which the staff will express a position or decline to express a position, whether orally or in writing, on the company's arguments for exclusion.

***Staff response taking no position on exclusion.*** Companies will now be faced more frequently with the question of what action they should take concerning a proposal where the staff has declined to express a view on the company's proposed exclusion of the proposal. The Division emphasizes that the parties should not construe such a response as indicating that the company must include the proposal in its proxy materials, affirming that "the company may have a valid legal basis to exclude the proposal under Rule 14a-8."

In some circumstances the staff's decision not to express its view on an argument for exclusion could increase the possibility that the shareholder proponent will seek a court order compelling the company to include the proposal in its proxy materials. The staff notes in the announcement that, "as has always been the case, the parties may seek formal, binding adjudication on the merits of the issue in court." Companies and proponents, however, typically consider litigation too expensive and time-consuming for resolving disputes under Rule 14a-8. The disadvantages of litigation may encourage companies and proponents to engage more intensively on a negotiated resolution.

A company may face other consequences if it excludes a proposal following the staff's decision not to express a view on the company's no-action request. Under their voting guidelines, proxy advisory firms, such as Institutional Shareholder Services (ISS) and Glass Lewis, may recommend against election of a company's board members if the company excludes a proposal without receiving a staff determination or court ruling in support of the exclusion. In addition to the possibility of negative voting recommendations, companies will need to consider whether exclusion of a proposal on which the staff has declined to state a position might attract negative publicity or an adverse reaction from shareholders.

***Oral staff response.*** Companies also should begin thinking about how oral responses from the staff will affect the shareholder proposal process. The staff's historical practice of providing written responses to no-action requests, and making those responses publicly available, has helped both companies and shareholder proponents understand the staff's evolving standards for evaluating shareholder proposals.

Oral responses to no-action requests could limit the precedential value of the staff's determinations. The reduced transparency of oral responses, however, might have a limited impact if the staff largely confines its oral responses to submissions relating to proposals or arguments for exclusion for which there is well-established precedent in prior no-action letters. The Division seemed to suggest this might be its intention by indicating in the announcement, as noted earlier, that a written response, rather than an oral one, is most likely where a written response would give registrants and shareholder proponents "more broadly applicable guidance" on Rule 14a-8. Further, although not addressed in the announcement, it is possible that the staff may rely more heavily on its long-standing practice of issuing guidance under Rule 14a-8 in the form of staff legal bulletins rather than in no-action responses.

Any adverse impact also might be mitigated if, as the Division apparently is considering, the staff will indicate on the SEC's website whether the staff has responded to a no-action request orally and the nature of the staff's determination (whether the staff concurred, disagreed, or declined to state a view with respect to the company's asserted basis for exclusion). We understand that the staff also will continue to post incoming no-action requests on its website, which will allow issuers and proponents to see the arguments for exclusion advanced in any letter the staff chooses to address orally.

## Conclusion

The Division's announcement makes clear that companies will receive fewer written responses to no-action requests under Rule 14a-8. Companies also should expect that in some circumstances the staff will not take a position on the proposed exclusion of a proposal. Companies should factor consideration of these procedural changes into their planning for shareholder proposals in the upcoming proxy season.

*This SEC Update is a summary for guidance only and should not be relied on as legal advice in relation to a particular transaction or situation. If you have any questions or would like any additional information regarding this matter, please contact your relationship partner at Hogan Lovells or any of the lawyers listed on the following page of this update.*

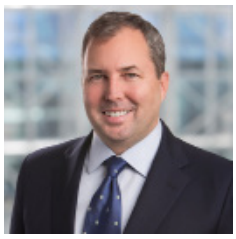
## Contacts

Alan L. Dye (Co-editor)
Washington, D.C.
alan.dye@hoganlovells.com
T +1 202 637 5737

Richard J. Parrino (Co-editor)
Washington, D.C.
richard.parrino@hoganlovells.com
T +1 202 637 5530

Steven Abrams
Philadelphia
steve.abrams@hoganlovells.com
T +1 267 675 4671

C. Alex Bahn
Washington, D.C., Philadelphia
alex.bahn@hoganlovells.com
T +1 202 637 6832



John B. Beckman
Washington, D.C.
john.beckman@hoganlovells.com
T +1 202 637 5464

David W. Bonser
Washington, D.C.
david.bonser@hoganlovells.com
T +1 202 637 5868

Amy Bowerman Freed
Baltimore, New York
amy.freed@hoganlovells.com
T +1 410 659 2774

Kevin K. Greenslade
Northern Virginia
kevin.greenslade@hoganlovells.com
T +1 703 610 6189

Paul Hilton
Denver, New York
paul.hilton@hoganlovells.com
T +1 303 454 2414

William I. Intner
Baltimore
william.intner@hoganlovells.com
T +1 410 659 2778

Michael E. McTiernan
Washington, D.C.
michael.mctiernan@hoganlovells.com
T +1 202 637 5684

Tiffany Posil
Washington, D.C.
tiffany.posil@hoganlovells.com
T +1 202 637 3663

Michael J. Silver
New York
michael.silver@hoganlovells.com
T +1 212 918 8235

Lillian Tsu
New York
lillian.tsu@hoganlovells.com
T +1 212 918 3599

Alicante
Amsterdam
Baltimore
Beijing
Birmingham
Boston
Brussels
Budapest
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Riyadh
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar
Warsaw
Washington, D.C.
Zagreb

Our offices
Associated offices

www.hoganlovells.com