

Client Update

SEC Issues Guidance on Rule 14a-8(i)(9)

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On October 22, the SEC issued Staff Legal Bulletin No. 14H providing much-anticipated guidance on the scope and application of Rule 14a-8(i)(9) prior to the 2016 proxy season. Rule 14a-8(i)(9) permits companies to exclude shareholder proposals that directly conflict with the company's own proposals. Under SLB 14H, the SEC Staff will determine that a conflict exists only if "a reasonable shareholder could not logically vote in favor of both proposals, i.e., a vote for one proposal is tantamount to a vote against the other proposal." As a result, it will be challenging for companies to exclude a shareholder proxy access proposal under Rule 14a-8(i)(9) even if management intends to include its own competing proposal.

The SEC Staff acknowledges that this new formulation may place a "higher burden" on companies seeking no-action relief under Rule 14a-8(i)(9). Historically, the Staff's analysis had focused, among other things, on whether including the shareholder proposal could present "alternative and conflicting decisions for the shareholders" or could create the potential for "inconsistent and ambiguous results." The SEC Staff took the unusual step of expressing no views on the application of the Rule 14a-8(i)(9) "directly conflicts" exception during the 2015 proxy season when Chair White, in reaction to the well-publicized debate surrounding a proxy access proposal received by Whole Foods, instructed the SEC Staff to review the application of the Rule.

While the mandate to review the application of Rule 14a-8(i)(9) was not limited to shareholder proxy access proposals, the issue is directly addressed in the following example provided in SLB 14H:

[I]f a company does not allow shareholder nominees to be included in the company's proxy statement, a shareholder proposal that would permit a shareholder or group of shareholders holding at least 3% of the company's outstanding stock for at least 3 years to nominate up to 20%

of the directors would not be excludable if a management proposal would allow shareholders holding at least 5% of the company's stock for at least 5 years to nominate for inclusion in the company's proxy statement 10% of the directors. This is because both proposals generally seek a similar objective, to give shareholders the ability to include their nominees for director alongside management's nominees in the proxy statement, and the proposals do not present shareholders with conflicting decisions such that a reasonable shareholder could not logically vote in favor of both proposals.

The SEC Staff also confirms in SLB 14H that they are not changing their interpretation of the Rule 14a-8(i)(7) ordinary business exception in light of the Third Circuit decision in the *Trinity Wall Street v. Wal-Mart Stores, Inc.* litigation. Consistent with the concurring opinion in the Third Circuit decision, the evaluation of whether a proposal raises an issue of significant social policy will not be separated from whether it transcends a company's day-to-day business; a proposal "is sufficiently significant 'because' it transcends day-to-day business matters." This is consistent with oral guidance provided by senior SEC Staff earlier this Fall. The majority opinion in the Third Circuit decision had recommended that the SEC revise its regulations and issue new interpretive guidance in this area, leading to concerns that the SEC's interpretation of the Rule 14a-8(i)(7) exception could be in flux at a time when companies are preparing for the 2016 proxy season.

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Please do not hesitate to contact us with any questions.