Client Alert

September 2019

Corp Fin Announcement Regarding Rule 14a-8 No-Action Requests

On September 6, 2019, the staff in the Securities and Exchange Commission's Division of Corporation Finance (the Division) announced important changes to the Division's process for administering Rule 14a-8 no-action requests regarding shareholder proposals. Specifically, the staff may respond orally rather than in writing to no-action requests. Moreover, the staff may decide not to take a position on the merits of certain requests, thus leaving to the company the decision of whether to include or exclude the shareholder proposal.

Division's Announcement

The Division's announcement states, in pertinent part:

> The staff will continue to actively monitor correspondence and provide informal guidance to companies and proponents as appropriate. In cases where a company seeks to exclude a proposal, the staff will inform the proponent and the company of its position, which may be that the staff concurs, disagrees or declines to state a view, with respect to the company's asserted basis for exclusion. Starting with the 2019-2020 shareholder proposal season, however, the staff may respond orally instead of in writing to some no-action requests. The staff 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.
>
> The staff continues to believe, as noted in Staff Legal Bulletin 14I and Staff Legal Bulletin 14J, that when a company seeks to exclude a shareholder proposal from its proxy materials under paragraphs (i)(5) or (i)(7) of Rule 14a-8, an analysis by its board of directors is often useful.
>
> If the staff declines to state a view on any particular request, the interested parties should not interpret that position as indicating that the proposal must be included. In such circumstances, the staff is not taking a position on the merits of the arguments made, and the company may have a valid legal basis to exclude the proposal under Rule 14a-8. And, as has always been the case, the parties may seek formal, binding adjudication on the merits of the issue in court.

Implications

The Division's announcement raises a number of important issues for public companies. One change for companies to consider is the possibility of receiving an oral response to a no-action request from the Division. Beginning with next year's shareholder proposal season, the Division may respond orally to no-action requests in certain circumstances. Although the Division maintains that it will continue to issue a response letter when doing so would add value, the type of circumstances that warrant an oral response

© 2019 Hunton Andrews Kurth LLP

and whether a publicly available documentation process for oral responses will be established for such responses has yet to be announced.

The other important aspect of the announcement is the possibility that the staff may not take a position on the merits of the request. In that case, companies will have to decide whether to include or exclude the proposal. The Division notes that its failure to provide a view on a particular no-action request should not be interpreted to mean that the proposal must be included in a company's proxy materials. This likely indicates that the Division will more frequently decline to take a position. The announcement did not indicate the types of proposals on which the staff might not respond. The staff may be more likely not to take a position on issues that are evolving or uncertain (such as whether a significant public policy issue transcends the company's ordinary business), but it is also possible that the staff declines to take a position on more routine requests due to its workload or other factors.

When considering whether to omit a shareholder proposal that the Division has declined to comment on, companies will need to reevaluate the strength of their arguments. In addition, companies should evaluate possible shareholder reaction as well as potential reputational and litigation risks. It is also possible that proxy advisory firms become critical of a company's decision to exclude a proposal in this situation.

Finally, the announcement states that litigation of a shareholder proposal continues to remain an option for companies and shareholders alike in lieu of the no-action process. A company that decides to exclude a proposal may face a lawsuit from the proponent, but companies might also initiate a declaratory judgment action. A company considering whether to initiate litigation, however, must weigh the costs and potential public relations and reputational risks that may occur. Historically, many companies have fared well when litigating cases on the merits while being heavily criticized by investor advocates for taking a "heavy-handed" approach. In addition, while litigation may be an appropriate strategy for some companies based on the merits of their positions, the process can be a costly and sometimes unpredictable one.

The announcement leaves unchanged Rule 14a-8(j)'s requirement for companies to notify the Division of their intent to omit a shareholder proposal. In doing so, a company should still provide the Division with strong arguments in support of omitting a proposal to decrease the likelihood of a response, whether orally or in writing, in disagreement with the company's position. In addition, the staff reiterated that it continues to find "useful" a summary of the board's analysis of the proposal.

Although the effects of the Division's announcement are largely left to be determined, public companies should begin to consider the changes to the Rule 14a-8 no-action request process in the coming 2019-2020 shareholder proposal season. Based on informal statements by representatives of the Division prior to publication of the announcement, we believe the Division is trying to encourage greater engagement on the part of companies with shareholder proponents with the expectation that such engagement will result in a greater number of negotiated compromises that do not require the Division to act as a mediator over a large number of disputed proposals. Companies should keep this fact in mind when the next round of shareholder proposals begin to arrive this fall.

Contacts

Steven M. Haas
shaas@HuntonAK.com

Scott H. Kimpel
skimpel@HuntonAK.com

© 2019 Hunton Andrews Kurth LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.