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New SEC Policy for No-Action Requests to Exclude Rule 14a-8 Shareholder Proposals for 2019–2020 Proxy Season

KEY TAKEAWAYS

- The SEC's Division of Corporation Finance announced that, starting with the 2019-2020 proxy season, it may issue oral rather than written guidance for some requests to exclude Rule 14a-8 shareholder proposals — companies may now receive oral or written confirmation the staff concurs, disagrees or declines to take a view with respect to proposed grounds for excluding a shareholder proposal.
- The SEC staff emphasized that, where they decline to take a view, it should not be interpreted to mean the proposal must be included.
- In light of the possibility of less certainty compared to the traditional SEC process for excluding Rule 14a-8 proposals, companies should be prepared to consider alternatives to this process, including making a unilateral determination to exclude proposals or requesting binding judicial relief.

On September 6, 2019, the SEC's Division of Corporation Finance announced a new policy for requests by companies seeking no-action relief to exclude shareholder proposals under Exchange Act Rule 14a-8. Starting with the 2019-2020 proxy season, the SEC staff may respond to some no-action requests orally instead of in writing. Going forward, the staff is more likely to issue a written response letter only where it believes doing so would provide value, such as more broadly applicable guidance about complying with Rule 14a-8.

The SEC staff will continue to actively monitor no-action requests and provide informal guidance to companies and shareholder proponents as appropriate. Consistent with its historic practice, where a company seeks to exclude a shareholder proposal, the SEC staff will inform the shareholder proponent and the company of the staff's 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.

The SEC's announcement also highlights that where the staff declines to take a view, the company and the shareholder proponent should not interpret that as indicating the company must include the shareholder proposal in its proxy statement. The SEC announcement reminds companies and shareholder proponents that, in addition to the informal no-action request process, they may seek formal, binding adjudication in court on the merits of excluding a shareholder proposal.

Implications for Rule 14a-8 Shareholder Proposal Exclusion Process

These announced changes mark a significant departure from the established Rule 14a-8 no-action process and some uncertainty is to be expected until new practices become clear over time. As

companies prepare for the first proxy season under the new SEC staff guidance, they should expect:

» fewer written responses to their requests for no-action relief,

» that the new policy of providing oral responses in certain cases may allow the SEC staff to respond more quickly to requests for exclusion where the grounds for the exclusion are clear, and

» more situations where the SEC staff declines to take a view on exclusion requests.

In light of the SEC staff's new guidance, companies seeking to exclude a Rule 14a-8 shareholder proposal should review their options and be prepared to proactively consider alternatives to the no-action request process. As always, a company may attempt to negotiate with the shareholder proponent for withdrawal of the proposal, often in exchange for some related commitment by the company with respect to the subject matter of the proposal. A company may also consider making a unilateral determination to exclude the proposal from its proxy statement without seeking prior SEC or judicial agreement, leaving the proponent of the 14a-8 proposal with the burden of seeking a judicial remedy to force its inclusion. As the SEC staff emphasized in its recent announcement, a company may also file suit in federal court seeking a binding declaratory judgment that the shareholder proposal may be excluded from the company's proxy materials.

These alternatives introduce different legal, timing, cost and investor relations considerations compared to the familiar no-action process. Companies considering alternative approaches to the no-action process should carefully review the potential benefits and risks with experienced counsel in advance of the upcoming proxy season.

If you have any questions about the matters addressed in this *Kirkland Governance Update*, please contact the following Kirkland attorneys or your regular Kirkland contact.

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