

SEC Staff Declines to Exclude Proposals on the Basis of Inflammatory or Incorrect Supporting Statements

March 4, 2013 | Client Update | 2-minute read

Companies with shareholder proposals are often frustrated by what they view as offensive, or merely wrong, supporting statements that accompany the resolutions. The supporting statements at times target specific directors with provocative claims of failed oversight. Several companies this season tried to exclude proposals, including asking to omit only a portion, on the basis that those supporting statements were false and misleading under Rule 14a-9. The Staff disagreed.

[Boeing](#) failed to convince the Staff that a proposal seeking an independent chairman which contained a supporting statement that focused on their CEO's responsibilities on other companies' boards would confuse shareholders in thinking that the proposal is actually about limitations on board service. The Staff also disagreed that statements in a proposal at [UMB Financial](#) impugned the character, integrity or personal reputation of directors or made charges concerning improper, illegal or immoral conduct or associations without factual foundations. UMB Financial had protested against statements which questioned whether the family of the former and current chairman "dominated" the company and made allegations of "nepotism." The Staff differed with Wendy's [views](#) that references to a GMI report about the board, statements regarding long director tenures and advanced ages and one director's past involvement with a public company bankruptcy were irrelevant to the subject matter of the proposal, which was focused on accelerated vesting of equity upon change of control, and instead merely constituted an opportunity to "attack" individual directors.

The Staff did not allow portions of proposals to be omitted even when a company demonstrated that the statements were simply untrue. [Allergen](#) tried to exclude portions of a proposal seeking to give shareholders the right to act by written consent that the company objected to as false and misleading, including statements regarding a former president who the proponent claimed acted as interim CEO, and his reported compensation. Allergen noted that the former president was never the company's CEO and the information in the supporting statement, including compensation, seemed to be about an entirely different company where their former president now serves as CEO. The company also asserted that, contrary to the claims in the proposal, it does not pay performance share units at all and again, it is the other company that pays these types of units. Allergen also protested as false the proposal's claims that the company still has a poison pill, which had instead been allowed to expire in 2010, and that the company was transitioning to annual elections when the company had completed declassification by the 2012 meeting. The Staff denied exclusion on the basis that Allergen did not demonstrate objectively that these portions are materially false or misleading.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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