

SEC Staff Allows Shareholder Proposal to Be Excluded Due to False and Misleading Supporting Statement

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The SEC staff has determined that a shareholder proposal can be excluded under Rule 14a-8(i)(3) because the supporting statement is false and misleading, a position that they have generally been reluctant to take in numerous other requests.

Every season, without exception, companies write no-action letters to the staff arguing that the supporting statement in shareholder proposals contain objectively incorrect information, either directly or by implication. These tend to be proposals seeking an independent chair of the board, and the supporting statement make claims that essentially question the independence and qualifications of not only the current chair, but also other directors. Sometimes the information is blatantly wrong because the data is outdated, or perhaps is relevant to another company. We have described prior examples [here](#).

The SEC staff has routinely denied those no-action letter requests, including during this season. For [one company](#), the SEC staff did not agree that the implications and suggestions made in the supporting statement about the company's directors' independence rendered the proposal excludable.

By contrast, the SEC staff stated that a shareholder proposal asking a company to reincorporate to Delaware from Ohio can be excluded because the company had "demonstrated objectively that certain factual statements in the supporting statement are materially false and misleading such that the proposal as a whole is materially false and misleading." In [that proposal](#), the company showed that specific statements in the supporting statement about Ohio state law were clearly contrary to the Ohio corporation statute.

The proponent, Ken Steiner and by proxy, John Chevedden, claimed that the Delaware corporation code is superior to Ohio because Ohio denies shareholders the right to amend company bylaws, requires shareholders to show criminal action to remove a director on a classified board, "does not require" a director to receive majority vote to be elected, and mandates a higher threshold requirement than Delaware for shareholders to call a special meeting. The company argued that the Ohio code entitles shareholders to change or repeal bylaws, does not seek criminal action as a precondition to director removal, and while it is true that the state law does not require directors to obtain majority votes for election, neither does Delaware. As for rights for shareholders to call special meetings, Ohio sets a 25% ownership threshold as a statutory default and permits Ohio corporations to set any threshold that does not exceed 50%, which is arguably more "shareholder-friendly," the company claimed, given Delaware corporate law which sets no upper or lower limit for this shareholder right.

The company was able to refute all of the reasoning in the supporting statement for why Ohio is less "shareholder-friendly" than Delaware, other than the fact that GMI Ratings assert that Ohio favors management rights. It appears that the standard for exclusion, from the SEC staff's view, is not that there are clearly incorrect assertions in the supporting statement, but that they must constitute the entire rationale for why the resolution in the proposal is necessary, to be deemed materially false and 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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