

SEC Denies No-Action Requests on Proposals Preferring Buybacks over Dividends

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Shareholders at several companies will vote on proposals asking boards to adopt a payout policy that gives preference to share repurchases instead of cash dividends. The proponents' supporting statement extolled the advantages of repurchases as more flexible than dividends and indicated some concern that dividends automatically caused a tax liability for some shareholders.

Companies did not convince the SEC staff in their arguments that the proposals should be excluded. The most common assertion was that the proposal focused on an ordinary business topic. Companies cited numerous prior no-action letters that permitted proposals asking boards to implement share repurchase programs with specific terms to be excluded. Some also argued that the proposals implicate capital allocation decisions that are fundamental to management functions.

The proponent cited to one prior no-action letter from the SEC staff that determined that the issue of whether to pay dividends involves economic and policy considerations, and is not ordinary business. The proponent also argued that stock buybacks have garnered significant attention in the media and from political figures and qualifies as a significant policy issue.

Companies also tried without success to argue that the proposal relates to a specific amount of dividends as a basis for exclusion, and that the meaning of "preference" rendered the proposal vague and misleading. All of the arguments failed, and the SEC staff did not provide a rationale for its decision.

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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