

SEC Staff Continues to Deny Rule 14a-8 Exclusion Requests Based on Misleading Supporting Statements

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Companies are frequently frustrated when the supporting statement of a shareholder proposal contains stale data, irrelevant information or, even worse, false allegations. The SEC staff, however, is fairly unsympathetic to those arguments as the basis of reasons to exclude a shareholder proposal from proxy materials, or to company requests to simply remove the disputed information.

The staff recently decided that [Disney](#) has not “demonstrated objectively” that portions of the supporting statement in a proposal were materially false or misleading. The proposal asked the Disney board to adopt a policy denying acceleration of equity vesting in the event of a change in control. Disney sought to exclude the supporting statement in its entirety other than a paragraph about executive compensation, on the basis that much of the assertions are unrelated and irrelevant to the subject matter of the proposal. The company argued unsuccessfully that several specific statements regarding the absence of an independent lead director and FCPA fines and settlements were in fact untrue.

[Pfizer](#) similarly failed to convince the SEC staff that a proposal seeking the ability of shareholders to act by written consent could be completely excluded because much of the supporting statement addresses executive pay, accounting matters, director tenure, director overboarding or environmental, social and corporate governance performance. The SEC staff responded that they were not able to conclude that those topics were irrelevant to a consideration of the subject matter such that shareholders would be confused about what they were being asked to vote on.

Both proposals were submitted by John Chevedden, who often cites to governance findings, and grades, by GMI Ratings in supporting statements. GMI Ratings, formed in 2010 through the merger of The Corporate Library, GovernanceMetrics International and Audit Integrity, assesses environmental, social, governance and accounting-related risks for public companies and publishes proprietary ratings, which are not available without charge. Several pending no-action letter requests, such as [Starbuck’s](#), take a different tactic from prior letters and argues that the proposals can be excluded because the supporting statement contains unsubstantiated and misleading reference to GMI Ratings as nonpublic materials that the proponents have failed to make available to companies.

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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