

SEC Division Director Discusses Current Staff Review on Conflicting Shareholder Proposals, Wal-Mart Case and False and Misleading Exclusion Standard

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In a [recent speech](#) on shareholder proposals, Keith Higgins, the SEC director of the Division of Corporation Finance, indicated that the rights under Rule 14a-8 for shareholder proposals is a fundamental one permitted under state law: to appear at a meeting, make a proposal for a proper purpose and have that proposal be voted on by other shareholders.

In addressing the Commission announcement about the suspension of the application of Rule 14a-8(i)(9) for this season, which we most recently discussed [here](#), the Division is looking for public comments and has established a special mailbox for that purpose at i9review@sec.gov. Higgins' remarks included commentary on three different Rule 14a-8 exclusions.

Rule 14a-8(i)(9) conflicting proposals. Higgins made several points, which he indicated were preliminary given the Division has just begun its review, but offers a sense of the issues that the Division is grappling with, and what it has heard from interested parties.

- The Division has not previously considered the argument made by some that a management proposal and shareholder proposal do not conflict if one is mandatory and the other is precatory, since virtually all shareholder proposals are precatory and therefore the exclusion would only apply to a small number of situations, although perhaps that was the intention. But even accepting that the vote on a precatory shareholder proposal is simply a data point for directors, the staff's concern was that, taken as a whole, having voting results for both management and shareholder proposals would still be ambiguous for directors to interpret, and also make it difficult for shareholders to decide how to send their message.
- As the Division continues its review, it may consider whether there are structural limitations in the current proxy rules that do not allow shareholders to indicate preferences, such as the ownership threshold for exercising proxy access rights, other than simply voting "for" or "against" management and shareholder proposals.
- It is unclear how the Division should address concerns that a conflicting management proposal is often made only "in response" to a proposal from shareholders, especially if there is some indication that management's "motive" is primarily to keep the shareholder proposal out of the proxy. However, the Division would face steep challenges in trying to examine management's intent in making its own proposal.
- Some have also expressed concern that shareholders do not have full information when, after a shareholder proposal is excluded, only a management proposal is then presented in the proxy without any background information. Higgins questioned whether the Division should require disclosure of the circumstances that led to the management proposal, including a discussion of alternatives and management's rationale for how its proposal was crafted, or even, allow the shareholder proponent to include an opposition statement.

Rule 14a-8(i)(7) ordinary business. Higgins noted that only a court can determine definitively whether a company is obligated to include a shareholder proposal, and both companies and proponents retain the option to pursue remedies in federal courts. In his view, the recent *Trinity v. Wal-Mart Stores* case (which we discussed [here](#)), represents the district court's perspective that a board committee's formulation and implementation of a policy is not a task that is fundamental

to management's ability to run a company on a daily basis. By contrast, the Commission has stated that, in analyzing whether a proposal requesting the formation of a special committee is excludable, the key is to consider whether the underlying subject matter of the committee involves an ordinary business matter.

Rule 14a-8(i)(3) false and misleading. Higgins noted that prior to 2004 and the issuance of SLB 14B, the staff had spent a significant amount of time analyzing the alleged deficiencies for factual accuracy and essentially editing the proposals, which became a due diligence burden. From the Division's perspective, the rule is still available if the argument meets three criteria: (a) is it a "fact" (not inferences or opinions), (b) is it false and misleading with demonstrable evidence, and finally (c) is it "material"? Higgins reminded companies that Rule 14a-9 prohibits "false and misleading" statements, not "unfair" statements.

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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