Harvard Law School Forum on Corporate Governance

Statement Commenting on the SEC's Withdrawal from the No Action Process

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The recent announcement by the SEC's Division of Corporation Finance that its staff will not, during the 2026 proxy season, "… respond to no-action requests related to any basis for exclusion other than 14a-8(i)(1)" leaves both companies and investors in uncertain, uncharted waters. The lack of staff input deprives companies and proponents of an orderly and time-honored process.

We are concerned about the Division's new approach and believe that companies would be unwise to rely on it as a basis to unilaterally decide to omit a resolution without considering further input from proponents.

For decades, shareholder proposals have been a key mechanism for investors to engage with the companies they own, and they have become an indispensable part of corporate governance. Shareholder engagement has encouraged many companies to adopt governance policies that are now widely adopted as best practices and recognized as important to long-term value creation. And resolutions relating to environmental and social impacts have led to important changes such as widespread adoption of human rights due diligence, corporate codes of conduct, and better management of climate risks.

The Division staff's reviews of requests for no-action relief under Rule 14a-8 have traditionally considered both a company's request and the proponent's response. A company provides an analysis and asks that the staff concur in its view that a proposal may be omitted from the proxy statement pursuant to one of the exclusions enumerated in the rule. The proponent then has an opportunity to respond. With that input, the staff either concurs with the company and agrees not to recommend an enforcement action, or indicates that it does not concur.

The staff's input is essential for companies as well as proponents because the rule otherwise mandates that proposals be included in company proxy statements. A company that unilaterally omits a proposal, without any clear representation by the staff as to whether the staff concurs substantively in a specific instance, threatens relations with the company's shareholders and creates potential legal risks.

Notwithstanding the language of Rule 14a-8(i), the staff in some instances has not awaited proponent responses before issuing its own response. In doing so, the staff has not considered whether a company has met its burden of proof for the exclusion it claims.

Instead, if requested by a company, the staff has now stated that it will not object if the company claims to have a reasonable basis for exclusion. That "no objection" letter provides no protection to companies or to shareholders relying on the staff's responses to understand the staff's views. And as the SEC acknowledges on its website, only the courts are empowered to determine whether a proffered exclusion applies. That risk to companies is arguably even higher where a staff has not even considered a proponent's response.

We are aware that a number of companies and their law firms have already sought such "no objection" letters but may not have made a final decision on whether to omit the resolution from its proxy. And going forward we have no signal about whether the SEC staff will continue its withdrawal from its arbiter role.

The Division has stated that staff resources are strained and that it takes time to review a no-action request and reach a conclusion. However, the no action decisions are important guidance to the parties that have long been relied upon by the market. Companies have traditionally gone to the staff for guidance. The current shift leaves companies without a clue as to whether, if they omit a proposal, they may be subjecting themselves to the risk of legal action. Investors are deeply concerned about the implications of companies simply deciding to omit a properly submitted shareholder resolution. A staff attorney's representation that they do not object to an exclusion is not the equivalent of receiving no-action relief.

The sole topic on which the Division has indicated its staff will continue to respond is on the application of state law regarding precatory proposals. We note that advisory proposals, which constitute 98% of proposals submitted, have long been deemed valid under Delaware law and never previously questioned as acceptable by Division staff. Precatory proposals strike an appropriate balance between allowing shareholders to provide input while acknowledging the discretion that management and the board must exercise over whether and how best to implement them. Such proposals provide an opportunity for all investors to communicate to companies whether an issue is of importance to them and if so how best to do so. In this way, the vote enables companies to get a read on the pulse of its investors. The Division's decision to abandon the established no-action process upsets the balance that has been in place for decades.

Even when a company submits a no action request to the staff, it is not unusual for the company's representatives to continue meaningful discussions with resolution proponents to seek an agreement acceptable to both parties pending a staff no action decision. Despite the lack of staff decisions, investors remain fully prepared to engage in dialogue about their proposals and to consider withdrawals after finding common ground. As New York State Comptroller Thomas DiNapoli recently argued in letters to companies with which they had filed, engagement with shareholders constitutes sound governance and enhances mutual understanding and trust.

Given those mutual benefits, we believe any company filing an exclusion notice regarding a shareholder proposal should welcome and evaluate responses from proponents, including about the validity of their exclusion claims, and reevaluate its intent to exclude before taking the risky step of omitting a resolution.

In this uncertain environment, investors are being forced to evaluate additional alternatives when proposals are unilaterally excluded. For example, some investors might vote against directors of companies that unilaterally omit resolutions. Others might present their proposals on the floor of the shareholder meeting instead of in the proxy. And yet others might choose to publicly highlight the risks for companies that omit resolutions, arguing they are undercutting shareholder value as well as sound corporate governance norms related to the rights of shareholders, and thereby disrespecting their own shareholders. Finally, as the staff reminds the parties in every no-action response, a proponent can pursue legal action in federal court.

Certainly, shareholders do not prefer such alternatives. Instead, we continue to believe that dialogue and the search for a win-win agreement by which a resolution can be withdrawn is in both a company's and its investors' best interests. We believe the best possible outcome would be for the Division to withdraw its newly-announced procedures and return to its established no-action process. However, absent that shift we urge companies to reconsider exclusion notices after input from proponents to avoid undercutting productive relationships between companies and their shareholders.