



LEGAL ALERT

January 28, 2015

SEC Moratorium on Issuance of Staff No Action Letters on Certain Shareholder Corporate Governance Proposals for 2015

Often, SEC reporting companies filing proxy materials for their annual shareholder meetings have requested issuance of a Staff No Action Letter by the SEC's Division of Corporation Finance when the company proposes to exclude a shareholder proposal properly submitted under the company's bylaws from its proxy statement because the company believes such shareholder proposal falls into a category of shareholder proposal that could be excluded in reliance on SEC Rule 14a-8 under the Securities Exchange Act of 1934. Issuance of a Staff No Action Letter confirming the availability of an exclusion for a shareholder proposal in the company's proxy statement under SEC Rule 14a-8 has long been viewed as an important step to shield companies from subsequent lawsuits by such shareholders.

SEC Rule 14a-8(i)(9) permits a company to exclude a shareholder proposal "if the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting." On January 16, 2015, SEC Chair Mary Jo White, due to questions that have arisen about the proper scope and application of this rule, directed staff to review the rule and report to the Commission on its review. Concurrently, the SEC Division of Corporation Finance announced that, based on this direction, it would express no views on the application of Rule 14a-8(i)(9) during the current proxy season.

What prompted these actions was the issuance of a SEC Staff No Action Letter to Whole Foods to exclude a shareholder corporate governance proposal from its annual meeting. A shareholder had submitted a proposal that would let investors holding 3% of the company's shares for at least three years nominate directors. Whole Foods' proposal would require a shareholder to own a substantially larger percentage of the company's stock for a longer period before the shareholder could nominate directors. Whole Foods had requested, and the SEC staff issued, a Staff No Action Letter advising Whole Foods that it would not recommend enforcement action to the Commission if Whole Foods excluded the shareholder proposal in reliance on Rule 14a-8(i)(9) because the shareholder proposal directly conflicted with Whole Foods' own proposal to be submitted to shareholders at the same meeting, even though there were significant differences between the two proposals.

Beyond the 2015 proxy season, no one knows how long this moratorium will last or if or when SEC staff would recommend to the Commission that the scope of Rule 14a-8(i)(9) be modified, if at all. Also, it is unknown if this moratorium constitutes a political reaction to public criticism or presages a more fundamental change to the availability of the exclusion in Rule 14a-8(i)(9). If SEC staff would recommend that the Commission revise Rule 14a-8(i)(9), it would be expected that the SEC Division of

Bybel Rutledge LLP
1017 Mumma Road, Suite 302
Lemoyne, PA 17043
Phone: 717-731-1700
Fax: 717-731-8205

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship.

Corporation Finance would continue to decline to express a view through issuance of Staff No Action Letters as to the availability of this rule until the rulemaking process is completed.

While it may be too late for shareholder proposals similar to the Whole Foods proposal to be submitted in accordance with company bylaw requirements for the 2015 proxy season for companies that have early annual meeting dates in 2015, it may not be too late for shareholders to submit such proposals to companies that have annual meeting dates later in 2015 or those that observe a non-calendar fiscal year.

Even if it is too late for shareholders to submit proposals for the 2015 proxy season, the request by SEC Chair White for staff to review Rule 14a-8(i)(9) and the concurrent imposition of a moratorium on issuance of SEC Staff No Action Letters in that regard may encourage shareholders to draft corporate governance proposals ready for submission in accordance with company bylaws for the 2016 proxy season. Therefore, SEC reporting companies may see an increase in the number of shareholder corporate governance proposals.

Absent definitive guidance from the SEC or lifting of the moratorium in the interim, companies could face in future the decision of either (i) excluding a shareholder proposal in reliance on SEC Rule 14a-8(i)(9) without receipt of a confirming SEC Staff No Action Letter or (ii) including the shareholder proposal in the proxy statement with the company's own proposal and engaging in active solicitation of shareholders to vote for the company's proposal.

Even if the moratorium is lifted for the 2016 proxy season, interim guidance issued by the SEC either as to (i) the availability of the exclusion in Rule 14a-8(i)(9) or (ii) when a Staff No Action Letter will be issued still may encourage shareholders to draft and file corporate governance proposals with the companies for inclusion in their proxy statements.

Need More Information?

If you would like additional information, please contact any of the following members of Bybel Rutledge LLP at (717) 731-1700 or at their respective email address:

G. Philip Rutledge, Esq.
(rutledge@bybelrutledge.com)

Nicholas Bybel, Jr., Esq.
(bybel@bybelrutledge.com)

Erik Gerhard, Esq.
(gerhard@bybelrutledge.com)

L. Renee Lieux, Esq.
(lieux@bybelrutledge.com)

Nicole Stezar Kaylor, Esq.
(kaylor@bybelrutledge.com)

Lauren E. Hokamp, Esq.
(hokamp@bybelrutledge.com)

The foregoing is provided solely for informational purposes. Neither this document nor the lawyers who authored it are rendering legal or professional advice or opinions on specific facts or matters. Distribution of this document to any person does not constitute the establishment of an attorney-client relationship.



Trusted Advisors to Companies...Every Step of the Way.SM