Shareholder Proposal No-Action Requests in the 2024 Proxy Season

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Key Points

- For the 2024 proxy season, companies submitted approximately 50% more no-action requests for the exclusion of shareholder proposals than they did for the prior proxy season.
- The SEC Staff granted more than two-thirds of no-action requests, versus approximately 56% in the corresponding prior period.
- The most successful bases for exclusion were that the shareholder proposal suffered from a procedural defect, related to the company's ordinary business matters, would micromanage the company or would (if implemented) cause the company to violate the law.
- The results this proxy season show that the no-action process remains a viable option for many companies to consider if they want to exclude inappropriate or deficient shareholder proposals.

Shareholder proposals submitted for 2024 annual meetings continued to cover a wide range of environmental, social and governance (ESG) topics. And companies seeking to exclude shareholder proposals they deemed inappropriate or deficient once again turned to a process of submitting no-action requests to the Staff of the Division of Corporation Finance (Staff) of the Securities and Exchange Commission (SEC).

For the 2024 proxy season, some noteworthy patterns emerged. Companies submitted approximately 50% more no-action requests than they did for the 2023 season — to overall success, with the Staff granting more than two-thirds of requests (excluding withdrawals). The season followed a tumultuous one in 2022, when the Staff denied a significant number of no-action requests and the grounds for obtaining no-action appeared to have narrowed, and 2023, when companies appeared less willing to challenge some proposals.

Although the Staff's decision-making process on some no-action requests remains opaque and difficult to decipher, the 2024 no-action season shows that the process remains a viable mechanism to exclude many shareholder proposals. Companies should note that outcomes will remain dependent on the actual proposal language, and there inevitably will be year-over-year variation in success rates.

Procedural Background

Rule 14a-8 under the Securities Exchange Act of 1934 permits shareholder proponents with relatively nominal shareholdings to submit proposals to companies for inclusion in the companies' proxy statements. These are to be voted on by shareholders at upcoming annual meetings.

Companies may exclude shareholder proposals due to a proponent's failure to meet certain procedural and eligibility requirements, or on the basis of one or more of 13 substantive grounds set forth in Rule 14a-8.

Companies Successfully Asserted Ordinary Business Basis for Exclusion

Consistent with prior seasons, the "ordinary business" basis for exclusion was the ground companies asserted most frequently. Aside from the "micromanagement" prong of this basis for exclusion (discussed below), the Staff concurred with more than half of the ordinary business arguments.

The Staff granted relief on ordinary business grounds to proposals such as those relating to healthy hospital food, airline in-flight meal options, relocation of a company's headquarters and advertising matters, all of which seem unquestionably "ordinary."

In contrast, the Staff found that many proposals transcended ordinary business and denied relief for proposals requesting:

- A report on the use of artificial intelligence and the adoption of any ethical guidelines relating thereto.
- Creation of a board committee on corporate financial sustainability to oversee the company's policy positions, advocacy and charitable contributions.
- A report on cost savings from the adoption of a smoke-free policy for the company's properties.
- A moratorium on sourcing minerals from deep sea mining.

- Establishment of wage policies, consistent with fiduciary duties, reasonably designed to provide workers with the minimum earnings necessary to meet a family's basic needs.

Micromanagement Arguments Were Often Successful

As articulated by the Staff, whether a proposal micromanages a company comes down to the level of granularity sought by a proposal and the extent to which it inappropriately limits board or management discretion.

On that basis, the Staff granted relief on micromanagement grounds, permitting companies to exclude proposals that requested:

- A report on the benefits and drawbacks of committing not to sell products containing titanium dioxide sourced from the Okefenokee wetlands.
- A living wage report including the number of workers paid less than a living wage, broken down by specific categories, and for each category the aggregate amount by which pay falls short of a living wage.
- A report on divestitures of assets with a material climate impact, including whether each purchaser discloses its greenhouse gas (GHG) emissions and has specified GHG reduction targets.
- A list of corporate charitable contributions of $5,000 or more be posted on the company's website, including any material limitations or monitoring of the contributions.

Violation of State Law

A shareholder proposal may be excluded if implementation of the proposal would cause the company to violate any state, federal or foreign law to which it is subject. Approximately three-quarters of no-action requests asserting this basis for exclusion were granted.

Funds affiliated with the United Brotherhood of Carpenters launched a new proposal campaign intended to enhance majority voting standards in director elections. The proposals sought adoption of bylaws mandating acceptance of a director's resignation where the director fails to receive majority support, absent "compelling" reasons. If the resignation is not accepted, the requested bylaw would require automatic acceptance of the director's resignation if the director fails to receive majority support a second, consecutive time.

Companies incorporated in Delaware and North Carolina, relying on the legal opinions of local counsel, successfully asserted that adoption of such a bylaw would cause directors to violate their fiduciary duties. To date, however, companies incorporated in New York and Virginia have not been successful in excluding this proposal.

In contrast to the outcome for most of those proposals, the Staff denied no-action requests to exclude proposals seeking a governance guideline or policy providing that a board would not renominate at the next annual meeting any director who failed to receive majority support in an uncontested election.

Procedural Arguments

Companies generally were successful excluding proposals on procedural grounds, with a couple of noteworthy exceptions.

A majority of the unsuccessful procedural arguments related to a specific proponent who submitted proposals to numerous companies, relying in each case on a broker letter affirming the proponent's ownership for the required period under Rule 14a-8 even though the shareholder's account with this particular broker did not cover that full ownership period.

Historically, proponents would have to provide letters from different brokers covering each portion of the period so that, together, the multiple letters covered the full period. In this case, the broker relied on information provided by a previous broker.

In response to numerous no-action requests, the Staff rejected the argument that the proponent had failed to provide adequate proof of ownership and that the one broker could not verify ownership for the entire period. The Staff stated that the proponent had supplied the necessary evidence of eligibility and, further, that Rule 14a 8 does not require submission of multiple broker letters in this context.

In another surprising outcome, a proponent provided proof of ownership from November 14, 2022, through November 13, 2023. Because that year's span was short one day, the company asserted, consistent with precedent, that the proponent failed to satisfy the one-year ownership requirement prior to submission of the proposal. The Staff denied relief, stating its view that the proponent's proof of ownership covered the one-year period required by Rule 14a-8.

Finally, in an important reminder to companies, the Staff denied relief where a company, in response to a proposal that was not accompanied by proof of ownership, sent the proponent an email requesting proof of ownership rather than a formal deficiency notice spelling out in detail the procedural deficiency and how to cure the defect.

Substantial Implementation Arguments Remain Uphill Battles

The Staff continues to apply a narrow lens to substantial implementation arguments, granting relief to only one-third of those arguments. In many cases, any deviation from the proposal's request resulted in a denial of relief on this basis.

In the case of proposals to adopt a simple majority-of-votes-cast voting standard in charters and bylaws — one of the most common proposal topics this season — the Staff continues to make fine distinctions that are not entirely transparent.

On the one hand, the Staff granted relief to some companies where they had eliminated higher voting standards in charters and bylaws. Where proposal language alluded to higher voting standards that are defaults under state law (but that can be changed by a company), the Staff stated that it "generally will not consider voting standards implicit in state law unless the [p]roposal identifies the specific state law provisions at issue."

On the other, the Staff rejected substantial implementation arguments where the company charter had a majority-of-outstanding-shares provision (i.e., higher than a simple majority standard) that was required by state law.

Questioning the Competence of a Director Standing for Election

Many shareholder proposals contain supporting statements that are critical of the company's board of directors or that criticize, for example, the asserted lengthy tenure of a lead independent director. Generally, those criticisms do not rise to the level of being able to exclude a proposal. But, from time to time, a company can successfully exclude a proposal for questioning the competence, business judgment or character of a nominee for election.

The Staff granted relief to the one no-action request submitted this season on this basis. The proposal sought adoption of an independent chair policy, and the supporting statement stated that the company's lead director did not "seem to have enough stature to be a lead director" in light of his 30-year career at a firm with less than $5 million of annual revenue compared to the company's $26 billion of revenue.

This serves as an important reminder that, although not a common basis for exclusion, there are limits to what a shareholder proponent under Rule 14a-8 can say about directors standing for election.