

Kingsdale Governance Advantage

SEC: Shareholder Proposals Harder to Be Excluded

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According to the latest [legal bulletin](#) posted yesterday by the Division of Corporate Finance of the Securities and Exchange Commission (“SEC”), public companies in the U.S. will no longer be able to exclude a shareholder proposal under Rule 14a-8(i)(9) (**Conflicting Proposals Exclusion**) by proposing a competing but not directly conflicting management proposal.

For example, a 3%/3 years/20% proxy access shareholder proposal will not directly conflict with a 5%/5 years/10% management proposal because in the SEC’s view, “a direct conflict would exist if a reasonable shareholder could not logically vote in favor of both proposals, i.e., a vote for one proposal is tantamount to a vote against the other proposal”. In this case, “both proposals generally seek a similar objective, to give shareholders the ability to include their nominees for director alongside management’s nominees in the proxy statement, and the proposals do not present shareholders with conflicting decisions such that a reasonable shareholder could not logically vote in favor of both proposals.” This means a reasonable shareholder could logically vote in favor of both a shareholder proposal that is more shareholder friendly as well as a competing management proposal that is less shareholder friendly but seeks a similar objective.

In the bulletin, SEC also clarified that a proposal may transcend a company’s ordinary business operations even if the significant policy issue relates to the “nitty-gritty of its core business.” Therefore, proposals that focus on a significant policy issue are not excludable under Rule 14a-8(i)(7) (**Ordinary Business Exclusion**) “because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.”

With the clarification of these long-held SEC positions on whether a shareholder proposal is excludable, companies will have hard time to exclude a shareholder proposal by submitting a competing one. As a result, we believe popular proposals such as proxy access will continue to flourish in the 2016 proxy season.

You can read the full text of the SEC Division of Corporation Finance Staff Legal Bulletin No. 14H (CF) [here](#).