

Shareholder Proposals Restricting Board/Management Access to Preliminary Voting Results May Be Excluded

January 13, 2017 – Governance & Compliance Insider
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On January 6, 2017, the SEC Staff granted no-action relief that would allow companies to exclude shareholder proposals preventing management or the board from accessing preliminary voting results on uncontested matters prior to the annual meeting, including a running tally of votes for and against, and using that information to solicit votes. See, *The Boeing Company*, *Ferro Corporation*, *Honeywell International Inc.*, *L-3 Communications Holdings, Inc.*, *NiSource Inc.*, and *Praxair, Inc.*

Under the shareholder proposals, this enhanced confidential voting requirement would apply to management or board-sponsored resolutions seeking approval of executive pay or for other purposes, including votes mandated under applicable stock exchange rules; proposals required by law, or the company's bylaws, such as say-on-pay votes; and Rule 14a-8 shareholder proposals included in the proxy. The proposals would not apply to director elections, or contested proxy solicitations, except at the board's discretion, and they would not prevent companies from monitoring voting for purposes of achieving a quorum. In its no-action letters, the companies cited a history of relief granted for shareholder proposals that seek to restrict management's access to preliminary voting results, to manage the conduct of annual shareholder meetings, and to restrict a company's solicitation of its shareholders.

The Staff concluded that the companies may rely on the "ordinary business" basis for exclusion under Rule 14a-8(i)(7), and noted that each proposal "relates to the monitoring of preliminary voting results with respect to matters that may relate to [the company's] ordinary business." The Staff does not conclude that the monitoring of preliminary voting results and the solicitation of votes per se are part of ordinary business operations, which leaves open the question of whether the proposals would survive if they were limited to matters that the Staff deems unrelated to the company's ordinary business. This series of no-action letters represents the latest volley in the debate over the disparity between boards and management versus shareholder proponents, in terms of their ability to access voting information and to communicate with shareholders on proposals.

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As described in the 1998 amendments to Rule 14a-8, the underlying policy of the “ordinary business” basis for exclusion is “to confine the resolution of ordinary business problems to management and board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.” There are two frequently cited considerations for evaluating whether an activity is within the ken of “ordinary business”: (1) whether the tasks are “so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight,” and (2) whether the proposals seek to “micro-manage” the company by “probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.”