

[Securities Regulation Daily Wrap Up, TOP STORY—CorpFin guidance emerges from Whole Foods proposal, Wal-Mart case, \(Oct. 22, 2015\)](#)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

The SEC's Division of Corporation Finance issued guidance to clarify how the division will review company requests to exclude shareholder proposals based on direct conflict with a company proposal or under the ordinary business exclusion. [Staff Legal Bulletin No. 14H](#) is the division's reply to Chair Mary Jo White's [call](#) to review the directly conflicts exclusion, but also reaches the ordinary business exclusion that spurred litigation resulting in a divided Third Circuit opinion. CorpFin Director Keith F. Higgins [spoke](#) at length about the "directly conflicts" issue earlier this year.

Logically vote for both. According to CorpFin, the touchstone for exclusion under the directly conflicts provision in Exchange Act Rule 14a-8(i)(9) is whether a reasonable shareholder could not logically vote in favor of both proposals. As explained later in a section listing examples of management and shareholder proposals, the division said this standard applies if both proposals move in the same direction, such as where a reasonable shareholder may prefer one of the proposals. The division noted this standard may be stricter than its prior guidance, but that it will help prevent shareholders from trying to end-run the agency's proxy rules.

Under Rule 14a-8(i)(9), a shareholder proposal is excludable if it directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting. A note to the rule tells companies making submissions to the Commission seeking to exclude a proposal to specify any points of conflict. But footnote 15 to SLB 14H warns that a company's no-action request may need to include the full text of the company's proposal to allow division staff to thoroughly review the submission. The division said its guidance mirrors the process under Rule 14a-8(i)(10) for substantially implemented proposals.

The division offered a few examples of when exclusion may/may not be appropriate:

- Direct conflict—Company wants shareholders to approve merger; Shareholder proposal urges a no vote.
- Direct conflict—Company wants bylaw mandating single CEO/chair; Shareholder proposal urges split CEO/chair
- No direct conflict—Shareholders want certain terms for nominating directors (e.g., 3 percent; 3 years; up to 20 percent of directors); Company proposes a different threshold (e.g., 5 percent; 5 years; up to 10 percent of directors).
- No direct conflict—Shareholders want compensation committee to mandate specific equity award vesting period; Company wants compensation committee to have discretion over these awards.

Moreover, the division suggested it was unlikely a direct conflict would develop merely because a company's board may need to mull the impact of two proposals.

Ordinary business. The division also took issue with aspects of the Third Circuit's Wal-Mart gun proposal [decision](#) that examined the agency's application of the ordinary business exclusion under Rule 14a-8(i)(7).

The division said that despite the panel having reached the same result as the division (exclude the proposal), a majority of the panel went on to adopt a test for applying the significant policy exception that deviates from Commission and division practice.

According to the division, the Third Circuit's new test could result in the needless exclusion of some shareholder proposals. The division said it will follow existing Commission and division standards for Rule 14a-8(i)(7), which happen to coincide with the approach urged by the concurring judge in the *Wal-Mart* case.

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