



SEC 14a-8 Ordinary Business Operations No-Action Letter Trends



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Introduction

Public companies may ask the Securities and Exchange Commission (SEC) for permission to omit shareholder proposals from their proxy votes through a no-action letter request under Rule 14a-8.

Executive Summary

In this report, you will find an analysis of SEC staff no-action letters from January 1, 2018 through June 15, 2018 in response to company requests for permission to omit shareholder proposals from their proxies citing the ordinary business operations exception under Rule 14a-8(i)(7). Our analysis shows that:

- 75% of public company no-action requests based solely on the ordinary business operations exception were successful.
- 100% of shareholder proposals regarding employment practices where companies cited 14a-8(i)(7) did not go forward.
- 50% of ESG shareholder proposals on climate change that cited 14a-8(i)(7) did not go forward.
- Cybersecurity is not considered an ordinary business operation by SEC staff.

Methodology

Our CompanyIQ™ platform surveyed no-action requests filed by US publicly traded companies and the no-action letter responses from the SEC dated January 1, 2018 through June 15, 2018. This analysis identifies trends in shareholder proposals, company ordinary business operations arguments, and SEC staff responses.

Ordinary Business Operations Exclusion Was Hugely Successful – 75% of No-Action Requests Were Approved

The expanded ordinary business operations exception under Rule 14a-8(i)(7) effective December 2017 has served companies well so far in 2018.

Specifically, 53 requests from January 1, 2018 through June 15, 2018 relied solely on 14a-8(i)(7) as the basis for their no-action request. Most significantly, nearly three-quarters of those ordinary business operations no-action requests were approved. 20% were denied via notification that the related shareholder proposal could not be omitted from the company's proxy, and the remaining 5% were withdrawn.

The table below highlights some of these ordinary business operations no-action requests.

Table 1 – Ordinary Business Operations No-Action Requests

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	Company	No-Action Ruling	Proposal
1)	3M	Permission to exclude	Executive Compensation: Stock and Option Awards
2)	Amazon	Withdrawn	Employee Criminal Background Checks
3)	Bimini Capital Management	Permission to exclude	Share Prices
4)	Boeing	Permission to exclude	Facility Location
5)	Comcast Corporation	Permission to exclude	In-Person Annual Shareholder Meetings
6)	Delta Airlines	Permission to exclude	Airline Seat Size
7)	Express Scripts Holdings	Cannot omit	Cyber Risk
8)	JPMorgan Chase	Permission to exclude	Charitable Contributions
9)	Pfizer, Inc	Permission to exclude	Drug Pricing
10)	Time Warner Inc	Permission to exclude	Journalistic Standards
11)	Wal-Mart Stores Inc	Permission to exclude	Gender Pay Gap

50% of Greenhouse Gases No-Action Requests Were Successful – Nearly a quarter of the company requests citing ordinary business operations were related to greenhouse gases and renewable energy. Half of them were permitted to be excluded from their proxies. Another 30% of these no-action requests were denied, and 20% were withdrawn.

100% of Employment Practices No-Action Requests Were Successful – 10% of the 14a-8(i)(7) requests were based on employment practices. All of them did not move forward: 60% were allowed to be excluded, and the remaining 40% were withdrawn.

Cybersecurity Not Permitted to Be Omitted Under Ordinary Business Operations Exception – Notably, SEC staff did not allow Express Scripts Holdings and Verizon Communications to omit shareholder proposals on cybersecurity and privacy. Exhibits 1 and 2 below display the related SEC staff no-action letters for these two requests.

Exhibit 1: Express Scripts Cybersecurity SEC No-Action Letter

March 7, 2018

Response of the Office of Chief Counsel
Division of Corporation Finance

Re: Express Scripts Holding Company
Incoming letter dated December 21, 2017

The Proposal asks the board to review and publicly report on its cyber risk and actions taken to mitigate that risk.

We are unable to conclude that the Company has met its burden of demonstrating that it may exclude the Proposal under rule 14a-8(i)(7) as a matter relating to the Company's ordinary business operations. Accordingly, we do not believe that the Company may omit the Proposal from its proxy materials in reliance on rule 14a-8(i)(7).

Sincerely,

Lisa Krestynick
Attorney-Adviser

Exhibit 2: Verizon Communications Cybersecurity SEC No-Action Letter

March 7, 2018

Response of the Office of Chief Counsel
Division of Corporation Finance

Re: Verizon Communications Inc.
Incoming letter dated December 20, 2017

The Proposal requests that a board committee publish a report assessing the feasibility of integrating cyber security and data privacy metrics into the performance measures of senior executives under the company's compensation incentive plans.

We are unable to concur in your view that the Company may exclude the Proposal under rule 14a-8(i)(7). We note that the no-action request does not include a discussion of the board's analysis and, as a result, we do not have the benefit of the board's views on these matters. Accordingly, we do not believe that the Company may omit the Proposal from its proxy materials in reliance on rule 14a-8(i)(7).

Sincerely,

Lisa Krestynick
Attorney-Adviser

Conclusion

Six months after the broadening of the ordinary business operations exception in Rule 14a-8(i)(7), it appears that this new provision will continue to be a successful choice for public companies to use in their no-action requests on shareholder proposals to the SEC.

For More

A general overview report on recent no-action requests is available as well as a detailed report on proxy access 14a-8 requests.

We also can provide more information about 14a-8(i)(7) ordinary business operations no-action requests as well as custom reports on no-action requests.

Contact us at reports@mylogiq.com or 888-546-4910.

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- 3) Benchmarking Financial Footnotes in Annual and Quarterly Filings
- 4) Changes in MD&A Discussion
- 5) Non-GAAP Disclosures and Compliance
- 6) What Has Been the SEC's Focus on Comments?
- 7) ASC 842 Lease Commitments, Early Adopters Trend

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- 1) Director Gender and Diversity
- 2) Are You an Independent Board Member If You Serve More Than 10-15 Years?
- 3) How Much Does a Board of Director Earn Per Meeting?
- 4) Analysis of Shareholder Proposals and Leading Trends
- 5) Risk Oversight and Cyber-Security and Company Boards - Who Is Responsible?

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- 2) What Is the CFO Pay-Ratio and How Does It Compare with the CEO Pay-Ratio?
- 3) Pay Elements of CEO and CFO Compensation Across Large Cap, Mid-Cap and Small-Cap Companies