



DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

May 30, 2019

Via Email

Thomas J. Kim
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005

**Re: MiMedx Group, Inc.
Request for Exemptive Relief from Exchange Act Rule 14a-3(b)**

Dear Mr. Kim:

We are responding to your letter dated May 29, 2019 requesting exemptive relief on behalf of MiMedx Group, Inc. To avoid having to recite or summarize the facts set forth in your letter, our response is attached to a copy of your letter. Unless otherwise noted, capitalized terms in this letter have the same meaning as in your letter.

Based on the representations and facts presented in your letter, the Division of Corporation Finance, acting for the Commission pursuant to delegated authority, by separate order is granting an exemption from the requirement of Exchange Act Rule 14a-3(b) in connection with the Delayed 2018 Meeting.

We note in particular that our grant of relief is conditioned upon the following:

- MiMedx is required to hold the Delayed 2018 Meeting as a result of an action taken by security holders pursuant to Florida law and the Florida Court ordering such meeting to be held on June 17, 2019;
- the company has made good-faith efforts to furnish the audited financial statements required by Rule 14a-3(b) before holding the Delayed 2018 Meeting but is unable to comply with this requirement;
- MiMedx has made a determination that it disclosed to security holders all available material information necessary for security holders to make an informed voting decision in accordance with Regulation 14A;
- absent the grant of exemptive relief, MiMedx would be forced to violate either Florida law or the rules and regulations administered by the Commission; and

- the company faces a proxy contest with respect to the matters to be presented at the Delayed 2018 Meeting, with certain MiMedx security holders filing a definitive proxy statement soliciting proxies for, among other things, the election of their own director nominees.

The foregoing exemptive relief is based solely on the representations and the facts presented in your letter. The exemptive relief granted is strictly limited to the application of Rule 14a-3(b) to the Delayed 2018 Meeting. Any solicitation by MiMedx in reliance on this grant of relief should be discontinued pending further consultations with the Commission staff if the facts or representations set forth in your letter change, including the company's inability to furnish audited financial statements required for the Delayed 2018 Meeting. In addition, this exemptive relief is subject to modification or revocation if at any time the Commission or the Division of Corporation Finance determines that such action is necessary or appropriate in furtherance of the purposes of the federal securities laws. The Division of Corporation Finance expresses no view with respect to any other questions that this solicitation may raise.

Sincerely,

/s/ William H. Hinman

William H. Hinman
Director
Division of Corporation Finance

**UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION**

May 30, 2019

In the Matter of MiMedx Group, Inc.

ORDER GRANTING EXEMPTION FROM
EXCHANGE ACT RULE 14A-3(B)

MiMedx Group, Inc. submitted a letter dated May 29, 2019 requesting that the Securities and Exchange Commission (“Commission”) grant an exemption from Exchange Act Rule 14a-3(b) for the proxy solicitation described in its letter (“Request”).

Based on the representations and the facts presented in the Request, and subject to the terms and conditions described in the letter from the Division of Corporation Finance dated May 30, 2019, it is ORDERED that the request for an exemption from Exchange Act Rule 14a-3(b) is hereby granted.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Vanessa A. Countryman
Acting Secretary



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1934 Act
Rule 14a-3(b)

May 29, 2019

BY ELECTRONIC MAIL

Office of Mergers & Acquisitions
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: MiMedx Group, Inc.; Request for Exemptive Relief

Ladies and Gentlemen:

On behalf of MiMedx Group, Inc., a Florida corporation (“MiMedx” or the “Company”), we are writing to request exemptive relief from the Division of Corporation Finance with respect to the requirements of Rule 14a-3(b) under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), in light of MiMedx’s inability to furnish audited financial statements, as discussed below. Pursuant to 17 CFR §200.30-1(f)(18) (“Rule 30-1(f)(18)”), the Director of the Division has the authority to exercise the Commission’s exemptive power in Section 36 of the Exchange Act with respect to Rule 14a-3(b).

On April 26, 2019, as a result of a shareholder lawsuit filed by the City of Hialeah Employees’ Retirement System (“Hialeah”) under the Florida Business Corporation Act, the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida (the “Florida Court”) entered a final declaratory judgment (the “Judgment”) requiring the Company to hold an annual shareholder meeting on June 17, 2019 for the election of three Class II directors (the “Delayed 2018 Meeting”). A copy of the Judgment is attached hereto as Exhibit A.

On April 26, 2019, the Company filed a notice of appeal with the Florida Court to appeal the Judgment. On April 29, 2019, the Company filed a motion to stay the Judgment, pending the outcome of the appeal. On May 3, 2019, the Company filed an emergency motion for temporary stay in the District Court of Appeal, First District of Florida (the “Florida Appellate Court”), requesting a temporary stay of the Judgment until the Company’s motion to stay in the Florida Court can be resolved. On May 9, 2019, the Florida Appellate Court denied the Company’s emergency motion for temporary stay, and directed the Florida Court to enter an order on or before May 20, 2019, resolving the Company’s motion to stay filed on April 29, 2019.

On May 15, 2019, the Florida Court denied the Company's motion to stay. On May 16, 2019, the Company appealed this denial to the Florida Appellate Court. On May 23, 2019, the Florida Appellate Court affirmed the Florida Court's order denying the Company's motion to stay.¹

Accordingly, the Judgment currently stands, and the Company is legally required under Florida law to hold the Delayed 2018 Meeting on June 17, 2019.

The Company has not filed a periodic report since its Form 10-Q for the quarter ended September 30, 2017.² For the reasons set forth below, the Company cannot comply with the requirement in Rule 14a-3(b) or in Rule 14c-3(a) for audited financial statements to be furnished to shareholders in connection with a shareholder meeting.

Rule 30-1(f)(18) authorizes the Director to grant exemptive relief from Rule 14a-3(b) if the applicant can demonstrate that it:

- (i) Is required to hold a meeting of security holders as a result of an action taken by one or more of the applicant's security holders pursuant to state law;
- (ii) Is unable to comply with the requirements of Rule 14a-3(b) under the Exchange Act for audited financial statements to be included in the annual report to security holders to be furnished to security holders in connection with the security holder meeting required to be held as a result of the security holder demand under state law;
- (iii) Has made a good faith effort to furnish the audited financial statements before holding the security holder meeting;
- (iv) Has made a determination that it has disclosed to security holders all available material information necessary for the security holders to make an informed voting decision in accordance with Regulation 14A; and
- (v) Absent a grant of exemptive relief, it would be forced to violate either state law or the rules and regulations administered by the Commission.

The Company believes it meets each of these requirements, for the reasons set forth below.

I. DISCUSSION

a. **MiMedx is required to hold an annual meeting as a result of an action taken by a shareholder pursuant to Florida law.**

¹ On April 18, 2019, Hialeah filed a separate action against the Company in the Florida Court asking the Florida Court to enter a final declaratory judgment for the election of Class III directors at either the June 17, 2019 meeting or within 30 days of the June 17, 2019 meeting. The complaint was served on the Company on May 3, 2019, and Hialeah filed its motion for summary judgment and declaratory judgment on May 13.

² The Company has, however, timely filed all required current reports on Form 8-K.

b. Absent a grant of exemptive relief, it would be forced to violate either state law or the rules and regulations administered by the Commission.

As noted above, MiMedx is a Florida corporation. MiMedx has not held an annual shareholder meeting since May 17, 2017. Section 607.0703 of the Florida Business Corporation Act authorizes the circuit court of the county in which a Florida corporation's registered office is located, upon application by a shareholder entitled to vote at an annual meeting, to order an annual meeting be held if an annual meeting has not been held within any thirteen-month period.³

As noted above, on April 26, 2019, the Florida Court entered the Judgment requiring the Company to hold the Delayed 2018 Meeting on June 17, 2019. The Company has taken every step possible to stay the Judgment, and its appeal of the Judgment will likely extend well past June 17, 2019.

The Company would like to hold its Delayed 2018 Meeting and is pursuing this request for exemptive relief so that it may do so in compliance with both state and federal law. Because its common stock is registered under the Exchange Act, MiMedx must comply with the federal proxy rules when soliciting proxy voting authority from its shareholders.⁴ Specifically, Exchange Act Rule 14a-3 requires a company to furnish a proxy statement to shareholders before soliciting voting authority for a matter submitted to a shareholder vote. If the proxy solicitation relates to a meeting at which directors will be elected, an annual report must accompany or precede the proxy statement. Rule 14a-3(b)(1) requires this annual report to include audited financial statements.

Accordingly, because the Company is unable to furnish audited financial statements, absent a grant of exemptive relief, the Company faces the possibility of being forced to violate either Florida law or the federal securities laws.

c. MiMedx is unable to comply with the requirements of Rule 14a-3(b) under the Exchange Act for audited financial statements to be included in the annual report to security holders.

d. MiMedx has made a good faith effort to furnish audited financial statements before holding the shareholder meeting.

³ FLA. STAT. § 607.0703 (2018) (“The circuit court of the county where a corporation’s principal office is located . . . may, after notice to the corporation, order a meeting to be held: (a) On application of any shareholder of the corporation entitled to vote in an annual meeting if an annual meeting has not been held within any 13-month period...”).

⁴ Although the Company’s common stock has been deregistered under Exchange Act Section 12(b), it is deemed to be registered under Exchange Act Section 12(g) by virtue of Exchange Act Rule 12g-2. Accordingly, the Company must comply with the federal proxy rules in order to solicit holders of the Company’s common stock for the Delayed 2018 Meeting.

First, as first disclosed in the Company's press release and Form 8-K dated February 20, 2018, the delay in the completion of the 2017 audit of the Company's financial statements was precipitated by the initiation in February 2018 of an independent internal investigation by the Audit Committee of the Company's Board of Directors into current and prior period matters concerning sales and distribution practices and other matters (the "Investigation"). The Audit Committee engaged King & Spalding LLP ("K&S") to assist in the Investigation, which in turn engaged KPMG LLP ("KPMG") to provide forensic accounting services.

The Investigation focused primarily on the following areas: (1) the Company's revenue recognition practices, (2) revenue management activities, (3) actions taken against whistleblowers, (4) tone set by former senior management and (5) Anti-Kickback Statute and related allegations.

In connection with the Investigation, K&S and KPMG reviewed over 1.5 million documents, including, but not limited to, emails, text exchanges and other electronic and hard-copy records. In addition, they reviewed significant amounts of data housed in the Company's accounting, customer relationship management, inventory and other systems. They also reviewed over 2,750 hours of video derived from a secret video surveillance system installed at the direction of Parker H. "Pete" Petit, the Company's former Chairman and Chief Executive Officer, as well as telephonic recordings captured without the consent of all conversation participants.

K&S and KPMG interviewed over 85 witnesses to date, many of them multiple times.

The Audit Committee held 84 meetings during the course of the Investigation.

The Investigation is now complete, subject to concluding one final interview related to the Company's course of dealing with a distributor and the Company's new independent auditor confirming their satisfaction with the adequacy of the Investigation. The Investigation's findings are summarized in the "Summary of the Findings of the Audit Committee Investigation" section in the proxy statement for the Delayed 2018 Meeting (the "2018 Proxy Statement").

Although the Investigation has taken approximately 15 months to be completed, by June 2018, the Audit Committee was able to conclude that the Company's previously issued financial statements and related information for fiscal years 2012 through 2016, and each of the interim periods within such years, as well as the financial statements for the three quarters of 2017 should be restated (the "Restatement") and should no longer be relied upon. As disclosed in the Item 4.02 Form 8-K that was filed on June 8, 2018 to report the Audit Committee's conclusion of non-reliance, "[t]he determination of the need to restate was based on investigation results to date which have primarily been focused on the accounting treatment afforded to such sales and distribution practices for two distributors for which certain implicit arrangements modified the

explicit terms of the contracts, impacting revenue recognition during specified periods.”

After this Item 4.02 Form 8-K was filed, as the Company explains in the 2018 Proxy Statement:

In connection with the Restatement, additional concerns arose, which resulted in the need to review and analyze the Company’s customary revenue recognition practices and related accounts for more than 20 distributors and 8,000 unique customers for 2012 to 2018. Additionally, as part of the Restatement, certain potential related party transactions are being analyzed to determine the impact on the Company’s financial statements.

Based on this review, we determined that certain arrangements with the Company’s distributors were not appropriately evaluated under the appropriate revenue recognition criteria applicable under GAAP. We have determined that the Company previously recognized revenue with respect to certain distributor relationships before all revenue recognition criteria were met. Specifically, we have determined that a fixed or determinable sales price did not exist, and/or collection was not reasonably assured, with respect to certain transactions where revenue was recognized at the time of shipment. Our review found that there were arrangements, or extra-contractual terms, with certain of our distributors regarding extended payment terms, return or exchange rights, and contingent payment obligations for sales to such distributors with respect to certain transactions. There were also concessions made subsequent to the shipment of inventory to the distributors and the related revenue recognition.

The impact of the Restatement on the Company’s income statement includes, but is not limited to, the following:

- revenue recognition, as discussed above;
- the presentation of gross revenue and net revenue and certain expenses related to discounts, returns or allowances, such as GPO fees and agency, consulting and speaker arrangements;
- the impact of changes in revenue recognition on cost of goods sold and commissions;
- the timing of certain general and administrative expense recognition;
- the impact on losses associated with contingency exposures; and
- the impact of the above on income tax.

The impact of the Restatement on the Company's balance sheet includes, but is not limited to, the following:

- changes in the amount of reported cash, due to the timing of certain cash collections;
- changes to reported accounts receivable and inventory and the related reserves on each, due to the restatement of revenue recognition;
- accrual balances that are impacted by the expense and contingency determinations discussed above; and
- the related income tax effects of the above.

We continue to work diligently to complete the Restatement. Due to the depth, breadth and complexity of issues identified through the Audit Committee Investigation, the scope of work in connection with the Restatement was expanded. However, we are nearing the end of this work. We have also made substantial progress in assessing the overall state of the Company and its business culture and we are implementing corrective processes to define, remediate and enhance internal procedures for business health and sustainability.

Second, on December 7, 2018, the Company disclosed in an Item 4.01 Form 8-K that Ernst & Young LLP ("EY") was resigning from its engagement to audit the Company's consolidated financial statements for the years ended December 31, 2017 and 2018, effective immediately. EY's resignation was not anticipated.

EY was engaged on August 4, 2017 to audit the Company's consolidated financial statements as of and for the year ended December 31, 2017. The 2017 audit was still in process at the time of EY's resignation, and EY did not issue any audit reports on the Company's consolidated financial statements for this or any other period. A discussion of the circumstances of EY's resignation is included in the "Changes In and Disagreements With Accountants on Accounting and Financial Disclosure" section of the 2018 Proxy Statement.

The Investigation was completed in May 2019, and its findings were publicly disclosed in a Form 8-K filed on May 23, 2019. On May 24, 2019, the Audit Committee approved the engagement of BDO USA LLP ("BDO") as the Company's new independent registered public accounting firm.⁵ BDO has been engaged to serve as the Company's auditor for the current

⁵ See Item 4.01 Form 8-K, filed on May 29, 2019.

fiscal year and all prior periods since 2016. The Audit Committee was not able to engage an independent auditor until its Investigation was completed.⁶

The Company understands the importance to its shareholders of maintaining and making publicly available, at all times, current audited financial statements. The Company's new management team, the Audit Committee, the entire Board, and their respective advisers are making every effort to put the Company in a position to furnish current and timely audited financial statements as soon as possible.

We believe that the foregoing shows why, at this time, the Company is not able in good faith to provide audited or unaudited financial statements in the 2018 Proxy Statement. We believe that the foregoing demonstrates that the Company has made a good faith effort to furnish audited financial statements before holding the Delayed 2018 Meeting.

e. MiMedx has determined that it has disclosed to shareholders all available material information necessary for the shareholders to make an informed voting decision in accordance with Regulation 14A.

With respect to the election of the Class II directors: as of the date of this request, one party has filed a preliminary proxy statement and another party has filed a definitive proxy statement, both indicating their intent to solicit proxies for their respective director nominee slates for the Delayed 2018 Meeting. One slate is being run by Mr. Petit, who has stated that he intends to nominate himself and two other candidates, David J. Furstenberg and Shawn P. George. The other slate is being run by Prescience Partners, LP, which has stated that it intends to nominate three candidates: Richard J. Barry, K. Todd Newton and M. Kathleen Behrens Wilsey.

In order for shareholders to make an informed voting decision with respect to these solicitations and the Company's solicitation, the Company believes that it is critically important to explain the Investigation's findings as well as how the Board and new management have been addressing and remediating those findings since last July. The 2018 Proxy Statement will contain the following sections that will be highly relevant and material to shareholders:

⁶ The reason being that only by learning the findings of the Investigation and subsequently speaking with EY about those findings would any potential successor auditor have the information it needed in order to determine whether to accept the MiMedx audit engagement in accordance with Audit Standard 2610: Initial Audits – Communications between Predecessor and Successor Auditors (“AS 2610”) and its own client acceptance procedures. *See* AS 2610 at ¶07 (“Inquiry of the predecessor auditor is a necessary procedure because the predecessor auditor may be able to provide information that will assist the successor auditor in determining whether to accept the engagement”); *id.* at ¶09 (“The successor auditor should make specific and reasonable inquiries of the predecessor auditor regarding matters that will assist the successor auditor in determining whether to accept the engagement. Matters subject to inquiry should include – Information that might bear on the integrity of management...Communications to audit committees or others with equivalent authority and responsibility regarding fraud, illegal acts by clients, and internal-control-related matters”).

- Summary of the Findings of the Audit Committee Investigation
- Legal Proceedings
- Risk Factors – Risks Related to the Proxy Solicitation and the Audit Committee Investigation
- Changes In and Disagreements With Accountants on Accounting and Financial Disclosure
- Management’s Discussion and Analysis
- Business
- Executive Compensation – Forfeited Awards Table
- Controls and Procedures

In addition, the Company will file a Form 8-K with an updated and complete exhibit index. The Company believes that its 2018 Proxy Statement, together with this Form 8-K, will disclose to shareholders all available material information necessary for them to make an informed voting decision.

II. REQUEST FOR RELIEF

For the reasons set forth above, MiMedx respectfully requests that the Division grant the Company exemptive relief under Section 36 of the Exchange Act from the requirement in Rule 14a-3(b) that audited financial statements be furnished to shareholders in connection with the Delayed 2018 Meeting. The Company believes strongly in the shareholder franchise and wants to hold an annual meeting at which shareholders can meaningfully exercise their franchise in accordance with both state and federal law.

The Company is facing a proxy contest, including with its former CEO and Chair, Mr. Petit, who was terminated for cause. Mr. Petit filed his definitive proxy statement for the Delayed 2018 Meeting on May 28, 2019.

If the Division does not grant the relief requested, then shareholders will be deprived of material information from the Company that could affect their voting decisions and their ability to vote on a fully informed basis with respect to competing director slates. In this situation, we believe that investor protection will be enhanced if the Company is permitted to file a proxy statement and to solicit shareholders for the Delayed 2018 Meeting.

If the Division grants this relief, MiMedx undertakes to disclose in current reports on Form 8-K any material developments relating to the audit of its consolidated financial statements for the years ended December 31, 2017 and 2018.

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In the event the Delayed 2018 Meeting is postponed or rescheduled to a later date by court action, MiMedx requests that this relief be extended to any such later date. MiMedx understands that any extension of such relief would be conditioned on the Company's continued inability to furnish audited financial statements as of any such later date. MiMedx undertakes to file definitive additional solicitation materials to disclose any subsequent material developments in a reasonable period of time before any such later date.

* * * * *

If you have any questions regarding this request, please call me at (202) 736-8615 at your convenience.

Sincerely,



Thomas J. Kim

Attachment: Exhibit A

EXHIBIT A

**IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

CITY OF HIALEAH EMPLOYEES'
RETIREMENT SYSTEM,

Plaintiff,

v.

MIMEDX GROUP, INC.,

Defendant.

Case No.: 2018 CA 002631

FINAL DECLARATORY JUDGMENT

THIS CAUSE came before the Court, with proper notice, on April 3, 2019 on Plaintiff's Motion for Final Summary Judgment and for entry of Final Declaratory Judgment. The Court having reviewed the pleadings, affidavits and other exhibits filed by all parties, having reviewed the memoranda of law filed by the parties, having heard argument of counsel, and being otherwise fully advised in the premises, the Court does hereby

ORDER AND ADJUDGE:

1. Plaintiff is entitled to final declaratory judgment pursuant to Fla. Stat., Sections 607.0701 and 607.0703 that the Defendant MiMedx Group, Inc., shall convene an annual shareholders meeting for the election of the three seats designated as Class II directors on June 17, 2019 at 9 o'clock AM at a location in Marietta,

Georgia to be determined (the "Annual Meeting"), and shall provide notice of that Annual Meeting in accordance with the Company's bylaws.

2. The Court expressly reserves jurisdiction for the determination of Plaintiffs' counsel's anticipated application for an award of attorneys' fees and costs, and as may be necessary for the enforcement of this Final Declaratory Judgment.

3. This Final Declaratory Judgment is without prejudice to the rights of Plaintiff or any other MiMedx shareholder to file a new action to seek to require the holding of a vote with respect to the election of Class III directors. The parties shall go forth without day.

DONE AND ORDERED at Tallahassee, Leon County, Florida, this 26 day of April, 2019.


Circuit Judge

Copies to all counsel

**Court NOT Responsible for Distributing
Copies to Parties Not in the E-Portal**