SEC Staff Issues Shareholder Proposal Guidance

Skadden

10 / 29 / 18

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Brian V. Breheny
Partner / Washington, D.C.
202.371.7180
brian.breheny@skadden.com

Marc S. Gerber
Partner / Washington, D.C.
202.371.7233
marc.gerber@skadden.com

Richard J. Grossman
Partner / New York
212.735.2116
richard.grossman@skadden.com

Hagen J. Ganem
Counsel / Washington, D.C.
202.371.7503
hagen.ganem@skadden.com

Four Times Square
New York, NY 10036
212.735.3000

1440 New York Avenue, N.W.
Washington, D.C. 20005

On October 23, 2018, the Division of Corporation Finance (Staff) of the U.S. Securities and Exchange Commission (SEC) published Staff Legal Bulletin No. 14J (SLB 14J), which provides important guidance concerning shareholder proposals. Specifically, SLB 14J addresses:

- board analyses that may be provided in the context of certain "ordinary business" or "relevance" no-action requests;
- the "micromanagement" prong of the "ordinary business" exclusion; and
- application of the "ordinary business" exclusion to certain proposals addressing senior executive or director compensation.

Board Analyses

At this time last year, the Staff published Staff Legal Bulletin No. 14I (SLB 14I), which invited companies to assist the Staff by including in no-action requests a discussion of the board's analysis of whether a proposal is "otherwise significantly related" to a company's business, in the case of a "relevance" no-action request under Rule 14a-8(i)(5), or focuses on sufficiently significant policy issues with a nexus to the company's business operations, in the case of an "ordinary business" no-action request under Rule 14a-8(i)(7). As described in our June 2018 *Insights*, although a number of companies attempted to utilize this guidance by including some discussion of the board's analysis in their no-action requests, virtually all of these attempts were unsuccessful. In the course of the post-proxy season engagement between the Staff and various shareholder proposal constituencies, many questioned whether the potential benefits of including a board analysis in a no-action request were illusory.

In an apparent attempt to address the frustration felt in some corners, the Staff, in SLB 14J, reiterated that a well-developed discussion of the board's analysis can assist the Staff in evaluating certain no-action requests. In particular, the Staff stated that a well-developed discussion "will describe in sufficient detail the specific substantive factors the board considered in arriving at its conclusion that an issue is not otherwise significantly related to its business … or is not sufficiently significant in relation to the company." The Staff then suggested a non-exclusive list of potential factors a board may consider:

- the extent to which the proposal relates to the company's core business activities;
- quantitative data, including financial statement impact, related to the matter that illustrates its lack of significance;
- whether the company already has addressed the issue in some manner, such that the difference between the proposal's specific request and the actions already taken does not present a significant policy issue for the company;
- the extent of shareholder engagement on the matter and level of shareholder interest expressed in that engagement;
- whether anyone other than the proponent has requested the type of action or information sought by the proposal; and
- whether the company's shareholders previously have voted on the matter and the board's views of the voting results, including whether any subsequent actions taken by the company or intervening events since the vote impact the significance of the issue to the company.

The Staff confirmed that the inclusion of a board analysis is not required in a no-action request and that the inclusion or absence of a board analysis does not create any presumption for or against exclusion of a proposal.

Micromanagement

The ordinary business basis for excluding a shareholder proposal has two distinct prongs. One prong looks to the substance of the proposal; the second prong relates to the degree to which a proposal "micromanages" the company "by probing too deeply into matters of a complex nature," which may occur if the proposal "involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies." The Staff explains in SLB 14J that a proposal can relate to subject matter that is appropriate for shareholder consideration but can be excludable because it does so in a manner that micromanages the company.

As we observed in our June 2018 *Insights*, micromanagement arguments found new life during the 2018 proxy season. Although SLB 14J does not change the overall substance of the micromanagement prong of the ordinary business exclusion, the discussion of micromanagement suggests that its newfound vitality is likely to continue into the upcoming shareholder proposal season.

Proposals Addressing Senior Executive or Director Compensation

For some time, proposals concerning the workforce generally have been excludable as relating to ordinary business matters, and proposals focusing on senior executive or director compensation have not been excludable as ordinary business. SLB 14J addresses three aspects of this framework.

First, SLB 14J articulates the existing framework for analyzing proposals that address both senior executive or director compensation and ordinary business matters. It explains that the Staff analyzes the focus of the proposal to ascertain whether the underlying concern of the proposal is an ordinary business matter or is a senior executive and/or director compensation matter. Accordingly, SLB 14J says that proponents cannot avoid exclusion by including an aspect of senior executive or director compensation in a proposal that otherwise focuses on an ordinary business matter.

Second, SLB 14J articulates a new approach regarding proposals that address aspects of senior executive or director compensation that also are available or applicable to a company's general workforce. Where a proposal focuses on aspects of compensation available only to senior executives or directors, generally the proposal may not be excluded as relating to an ordinary business matter. On the other hand, if a proposal focuses on aspects of compensation that are broadly available to a company's general workforce, in addition to its senior executives and/or directors, and the company demonstrates that the executives' or directors' eligibility to receive the compensation does not implicate significant compensation matters, the proposal may be excluded on ordinary business grounds. It remains to be seen whether this distinction will prove to be of practical use to companies in arguing for the exclusion of proposals.

Third, and perhaps most significantly, SLB 14J expresses a reversal of the Staff's prior position that proposals addressing senior executive or director compensation could not be excluded on the basis of micromanagement under the ordinary business exclusion. Consistent with the micromanagement discussion above, SLB 14J states that going forward the Staff may agree that proposals addressing senior executive or director compensation that seek intricate detail or seek to impose specific timeframes or methods for implementing complex policies can be excluded on the basis of micromanagement. Where, precisely, the Staff draws the line on micromanagement and senior executive or director compensation only will become clear over time as the Staff considers the arguments in the context of specific proposals.

For additional information, a copy of SLB 14J is available here.