

SEC Staff Issues New Shareholder Proposals Guidance

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The Division of Corporation Finance (Staff) of the U.S. Securities and Exchange Commission (SEC) recently published Staff Legal Bulletin No. 14I (SLB 14I), which provides important new and timely guidance for companies and shareholder proponents concerning shareholder proposals for the upcoming proxy season. SLB 14I addresses: (1) the ordinary business exclusion; (2) the relevance exclusion; (3) proposals by proxy; and (4) the use of images in proposals.

Notably, this new guidance may impact a company's board and governance committee processes relating to certain shareholder proposals. SLB 14I also may impact deficiency notices for proposals submitted by a representative or proxy of a shareholder.

'Ordinary Business' No-Action Requests

Rule 14a-8(i)(7) permits a company to exclude a proposal that "deals with a matter relating to the company's ordinary business operations." The SEC has stated that the policy underlying Rule 14a-8(i)(7) rests on two central considerations: the proposal's subject matter and the degree to which the proposal "micromanages" the company. The first consideration recognizes that certain 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." Shareholder proposals that implicate this first consideration generally may be excluded from a company's proxy statement unless, in the Staff's view, the proposal focuses on sufficiently significant policy issues related to a company's business operations that are appropriate for shareholder consideration.

SLB 14I states that this "significant policy exception" often raises difficult judgment calls for the Staff. The Staff now believes these determinations are, in the first instance, matters that the company's board of directors is "generally in a better position to determine." Therefore, in such cases, the Staff expects a company's no-action request seeking to exclude a proposal relating to ordinary business operations to include "a discussion that reflects the board's analysis of the particular policy issue raised and its significance." The Staff notes that it would be most helpful if that discussion detailed the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned.

As a result of this new guidance, companies will need to consider whether a proposal raises a potential significant policy issue. If so, companies will need to consider whether having the board or a board committee make a determination regarding the significance of the issue to the company's business would benefit the company's chances of excluding the proposal under Rule 14a-8(i)(7). It remains to be seen what level of board analysis and process, and how much description in a no-action request, will be viewed as sufficiently helpful to the Staff's consideration of the issue.

'Relevance' No-Action Requests

Rule 14a-8(i)(5) permits a company to exclude a proposal that "relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business."

SLB 14I notes that the Staff has infrequently granted no-action relief under this exclusion because the Staff has focused its analysis on whether a company conducted any amount of business related to the issue raised in the proposal and whether that issue was of broad social or ethical concern. Going forward, the Staff's analysis will focus

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on a proposal's "significance to the company's business when it otherwise relates to operations that account for less than 5% of total assets, net earnings and gross sales." Similar to the guidance concerning Rule 14a-8(i)(7), described above, the Staff believes that a company's board of directors is better positioned to determine whether a proposal topic is "otherwise significantly related to the company's business." Accordingly, the Staff will expect that no-action requests seeking to exclude a proposal as irrelevant include a discussion of the board's analysis concerning the proposal's significance to the company. Again, the Staff indicates that the discussion will be most helpful if it details the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned.

Proposals Submitted on Behalf of Shareholders

SLB 14I notes the Staff's view that submission of proposals through a representative, known as "proposal by proxy," is consistent with Rule 14a-8. However, the Staff recognizes the challenges that such proposals may present, including whether the eligibility requirements under Rule 14a-8(b) have been satisfied and whether a shareholder knows that a proposal is being submitted on its behalf. Going forward, the Staff expects proposals by proxy to provide documentation describing the shareholder's delegation of authority to the proxy. Specifically, pursuant to SLB 14I, the Staff generally expects such documentation to:

- identify the shareholder-proponent and the person or entity selected as proxy;
- identify the company to which the proposal is directed;

- identify the annual or special meeting for which the proposal is submitted;
- identify the specific proposal to be submitted; and
- be signed and dated by the shareholder.

Proposals by proxy that do not provide this information may be excludable under Rule 14a-8(b), subject to notifying the proponent of the specific defects within 14 calendar days of receiving the proposal so that the proponent has an opportunity to cure the defects.

Images in Proposals

Rule 14a-8(d) provides that a "proposal, including any accompanying supporting statement, may not exceed 500 words." Consistent with recent no-action letters, SLB 14I notes the Staff's view that graphs and/or images in shareholder proposals are not prohibited by the 500-word rule. The Staff states, however, that graphs and/or images may be excludable under Rule 14a-8(i)(3) where those graphs and/or images make the proposal false or misleading, render the proposal vague or indefinite, directly or indirectly impugn character, integrity or personal reputation, or are irrelevant to the subject matter of the proposal. The Staff also notes that words contained in graphs and images would be counted toward the 500-word limit.

For additional information, a copy of the SLB 14I is [available here](#).

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