

SEC GUIDES ON TACKLING SHAREHOLDER PROPOSALS

Bulletin offers new insight into how to frame no-action requests

On October 23, 2018, the SEC's Division of Corporation Finance published Staff Legal Bulletin No 14J (SLB 14J), providing 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 'micro-management' prong of the 'ordinary business' exclusion, and the application of the 'ordinary business' exclusion to certain proposals addressing senior executive or director compensation.

BOARD ANALYSES

At this time last year, the division 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 shareholder 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).

Although a number of companies attempted to use 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 SEC staff and various shareholder proposal representatives, many observers

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 reiterated in SLB 14J that a well-developed discussion of the board's analysis can help the staff in evaluating certain no-action requests. In particular, they 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 has already 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
- Whether the company's shareholders have previously 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.

MICRO-MANAGEMENT

The ordinary business basis for excluding a shareholder proposal has two distinct prongs. One looks to the substance of the proposal; the second relates to the degree to which a proposal 'micro-manages' the company 'by probing too deeply into matters of a complex nature.' This 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 micro-manages the company.

Micro-management arguments found new life during the 2018 proxy season. Although SLB 14J does not change the overall substance of the micro-management prong of the ordinary business exclusion, the discussion of micro-management suggests its newfound vitality is likely to continue into the upcoming shareholder proposal season.

PROPOSALS ON 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, the bulletin 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 states 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 and that are also 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 previous position that proposals addressing senior executive or director compensation could not be excluded on the basis of micro-management under the ordinary business exclusion.

Consistent with the micro-management discussion above, SLB 14J states that in future the staff may agree that proposals addressing senior executive or director compensation that seek intricate detail or seek to impose specific time frames or methods for implementing complex policies can be excluded on the basis of micro-management.

Where, precisely, the staff draw the line on micro-management and senior executive or director compensation will become clear only over time as the staff consider the arguments in the context of specific proposals.

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