SEC Staff Issues Additional Shareholder Proposal Guidance

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On October 16, 2019, the Division of Corporation Finance (Staff) of the U.S. Securities and Exchange Commission (SEC) published Staff Legal Bulletin No. 14K (SLB 14K), providing updated guidance concerning shareholder proposals. Specifically, SLB 14K:

- addressed and encouraged the use of board analyses to demonstrate a policy issue raised by a proposal is not significant to a company under the ordinary business exclusion;
- discussed the scope and application of the micromanagement prong of the ordinary business exclusion; and
- endorsed a "plain meaning" approach to proof of ownership letters.

Board Analyses

SLB 14K makes a trilogy of Staff Legal Bulletins issued in successive shareholder proposal seasons relating to the board analysis concept introduced in late 2017. As a brief reminder, Staff Legal Bulletin No. 14I invited companies to include the board's analysis of the significance of a proposal in ordinary business and relevance no-action requests and emphasized that a well-developed discussion of a board analysis would assist the Staff in its review of no-action requests. Staff Legal Bulletin No. 14J (SLB 14J) reiterated the Staff's view that a board analysis could be helpful in analyzing no-action requests and provided a nonexclusive list of items that might be included in a "well-developed discussion." As described in our June 2019 *Insights*, however, the vast majority of attempts to exclude proposals utilizing a board analysis have so far been unsuccessful.

SLB 14K again reiterated the view that a well-developed discussion of the board's analysis of the significance of a proposal can assist the Staff in evaluating certain no-action requests. Notably, in SLB 14K the Staff emphasized that no-action requests featuring a robust discussion of the board's analysis are helpful even when the Staff does not explicitly reference the board analysis in its response letter. The Staff also noted that if a no-action request in which significance is an issue does not include a board analysis, the Staff may be unable to state a view regarding exclusion.

SLB 14K provided additional guidance on two of the factors listed in SLB 14J that may form part of a well-developed discussion: (i) the "delta" between a proposal's specific request and the actions the company has already taken; and (ii) prior voting results on a particular issue.

"Delta" analysis. SLB 14K explained that a discussion clearly identifying the "delta" between a proposal's specific request and the actions the company already has taken may be useful where companies have addressed the policy issue raised by the proposal in some manner but may not have substantially implemented the proposal's specific request. Accordingly, a useful delta analysis should explain in detail why any differences do not represent a significant policy issue to the company.

Prior voting results analysis. SLB 14K indicated that the Staff does not find it persuasive when a board analysis focuses on the fact that a majority of shareholders voted against the prior proposal, attributes prior voting results to proxy advisory firm recommendations or analyzes results based on the number of shares outstanding. The Staff indicated that a board analysis should address the prior voting results by explaining how the company's subsequent actions, intervening events or other objective indicia of shareholder engagement on the issue bear on the significance of the issue to the company.

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Micromanagement

A second prong of the ordinary business exclusion is whether a proposal "micromanages" the company. As we observed in our June 2019 *Insights*, micromanagement arguments, which historically had a low success rate, recently have enjoyed a renaissance.

SLB 14K provided insight into the way in which the Staff analyzes micromanagement arguments. In particular, SLB 14K made clear that micromanagement determinations turn on the level of prescriptiveness with which a proposal approaches its subject matter. In this regard, the Staff noted that precatory proposals, although nonbinding, can still rise to the level of micromanagement if the method or strategy for implementing the action requested by the proposal is overly prescriptive, such that it might limit the judgment and discretion of the board or management. In addition, SLB 14K explained that when determining a proposal's underlying concern or central purpose, the Staff looks not only to the "resolved" clause but to the proposal in its entirety. Accordingly, a proposal's supporting statement should be reviewed to determine if it modifies or refocuses the intent of the resolved clause, such that the proposal as a whole seeks to micromanage the company.

To illustrate the Staff's approach, SLB 14K explained that the Staff found proposals that sought an annual report on "short-, medium- and long-term greenhouse gas targets aligned with the greenhouse gas reduction goals established by the Paris Climate Agreement" excludable on the basis of micromanagement because these proposals effectively required the adoption of time-bound targets to meet the goals of the proposal. In contrast, proposals seeking a report "describing if, and how, [a company] plans to reduce its total contribution to climate change and align its operations and investments with the Paris [Climate] Agreement's goal" were not excludable on the basis of micromanagement because the proposals deferred to management's discretion and allowed for flexibility in implementing the proposals.

The Staff suggested that when making micromanagement arguments, companies should include an analysis of how the proposal may unduly limit the ability of the board and/or management to manage complex matters with the level of flexibility necessary to fulfill their fiduciary duties to shareholders.

Proof of Ownership Letter

Shareholder proposals may be excluded if a proponent is unable to demonstrate that he or she meets minimum ownership requirements. Recognizing that such determinations often turn upon highly technical readings of a proponent's proof of ownership letter, Staff Legal Bulletin No. 14F previously outlined a suggested format for providing proof of ownership.

In SLB 14K, the Staff explained that its suggested format is not mandatory. The Staff also observed that some companies have applied an "overly technical" reading of proof of ownership letters. SLB 14K explained that the Staff generally does not find such arguments persuasive and instead takes a "plain meaning" approach to interpreting the text of proof of ownership letters and expects companies to apply a similar approach.

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

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