Harvard Law School Forum on Corporate Governance

Shareholder Proposal No-Action Requests in the 2020 Proxy Season

Posted by Marc S. Gerber, Hagen J. Ganem, and Ryan J. Adams, Skadden, Arps, Slate, Meagher & Flom LLP, on Sunday, September 27, 2020

Editor's note: Marc Gerber is partner, Hagen Ganem is counsel and Ryan Adams is an associate at Skadden, Arps, Slate, Meagher & Flom LLP. This post is based on their Skadden memorandum.

In October 2019, for the third consecutive year, the Staff of the Division of Corporation Finance (Staff) of the U.S. Securities and Exchange Commission (SEC) issued guidance concerning companies' ability to exclude shareholder proposals from their proxy statements by addressing the significance of a proposal through a board analysis. That guidance also discussed the ability to exclude proposals on the basis of micromanagement. The 2020 proxy season witnessed a small but potentially meaningful uptick in the number of successful no-action requests containing a board analysis, as well as limits on the success of micromanagement arguments.

During the summer of 2020, the Staff informally indicated that it was not planning on issuing further guidance on these topics this year. As a result, taking stock of the guideposts provided by no-action letters from the 2020 proxy season is critically important as calendar year companies anticipate the wave of shareholder proposals they are likely to receive over the coming months.

Background on Board Analysis

The Staff first introduced the notion of including a board analysis in certain shareholder proposal no-action requests in Staff Legal Bulletin No. 14I (SLB 14I). Specifically, the Staff indicated that a board analysis could be helpful to the Staff in making determinations required to be made for exclusion of proposals relating to the company's "ordinary business" under Rule 14a-8(i)(7) or as lacking "relevance" to the company under Rule 14a-8(i)(5). One year later, in Staff Legal Bulletin No. 14J (SLB 14J), the Staff provided further guidance as to the types of factors that might be addressed in a "well-developed" board analysis. Finally, in October 2019, in Staff Legal Bulletin No. 14K (SLB 14K), the Staff expanded its guidance on two of those factors—the "delta analysis" and "prior voting results"—perhaps foreshadowing the importance of these two factors.[1]

As described in greater detail in SLB 14K:

[1] Summaries of SLB 14I, SLB 14J and SLB 14K can be found here, here and here.

- A “delta analysis” considers whether the proposal raises a significant policy issue for a company by looking to the differences or “delta” between the proposal’s specific request and the actions the company already has taken to address the issue in some way.
- As to prior voting results, a board analysis should explain the board’s views of the voting results on the matter at issue and how to view those results in the context of intervening events or other objective indicia of shareholder engagement on the topic.

Prior to the 2020 proxy season, there had been only two successful attempts to exclude shareholder proposals by including a board analysis in the no-action request—and both were determined on “relevance” grounds. No company had succeeded in utilizing a board analysis to exclude a proposal as “ordinary business.”[2]

Board Analyses See Increasing Success

According to the Staff, the number of no-action requests that included a board analysis has declined each year since the concept was introduced. With a track record of one successful board analysis per year for 2018 and 2019, this decline is unsurprising.

Despite this record of futility, inclusion of a board analysis appears to have been pivotal in granting no-action requests during the 2020 proxy season to three companies on ordinary business grounds (all relating to the same proposal) and to two companies on relevance grounds (one during the traditional proxy season and one over the summer). In addition, in one novel example, the inclusion of a board analysis appears to have been persuasive in granting a no-action request on the grounds that the proposal had been substantially implemented. Finally, the Staff continues to note instances where the absence of a board analysis prevents the Staff from granting the request.

Ordinary Business

In the case of the ordinary business exclusion, a leading technology company argued that a proposal requesting a report on the potential risks associated with omitting the terms “viewpoint” and “ideology” from its equal employment opportunity policy was not significant to the company and did not transcend its ordinary business operations under Rule 14a-8(i)(7). The company’s argument was based, in large part, on an analysis by its nominating and corporate governance committee that concluded the proposal was not significant to the company. The committee’s analysis discussed the fact that the company already had robust employee policies relating to inclusion, diversity and antidiscrimination and that the difference — or delta — between those policies and the proposal’s request did not represent a significant policy issue for the company. The committee’s analysis also noted that investors had not demonstrated significant interest in the proposal’s topic and that a similar proposal from the proponent received only 1.7% shareholder support at the company’s 2019 annual meeting.

In granting relief under Rule 14a-8(i)(7), the Staff noted that it had considered the committee’s analysis and highlighted that the analysis discussed the delta between the proposal and the company’s current policies and practices, as well as the lack of shareholder support for a similar

[2] The lack of success of board analyses in prior proxy seasons is described in greater detail here and here.

proposal in 2019. Notably, the two factors highlighted in the Staff's response letter were the two factors focused on in SLB 14K. Two other companies received no-action relief under the ordinary business exclusion for identical proposals from the same proponent, after having included a similar board analysis in their no-action requests, implying that the Staff applied the same reasoning to their requests.

Relevance

In the case of the relevance exclusion, a large hotel company argued that a proposal requesting the company prohibit "wild animal" displays at its hotels was not relevant to the company's business under Rule 14a-8(i)(5). After demonstrating that the proposal was not economically significant to the company, the company submitted an analysis from its nominating and corporate governance committee that concluded the proposal was not otherwise significant to the company. The committee's analysis noted, among other factors, that the displays at issue in the proposal occurred in limited situations and were provided by third parties and that shareholders had never before raised an issue with the displays. In granting relief under Rule 14a-8(i)(5), the Staff stated that the committee's analysis was "dispositive" to its determination.

More recently, a second company was able to exclude a proposal seeking a report disclosing the company's policies and procedures for making political contributions and the company's actual political contributions and expenditures. The company argued that it had made a single, small political contribution over the prior five years and included an analysis by the nominating and governance committee concluding that the proposal was not otherwise significantly related to the company's business. This result represented the second consecutive year where a company was able to exclude a political contributions shareholder proposal on relevance grounds.

Substantial Implementation

The Staff's legal bulletins discussing board analyses did not raise the prospect that a board analysis might be helpful in arguing for exclusions on bases other than ordinary business or relevance. In fact, SLB 14K described the delta analysis as potentially helpful where a company already addressed a matter in a way that does not permit exclusion on substantial implementation grounds. Nevertheless, in one example, the Staff cited a company's board analysis in granting relief on the grounds of substantial implementation.

Specifically, in the case of a large financial institution that had received a proposal calling for the board of directors to provide guidance on how the company would implement the Business Roundtable's Statement of the Purpose of a Corporation, the Staff concurred that the company could exclude the proposal on the basis of substantial implementation. The Staff's letter noted the company's representation that the company's corporate governance and nominating committee "again reviewed the BRT Statement and determined that no additional action or assessment is required, as the Company already operates in accordance with the principles set forth in the BRT Statement with oversight and guidance by the Board of Directors, consistent with the Board's fiduciary duties."

Absence of Board Analysis Noted

In SLB 14K, the Staff reminded companies that a board analysis may be required when a proposal has a policy implication that appears relevant to a particular company, as opposed to having significance in a broad or abstract manner. For example, in one instance, the Staff wrote that it was unable to concur with a company's request to exclude a proposal under the ordinary business exclusion where a proposal suggested that the policy issue of the humane treatment of animals was significant to the company and the company did not provide a board analysis. In denying relief, the Staff wrote that the company "must meet its burden of showing that the Proposal is not significant to it" and specifically noted that the company did not provide a board analysis.

On the other hand, a no-action request may not require a board analysis where the policy implication of a proposal is not tied to the particular company. In this regard, the Staff granted relief for a proposal requesting a company report on the use of contractual provisions requiring employees to arbitrate employment-related claims. In its response letter, the Staff noted that "notwithstanding some references in the supporting statement to potentially important social issues," the proposal dealt with an ordinary business matter and did not focus on any particular policy implication of the use of arbitration at the company in question.

Micromanagement: Continuing Success, but Not Always

Arguments to exclude shareholder proposals under the micromanagement prong of the ordinary business exclusion have had significant success the past few proxy seasons, and this basis for exclusion was the topic of Staff guidance in SLB 14J and SLB 14K. As a result, the number of no-action requests containing a micromanagement argument increased in the 2020 proxy season, but the number of requests prevailing on this basis declined. Whether this decline continues for the upcoming proxy season will be closely watched.

SLB 14K made clear that micromanagement determinations turn on the level of prescriptiveness with which a proposal approaches its subject matter. The Staff noted that proposals that unduly limit the ability of the board to manage complex matters with the level of flexibility necessary to fulfill their fiduciary duties may be examples of overly prescriptive proposals that are excludable due to micromanagement.

This approach was reflected in a number of no-action decisions issued during the 2020 proxy season, particularly with respect to executive compensation matters. For example, the Staff granted relief on the basis of micromanagement where a proposal would require the company's compensation committee to adopt a bonus deferral scheme and prohibit full payment of short-term bonus awards even though the proposal would allow the committee discretion as to how to fully implement the mandated program. In contrast, the Staff denied a company's micromanagement argument where a proposal sought augmented disclosure in the company's filings relating to the use of non-GAAP measures by the compensation committee but did not prescribe the method or manner in which the information should be presented.

The application of the micromanagement prohibition on prescriptiveness appears to be more nuanced when a proposal relates to matters of corporate governance. Although not articulated by the Staff, there may be a distinction between proposals that call for governance changes that also

relate to a social or environmental matter versus those that do not also relate to such matters. For example, the Staff rejected the argument that a proposal mandating an independent chair policy was overly prescriptive and deprived the board of directors of the necessary flexibility to choose the desired approach to board leadership. In denying the micromanagement argument, the Staff cited the fact that the proposal did not encompass an ordinary business matter. In contrast, the Staff granted relief on the basis of micromanagement where a proposal requested that the board create a new board committee on climate risk, with specific requirements as to the committee's role. The Staff indicated that the proposal "unduly limits the board's flexibility and discretion in determining how the board should oversee climate risk."

Conclusion

Although companies largely have struggled to find success excluding shareholder proposals through a board analysis, the traction gained in the 2020 proxy season may foster some glimmer of hope as previous guidance provided by the Staff begins to yield positive results. Some companies also may find that a board analysis is the only viable avenue to exclude a proposal that, at least on its face, appears to raise a policy implication that appears relevant to a particular company. Finally, while the Staff's recent views on micromanagement have been welcome, the availability of a successful argument remains heavily dependent on a proposal's specific request. These no-action grants and denials provide significant reference points as companies, shareholder proponents and the Staff prepare for the upcoming Rule 14a-8 no-action letter season.