



SEC Staff Issues New Shareholder Proposal Guidance

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On November 3, 2021, the Division of Corporation Finance (Staff) of the U.S. Securities and Exchange Commission (SEC) published Staff Legal Bulletin No. 14L (SLB 14L), which explicitly rescinds Staff Legal Bulletin Nos. 14I, 14J and 14K (SLB 14I, 14J and 14K) (issued in 2017, 2018 and 2019, respectively), and effectively resets the Staff's approach to the "ordinary business" and "relevance" exclusions for shareholder proposals to the pre-November 2017 approach.

The rescinded Staff Legal Bulletins introduced and expounded on the concept of a board analysis to support no-action requests to exclude shareholder proposals relating to the company's "ordinary business" or lacking "relevance." SLBs 14J and 14K also provided guidance concerning the micromanagement prong of the "ordinary business" exclusion.

The new SLB 14L also restates (with technical updates) portions of the rescinded guidance relating to the use of images in shareholder proposals and proof of ownership letters. In addition, SLB 14L provides guidance on the use of email with respect to shareholder proposals.

Significant Policy Exception to "Ordinary Business"

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." Under this exclusion, companies may exclude proposals relating to matters that 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" unless, in the Staff's view, the proposal focuses on policy issues that are sufficiently significant because they transcend ordinary business and would be appropriate for a shareholder vote.

The rescinded Staff Legal Bulletins established that the significance of an issue should be viewed in the context of the particular company and encouraged companies to provide a board analysis assessing whether the particular policy issue raised by the proposal was sufficiently significant to the company.

SLB 14L rejects that approach, and instead, the Staff will focus on whether the proposal raises issues with broad societal impact such that they transcend ordinary business. As an example, SLB 14L provides that "proposals squarely raising human capital management issues with a

broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.”

Micromanagement

Under the ordinary business exclusion, companies may exclude a proposal that “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.” In SLB 14K, the Staff expressed a view that its micromanagement determinations would turn on the prescriptiveness of a proposal.

SLB 14L reverses course on this approach and, going forward, the Staff will take a “measured approach” to micromanagement arguments. SLB 14L specifically notes that proposals seeking detail or seeking to promote timeframes or methods “do not per se constitute micromanagement” and that the Staff will focus on “the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management.” In addition, SLB 14L explains that in order to assess whether a proposal probes matters “too complex” for shareholder consideration, the Staff may consider “the sophistication of investors generally on the matter, the availability of data, and the robustness of public discussion and analysis on the topic” as well as “references to well-established national or international frameworks when assessing proposals related to disclosure, target setting, and time frames.”

SLB 14L further notes that the Staff will not concur with exclusion of climate change proposals that “suggest targets or timelines so long as the proposals afford discretion to management as to how to achieve such goals.”

Relevance

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 encouraged companies to submit a board analysis to support the argument that the proposal topic was not “otherwise significantly related to the company’s business.” The new guidance rejects the need for a board analysis and reverts to the prior approach of not excluding proposals that “raise issues of broad social or ethical concern related to the company’s business” even if the relevant business falls below the economic thresholds of Rule 14a-8(i)(5).

Images in Proposals; Proof of Ownership Letters

The rescinded Staff Legal Bulletins contained guidance on the topics of images in proposals and proof of ownership letters. SLB 14L reissues that prior guidance, generally, with technical updates. This guidance expresses the Staff’s view that the use of graphs and/or images to convey information about a proposal is not prohibited by the 500-word rule. In addition, SLB 14L updates suggested language concerning broker letters to reflect the revised ownership thresholds adopted in the September 2020 amendments to Rule 14a-8(b) and reiterates that the Staff generally does not find overly technical arguments regarding broker letters persuasive.

Further, SLB 14L expresses a new Staff view that companies should identify any specific defects in the proof of ownership letter, even if the company previously sent a deficiency notice prior to receiving proof of ownership.

Use of Email

SLB 14L encourages proponents wishing to submit a proposal by email to contact the company to obtain the correct email address, and for companies to provide an appropriate email address upon request. The Staff also encourages senders of email to seek confirmation of receipt from the recipient and for recipients to provide such confirmation when using email to transmit shareholder proposals, deficiency letters and responses to deficiency letters.

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