

Client Alert: SEC Staff Legal Bulletin 14M Rescinds Prior Staff Guidance and Implements More Company-Friendly Approaches to Shareholder Proposals under Rule 14a-8

Publications

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On February 12, 2025, the Division of Corporation Finance (Staff) of the US Securities and Exchange Commission (SEC) issued Staff Legal Bulletin No. 14M (SLB 14M) concerning shareholder proposals for public company proxy statements. SLB 14M rescinds the Staff's social and ethical policy-focused Staff Legal Bulletin No. 14L (SLB 14L) from 2021, and will make it easier for a public company to exclude from its proxy statement certain types of shareholder proposals made by activist stockholders. SLB 14M also provides additional changes and clarifications to other Staff guidance concerning shareholder proposals.

Background

Rule 14a-8 promulgated by the SEC under the Securities Exchange Act of 1934 requires a public company to include in its proxy statement a proposal submitted by a company shareholder who meets certain ownership requirements and satisfies certain other substantive and procedural requirements in respect of that proposal. Rule 14a-8 also provides a public company with several specific bases under which the company may exclude a shareholder proposal from its proxy statement, after submitting its reasons for exclusion to the SEC Staff in a "no-action" request. Those bases for exclusion include, among other things, an economic relevance exclusion under Rule 14a-8(i)(5) and an ordinary business exclusion under Rule 14a-8(i)(7).

In 2021, the Staff issued social and ethical policy-focused SLB 14L, which at the time made it more difficult for a public company to rely on Rule 14a-8(i)(5) and Rule 14a-8(i)(7) to exclude certain types of shareholder proposals from the company's proxy statement under some circumstances. This resulted in a significant increase in the number of social and ethical policy-based shareholder proposals from activist shareholders that were included in many public companies' proxy statements.

In light of the guidance in new SLB 14M and the rescission of old SLB 14L, a public company will have fewer roadblocks to excluding certain types of shareholder proposals from its proxy statement under Rule 14a-8(i)(5) and Rule 14a-8(i)(7), if the company does not wish to include such proposal in its proxy statement. SLB 14M reflects a shift by the Staff to a more pro-company framework for shareholder proposals, similar to the approach taken prior to the Gensler era at the SEC.

Changes in Staff’s Approach to the Rule 14a-8(i)(5) Economic Relevance Exclusion

By rescinding SLB 14L, the Staff has returned to a broader, and more company-friendly, reading of Rule 14a-8(i)(5)’s economic relevance exclusion. Rule 14a-8(i)(5) allows a company to exclude a shareholder proposal from its proxy statement if the proposal “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.”

When the Staff issued the now-rescinded SLB 14L in 2021, it effectively signaled that it would bar companies from relying on Rule 14a-8(i)(5)’s economic relevance exclusion if the shareholder proposal in question “raise[d] 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).” This 2021 change (which was stylized at that time by the Staff as a return to pre-2017 approaches) naturally resulted in a significant increase in the volume of shareholder proposals related to social policy matters.

Under the new guidance in SLB 14M, the Staff is now making it significantly easier for public companies to rely on Rule 14a-8(i)(5) to exclude proposals relating to operations that fall below the 5 percent thresholds in the rule. While SLB 14M acknowledges that a shareholder proponent can raise social or ethical issues in any argument it makes that its shareholder proposal is “significantly related to the company’s business” and thus not excludable under Rule 14a-8(i)(5), SLB 14M notes that the shareholder proponent will need to show that the issues have a significant effect on the company’s business. SLB 14M further emphasizes this change in approach by stating that “[t]he mere possibility of reputational or economic harm alone will not demonstrate that a proposal is ‘otherwise significantly related to the company’s business.’”

SLB 14M does also acknowledge that the analysis as to whether a shareholder proposal is “otherwise significantly related to the company” continues to be highly dependent upon the particular facts of the company and the proposal--and that a matter significant to one company may not be significant to another. Further, SLB 14M notes that the Staff would generally view substantive governance matters to be significantly related to almost all companies, indicating a view that companies will be generally unable to rely on Rule 14a-8(i)(5) to exclude proposals on substantive governance matters.

Changes in Staff’s Approach to the Rule 14a-8(i)(7) Ordinary Business Exclusion

By rescinding SLB 14L, the Staff has also returned to a more company-friendly approach to applying Rule 14a-8(i)(7)'s ordinary business exclusion. Rule 14a-8(i)(7) allows a company to exclude a shareholder proposal from its proxy statement if the proposal "deals with a matter relating to the company's ordinary business operations."

The SEC has stated that the general underlying policy of this ordinary business exclusion is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual meeting."¹ The SEC has also stated that this policy rests on two central considerations – the first relates to the subject matter of the proposal, and the second relates to the degree to which the proposal micromanages the company.²

1. Subject Matter Significance

Under the first consideration, long-standing SEC guidance indicates 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" and suggests that proposals that raise such matters (e.g., the hiring, promotion and termination of employees, decisions on production quality and quantity, and the retention of suppliers) should be viewed as relating to a company's ordinary business operations.³ However, that same SEC guidance also notes that proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be excludable under the first consideration "because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote."⁴

Under the now-rescinded SLB 14L, the Staff in 2021 indicated that (1) the Staff, in assessing whether a shareholder proposal is excludable under Rule 14a-8(i)(7), would not focus on determining the nexus between a policy issue and the company, but would instead focus on the social policy significance of the issue that is the subject of the shareholder proposal, and (2) the Staff, in making this determination, would consider whether the proposal raises issues with a broad societal impact such that they transcend the ordinary business of the company. SLB 14L had the effect of allowing relatively small shareholders (some having specific agendas other than the economic performance of the company) to force public companies to include in their proxy statements shareholder proposals on a larger array of topics addressing societal issues, even if the issues had only a tangential relationship to the company's business. As explained by the Staff with the following example in the now-rescinded SLB 14L: "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."

SLB 14M now reflects a more company-favorable change in the Staff’s approach to the ordinary business exclusion under Rule 14a-8(i)(7). SLB 14M now notes that “the staff will take a company-specific approach in evaluating significance, rather than focusing solely on whether a proposal raises a policy issue with broad societal impact or whether particular issues or categories of issues are universally ‘significant’” and that a policy issue that is significant to one company may not be significant to another. SLB 14M further notes that the Staff’s “analysis will focus on whether the proposal deals with a matter relating to an individual company’s ordinary business operations or raises a policy issue that transcends the individual company’s ordinary business operations.” While the old approach under SLB 14L (written in 2021) made it difficult at times for a company to exclude a shareholder proposal addressing a topic with a broad general societal impact, the new approach under SLB 14M will make it easier for a company to use Rule 14a-8(i)(7) to exclude such a proposal on such a topic if it is not significant for the particular company.

2. Degree of Micromanagement

Under the second consideration, long-standing SEC guidance suggests that shareholder proposals could be excludable under Rule 14a-8(i)(7) depending on “the degree to which the proposal seeks to ‘micro-manage’ the company by probing too deeply into matters of a company nature upon which shareholders, as a group, would not be in a position to make an informed judgment.”⁵

SLB 14M reinstated portions of two previous staff legal bulletins (which had been previously rescinded under now-rescinded SLB 14L in 2021) related to the topic of micromanagement under Rule 14a-8(i)(7) that clarified, among other things, that in considering arguments for exclusion based on “micromanagement,” the Staff would look to whether the proposal seeks intricate detail or imposes a specific strategy, method, action, outcome or timeline for addressing an issue, thereby “supplanting the judgment of management and the board.” The reinstatement of this prior guidance should provide public companies with leeway to make additional arguments to potentially exclude, for example, proposals which set specific targets with specific dates in mind (e.g., climate change or decarbonization proposals) or proposals which may overly micromanage some employee compensation matters.

Additional Guidance in SLB 14M

While the changes in Staff guidance related to the Rule 14a-8(i)(5) economic relevance exclusion and the Rule 14a-8(i)(7) ordinary business exclusion are the most noteworthy changes stemming from SLB 14M, the bulletin included a number of additional clarifications to or confirmations of prior Staff guidance, including as follows:

- Boards are not expected to provide their analysis of a particular policy issue and its significance to the company in no-action requests related to Rule 14a-8(i)(5) or Rule 14a-8(i)(7);

- Shareholders are not precluded from using graphics and images in their proposals, but any words used in the graphics or images would count toward the 500 word limit of Rule 14a-8(d) and graphics or images could be excludable under Rule 14a-8 if they, for example, make the proposal false or misleading or are irrelevant to a consideration of the subject matter of the proposal;
- Companies should not seek to exclude a shareholder proposal simply because the shareholder's proof of ownership letter does not precisely match the format set forth in Staff Legal Bulletin 14F or SLB 14L;
- Shareholders should submit proposals by means that allow proof of delivery;
- Both shareholders and companies should seek a confirmatory receipt reply email when using electronic delivery for Rule 14a-8 matters, and if confirmation of receipt is not provided, should seek alternative means of communication other than electronic means; and
- Both shareholder and companies should acknowledge receipt of emails relating to Rule 14a-8 matters as requested.

Practical Considerations for Public Companies

The Staff confirmed in SLB 14M that a company that submitted a no-action request relating to Rule 14a-8 matters prior to the publication of SLB 14M will have its no-action request reviewed under the new guidance in SLB 14M, but stressed that any previously submitted request would not need to be resubmitted unless the company wishes to raise new arguments in light of the new guidance. If the deadline for no-action request submission has passed, the Staff has also indicated that the Staff may permit a late no-action request submission so long as any new legal arguments presented in the letter relate to SLB 14M.

In light of the new guidance, public companies could consider the following:

1. Whether to submit a no-action request regarding an existing shareholder proposal:

Since a greater number of shareholder proposals are likely to be potential candidates for exclusion under SLB 14M's revised approach to the economic relevance and ordinary business exclusions, a public company that received an undesirable shareholder proposal could consider whether it can still avail itself of no-action relief to exclude that proposal from its proxy statement. We expect an uptick in no-action requests following SLB 14M, so companies would be well-advised to promptly submit any desired no-action requests.

2. Negotiate with shareholder proponents for withdrawal: Even if a public company may not want to immediately submit a no-action request to the SEC in respect of an undesirable shareholder proposal, the company could consider whether it may be able to use any of the company-favorable approaches under SLB 14M as leverage in negotiations with certain proponents to withdraw their proposal.

3. **Prepare to file additional soliciting materials if a proposal is eventually excluded:** If a public company elects to seek no-action relief to exclude a shareholder proposal in light of the new guidance under SLB 14M close in time to when it plans to print and mail its proxy statement to its shareholders, the company could consider including the shareholder proposal in the proxy statement and moving forward with its printing and mailing while simultaneously preparing to file additional soliciting materials – if and when such no-action relief is later granted – notifying shareholders that such shareholder proposal will not be considered at the annual meeting notwithstanding its inclusion in the proxy statement.

4. **Future ESG disclosures:** A public company could consider discussing the new SLB 14M guidance with its internal and external ESG teams so they are aware of the new guidance landscape and how it could impact future shareholder proposals related to existing disclosures.

Footnotes

[1] Securities and Exchange Commission, Amendments to Rules on Shareholder Proposals, Federal Register, Volume 63, No. 102, 29108 (May 28, 1998).

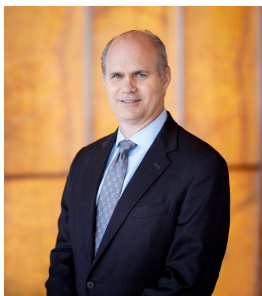
[2] Id.

[3] See Id.

[4] Id.

[5] Id.

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