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SEC STAFF ISSUES LEGAL BULLETIN ANNOUNCING CHANGES TO SHAREHOLDER PROPOSAL REVIEW PROCESS DURING THE 2025 PROXY SEASON

On February 12, 2025, the staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission") issued Staff Legal Bulletin No. 14M ("SLB 14M"), which rescinds in part Staff Legal Bulletin No. 14L ("SLB 14L"). In addition, SLB 14M provides guidance and clarification on the Staff's views on the scope and application of Rule 14a-8(i)(5), Rule 14a-8(i)(7), and certain other aspects of Rule 14a-8, which governs the conditions under which a company can exclude a shareholder proposal from consideration in its definitive proxy statement. SLB 14M also provides guidance for companies that previously submitted and/or plan to submit no-action requests, pursuant to which the Staff agrees not to take action against the company for excluding a shareholder proposal on such grounds, during the 2025 shareholder proposal season.

Practically speaking, the effect of the Staff's updated guidance is that it will be more difficult for shareholder proposal proponents to overcome no-action requests based on broad social policy concerns, as discussed later. This is a significant change in position from that taken by the Commission's Staff under the leadership of former Chairman Gary Gensler, which often prioritized the inclusion of environmental, social and governance ("ESG") related proposals in proxy statements.

Rule 14a-8(i)(5): Economic Relevance Exclusion

Rule 14a-8(i)(5), or the "economic relevance exclusion," is one of the substantive bases for exclusion of a shareholder proposal under Rule 14a-8. The rule permits companies to exclude a shareholder proposal when it "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."

In the now-rescinded SLB 14L, the Staff took the view that "proposals that raise issues of broad social or ethical concern related to the company's business may not be excluded, even if the relevant business falls below the economic thresholds" that are set out in Rule 14a-8(i)(5). Now, however, under SLB 14M, the

Staff will analyze whether proposals that relate to operations that are under the 5% threshold are still "otherwise significantly related to the company" by looking at the specific facts and circumstances involved, as well as the total mix of information about the company. Under this approach, an issue may be considered significantly related to one company but may not be to another. Under SLB 14M, a proponent must tie social or ethical issues raised in support of its proposal directly to matters that have a "significant effect" on the company's business in order to be successful. In other words, notwithstanding how important they may be in the abstract, proposals that raise social or ethical concerns may be excludable based on the application of the factors of Rule 14a-8(i)(5), a shift from the Staff's previous position. However, substantive governance matters are likely to be "otherwise significantly related" for most companies.

In addition, the Staff clarified that the economic relevance exclusion and ordinary business exclusion (discussed below) analyses are undertaken separately, which means that a proposal may be excludable under Rule 14a-8(i)(5) even when the ordinary business exclusion is not available.

Rule 14a-8(i)(7): Ordinary Business Exclusion

Rule 14a-8(i)(7), the "ordinary business exclusion," allows a company to exclude a proposal that "deals with a matter relating to the company's ordinary business operations," and is intended "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 shareholders meeting." The two central considerations underlying this exclusion are the (a) subject matter of the proposal and the (b) degree to which the proposal "micromanages" the behavior of the company. A proposal may be excludable under one or both of these prongs, since both are considered separately.

Subject Matter Significance

The first component of Rule 14a-8(i)(7), the subject matter of the proposal, considers whether a proposal raises matters that are a part of a company's "ordinary" business 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." The Commission has long recognized an exception to the ordinary business exclusion for proposals that focused on policy issues that were significant enough to transcend ordinary business, such as those with a broad societal impact.

Under SLB 14M, 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," as was the case under SLB 14L. This determination now will be "made on a case-by-case basis, taking into account factors such as the nature of the proposal and the circumstances of the company to which it is directed."

Micromanagement

The second component of Rule 14a-8(i)(7) considers whether a proposal seeks to micromanage a company. In SLB 14M, the Staff announced a reinstatement of certain previously rescinded guidance regarding micromanagement. Under the now-rescinded SLB 14L, the Staff attempted to 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 particular, under SLB 14L, the Staff's view was that proposals "seeking detail or seeking to promote timeframes or methods do not per se constitute micromanagement." Further, when determining whether a proposal was "too complex" for shareholders to make an informed decision, the Staff could consider the sophistication level of investors on proposal matters, as well as the information and data available to shareholders and the robustness of public discussion on an issue.

Now, however, under SLB 14M, the Staff is returning to positions in effect prior to SLB 14L, particular previously-rescinded portions of Staff Legal Bulletins 14J and 14K. Under these reinstated provisions, micromanagement is described as a proposal that probes "too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." On a case-by-case basis, the Staff will consider only the degree to which a proposal seeks to micromanage a company, considering factors such as the nature of the proposal and the specific circumstances of the company. The Staff may find a proposal too complex if it (a) includes intricate detail, (b) imposes a specific time-frame or method for implementing a complex policy (either in the proposal itself or in a report or study called for by the proposal), or (c) calls for an extremely detailed study or report. In all of these cases, SLB 14M permits the exclusion of proposals that, by virtue of their structure and overly prescriptive nature, could undermine the ability of the board and management to exercise their judgement. Under the reinstated provisions, micromanagement addresses the manner in which a proposal is raised, not whether the subject matter itself is proper for a proposal under Rule 14a-8. As such, two no action requests involving proposals on the same topic may have different outcomes, depending upon how prescriptive such proposals are to the board and/or the company.

In addition, the Staff will look review not only the text of the proposal itself, but also the proponent's supporting statement, in determining whether or not a proposal can be excluded due to micromanagement—"if a supporting statement modifies or re-focuses the intent of the resolved clause, or effectively requires some action in order to achieve the proposal's central purpose as set forth in the resolved clause," the Staff will take that into account.

Executive Compensation

SLB 14M also reinstates significant prior guidance about proposals relating to executive compensation. While proposals involving general workforce management, such as compensation, hiring, promotion, and termination, are generally excludable under the ordinary business exemption, proposals that address

significant aspects of senior executive and/or director compensation are treated differently. Considering both the proposal itself and the supporting statement, the Staff will generally categorize compensation-related proposals as follows:

Proposal Topic	Staff Guidance under Rule 14a-8(i)(7)
Senior executive and/or director compensation and ordinary business matters	Is the focus of the proposal actually senior executive/director compensation, or underlying (and not sufficiently related) ordinary business matters? If the focus appears to be on ordinary business matters, a proposal may be excludable; "including an aspect of senior executive or director compensation in a proposal that otherwise focuses on an ordinary business matter will not insulate a proposal from exclusion."
Aspects of senior executive and/or director compensation; also available/applicable to general workforce	Is a primary aspect of the targeted compensation broadly available or applicable to a company's general workforce? Can the company demonstrates that the executives' or directors' eligibility to receive the compensation does not implicate significant compensation matters? If yes to both, proposal may be excludable. Companies may generally *not* omit proposals where the focus is on aspects of compensation that are available or apply only to senior executive officers and/or directors. Companies *may* generally omit proposals where the focus is on aspects of compensation that are available or apply to senior executive officers, directors, *and* the general workforce.
Micromanage senior executive and/or director compensation	Proposals addressing senior executive and/or director compensation in intricate detail, or seeking to impose specific timeframes or methods for implementing complex policies, can be excluded on the basis of micromanagement. Proposals that focus on significant executive and/or director compensation matters and do not micromanage will continue not to be excludable.

Board Analysis

The Staff clarified that they do not expect no-action requests to include board analysis on the significance of policy issues raised by shareholder proposals. SLB 14M noted that board analyses tended not to assist the Staff in their analysis of a proposal; however, a company may submit such an analysis with its no-action request if it believes that it will assist the Staff in their analysis.

Update on Proposed Amendments to Rule 14a-8(i)(10), (11), and (12)

SLB 14M also clarifies that amendments to Rules 14a-8(i)(10) (the "substantial implementation" exclusion), 14a-8(i)(11) (the "duplication" exclusion) and 14a-8(i)(12) (the "resubmission" exclusion), which were proposed by the Commission in 2022, remain unadopted, and, as such will not be considered in connection with no-action requests at this time.

Rule 14a-8(d): Graphics in Shareholder Proposals

In SLB 14M, the Staff stated their view that Rule 14a-8(d), which limits shareholder proposals and accompanying statements to 500 words, does not prohibit the inclusion of graphics and/or images in shareholder proposals. Further, the Staff clarified that potential abuses can be addressed through other provisions of Rule 14a-8; for example, excluding a proposal may be appropriate under Rule 14a-8(i)(3) if the graphic (a) would make the proposal materially false or misleading; (b) would render the proposal so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing it, would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires; (c) would directly or indirectly impugn character, integrity or personal reputation, or directly or indirectly make charges concerning improper, illegal, or immoral conduct or association, without factual foundation; or (d) is irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote. SLB 14M also stated that exclusion would be appropriate under Rule 14a-8(d) if the total number of words in a proposal, including words in the graphics, exceeds 500.

Rule 14a-8(b): Proof of Ownership Letters

SLB 14M discusses the Rule 14a-8(b) requirement that a proponent prove eligibility to submit a shareholder proposal by showing that it "continuously held" the required amount of securities for the required amount of time. Specifically, while previous Staff guidance[1] suggested a format for such proof, the Staff noted that some companies apply an overly technical reading of proof of ownership letters as a means to exclude a shareholder proposal. However, SLB 14M clarified that the Staff generally does not find these arguments persuasive, and reiterated that companies should not seek to exclude a shareholder proposal merely based on drafting differences from the suggested format, as long as the language is clear and sufficiently evidences minimum ownership requirements.

Significantly, SLB 14M also reverses the Rule 14a-8(b) position taken in SLB 14L, under which companies were expected to send a second deficiency notice identifying the specific defects in a proof of ownership if those defects had not already been identified in a prior deficiency notice. Under the new guidance, the Staff is not of the view that Rule 14a-8 requires a company to send a second deficiency notice to a

proponent, as long as the company had previously sent an adequate deficiency notice prior to receiving the proponent's proof of ownership.

The Staff also clarified that the 2020 amendments to Rule 14a-8(b) do not contemplate a change in how brokers or banks fulfill their role. Banks or brokers may continue to confirm how many shares the proponent held continuously and need not separately calculate the share valuation, which may instead be done by the proponent and presented to the receiving company.

Emails

In response to the increased use of email for sending proposals themselves, as well as deficiency notices and responses, the Staff in SLB 14M discussed 'best-practices' to ensure proof of compliance with the timelines of Rule 14a-8.[2] The Staff noted that electronic delivery confirmations and company server logs may not be sufficient to prove the receipt of emails, but instead only prove that emails were sent. Similarly, screenshots or photos of emails on the sender's device would not be considered proof of delivery. Instead, companies and proponents should seek an acknowledgement of receipt by reply email from the recipient, and affirmatively acknowledge receipt when requested. Otherwise, email "read receipts" may help to establish receipt of emails.

Proponents were encouraged to contact the company to obtain the correct email address for submitting proposals, with companies being similarly encouraged to provide such addresses upon request. Lastly, the Staff encouraged other methods of communication, or emailing another contact, if the requested confirmation of receipt was not received.

Application of SLB 14M to the 2025 Proxy Season

Because SLB 14M was issued during the 2025 proxy season, the Staff provided specific guidance regarding its implementation, as follows:

- For companies that submitted a no-action request prior to the publication of SLB 14M, the Staff will consider all guidance in place at the time of response (including SLB 14M).
- SLB 14M alone does not in and of itself provide a company with a basis to exclude a proposal; a company must demonstrate that it is entitled to exclude a proposal under operative rules.[3]
- If, after considering the views expressed in SLB 14M, a company believes that it is entitled to exclude a proposal, it must make a legal argument that clearly lays out the basis for the exclusion in either the initial no-action request or a supplemental correspondence.
- Previously submitted no-action requests do not need to be resubmitted. However, companies that wish to raise new legal arguments as a result of the new guidance may submit supplemental correspondence via the online portal.

- Pursuant to Rule 14a-8(j)(1), the "staff may permit the company to make its submission later than 80 days before the company files its definitive proxy statement and form of proxy, if the company demonstrates good cause for missing the deadline." Companies may submit a new no-action request if the legal arguments included in the request relate to the substance of SLB 14M even if the deadline for new requests has already passed (i.e., SLB 14M will be considered "good cause"). However, new action requests that do not relate to the substance of SLB 14M cannot be submitted if the deadline for such requests has passed (i.e., SLB 14M will not be considered "good cause").
- Any new no-action requests should be submitted as soon as possible; in order to (a) enable companies to meet the print deadlines for their definitive proxy statements and (b) provide the opportunity for proponents to provide supplemental correspondence in response to the request. The Staff will try to meet print deadlines, but cannot guarantee meeting all such deadlines.
- Other questions can be directed to shareholderproposals@sec.gov, noting that this mailbox is not for legal advice.

Practical Considerations

SLB 14M is likely to result in greater success for companies seeking exclusions of proposals from their proxy statements on ordinary business and economic relevance grounds, including ESG-related proposals. In addition, during the current proxy season, companies that have submitted no-action requests seeking exclusions may need to re-frame their arguments (or raise additional arguments) within the scope of the interpretive approach of SLB 14M, and should provide such analysis to the Staff per the guidance above.

As of the time of this publication, only a handful of no-action requests have been decided since the publication of SLB 14M, and the majority of such proposals were withdrawn by the proponents, such that there is little to learn about the Staff's new substantive approach.

In light of the procedural suggestions discussed in SLB 14M, companies should pay attention to the guidance provided with respect to proof of ownership letters, and both companies and proponents should monitor timely receipt of emails by seeking delivery receipts or other acknowledgements of receipt. Lastly, in light of the Staff's guidance as to graphics, companies should take note that an argument for exclusion of a shareholder proposal that relies solely on the mere presence of graphics is unlikely to succeed; conversely, shareholders should continue to be aware that graphics included in their proposals should be reviewed in light of the applicable requirements of Rule 14a-8(i)(3).

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[1] Section C of Staff Legal Bulletin No. 14F suggested a format for shareholders and their brokers or banks to follow when supplying the verification of ownership required by Rule 14a-8b(2) in order to avoid common errors. This format was updated in SLB 14L to account for amendments to Rule 14a-8.
[2] There are potential consequences for both proponents and companies for lack of receipt of communications. Rule 14a-8(e)(1) provides that shareholders should submit proposals by means that permit the proponent to prove the date of delivery. Pursuant to Rule 14a-8(f)(1), a company must notify the shareholder of any defects within 14 calendar days of receipt of the proposal, and accordingly, the company has the burden to prove timely delivery of the notice. Rule 14a-8(f)(1) provides that a shareholder's response to a deficiency notice must be postmarked, or transmitted electronically, no later than 14 days from the date of receipt of the company's notification, with the burden on the shareholder to prove receipt.
[3] See Rule 14a-8(g).