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Corp Fin Issues Staff Legal Bulletin 14M

February 24, 2025

On February 12, 2025, the staff of the U.S. Securities and Exchange Commission's Division of Corporation Finance (the "Staff") issued new guidance that should provide additional leeway for public companies to exclude shareholder proposals from their proxy statements. New Staff Legal Bulletin ("SLB") 14M clarifies the Staff's views on the scope of the "*economic relevance*" and "*ordinary business*" bases for excluding shareholder proposals under Rule 14a-8, reverting back to Staff guidance in effect under the first Trump administration.

Under the framework articulated in SLB 14M, a "case-by-case" consideration of a particular company's facts and circumstances is a key factor in the analysis of shareholder proposals that raise significant policy issues. In the case of Rule 14a-8(i)(7)'s ordinary business analysis, the Staff will consider whether or not the proposal has a sufficient nexus to a particular company, and in the case of Rule 14a-8(i)(5)'s economic relevance test, it will consider whether the proposal is "otherwise significantly related to a particular company's business." This differs from the now-rescinded SLB 14L, which among other items had focused on whether a proposal "raised issues with a broad societal impact," rather than on the relationship of such issues to the particular company.

In summary, SLB 14M:

- **Reinstates previous guidance** in effect during the first Trump administration on the exclusion of shareholder proposals from company proxy statements using the "*economic relevance*" and "*ordinary business*" tests in Rule 14a-8;
- **Addresses the inclusion of board analyses** in no-action requests;
- **Includes FAQs** on the application of the new guidance for the current proxy season; and
- **Provides additional guidance** on other aspects of Rule 14a-8 (as discussed in **Appendix A**).

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

Rule 14a-8(i)(5), the "economic relevance" exclusion, permits a company to exclude a shareholder 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*" (emphasis added).

Returning to the standard in place prior to the issuance of SLB 14L, SLB 14M explains that whether a matter is "otherwise significantly related to a company's business" depends upon the particular circumstances of the

company. A matter significant to one company may not be significant to another. SLB 14M notes, however, that the Staff would generally view substantive governance matters to be significantly related to almost all companies.

Where a proposal's significance to a company's business is not immediately apparent, the proponent must demonstrate its significance, for example, by providing information demonstrating that the proposal "may have a significant impact on other segments of the issuer's business or subject the issuer to significant contingent liabilities." Social or ethical issues can still be raised, but they must be tied to ***a significant effect on the company's business***,[1] in light of the "total mix" of information about the issuer. SLB 14M also clarifies that, unlike in the past, Corp Fin will not look to its analysis under "*ordinary business*" in Rule 14a-8(i)(7) when evaluating arguments under "*economic relevance*" in Rule 14a-8(i)(5).

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

Rule 14a-8(i)(7), the "ordinary business" exclusion, permits a company to exclude a proposal that "deals with a matter relating to the company's ordinary business operations." The SEC has stated that the policy underlying the "ordinary business" exclusion rests on two central considerations: the significance of the proposal's subject matter and the degree to which the proposal "micromanages" the company.

Subject Matter

Proposals that raise matters that relate to a company's "ordinary" business operations are excludable, unless they "raise…policy issues so significant that it would be appropriate for a shareholder vote" and thus "would transcend the day-to-day business matters." SLB 14M affirms, in a return to past practice, that the Staff will take a company-specific approach in evaluating significance, "taking into account factors such as the nature of the proposal and the circumstances of the company to which it is directed," 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." Accordingly, a policy issue that is significant to one company may not be significant to another.

Micromanagement

Rule 14a-8(i)(7) also permits a company to exclude a proposal that "micromanages" the company. This analysis focuses only on the *manner by which* a proposal seeks to address a subject, and may apply "where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies." SLB 14M specifically reinstates the portions of SLB 14J and SLB 14K related to micromanagement that were rescinded by SLB 14L, providing that determinations as to excludability of proposals "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." The reinstated portion of SLB 14K specifically notes that two proposals focusing on the same subject matter may warrant different outcomes based solely on the level of prescriptiveness with which the proposals approach that subject matter. Both of these bulletins provide helpful examples of proposals that were excludable or not under the micromanagement prong.[2]

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1 SLB 14M notes 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.'"

2 For example, a proposal seeking annual reporting on "short-, medium- and long-term greenhouse gas targets aligned with the greenhouse gas reduction goals established by the Paris Climate Agreement to keep the increase in global average temperature to well below 2 degrees Celsius and to pursue efforts to limit the increase to 1.5 degrees Celsius" was excludable on the basis of micromanagement, because it prescribed the method for addressing reduction of greenhouse gas emissions. The Staff viewed the proposal "as effectively requiring the adoption of time-bound targets (short, medium and long) that the company would measure itself against and changes in operations to meet those goals, thereby imposing a specific method for implementing a complex policy."

By contrast, the Staff did not concur with the excludability of a proposal 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 of maintaining global temperatures well below 2 degrees Celsius." The proposal was not excludable because it did not seek to micromanage the company and instead "deferred to management's discretion to consider if and how the company plans to reduce its carbon footprint."

The reinstated portion of SLB 14K notes that this framework also applies to proposals that call for a study or report.[3] This is a shift from Corp Fin's approach under SLB 14L, where the Staff's position was that "proposals seeking detail or seeking to promote timeframes or methods [did] not per se constitute micromanagement," especially if they requested detail "needed to enable investors to assess an issuer's impacts, progress towards goals, risks or other strategic matters appropriate for shareholder input."

Application of Rule 14a-8(i)(7) to Proposals Addressing Senior Executive or Director Compensation

SLB 14M also reinstated Section C.3 of SLB 14J, addressing the application of Rule 14a-8(i)(7) to proposals addressing senior executive or director compensation. Proposals that relate to general employee compensation and benefits are excludable under Rule 14a-8(i)(7), unless they focus on significant aspects of senior executive and/or director compensation. In determining whether the focus of a proposal is senior executive and/or director compensation or, instead, an ordinary business matter, Corp Fin considers both the resolved clause and supporting statement as a whole.

SLB 14J laid out the Staff's analysis for three different scenarios:

a. Proposals that address senior executive and/or director compensation and ordinary business matters

At issue in some Rule 14a-8(i)(7) requests is whether the focus of a proposal is senior executive and/or director compensation, or whether its underlying concern relates primarily to ordinary business matters that are not sufficiently related to senior executive and/or director compensation. Where the *focus* is on the ordinary business matter, the proposal may be excludable under Rule 14a-8(i)(7), so 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 under Rule 14a-8(i)(7).[4]

b. Proposals that address aspects of senior executive and/or director compensation that are also available or applicable to the general workforce

A proposal that addresses senior executive and/or director compensation may be excludable under Rule 14a-8(i)(7) if a "primary aspect" of the targeted compensation applies broadly to a company's general workforce and the company demonstrates that the executives' or directors' eligibility to receive the compensation does not implicate significant compensation matters.[5]

SLB 14J specifically set out the Staff's analysis with respect to Rule14a-8(i)(7) submissions concerning proposals that relate to shareholder approval of equity compensation plans that are also available or applicable to a company's general workforce. For 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 not rely on Rule 14a-8(i)(7) to omit these proposals from their proxy materials; if the focus is on aspects of compensation that are available or apply to senior executive officers, directors, and the general workforce, companies may generally rely on Rule 14a-8(i)(7) to omit the proposal.

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3 For example, a proposal that seeks an intricately detailed study or report may be excluded on micromanagement grounds. In addition, the Staff will consider the underlying substance of the matters addressed by the study or report, so a proposal calling for a report may be excludable "if the substance of the report relates to the imposition or assumption of specific timeframes or methods for implementing complex policies."

4 For example, the Staff agreed with the exclusion of a proposal requesting that the board prohibit payment of incentive compensation to executive officers unless the company first adopted a process to fund the retirement accounts of certain retired employees, on the grounds that the focus of the proposal was on the ordinary business matter of employee benefits, rather than senior executive compensation matters.

5 For example, a proposal that seeks to limit when senior executive officers will receive golden parachutes may be excludable under Rule14a-8(i)(7) if the company's golden parachute provision broadly applies to a significant portion of its general workforce.

c. Proposals that micromanage senior executive and/or director compensation practices

Under SLB 14J, proposals addressing senior executive and/or director compensation that seek intricate detail, or seek to impose specific timeframes or methods for implementing complex policies can be excluded under Rule14a-8(i)(7) on the basis of micromanagement.[6]

Board Analysis

Beginning with SLB 14I in 2017, Corp Fin has encouraged companies to include a discussion of the board's analysis of the particular policy issue raised and its significance to the company with their no-action requests under Rules 14a-8(i)(5) and 14a-8(i)(7). As the Staff have found that in most instances the board analysis did not have the information they needed and was not generally dispositive, they will no longer expect a company's no-action request to include a discussion of the board's analysis. A company may still submit a board analysis if it believes it will help the Staff analyze the no-action request.

Frequently Asked Questions

SLB 14M notes that companies, proponents, and their representatives may have time-sensitive questions regarding the implementation of this bulletin and provides the following guidance:

1. **What guidance applies to a request?** For no-action requests submitted prior to the publication of SLB 14M, the Staff will consider the guidance in place *at the time it issues a response*. If a company believes it is entitled to exclude a proposal based on SLB 14M, 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."

2. **Supplementing a previous request in light of SLB 14M.** Previously submitted requests do not need to be resubmitted. However, if a company wishes to raise new legal arguments in light of SLB 14M, they should submit supplemental correspondence via the online portal. Companies and proponents should provide any supplemental correspondence in as timely a manner as possible and should promptly forward to each other copies of all correspondence provided to the Staff in connection with Rule 14a-8 requests.

3. **Submitting a new request in light of SLB 14M.** If, in light of SLB 14M, a company wants to submit a *new* no-action request but the deadline prescribed in Rule 14a-8(j) has passed, the "[S]taff 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*." The Staff will consider the publication of SLB 14M to be "good cause" only if it relates to legal arguments made by the new request.

   Companies should endeavor to submit any new requests as soon as possible, with consideration for the print deadline for their definitive proxy statement, as well as the opportunity for proponents to provide supplemental correspondence in response to the new request.

4. **Proxy statement print deadlines.** The Staff will endeavor to meet print deadlines for definitive proxy statements, but may not be able to depending on the volume and timing of new requests and supplemental correspondence received. Companies and proponents are encouraged to work together to the best of their abilities to resolve submitted proposals prior to print deadlines.

[6] For example, a proposal detailing the eligible expenses covered under a company's relocation expense policy such as the type and duration of temporary living assistance, as well as the scope of eligible participants and amounts covered, could well be excludable on the basis of micromanagement.

5. **Questions.** For questions, email shareholderproposals@sec.gov, which is monitored during normal business hours. Note that the Staff will not advise companies or proponents regarding legal arguments or strategy.

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Appendix A
Additional Guidance in SLB 14M

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

Rule 14a-8(d), one of the procedural bases for exclusion of a shareholder proposal, provides that a "proposal, including any accompanying supporting statement, may not exceed 500 words." Under SLB 14M, this does not preclude the use of graphics or images to convey information, as long as they are appropriate under other provisions of Rule 14a-8[7] and the total number of words in the proposal, including those in the graphics, does not exceed 500.

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

In relevant part, Rule 14a-8(b) provides that a proponent must prove eligibility to submit a proposal by offering proof that it "continuously held" the required amount of securities for the required amount of time. In an effort to reduce common errors that shareholders make when submitting this information, Corp Fin previously provided a suggested format for shareholders and their brokers or banks to follow when supplying the required verification of ownership.[8]

While Corp Fin encourages shareholders and their brokers or banks to use the sample language provided to avoid errors, such formulation is neither mandatory nor the exclusive means of demonstrating the ownership requirements of Rule 14a-8(b), and SLB 14M reminds companies that they "should not seek to exclude a shareholder proposal based on drafting variances in the proof of ownership letter if the language used in such letter is clear and sufficiently evidences the requisite minimum ownership requirements." The Staff takes a plain meaning approach to interpreting the text of the proof of ownership letter.

Additional Guidance:

- The Staff does not interpret the 2020 amendments to Rule 14a-8(b) to contemplate a change in how brokers or banks fulfill their role. Brokers and banks may continue to provide confirmation as to 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 issuer consistent with the 2020 Release.
- The Staff does not view Rule 14a-8 as requiring a company to send a second deficiency notice to a proponent if the company previously sent an adequate deficiency notice prior to receiving the proponent's proof of ownership and the company believes that the proponent's proof of ownership letter contains a defect.

Use of Email

SLB 14M notes that both proponents and companies have increasingly relied on email to submit proposals and make other communications. As such, parties should keep in mind potential pitfalls, including that: (i) the confirmation of email delivery may differ, and email delivery confirmations and company server logs may not be sufficient to prove receipt of emails as they only serve to prove that emails were sent; and (ii) spam filters or incorrect email addresses can prevent an email from being delivered to the appropriate recipient.

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7 For example, exclusion of graphs and/or images would be appropriate under Rule 14a-8(i)(3) where they make the proposal materially false or misleading, or so vague that it cannot be determined exactly what actions or measures the proposal requires; where they impugn the character of any person or allege illegal or immoral conduct without a factual basis; or where they are irrelevant to the proposal's subject matter.

8 *See* Section C of Staff Legal Bulletin No. 14F. The suggested format is as follows:

"As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least [one year] [two years] [three years], [number of securities] shares of [company name] [class of securities]."

Brokers and banks are not required to follow this format.

The Staff therefore suggests that to prove delivery of an email for purposes of Rule 14a-8, the sender should seek a reply email from the recipient acknowledging receipt of the email. The Staff also encourages both companies and shareholder proponents to acknowledge receipt of emails when requested. Email read receipts may also help to establish that emails were received. Finally, companies and proponents are encouraged to reach out using another method of communication or emailing another contact, if available, if the requested confirmation of receipt is not provided. The Staff does not consider screenshots or photos of emails on the sender's device to be proof of delivery to the recipient.

- **Submission of Proposals**

Rule 14a-8(e)(1) provides that in order to avoid controversy, shareholders should submit their proposals by means, including electronic means, that permit them to prove the date of delivery. Therefore, where a dispute arises regarding a proposal's timely delivery, shareholder proponents risk exclusion of their proposals if they do not receive a confirmation of receipt from the company in order to prove timely delivery with email submissions. Additionally, where a company does not disclose in its proxy statement an email address for submitting proposals, proponents are encouraged to contact the company to obtain the correct email address for submissions and companies are encouraged to provide such email addresses upon request.

- **Delivery of Notices of Defects**

Rule 14a-8(f)(1) provides that the 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 deficiency notice. Companies that use email to deliver deficiency notices to proponents are encouraged to seek a confirmation of receipt from the proponent or the representative in order to prove timely delivery.

- **Submitting Responses to Notices of Defects**

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. If a shareholder uses email to respond to a company's deficiency notice, the burden is on the shareholder or representative to use an appropriate email address (e.g., an email address provided by the company, or the email address of the counsel who sent the deficiency notice), and shareholders are encouraged to seek confirmation of receipt.

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