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SEC Staff Limits Exclusion of "Social Policy" Shareholder Proposals

The SEC Staff has issued revised guidance rescinding prior Staff Legal Bulletins addressing the exclusion of Rule 14a-8 shareholder proposals based on the social significance to a company, "micromanagement" or "economic relevance." The changes will likely facilitate a larger number of shareholder proposals, including ESG proposals, coming to a shareholder vote.

Ordinary Business Exception: The new guidance revises the SEC's application of the "ordinary business" exclusion, which considered whether a proposal was of social policy significance or sought to micromanage a company. While the Staff has previously focused on the significance of a social policy issue to a *particular* issuer, they will now focus on the proposal's "broad societal impact." As an example, a proposal related to human capital management will no longer be excluded solely because the issue is not demonstrated to be significant to the company. Accordingly, the Staff will no longer expect board analyses on the impact on the company to accompany claims for no-action relief under the ordinary business exclusion. With respect to micromanagement claims, the Staff will focus on the level of granularity of a proposal and the extent of any limitations on the board's or management's discretion. For example, a proposal requesting a company set greenhouse gas emission targets, but providing the company with discretion on a method for its implementation, will no longer meet the threshold for exclusion based on micromanagement. The new guidance also states that in considering whether a proposal is excessively complex for a shareholder vote, the Staff may consider the sophistication of shareholders with respect to the matter, the availability of data, and the robustness of public discussion. The Staff specifically noted that references to well-established national or international frameworks may be indicative of topics that shareholders are well-equipped to evaluate.

Economic-Relevance Exception: The SEC has also rescinded prior guidance and reaffirmed that issues of broad social or ethical concern related to the company's business may not be excluded under the economic-relevance exception, even if the relevant business does not meet the 5% economic thresholds.

Under the new guidance, which aligns with the SEC's ongoing efforts to enhance transparency, disclosure and shareholder franchise, the Staff is less likely to exclude shareholder proposals on the basis of the ordinary business and economic relevance exceptions. However, it is not clear which social issues the Staff will deem broad enough to "transcend the ordinary business," beyond the Staff's examples of proposals relating to human capital management with a broad social impact or to greenhouse gas emissions targets without specific methodologies. Accordingly, while issuers should expect specific issues to be handled categorically, other issues may require further Staff review and study. In the upcoming proxy season, issuers seeking to exclude social policy proposals should build in sufficient time for Staff review of exclusion requests, engagement with key investors, and, if appropriate, reaching a reasonable resolution with the proponent in advance of the annual meeting.

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