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SEC Provides Updated Guidance on Excludability of Rule 14a-8 Shareholder
Proposals, Eschewing One-Size-Fits-All Approach

Yesterday, the Staff of the SEC's Division of Corporation Finance provided additional guidance in [Staff Legal Bulletin \(SLB\) No. 14K](#) on two key considerations for excluding Rule 14a-8 shareholder proposals under the "ordinary business" exception of Rule 14a-8(i)(7): the significance of the proposal's subject matter and whether it seeks to "micromanage" the company. SLB 14K also addresses claims of technical deficiencies relating to a shareholder proponent's proof of ownership letters, noting that companies should not seek to exclude proposals if documentary support sufficiently evidences the requisite minimum ownership requirements. The key takeaway from SLB 14K is that the SEC looks more favorably upon arguments tailored to the circumstances of a particular company, eschewing one-size-fits-all or overly technical approaches in determining if no-action relief is appropriate.

"Ordinary Business" Exception – Significance. Rule 14a-8(i)(7) does not permit a company to exclude shareholder proposals that address a significant policy issue. In assessing whether a shareholder proposal relates to a significant policy matter, the SEC Staff will take a company-specific approach. For example, SLB 14K suggests that a climate change proposal may be more likely to be successfully excluded by a software development company than an energy company, as climate change may not raise significant policy issues for the former. Accordingly, companies should endeavor to explain why a policy issue is not significant for them in particular.

SLB 14K reaffirmed that the SEC Staff expects to see robust board analysis in no-action letters, including discussion of the specific substantive factors considered by the board. For example, where the board's analysis explains the differences—or the "delta"—between the actions that the company has already taken to address the topic of the shareholder proposal and the proposal's specific request for action, the analysis should explain why the "delta" does not present a significant policy issue. The SEC Staff also clarified, however, that while they believe an appropriate body with fiduciary duties to shareholders should give due consideration to whether the proposal presents a significant policy issue, they do not necessarily expect the board to prepare the significance analysis included in the no-action request.

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The latest guidance also noted that in the 2019 proxy season, the SEC Staff was not persuaded by board analyses that failed to address whether a policy issue remained significant to the company following a prior shareholder vote. Companies should provide an analysis of what events following the shareholder vote, such as shareholder engagement on the issue, informed the board's views on the significance (or insignificance) of the underlying issue to that particular company.

“Ordinary Business” Exception – Micromanagement. SLB 14K also noted that shareholder proposals (even if precatory) that prescribe the method for addressing a particular issue, such as reduction of greenhouse gas emissions, rather than defer to management's discretion, could be excludable as micromanaging. The SEC Staff is not focused solely on the “resolved” clause of a shareholder proposal, and will take into account elements of the supporting statement that require company action. To exclude a proposal for micromanaging, the company should explain directly, and with specificity, how the proposal would “unduly limit the ability of management and the board to manage complex matters with a level of flexibility necessary to fulfill their fiduciary duties to shareholders.”

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The latest guidance underscores the importance of adopting a thorough and tailored approach when seeking to exclude shareholder proposals under the “ordinary business” exception of Rule 14a-8(i)(7). When submitting no-action requests to the SEC, managements and boards should ensure they are providing substantive analysis that reflects careful consideration and review of their company's business and operations.

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