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CHARTERS & BYLAWS

Recent Trends in Governance Documents

By Melissa Sawyer and Lee Parnes

Many boards' nominating and governance committees meet in November and December to consider what changes, if any, to implement in advance of the upcoming proxy season. Among other things, committee chairs may ask management to review the issuer's governance documents with counsel to assess whether any amendments are warranted, particularly in light of recent events, such as the COVID-19 pandemic. Many companies have already revised their governance documents to ensure they are able to operate in a remote world in light of the pandemic, including by adopting emergency bylaws and explicitly allowing for virtual or hybrid shareholder and board meetings.

This article discusses certain recent trends in governance documents. It goes without saying that there is no "one size fits all" model of governance. Amendments to governance documents should not be made in a vacuum; rather, they must be informed by discussions with the board of directors, shareholders, and other

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constituencies and be considered in light of a company's disclosure posture and long-term strategic objectives.

I. The Shift from Structural Defenses to Procedural Safeguards

With the increased focus of large institutional investors, serial shareholder proponents, and proxy advisory firms on shareholder rights, many companies have been dismantling structural defenses to takeover and activism tactics by, for example, declassifying boards, adopting proxy access bylaws, and allowing (or lowering voting thresholds for) shareholders to take action by written consent or call special meetings of shareholders. At the same time, many companies have been implementing more detailed procedural safeguards in connection with those actions, such as advance notice bylaws.

The changing make-up of governance documents has been driven not only by market forces but also by Delaware court decisions repeatedly upholding advance notice provisions as "useful in permitting orderly shareholder meetings."[1] The Delaware courts have generally upheld advance notice bylaws as long as they do not "unduly restrict the shareholder franchise"[2] and are not "applied inequitably."[3] The Delaware courts have also taken into account other factors, such as whether the bylaw was adopted in advance of a specific threat. The Delaware courts' permissive view of procedural and informational requirements likely applies to other governance document provisions, such as those governing a shareholder's right to call a special meeting or to act by written consent, subject to the same caveats.

A. Advance Notice Bylaws

Advance notice bylaws are ubiquitous, but companies seeking to refresh their governance documents often seek to implement the latest advance notice "technology." The overarching trend has been to expand the scope of information that needs to be provided for a shareholder proposal or nomination to be deemed "proper" under the company's bylaws. Many modern versions of these bylaws require the proposing shareholder to provide the following (among other) information to the secretary of the company:

- With respect to the proposing shareholder, information relating to the background of the proposing shareholder, its ownership in the company's securities (including any derivative or short interests), and any voting agreements between the proposing shareholder and any other person.

- With respect to any proposed nominee, personal and employment biographical information, completion of a D&O questionnaire, description of any compensation arrangements between the proposing shareholder and the proposed nominee and various undertakings of the proposed nominee (including, in the event that the nominee is elected, to abstain from entering into voting commitments with respect to the nominee's service as a director, adhering to the company's governance and other policies and serving a full term).

- With respect to any shareholder proposal, a description, actual text and rationale of the proposal, the actual text of any rationale that would be disclosed in a securities filing and a description of any material interest of the proposing shareholder in the proposal.

B. Shareholder Requested Special Meetings

While companies have generally shifted their approach to permit shareholders owning a certain minimum percentage of shares or votes to call special meetings, companies have also incorporated various limitations on this right.

- Many versions of these bylaws require the requesting shareholder to include in its initial notice (i) the specific purpose of such special meeting, (ii) all information required by the advance notice bylaw, and (iii) a calculation of the requesting shareholder's holdings (including any derivative or short interests). Bylaws may also require such shareholder to satisfy a minimum holding period requirement (*e.g.*, one year of continuous record ownership prior to the date of the request and/or meeting) and update any information provided to the company as of the record date and/or the date of such meeting (or shortly before the meeting).

- Many versions of these bylaws provide companies with an exemption from holding a shareholder requested special meeting in various circumstances, including (i) if the special meeting request is received by the company during a certain window of time (*e.g.*, during the period that is 90 days prior to the first anniversary of the date of the preceding annual meeting to the annual meeting date); or (ii) the special meeting request relates to an identical or substantially similar item that was presented at a shareholder meeting within a certain period of time of such request (*e.g.*, 12 months prior to such shareholder request) or is otherwise included in a company's notice for a shareholder meeting that has been called, but not yet held, within a certain period of time of such shareholder request (*e.g.*, 90 days).

- Shareholder proposals requesting companies to lower the holdings threshold required for shareholders to call a special meeting is a notable trend, with companies in the S&P Composite 1500 receiving approximately 32% more of these proposals in 2020 as compared to 2019. Average support for these proposals has remained high, with such proposals receiving, on average, 40% support in 2020.[4] For context, 25% is currently the most common threshold selected by companies in the S&P 500.[5]

C. Shareholder Action by Written Consent

As with shareholder-requested special meetings, companies have generally shifted toward granting shareholders the right to act by written consent, while instituting procedural safeguards. This trend has been less pronounced than special meeting rights, however, as it is comparatively more difficult to include procedural safeguards around the right to act by written consent. Institutional investors also tend to be less focused on the right to act by written consent if a company has standard shareholder-requested special meeting provisions. For example, certain governance documents require a shareholder seeking to act by written consent to first request that a company set a record date for such purposes and provide in its notice all information required under the advance notice bylaw. Many provisions also require the shareholder seeking to act by written consent to comply with the Securities and Exchange Commission's proxy rules, even if the shareholder intends to solicit consents from fewer than 10 other shareholders. For Delaware companies, it is important to keep in mind that certain restrictions on a shareholder's ability to act by written consent must be included in the corporation's certificate of incorporation, which requires shareholder action to implement (not just unilateral action by the board), while provisions that merely establish processes for ministerial review may be included in the bylaws (which generally can be amended unilaterally by the board).

D. Proxy Access Bylaws

More than 75% of S&P 500 companies have adopted proxy access bylaws, as compared to 39% five years ago. Given the number of companies that already grant proxy access, the trend has been to amend (or for shareholders to propose that companies amend) such provisions to reflect the latest thinking from shareholder rights proponents. Amendments have focused on, among other matters: (i) whether a proposing shareholder is required to own its shares beyond the annual meeting; (ii) whether shares loaned by the proposing shareholder count as "owned" for calculating the ownership threshold; (iii) the cap on the number of nominees that may be nominated; and (iv) whether nominees who fail to receive sufficient voting support may be re-nominated for election at subsequent meetings.

II. Environmental, Social, And Governance (ESG) Oversight

ESG has become an area of heightened focus by companies and their constituencies. Not only is there currently a spirited debate regarding the wisdom of shareholder primacy (*i.e.*, whether shareholder value should be the primary objective or interest underlying director decisionmaking), companies may also face significant economic and reputational damage as a result of the board's failure to exercise sufficient ESG oversight. Boards also risk shareholder claims that the directors breached their fiduciary duties as a result of a failure to satisfy their duty of oversight. To make such a claim (referred to as a *Caremark* claim), shareholders must allege that a board (i) completely failed to implement any reporting or information system or controls, or (ii) having implemented such a system or controls, consciously failed to monitor or oversee its operations, thus disabling themselves from being informed of risks or problems requiring their attention.[6] Although *Caremark* claims are among the most difficult claims to plead and prove, recent shareholder claims[7] have survived motions to dismiss, demonstrating that while the burden for surviving a motion to dismiss a *Caremark* claim is high, it is surmountable.

There is a growing trend among public companies to amend their governance documents to explicitly grant ESG oversight responsibilities to a committee of the board and describe the scope of such committee's ESG oversight responsibilities. Alternatively, where companies have chosen to retain ESG oversight as a responsibility of the full board, some companies have chosen to make this responsibility more explicit by adding language about this responsibility to their corporate governance guidelines. While the scope and level of detail vary widely, there are a number of commonalities and topics that are frequently addressed, including:

- ESG oversight generally residing with the full board or being granted to the nominating and governance committees or, if a company has such a committee, the public policy committee.

- Responsibilities include: (i) reviewing and evaluating ESG-related plans and practices; (ii) reviewing current ESG trends and discussing such matters with management and communicating the impact on the company and its stakeholders; (iii) overseeing the development and use of tailored ESG-specific measurement and tracking metrics; (iv) reviewing the company's external ESG-specific communications; and (v) if information is discussed at the committee level in the first instance, reporting out key information to the full board on a regular basis.

III. Federal Exclusive Forum Provisions

It is well accepted that exclusive forum provisions requiring that intra-corporate claims be brought in certain specified courts are enforceable in Delaware and many other jurisdictions with respect to state law claims. Until the recent *Salzberg v. Sciabacucchi* decision,[8] it was an unsettled question whether exclusive forum provisions were enforceable under Delaware law in relation to federal claims. *Salzberg* validates the ability of a Delaware company to adopt a charter provision directing that all Securities Act of 1933 claims brought by shareholders be filed in federal court.

Adopting such a provision can provide a company with a number of advantages, including the ability to consolidate multi-jurisdiction litigation, avoid state court forum shopping and parallel filings, take advantage of certain heightened pleading standards and ensure the applicability of the automatic Private Securities Litigation Reform Act (PSLRA) discovery stay.

The decision was also consequential in connection with shareholder litigation relating to public company mergers. Prior to the *In re Trulia* case in 2016,[9] it was common practice for plaintiff lawyers to bring state law fiduciary duty claims (including duty of disclosure) in Delaware Chancery Court in connection with public company mergers. Plaintiff lawyers would typically reach a settlement with the target company pursuant to which the target company would provide "curative" disclosure to shareholders, pay the plaintiff lawyers' attorney fees and obtain a broad release from claims. The *Trulia* court held that it would reject disclosure-only settlements unless the supplemental disclosures were "plainly material" and any releases were narrowly circumscribed. This holding resulted in a spike in federal claims by plaintiff lawyers as they refashioned their fiduciary duty state law claims as federal claims under the federal securities laws. *Salzberg* provides Delaware companies with a basis to consolidate federal claims in respect of public company mergers in Delaware federal court.

While federal forum provisions have been held to be facially valid under Delaware law, uncertainty remains as to whether such provisions will be recognized by non-Delaware courts. Further, the *Salzberg* court's analysis was limited to federal forum provisions in a company's charter and not its bylaws, and while it is likely that such a provision in a company's bylaws would be upheld, this was not explicitly addressed by the Court.

IV. Enhancing Board Leadership and Evaluation Guidelines

Today, 98.8% of S&P 500 companies have some form of independent leadership (either an independent chair or a lead independent director).

Shareholders, institutional investors, and proxy advisors are now calling for enhanced transparency around why a company's independent board leadership structure is appropriate for the company. In response, many companies are providing more detail in their corporate governance guidelines regarding their processes for determining their leadership structures, the roles and responsibilities of their board leader(s), and their board evaluation practices.

The use of corporate governance guidelines generally arose after the New York Stock Exchange adopted a rule in 2003 requiring all listed companies to adopt and disclose corporate governance guidelines that address certain topics, including director qualifications and responsibilities, CEO succession planning, and annual board evaluations. Because corporate governance guidelines form a basis for the disclosure included in a company's proxy statement, it is important that these guidelines accurately reflect a company's practices.

For example, in July 2020, shareholders filed complaints against Oracle Corporation, Facebook, Inc., and Qualcomm, Inc. alleging that the directors and officers of these companies breached their fiduciary duties by, among other things, misrepresenting the company's progress toward increasing diversity at all levels of the company. In these complaints, the plaintiffs referred to statements included in corporate governance guidelines, committee charters and proxy statements, which they claim do not accurately represent the companies' practices.

As more companies consider whether to provide enhanced transparency around their leadership structures and evaluation practices in their corporate governance guidelines and other governing documents, it is important to ensure that any disclosures remain consistent not only with the company's other public disclosures but also with the company's actual practices.

V. Succession Planning Processes beyond the CEO

The pandemic has underscored the importance of robust succession planning, not only for the CEO but also for the entire senior leadership team. Inadequate succession planning for senior executives can lead to a more prolonged and expensive executive search process and be a factor in stock price headwinds.

In light of these risks, some institutional investors, proxy advisors, and other key stakeholders are increasingly calling for companies to publicly disclose a succession planning process for key executives.

In response, some companies are beginning to acknowledge explicitly in their governing documents the importance of both management and board succession planning, such as by including standalone provisions broadly discussing their succession planning processes and/or assigning oversight of these activities to the full board or a committee, as appropriate, in their corporate governance guidelines or committee charters.

Moreover, in light of the continuing push for increased diversity in leadership roles, companies have also begun formalizing their commitment to diversity in their succession planning policies and practices. This change has been driven in part by the NYC Comptroller's Boardroom Accountability Project 3.0, which was launched in October 2019 and calls on companies to adopt "Rooney Rule" policies that require the consideration of both women and racially/ethnically diverse candidates for every open board seat and for CEO appointments. Thus far, 14 of the 17 companies that received Rooney Rule shareholder proposals as part of this initiative have adopted such a policy in their corporate governance guidelines and/or committee charters.

Notes

1. *Goggin* v. *Vermillion, Inc.*, C.A. No. 6465-VCN (Del. Ch. June 3, 2011).

2. *Openwave Sys. Inc.* v. *Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 239 (Del. Ch. 2007).

3. *Id.*

4. Sullivan & Cromwell LLP 2020 Proxy Season Review: Part 1 (July 15, 2020), *available at https://www.sullcrom.com/files/upload/SC-Publication-2020-Proxy-Season-Review-Part-1-Rule-14a-8.pdf*.

5. Deal Point Data as of September 28, 2020.

6. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

7. *Hughes* v. *Hu*, No. CV 2019-0112-JTL, 2020 WL 1987029 (Del. Ch. Apr. 27, 2020); *In re Clovis Oncology, Inc. Derivative Litig.*, No. CV 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).

8. *Salzberg* v. *Sciabacucchi*, 227 A.3d 102 (Del. 2020).

9. *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884 (Del. Ch. 2016).

A Review of the Latest Shareholder Proposal No-Action Letters

By Scott Lesmes, Dave Lynn, and Hillary Daniels

Rule 14a-8 under the Securities Exchange Act of 1934 ("Rule 14a-8") permits a company's shareholders to present proposals for inclusion in the company's proxy materials for its next annual meeting. Rule 14a-8 includes eligibility and procedural requirements that a shareholder must satisfy and a list of 13 substantive categories that a proposal may not address. If a shareholder fails to satisfy the eligibility or procedural requirements, or if a proposal falls within one of the 13 prohibited categories, a company may exclude a shareholder's proposal from its proxy materials. When a company intends to exclude a shareholder's proposal from its proxy materials, it submits a "no-action request" to the Staff. The Staff usually responds to a no-action request, providing its decision regarding whether it concurs with the company's intention to exclude the shareholder proposal from its proxy materials.

On September 6, 2019, the Division announced that, starting with the 2019–2020 shareholder proposal season, the Staff may respond orally instead of in writing to some Rule 14a-8 no-action requests, and that the Staff intended to "issue a response letter where it believes doing so would provide value, such as more broadly applicable guidance about complying with Rule 14a-8." As a result of this change, the Staff's responses for the past season are reflected in its Shareholder Proposal No-Action Responses Chart posted to the Division's website, which contains hyperlinks to the corresponding letter responses issued by the Staff, where applicable. The Staff issued a letter response to approximately 10% of the no-action requests received by the Division during the past season.

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The Staff's responses to no-action requests regarding shareholder proposals during the 2019–2020 proxy season provide significant guidance regarding the application of Rule 14a-8. The positions taken by the Staff are particularly useful with regard to the following three Rule 14a-8 substantive bases for exclusion on which companies often rely when taking the view that they may exclude a shareholder proposal from their proxy materials:

- Rule 14a-8(i)(3) (proposal is "materially false and misleading");
- Rule 14a-8(i)(7) (proposal relates to a company's "ordinary business" matters); and

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- Rule 14a-8(i)(10) (proposal has been “substantially implemented” by a company).

Overview of Takeaways from the 2019–2020 Proxy Season

Rule 14a-8(i)(3)—

- Do *not* anticipate excluding a proposal or a specific statement in a proposal’s supporting statement unless you can:
  - “[D]emonstrate objectively” that the proposal or specific statement in the supporting statement is materially false or misleading; or
  - Show that a term that is absolutely fundamental to an understanding of the nature of the action sought by the proposal cannot be understood “with any reasonable certainty,” including in light of the supporting statement.

Rule 14a-8(i)(7)—

- The “micromanagement” analysis in the exclusion “rests on an evaluation of the manner in which a proposal seeks to address the subject matter raised, rather than the subject matter itself,” and may be relied upon where the proposal “involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies”;
- The “ordinary business” analysis in the exclusion does not appear to require a separate board analysis as to the significance of the proposal to the company, unless “the significance of a particular issue to a particular company and its shareholders may depend on factors that are not self-evident and that the board may be well-positioned to consider and evaluate,” including where the board may be in the best position to discuss the “delta” between the proposal’s specific request and the actions the company has already taken; and
- Any discussion regarding a board’s analysis as to the significance of a proposal to a particular company that is included in a company’s analysis of the “ordinary business” exclusion must address the significance of the proposal *to the company* in extensive substantive detail, including any company response to prior shareholder votes on the issue presented.

Rule 14a-8(i)(10)—

- Where the proposal relates to a governance change, exclusion may be permitted where the company indicates that the board has approved any necessary amendments for submission to a vote of company shareholders and that the company intends to present those amendments to a vote of shareholders at the company’s next annual meeting of shareholders;
- Where the proposal relates to a governance change, exclusion may be permitted where the company’s policies, practices, and procedures “compare favorably” to the action sought by the proposal, and charts are especially helpful in illustrating this comparison; such arguments should also include a copy of the documentation of the relevant policies, practices, and procedures; and
- Where the proposal relates to public disclosure regarding a particular issue, exclusion may be permitted where the company’s public disclosures “compare favorably” to the disclosure sought by the proposal, and charts are also helpful in illustrating this type of comparison to demonstrate substantial implementation.

Just the Facts: The 2019–2020 Proxy Season

From November 21, 2019, through August 31, 2020, the Staff issued 232 responses to no-action requests under Rule 14a8. Of those 232 Staff responses:

- The Staff concurred in a company's intention to exclude a proposal in response to 132 requests (56.9% of all responses/70.6% of responses to non-withdrawn requests);
- The Staff did not concur in a company's intention to exclude a proposal in response to 56 requests (24.1% of all responses/29.9% of responses to non-withdrawn requests); and
- The Staff indicated that 44 requests had been withdrawn, and it would take no further action (19.0% of all responses).

Based On What?—Staff "Grants" of No-Action Requests

In concurring in a company's position that it may exclude a proposal from its proxy materials—often referred to as a "grant" of a no-action request—the Staff's response will (1) express its view with regard to only a single basis under Rule 14a-8 for concurring in a company's exclusion of a proposal and (2) state (or imply) that it was not necessary for it to address any of the company's other bases for exclusion. During the 2019–2020 proxy season, the 132 Staff grants of no-action requests noted the following Rule 14a-8 paragraphs as the basis for its position with the indicated frequency:

- (i)(10) (company has substantially implemented the proposal) 46
- (i)(7) (proposal relates to ordinary business matters) 35
- (b)/(f) (proponent failed to satisfy eligibility or procedural requirements) 20
- (e)(2) (proponent failed to meet deadline for submission) 16
- (i)(11) (proposal duplicates a proposal to be included in proxy materials) 4
- (h)(3) (proponent did not appear previously to present a proposal) 2
- (i)(2) (proposal would cause violation of law) 2
- (i)(5) (proposal is not economically relevant or significant to company) 2
- (i)(6) (company lacks authority to implement a proposal) 2
- (i)(3) (proposal/supporting statement is materially false or misleading) 1
- (i)(4) (proposal relates to a personal grievance or special interest) 1
- (i)(13) (proposal relates to specific amounts of dividends) 1

Rule 14a-8(i)(3)—Is It "Irrelevant"?

Background Regarding the Rule 14a-8(i)(3) Exclusion

Rule 14a-8(i)(3) permits exclusion of a proposal if "the proposal or supporting statement is contrary to any of the Commission's proxy rules, including [Rule] 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials." The Staff set forth its analysis of the Rule 14a-8(i)(3) exclusion in Staff Legal Bulletin No. 14B (September 15, 2004) ("SLB 14B"), stating:

- "[R]ule 14a-8(i)(3), unlike the other bases for exclusion under [R]ule 14a-8, refers explicitly to the supporting statement as well as the proposal as a whole";

- "[C]ompanies have relied on [R]ule 14a-8(i)(3) to exclude portions of the supporting statement, even if the balance of the proposal and the supporting statement may not be excluded"; and

- "Companies have requested that the [S]taff concur in the appropriateness of excluding statements in reliance on [R]ule 14a-8(i)(3) for a number of reasons, including the following":

  – **Vagueness**—"the language of the proposal or the supporting statement render the proposal so vague and indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires";

  – **Impugning Statements**—"exclude statements in a supporting statement because they fall within Note (b) to [R]ule 14a-9"; [Exchange Act Rule 14a-9 prohibits false or misleading statements in proxy solicitation materials. The Note to Rule 14a-9 provides "some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of [Rule 14a-9]." Part (b) of that Note provides the following example: "Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation."];

  – **Irrelevant Statements**—"exclude statements in a supporting statement because they are irrelevant to the subject matter of the proposal being presented" and, as such, "mislead shareholders by making unclear the nature of the matter on which they are being asked to vote";

  – **Opinions Presented as Fact**—"exclude statements in a supporting statement because they are presented as fact when they are the opinion of the shareholder proponent" and, as such, "mislead shareholders into believing that the statements are fact and not opinion"; and

  – **Statements without Factual Support**—"exclude statements in a supporting statement because they are presented as fact, but do not cite to a source that proves that statement."

Noting the "unintended and unwarranted extension of [R]ule 14a-8(i)(3)," the Staff stated in SLB 14B that, "[d]uring the [prior] proxy season, nearly half the no-action requests we received asserted that the proposal or supporting statement was wholly or partially excludable under [R]ule 14a-8(i)(3)." The Staff then stated that, "going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on [R]ule 14a-8(i)(3) in the following circumstances:

- the company objects to factual assertions because they are not supported;

- the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;

- the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or

- the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such."

The Staff also stated its belief that, rather than addressing those matters in no-action requests, "it is appropriate under [R]ule 14a-8 for companies to address these objections in their statements of opposition."

With regard to its application of the Rule 14a-8(i)(3) exclusion after SLB 14B, the Staff stated that "reliance on [R]ule 14a-8(i)(3) to exclude or modify a statement may be appropriate where:

- statements 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;

- the company demonstrates objectively that a factual statement is materially false or misleading;

- the resolution contained in the proposal is so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires — this objection also may be appropriate where the proposal and the supporting statement, when read together, have the same result; and

- substantial portions of the supporting statement are 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 she is being asked to vote."

Staff Responses to Rule 14a-8(i)(3) No-Action Requests during the 2019–2020 Proxy Season

Consistent with the prior season, the statistics from the 2019–2020 proxy season show that the Staff applies the Rule 14a-8(i)(3) exclusion narrowly. From November 21, 2019, through August 31, 2020, the Staff responded to 34 no-action requests seeking the Staff's concurrence with the exclusion of a shareholder proposal, at least in part, in reliance on Rule 14a-8(i)(3). The Staff responded to those 34 requests as follows:

- In response to 18 no-action requests in which a company stated its intention to exclude a proposal in reliance on Rule 14a-8(i)(3), the Staff did not concur in a company's reliance on the Rule 14a-8(i)(3) basis for exclusion (these Staff responses are referred to below as "denied");

- In response to 15 no-action requests in which a company stated its intention to exclude a proposal in reliance on Rule 14a-8(i)(3) and at least one other basis, the Staff concurred in a company's intention to exclude the proposal on a basis for exclusion other than Rule 14a-8(i)(3) and did not address the company's Rule 14a-8(i)(3) basis for exclusion (these Staff responses are referred to below as "did not address"); and

- In response to one no-action request, the Staff concurred specifically in a company's stated intention to exclude a proposal in reliance on the Rule 14a-8(i)(3) basis for exclusion (these Staff responses are referred to below as "grants").

Staff Responses that Denied or Did Not Address Requests Relying on Rule 14a-8(i)(3)

The most common reasoning in no-action requests arguing for exclusion in reliance on Rule 14a-8(i)(3) was that the language of the proposal and/or the supporting statement was so vague and indefinite as to render the entire proposal materially false or misleading, with some of those arguments asserting that the proposal was vague in part because it could not be understood without referring to materials outside of the proposal. Where the Staff did not concur in that position, it generally stated that it disagreed with the analysis in the no-action request because the company had not:

- "[D]emonstrated objectively" that "the [p]roposal, taken as a whole, [was] so vague or indefinite that it is rendered materially misleading";

- Persuasively explained why a proposal's supporting statement did not, as was argued, provide "clarity as to what [was] meant" by the proposal; or

- Shown that the proposal, "taken as a whole," was "so inherently vague or indefinite that neither shareholders voting on the [p]roposal, nor the [c]ompany in implementing the [p]roposal, would be able to determine with any reasonable certainty exactly what actions or measures the [p]roposal requires."

Staff Response that Granted a Request Relying on Rule 14a-8(i)(3)

As was the case in the prior season, there was only one no-action response in which the Staff concurred in the exclusion of a proposal in reliance on Rule 14a-8(i)(3). In *Apple Inc.* (December 6, 2019), the proposal read: "Resolved: shareholders recommend that [the company] improve guiding principles of executive compensation." While the company's proxy statement for its 2019 annual meeting of shareholders included a sub-heading entitled "Guiding Principles," neither the proposal nor its supporting statement defined what the proponent had in mind to "improve" such principles. In concurring with the company's exclusion of the proposal, the Staff stated:

> There appears to be some basis for your view that the Company may exclude the Proposal under [R]ule 14a-8(i)(3), as vague and indefinite. We note your view that neither shareholders nor the Company would be able to determine with reasonable certainty how the Proposal seeks to "improve [the] guiding principles of executive compensation". In this regard, we note that the Proposal lacks sufficient description about the changes, actions or ideas for the Company and its shareholders to consider that would potentially improve the guiding principles. A proposal that described the nature of improvements that the company could consider, without prescribing the particular result, would be less likely to be viewed as vague and indefinite.

In contrast, the Staff did not concur in exclusion of the proposal in *AT&T Inc.* (January 31, 2020; recon. denied February 25, 2020), in which the proposal's "resolved" clause was identical to that in *Apple Inc.*—a request that the company "improve guiding principles of executive compensation"—but where the proposal's supporting statement included additional instructive language regarding the interpretation of such clause. In disagreeing with the company's no-action request in *AT&T Inc.*, the Staff provided as follows:

> [. . .] we note that the Proposal's supporting statement provides clarity as to what is meant by improving the guiding principles of executive compensation: "[r]educing the CEO pay ratio should be included as a guiding principle of executive compensation."

Rule 14a-8(i)(3)—Takeaways From the 2019–2020 Proxy Season

Our Rule 14a-8(i)(3) takeaways from the Staff's 2019–2020 responses to no-action requests:

- It generally will not be sufficient for a company to take the view that a proposal is so vague or indefinite that it would confuse shareholders as to the action sought and, therefore, is materially false or misleading if the proposal's supporting statement provides clarifying information or details.

- It generally will not be sufficient for a company to take the view that, because there may, in a technical sense, be more than one interpretation regarding the details of implementation of a proposal, such proposal is necessarily so vague or indefinite that it would confuse shareholders as to the action sought and, therefore, is materially false or misleading.

While it requires a rare and difficult facts-and-circumstances analysis for a company to show that the language of a proposal or a supporting statement is sufficiently vague and indefinite, the Staff may determine to concur in exclusion where the no-action request is sufficiently compelling in demonstrating that neither shareholders nor the company would be able to determine with reasonable certainty how the proposal should be implemented.

Rule 14a-8(i)(7)—When Is a Proposal Concerning "Ordinary Business"?

Rule 14a-8(i)(7) Issues Presented Prior to the 2019–2020 Proxy Season

Rule 14a-8(i)(7) no-action requests include a discussion under one or both of the two analyses underlying the Rule 14a-8(i)(7) "ordinary business" exclusion: (1) whether the subject matter of the proposal concerns "[c]ertain tasks" that "are so fundamental to management's ability to run a company on a day-to-day basis" that they are not proper for shareholders' interference; and (2) the degree to which the proposal seeks to "micromanage" the company "by probing too deeply into matters of a complex nature."

While it was the most often argued basis in Rule 14a-8 no-action requests this season (as is frequently the case), relying on Rule 14a-8(i)(7) as a basis to exclude a proposal because it concerns a matter relating to the company's ordinary business operations has long presented challenges, due mainly to the subjective nature of the line between a proposal relating to a company's "ordinary business" matters—which generally may be excluded from a company's proxy materials—and a proposal relating to issues that are so significant as to "transcend ordinary business" matters—which generally may not be excluded from a company's proxy materials. The particular analysis as to whether a proposal seeks to micromanage a company in the manner in which the proposal seeks to address the subject matter raised often presents difficulties as well.

In its continuing effort to provide guidance on the Rule 14a-8(i)(7) basis, the Staff published Staff Legal Bulletin No. 14K on October 16, 2019 ("SLB 14K"), addressing:

- The analytical framework of Rule 14a-8(i)(7);
- The inclusion of a board's analysis of a proposal's significance in a no-action request; and
- The "micromanagement" analysis under Rule 14a-8(i)(7).

The "Micromanagement" Analysis under the Rule 14a-8(i)(7) Exception

In SLB 14K, the Staff stated that the "micromanagement" analysis "rests on an evaluation of the manner in which a proposal seeks to address the subject matter raised, rather than the subject matter itself" and provided the following key factors to consider in this analysis under the Rule 14a-8(i)(7) exclusion:

- A "proposal framed as a request that the company consider, discuss the feasibility of, or evaluate the potential for a particular issue generally would not be viewed as micromanaging matters of a complex nature."
- A "proposal, regardless of its precatory nature, that prescribes specific timeframes or methods for implementing complex policies, consistent with the Commission's guidance, may run afoul of micromanagement. In our view, the precatory nature of a proposal does not bear on the degree to which a proposal micromanages."
- "Notwithstanding the precatory nature of a proposal, if the method or strategy for

implementing the action requested by the proposal is overly prescriptive, thereby potentially limiting the judgment and discretion of the board and management, the proposal may be viewed as micromanaging the company."

- "When analyzing a proposal to determine the underlying concern or central purpose of any proposal, we look not only to the resolved clause but to the proposal in its entirety. Thus, 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, we take that into account in determining whether the proposal seeks to micromanage the company."

- During the 2018–2019 season, "where we concurred with a company's micromanagement argument, it was not because we viewed the proposal as presenting issues that are too complex for shareholders to understand. Rather, it was based on our assessment of the level of prescriptiveness of the proposal."

- "When a proposal prescribes specific actions that the company's management or the board must undertake without affording them sufficient flexibility or discretion in addressing the complex matter presented by the proposal, the proposal may micromanage the company to such a degree that exclusion of the proposal would be warranted."

- "When a company asserts the micromanagement prong as a reason to exclude a proposal, we would expect it to include in its analysis how the proposal may 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."

As these SLB 14K factors demonstrate, a proposal may not be excluded under the "micromanagement" analysis, even where the subject matter is complex, if the proposal does not seek to supplant management's analysis and judgment to such a degree that exclusion would be appropriate. As the Staff provided in Staff Legal Bulletin No. 14J (October 23, 2018) ("SLB 14J"), "[u]nlike the [ordinary business] consideration, which looks to a proposal's subject matter, the [micromanagement] consideration looks only to the degree to which a proposal seeks to micromanage."

"Significant Policy Issue" Analysis under the Rule 14a-8(i)(7) Exception

SLB 14K also addressed the Staff's considerations with respect to "the connection between the significant policy issue and the company's business operations," providing that the significance analysis should be "company-specific" and should not look to the "overall significance of the policy issue raised by the proposal," as the Staff does not "recogniz[e] particular issues or categories of issues as universally 'significant.'" To illustrate this concept, in SLB 14K the Staff provided, by way of example, that, "although a climate change proposal submitted to an energy company may raise significant policy issues for that company, a similar proposal submitted to a software development company may not raise significant policy issues for that company."

Based on this guidance, when a company applies rule 14a-8(i)(7) to a proposal:

- The company should consider whether the proposal deals with a matter relating to that company's ordinary business operations or raises a policy issue that transcends that company's ordinary business operations; and

- If a proposal raises a policy issue that appears to be significant, a company's no-action request should focus on the significance of the issue to that company.

Inclusion of a Board Analysis Regarding Significance in a Rule 14a-8(i)(5), Rule 14a-8(i)(7), or Rule 14a-8(i)(10) No-Action Request

On November 1, 2017, the Staff released Staff Legal Bulletin No. 14I ("SLB 14I"), which introduced the concept of a board's analysis being presented in companies' requests for no-action under Rule 14a-8(i)(5), the "economic relevance" exception, and under Rule 14a-8(i)(7), the "ordinary business" exception. The following year, the Staff discussed in SLB 14J the similarities between the Rule 14a-8(i)(7) "transcends ordinary business operations" analysis and the Rule 14a-8(i)(5) "significantly related" analysis. Accordingly, companies should broadly apply the Staff's guidance discussed below when considering the relevance of a board's analysis in a no-action request.

SLB 14K reiterated the Staff's views from SLB 14I and SLB 14J regarding the value of "a well-developed discussion of the board's analysis of whether the particular policy issue raised by the proposal is sufficiently significant in relation to the company" in certain no-action requests. Indicating that, during the 2018–2019 proxy season, the discussions of board analyses in no-action requests had become more helpful in determining whether the proposal was significant to the company's business when compared with the prior season, the Staff made the following key statements in this regard:

- "The improvement in the board analyses provided was largely attributable to a greater proportion of requests discussing in detail the specific substantive factors, such as those set forth in SLB No. 14J, that the board considered in arriving at its conclusion that an issue was not significant in relation to the company's business."

- "[I]n a number of instances, we were unable to agree with exclusion where a board analysis was not provided, which was especially likely where the significance of a particular issue to a particular company and its shareholders may depend on factors that are not self-evident."

- "If a request where significance is at issue does not include a robust analysis substantiating the board's determination that the policy issue raised by the proposal is not significant to the company, our analysis and ability to state a view regarding exclusion may be impacted."

- "While we do not necessarily expect the board, or a board committee, to prepare the significance analysis that is included in the company's no-action request, we do believe it is important that the appropriate body with fiduciary duties to shareholders give due consideration as to whether the policy issue presented by a proposal is of significance to the company."

Delta Analysis. With regard to this "significance analysis," the Staff further expressed its view in SLB 14K that the discussion may focus on any differences between the proposal's specific request and the actions the company has already taken and an analysis of whether the specific manner in which the proposal addresses the issue presents a significant policy issue for the company. The Staff refers to these differences as the "delta." This "delta analysis" may be useful in situations where a company has taken efforts to implement a proposal but believes it may fall short of being able to exclude a proposal under Rule 14a-8(i)(10) as already having "substantially implemented" the proposal. SLB 14K indicates that a "delta analysis" should:

- Identify the differences between the actions that the company has already taken to address the issue and the proposal's specific request;

- Explain whether the difference between the company's actions and the proposal's request represents a significant policy issue to the company; and

- Address whether the company's prior actions diminished the significance of the policy issue to such an extent that the proposal does not present a policy issue that is significant to the company.

In this regard, the Staff emphasized the importance of specificity in a "delta analysis," stating that such analysis is "most helpful where it clearly identifies the differences between the manner in which the company has addressed an issue and the manner in which a proposal seeks to address the issue and explains in detail why those differences do not represent a significant policy issue to the company," whereas, in contrast, "conclusory statements about the differences that fail to explain why the board believes that the issue is no longer significant are less helpful."

Prior Voting Results. The Staff indicated in SLB 14J that a board's analysis should address whether the company's shareholders have previously voted on the matter and, where relevant, the board's views on such voting results. During the 2018–2019 proxy season, the Staff noted in SLB 14K that it did not concur with certain Rule 14a-8(i)(7) no-action requests where the Staff "did not find the board's discussion of the prior vote to be persuasive in demonstrating that the policy issue is no longer significant to the company," noting three unsuccessful arguments in such no-action requests:

- "The voting results were not significant given that a majority of shareholders voted against the prior proposal."
- "The significance of the prior voting results was mitigated by the impact of proxy advisory firms' recommendations."
- "When considering the voting results based on shares outstanding, instead of votes cast, the voting results were not significant."

The Staff stated that "the board's analysis may be more helpful if it includes, for example, a robust discussion that explains how the company's subsequent actions, intervening events or other objective indicia of shareholder engagement on the issue bear on the significance of the underlying issue to the company."

Staff Responses to Rule 14a-8(i)(7) No-Action Requests during the 2019–2020 Proxy Season

The statistics from the 2019–2020 proxy season indicate that the Staff's analysis of the application of Rule 14a-8(i)(7) to shareholder proposals continues to evolve. In its responses, the Staff further clarified the "micromanagement" analysis, affirmed the need to continue to argue that the focus is not on a significant policy issue when using the "ordinary business" analysis, and, for the first time, provided an example of an ordinary business argument that was successfully supported by a discussion of a board's analysis. From November 21, 2019, through August 31, 2020, the Staff responded to 78 no-action requests seeking the Staff's concurrence with the exclusion of a shareholder proposal, at least in part, in reliance on Rule 14a-8(i)(7). The Staff responded to those 78 requests as follows:

- In response to 31 no-action requests in which a company stated its intention to exclude a proposal in reliance on Rule 14a-8(i)(7), the Staff did not concur in a company's reliance on the Rule 14a-8(i)(7) basis for exclusion;
- In response to 12 no-action requests in which a company stated its intention to exclude a proposal in reliance on Rule 14a-8(i)(7) and at least one other basis, the Staff concurred in a company's intention to exclude the proposal on a basis for exclusion other than Rule 14a-8(i)(7) and did not address the company's Rule 14a-8(i)(7) basis for exclusion; and
- In response to 35 no-action requests, the Staff concurred specifically in a company's stated intention to exclude a proposal in reliance on the Rule 14a-8(i)(7) basis for exclusion.

Staff Responses that Granted a Request Relying on Rule 14a-8(i)(7)

In the 35 no-action responses in which the Staff concurred in the exclusion of a shareholder proposal in reliance on Rule 14a-8(i)(7), the Staff concurred in a "micromanagement" analysis in 16 no-action responses and concurred in an "ordinary business matters" analysis in 19 no-action responses.

Micromanagement grants of no-action requests.—In concurring in "micromanagement" analyses, the Staff concurred in the exclusion of proposals seeking to:

- Impose a specific pricing structure on fossil fuels;
- Review or implement specific senior executive compensation decisions;
- Require the company's support of legislators and legislation that promote climate action; and
- Require that the company take specific action with regard to its mandatory arbitration requirements for employee claims of sexual harassment.

In the Staff's concurrences with micromanagement arguments, it responded by issuing a letter in only three instances.

In *Johnson & Johnson* (February 12, 2020) (Hammerman Family Revocable Inter Vivos Trust and the UAW Retiree Medical Benefits Trust), the Staff considered a proposal urging the company's board of directors to change any annual cash incentive program to provide that any award to a senior executive that is based on financial measurements where the performance period was one year or shorter would not be paid in full for some period following the award. In its response, the Staff appeared to affirm its general stance that the prohibition of a practice in all situations, the "phasing out" of a practice, or the adoption of a specific practice in all situations to be excludable, stating:

> There appears to be some basis for your view that the Company may exclude the Proposal under [R]ule 14a-8(i)(7), as relating to the Company's ordinary business operations. In our view, the Proposal micromanages the Company by seeking to impose specific methods for implementing complex policies. [. . .] Despite the fact that the supporting statement says that the Committee could develop the methodology for determining the length of the deferral period and adjusting the remainder of the bonus over the deferral period, in reaching this position, we note your statement that "the Proposal's request to categorically prohibit immediate full payment of short-term bonus awards to senior executives would strip the Compensation & Benefits Committee of the discretion and flexibility it requires to properly exercise its business judgment."

Johnson & Johnson (February 12, 2020) (Vermont Pension Investment Committee) provides an example of the Staff's views regarding a proposal that unduly supplanted management's discretion by imposing highly specific requirements on a particular matter. The proposal requested that the company's board of directors "adopt a policy that when a financial performance metric is adjusted to exclude 'legal or compliance costs' when evaluating performance for purposes of determining the amount or vesting of any senior executive compensation award, it provides an explanation of why the precise exclusion is warranted and a breakdown of the litigation costs," where "legal or compliance costs" were defined in the proposal as "expenses or charges associated with any investigation, litigation or enforcement action related to drug distribution, including legal fees; amounts paid in fines; penalties or damages; and, amounts paid in connection with monitoring required by any settlement or judgment of claims of the kind described above." In its response, the Staff stated:

> There appears to be some basis for your view that the Company may exclude the Proposal under rule 14a-8(i)(7). Although the Proposal would not prohibit the adjustment of financial performance metrics to exclude legal or compliance costs, we agree that the Proposal nonetheless micromanages the Company by seeking intricate detail of those costs identified in the Proposal.

Exxon Mobil Corporation (March 6, 2020) provides an example of a proposal where the Staff concurred with the company's view that the proposal micromanaged the company by imposing a specific strategy, method, action, outcome, or timeline for addressing an issue. The proposal requested that the company's board of directors "charter a new board committee on climate risk to evaluate the board and management's climate strategy and to better inform board decision making on climate risks and opportunities." In its response, the Staff stated:

> There appears to be some basis for your view that the Company may exclude the Proposal under rule 14a-8(i)(7). In our view, the Proposal micromanages the Company by dictating that the board charter a new board committee on climate risk. As a result, the Proposal unduly limits the board's flexibility and discretion in determining how the board should oversee climate risk.

Drawing the "micromanagement" line.—Two Staff no-action responses help demonstrate whether a proposal unduly limits the judgment and discretion of the board and management, regardless of whether the proposal was framed as mandatory or precatory. The proposals in each of these no-action requests addressed policy issues, and, yet, the Staff reached different positions, further demonstrating that the "micromanagement" analysis does not hinge on the subject matter of the proposal or the complexity of the issue addressed by the proposal.

Juniper Networks, Inc. (February 25, 2020) addressed a proposal requesting that the company "reduce the CEO Pay Ratio by 5% each year until it reaches 50:1." The Staff concurred in the company's view that it could exclude the proposal in reliance on the micromanagement prong of Rule 14a-8(i)(7). While the Staff did not issue a letter, its decision demonstrated that, while proposals that focus on significant aspects of senior executive compensation generally are not excludable under Rule 14a-8(i)(7), where a proposal's prescriptive strategy, method, outcome, and timeframe appear to micromanage the company, it may be excludable despite the fact that the proposal addresses executive pay. This decision is in line with the Staff's guidance provided in SLB 14J that it will not treat senior executive compensation proposals differently from other types of proposals such that it may agree with exclusion of compensation proposals on the basis of micromanagement.

The TJX Companies, Inc. (April 9, 2020), on the other hand, addressed a proposal requesting that the compensation committee of the company's board of directors "take into consideration the pay grades and/or salary ranges of all classifications of Company employees when setting target amounts for CEO compensation" and "describe in the Company's proxy statements for annual shareholder meetings how it complies with this requested policy." The Staff did not concur in the company's view that it could exclude the proposal in reliance on Rule 14a-8(i)(7) as micromanaging the company's business. The Staff did not issue a letter, but the decision appears to reflect its view that, while the proposal required the company to take a specific action—particular considerations with respect to CEO compensation—it allowed for sufficient discretion to the company's management and board of directors in implementing the directive.

"Ordinary Business" grants of no-action requests.—A recurring issue since the Staff's publication of SLB 14I relates to the Staff's statements that a discussion regarding a board analysis of a proposal's significance to a company is not required in a no-action request but may be useful in certain circumstances. Consistent with the prior season, the Staff's no-action responses indicate that, where it is "self-evident" that a proposal topic relates to the company's ordinary business matters, inclusion of a discussion regarding the board's analysis of the proposal's significance to such company may not be necessary in the no-action request. The Commission addressed a number of these topics in Release No. 34-40018, stating that "[c]ertain 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. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers." For example, the Staff concurred in the exclusion of proposals in response to the following representative no-action requests that *did not* include a separate discussion regarding a board analysis of the proposal's significance to the company:

A proposal requested that the company's board of directors "adjust their buyback programs to ensure that repurchase of shares, class A or class B, are at the lowest price available and are purchased at 'arms' length.' Specifically, [the company] will not repurchase class B shares so long as class A shares are offered at a lower price; they will not repurchase class A shares where class B shares are offered at a lower price" – the Staff concurred in the exclusion of the proposal in reliance on Rule 14a-8(i)(7), stating that the proposal "relates to the Company's discount pricing policies." (*Lennar Corporation*, December 20, 2019.)

A proposal requested that the company's board of directors report to shareholders on "the use of contractual provisions requiring employees of [the Company] to arbitrate employment-related claims," where the proposal's "resolved clause" further stated that the report "should specify the proportion of the workforce subject to such provisions; the number of employment-related arbitration claims initiated and decided in favor of the employee in the previous calendar year; and any changes in policy or practice the Company has made, or intends to make, as a result of California's ban on agreeing to arbitration as a condition of employment"—the Staff concurred in the exclusion of the proposal in reliance on Rule 14a-8(i)(7), stating:

There appears to be some basis for your view that the Company may exclude the Proposal under rule 14a-8(i)(7) as the Proposal does not transcend the Company's ordinary business operations. In our view, notwithstanding some references in the supporting statement to potentially important social issues, the Proposal as a whole deals with a matter relating to the Company's ordinary business operations – the overall "use" of arbitration – and does not focus on any particular policy implication of that use at this particular company. See Staff Legal Bulletin No. 14K (discouraging "proponents and companies [from focusing] on the overall significance of the policy issue raised by the proposal, instead of whether the proposal raises a policy issue that transcends the particular company's ordinary business operations"). (*Dollar General Corporation*, March 6, 2020)

Staff Responses that Addressed Requests that included a Discussion of a Board Analysis of the Rule 14a-8(i)(5) "Significantly Related" Issue, the Rule 14a-8(i)(7) "Transcends Ordinary Business" Issue, or the Rule 14a-8(i)(10) "Delta" Issue

In the 16 no-action requests that included a board analysis under any basis, the Staff concurred in the exclusion of a shareholder proposal in four. Among these four, the Staff concurred in two under Rule 14a-8(i)(5), one under Rule 14a-8(i)(7), and one under Rule 14a-8(i)(10).

The Staff's discussion in SLB 14K made clear that a board analysis of a proposal's significance can aid the Staff as it considers difficult judgment calls raised in a no-action request. Based on SLB 14I, SLB 14J, SLB 14K, and the Staff's no-action responses, a company should consider the following when determining whether and how a no-action request should present a discussion regarding the board's analysis:

- If the "ordinary business matter" is not "self-evident," a discussion of the board's analysis of the significance of the issue to the company likely will be necessary;
- If significance is at issue in a no-action request, the company should consider including a thorough analysis substantiating the board's determination that the policy issue raised by the proposal is not significant to the company;

- Any discussion regarding the board's analysis should address both:
  - The significance to the company of the issue presented; and
  - The significance to the company of the difference between the action(s) sought by the proposal and the company's current actions regarding the issue raised by the proposal, or the "delta," particularly where the company may not have "substantially" implemented the proposal's specific request for purposes of exclusion under Rule 14a-8(i)(10);
- If there has been a recent shareholder vote on a proposal relating to a similar issue:
  - The discussion should address the recent vote and the actions the company has taken since that vote; and
  - Any discussion regarding the recent vote will not be persuasive if it emphasizes only that the vote was: (1) insufficient to adopt the proposal or (2) influenced by proxy adviser recommendations.

In SLB 14I and SLB 14J, the Staff indicated that the absence of a discussion regarding a board analysis in a no-action request will not preclude exclusion of a proposal and that the inclusion of a board analysis in a no-action request will not create a presumption that a proposal may be excluded from a company's proxy materials, and this has been demonstrated in the Staff's decisions, as discussed below. Many no-action requests have included a board analysis since SLB 14I, although the number of such requests decreased this year as compared with prior years. Similar to last season, a small number of exclusions were granted for no-action requests that included a board analysis.

For example, in *Marriott International, Inc.* (March 13, 2020), the Staff considered a proposal that encouraged the company to prohibit wild animal displays at all of its hotels. In concurring with exclusion of the proposal under Rule 14a-8(i)(5), the Staff was clear that the board's analysis was the basis of its decision, stating:

> The Board of Directors' Nominating and Corporate Governance Committee's analysis was dispositive to the staff's ability to grant relief under Rule 14a-8(i)(5). In our view, the committee's analysis explained in detail how and why the committee concluded that the Proposal is not otherwise significantly related to the Company's business. Of particular importance to the staff's concurrence are the following representations from the committee:

- The fees received by the Company and its franchisees for wild animal–related events are economically insignificant to the Company.
- Wild animal–related events at the Company's managed and franchised hotels occur in very limited situations, and hosting such functions is not the Company's primary business.
- Wild animal displays are not Company-offered services and thus the policy concerns raised by the Proposal are not significantly related to the Company's business.
- No other investor besides the Proponent has raised the issue of the Company's policy permitting wild animal displays at its hotels.

Another example was *Apple Inc.* (December 20, 2019), in which the proposal at issue recommended that the company issue a report detailing the potential risks associated with omitting "viewpoint" and "ideology" from its written equal employment opportunity policy. In concurring with exclusion of the proposal under Rule 14a-8(i)(7), the Staff provided the following:

> There appears to be a basis for your view that the Company may exclude the Proposal under rule 14a-8(i)(7) as the Proposal does not transcend the Company's ordinary business operations. Accordingly, we will not recommend enforcement action to

the Commission if the Company omits the Proposal from its proxy materials in reliance on rule 14a-8(i)(7). In reaching our position, we considered the board's Nominating and Corporate Governance Committee's analysis and conclusion that the Proposal did not present a significant policy issue for the Company. That analysis discusses the difference – or delta – between the Proposal and the Company's current policies and practices. In addition, the committee's analysis noted that a shareholder proposal submitted to the Company's shareholders last year regarding a related issue received 1.7% of the vote.

One of the Staff's no-action responses in which it did not concur with exclusion may further inform a company's determination of whether and how to include a discussion regarding a board analysis in a Rule 14a-8(i)(7) no-action request. In *The TJX Companies, Inc.* (April 9, 2020), in which the proposal requested "that the board commission an independent analysis of any material risks of continuing operations without a company-wide animal welfare policy or restrictions on animal-sourced products associated with animal cruelty." Despite the company's discussion regarding the purpose of the proposal and the fact that the "vast majority" of its businesses were "fur-free," the Staff did not concur in the exclusion of the proposal under Rule 14a-8(i)(7), stating:

> Given that the Proposal indicates that the policy issue of the humane treatment of animals is significant to the Company, the Company must meet its burden of showing that the Proposal is not significant to it. As Staff Legal Bulletin No. 14K (October 16, 2019) explained, "[t]he staff takes a company-specific approach in evaluating significance" and, "[w]hen a proposal raises a policy issue that appears to be significant, a company's no-action request should focus on the significance of the issue to that company." The Company has not provided a board analysis or other analysis addressing the significance of the Proposal to the Company's business operations.

Rule 14a-8(i)(7)—Takeaways from the 2019–2020 Proxy Season

Our Rule 14a-8(i)(7) takeaways from the Staff's 2019–2020 responses to no-action requests:

- The "micromanagement" analysis in the Rule 14a-8(i)(7) basis for exclusion may be relied on regardless of a proposal's subject matter, but only where the proposal involves intricate detail, seeks to impose specific timeframes or methods for implementing complex policies, or seeks to impose a specific outcome on a company. In this regard, companies should consider the following:
  - Proposals seeking to impose specific outcomes or specific timeframes in all situations may be viewed as unduly supplanting management's discretion in addressing an issue;
  - Proposals seeking to prohibit an activity, phase-out an activity, or require shareholder approval of an activity in all cases may be viewed as seeking to impose a specific method for implementing a complex policy; and
  - Proposals seeking a discussion of "if" or "how" management intends to address an issue on a day-to-day basis may be viewed as not unduly supplanting management's discretion regarding that issue.
- The "ordinary business" analysis in the Rule 14a-8(i)(7) basis for exclusion generally may be relied on without a discussion regarding the board's analysis of the proposal's significance to the company where it is "self-evident" that the proposal relates to a matter that the Commission and the Staff have long considered to be "ordinary business." However, if a company questions whether it has met its burden of

showing that a proposal is not significant to the company in its no-action requests, it may be advisable to include a board's analysis on this determination.

- A no-action request's discussion regarding a board analysis of a proposal's significance to the company generally should include:
  - A discussion of the specific proposal and its application to the company's specific operations, rather than a broad discussion of the general significance of the issue presented;
  - A detailed discussion of the "delta" as relevant, meaning any specific differences between the action requested by the proposal and the company's current policies, practices, procedures, or disclosures; and
  - A discussion of (1) any recent vote regarding a proposal seeking action regarding the topic of the current proposal, including the percentage vote received in favor of the recent proposal (we doubt that a discussion that the prior vote was not sufficient to pass the proposal or that the prior vote was the result of a recommendation from one or more proxy advisers generally would be sufficient), and (2) the company's response to the recent shareholder vote.

Rule 14a-8(i)(10)—Is It "Substantially" More Useful?

Rule 14a-8(i)(10) provides that a company may exclude a proposal "[i]f the company has already substantially implemented the proposal." The ongoing challenge in applying this basis for exclusion has been the analysis of the word "substantially." Despite Commission statements that the analysis should be based on whether the company's "policies, practices and procedures compared favorably" to the action sought by a proposal, Rule 14a-8 practitioners had in the past expressed concern that the Staff's analysis appeared to read the word "substantially" to be the equivalent of "completely." Based on the Staff's responses to no-action requests during the 2019–2020 proxy season and the prior season, the Staff appears to have modified its approach to evaluating whether a proposal has been substantially implemented. However, the 2019–2020 proxy season's responses imply that the Staff is looking for detail in the analysis provided in Rule 14a-8(i)(10) arguments, and charts appear to be among the most effective tools in this regard.

Staff Responses to Rule 14a-8(i)(10) No-Action Requests during the 2019–2020 Proxy Season

From November 21, 2019, through the end of August 2020, the Staff responded to 71 no-action requests seeking the Staff's concurrence with the exclusion of a shareholder proposal, at least in part, in reliance on Rule 14a-8(i)(10). The Staff responded to those 71 requests as follows:

- In response to 20 no-action requests in which a company stated its intention to exclude a proposal in reliance on Rule 14a-8(i)(10), the Staff did not concur in a company's reliance on the Rule 14a-8(i)(10) basis for exclusion;
- In response to six no-action requests in which a company stated its intention to exclude a proposal in reliance on Rule 14a-8(i)(10) and at least one other basis, the Staff concurred in a company's intention to exclude the proposal on a basis for exclusion other than Rule 14a-8(i)(10) and did not address the company's Rule 14a-8(i)(10) basis for exclusion; and
- In response to 45 no-action requests, the Staff concurred specifically in a company's stated intention to exclude a proposal in reliance on the Rule 14a-8(i)(10) basis for exclusion.

Staff Responses that Granted a Request Relying on Rule 14a-8(i)(10)

In the 45 no-action responses in which the Staff concurred in the exclusion of a shareholder proposal in reliance on Rule 14a-8(i)(10), the Staff concurred that a company had "substantially implemented" a proposal based on the following:

- In 25 no-action responses—depending on whether the proposal sought one or more amendments to (1) a company's policies, practices, or procedures, or (2) a company's public disclosures, the Staff was of the view that the company had "substantially implemented" the proposal where the company's policies, practices, procedures, or public disclosures "compared favorably" to the action sought by the proposal; and

- In 20 no-action responses—where a proposal sought a specific governance action (*e.g.*, bylaw amendments relating to a specific issue), the Staff was of the view that the company had "substantially implemented" the proposal where the company showed that: (1) its board had approved the necessary amendments for submission to a vote of company shareholders; and (2) the company intended to present those amendments to a vote of shareholders at the company's next annual meeting of shareholders.

Staff Responses Addressing the Burden of Proof in a Request Relying on Rule 14a-8(i)(10)

Among the 45 no-action responses in which the Staff concurred in the exclusion of a shareholder proposal in reliance on Rule 14a-8(i)(10), the Staff issued two letters in response. With regard to the Staff's concurrence with no-action requests arguing that the action sought by a proposal "compared favorably" with a company's existing practices, four of such no-action requests included a chart to illustrate the comparison.

For example, the Staff responded via letter in *InvenTrust Properties Corp.* (February 7, 2020), in which it considered a proposal asking that the company's board of directors "engage its investment bankers to develop a plan that will provide Shareholders with full liquidity for their shares by December 31, 2021," stating that such plan "should explore options including the outright sale of the Company or its assets, or a merger with a publicly listed company." The Staff's response stated simply: "[t]here appears to be some basis for your view that the Company may exclude the Proposal under rule 14a-8(i)(10)."

The Staff's letter responses issued this year in instances in which it did not concur with exclusion under Rule 14a-8(i)(10) are more instructive in providing guidance regarding the Staff's view of a company's burden of proof when relying on Rule 14a-8(i)(10). In *Marriott International, Inc.* (March 27, 2020), the Staff did not concur in the company's request to exclude a proposal that asked that the company take all steps necessary to remove the supermajority vote requirements in its bylaws and certificate of incorporation. Though the company's board of directors had, in the prior year, previously approved amendments to implement a majority voting standard in place of each of the supermajority voting provisions in its governing documents, the amendments were not ultimately approved by the company's shareholders. The Staff stated as follows:

> We are unable to concur in your view that the Company may exclude the Proposal under rule 14a-8(i)(10). In this regard, we note your explanation that the Company provided shareholders at its 2019 annual meeting with an opportunity to approve amendments to its governing documents, which, if approved, would have eliminated supermajority voting provisions in such documents. However, none of the proposed amendments were approved last year. Therefore, the Company's practices and policies do not compare favorably with the guidelines of the Proposal, and as the Company has not represented that it will

Rule 14a-8(i)(10)—Takeaways from the 2019–2020 Proxy

Our Rule 14a-8(i)(10) takeaways from the Staff's 2019–2020 responses to no-action requests:

- Exclusion of a proposal may be appropriate where:
  - The board has approved the necessary amendments for submission to a vote of company shareholders; and
  - The company intends to present those amendments to a vote of shareholders at the company's next annual meeting of shareholders.
- Exclusion likely will not be warranted where the board has previously approved the necessary amendments, but such amendments were not ultimately adopted.
- A no-action request should address the following in its discussion of the manner in which the company has "substantially implemented" the proposal:
  - The company's current policies, practices, procedures, or disclosures; and
  - The manner in which those current policies, practices, procedures, or disclosures compare to the actions sought by the proposal.
- Where a proposal seeks a governance change or expanded public disclosure regarding a particular matter, a no-action request should include a copy of the company's policies, practices, procedures, or disclosures that "compare favorably" to the specific actions sought by the proposal" and may benefit from including a chart that illustrates the comparison.

> pursue similar actions this year to eliminate its supermajority voting provisions, the Company has not substantially implemented the Proposal.
>
> Accordingly, we do not believe that the Company may omit the Proposal from its proxy materials in reliance on rule 14a-8(i)(10).

In *Abbott Laboratories* (February 12, 2020), the proposal at issue asked that the company's board of directors "adopt a policy that when the Company adjusts or modifies any generally accepted accounting principles ('GAAP') financial performance metric for determining senior executive compensation, the Compensation Committee's Compensation Discussion and Analysis shall include a specific explanation of the Committee's rationale for each adjustment and a reconciliation of the adjusted metrics to GAAP." In stating its disagreement with exclusion under the Rule 14a-8(i)(10) basis, the Staff stated:

> We are unable to concur in your view that the Company may exclude the Proposal under rule 14a-8(i)(10). Based on the information that you have presented, it does not appear that the Company's public disclosures compare favorably with the guidelines of the Proposal. While the Company has identified the nature of the adjustments made to the financial metrics in the Company's 2019 Proxy Statement, the Company has neither provided a thorough explanation for why such adjustments are appropriate or any disclosure describing the magnitude of such adjustments. Accordingly, we do not believe that the Company may omit the Proposal from its proxy materials in reliance on rule 14a-8(i)(10).

New Law Requires Racial, Ethnic, or LGBT Diversity on Boards of California-Based Public Companies

By David Bell, Dawn Belt, and Jennifer Hitchcock

In a move that continues California's push for increased diversity on corporate boards, Governor Gavin Newsom on September 30, 2020, signed into law a bill that requires publicly held companies headquartered in the state to include board members from underrepresented communities. The action follows passage of a similar law in 2018 mandating that public companies headquartered in the state have at least one woman on their boards of directors by the end of 2019 (SB 826), with further future increases required depending on board size. The law significantly expands on the diversity categories included in the legislation as originally proposed.

Companies that do not comply with the new law, AB 979, will face similar penalties as those noncompliant with SB 826, the gender diversity law: fines in the six figures, in addition to ramifications to their brand and reputation. As with SB 826, the new law contains some open questions and ambiguities that may affect implementation.

Requirements of AB 979

AB 979 requires that by the end of 2021 California-headquartered public companies have at least one director on their boards who is from an underrepresented community, defined as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender."

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In addition to that initial 2021 requirement, the law mandates that the number of directors from underrepresented communities be increased by the end of calendar year 2022, depending on the size of the board, as follows:

Number of Directors on Board	Minimum Number of Directors from Underrepresented Communities
Nine or more	Three
Five to Eight	Two
Four or fewer	One

A company can comply with the law by adding one or more board seats, rather than removing directors. However, the step-up feature of the requirement, where an increased number of directors from underrepresented communities is required as board size expands, could make that challenging for some smaller boards.

For example, an eight-member all-white board without LGBT representation could satisfy the 2021 requirement by adding a new member who meets the diversity requirements (simultaneously increasing the board size). But that company will find it needs to add two more members who meet the diversity requirements by 2022. That's because, unless it removes members who don't meet the requirements, the company would then step up to a board composed of nine or more members, triggering the requirement that it has three members from underrepresented communities. A similar result would hold for a similarly comprised board starting with four members.

Of course, adding a woman who meets the diversity requirements in 2021 could allow a company to tick two boxes at once: gender diversity, as required by SB 826 (which applies starting in 2019 and includes a step up in 2021) and, potentially, if the woman is also LGBT, racially or ethnically diverse, the diversity requirement under AB 979 (which applies starting in 2021 and steps up in 2022). This means that, for example, a four-person board with one woman in 2020 that adds an Asian woman in 2021 could meet the requirements of both laws for that year: two women and one-person meeting diversity requirements.

AB 979 defines a "publicly held corporation" as a corporation with outstanding shares listed on a major U.S. stock exchange. While a major U.S. stock exchange is not defined by the law, it is expected that exchanges such as the New York Stock Exchange, NYSE American, Nasdaq Global Market, and Nasdaq Capital Market would qualify (as has been the general understanding under SB 826). A corporation would be deemed to be headquartered in California based on whether its principal executive offices, according to the corporation's Annual Report on Form 10-K, are located in California.

Failure to Comply

Companies that fail to comply will be fined $100,000 for the first violation and $300,000 for each additional violation. Each required director seat not held by a member who meets the diversity requirements will count as a separate violation, but a seat held by a diverse director for at least a portion of the year will be deemed to satisfy the requirement. While the fines are not particularly consequential, they may add up, and the cost of public criticism and embarrassment should not be underestimated (for example, the impact on brand and reputation, recruitment and retention, and investor relations should be considered).

Legal Challenges

Some legislators and commentators have noted that the bill has potentially fatal issues. We expect AB 979 to be challenged on various constitutional and other grounds.

In addition to Equal Protection Clause– and Civil Rights Act–based arguments, it is possible that the bill will be challenged under the "internal affairs doctrine" (a longstanding doctrine under the Commerce and Full Faith and Credit Clauses and conflict of laws principles) which provides that the internal affairs (such as corporate governance) of a corporation should be governed by the state law in which it is incorporated.

So far, SB 826 has been challenged on equal-protection grounds in several lawsuits. The results have been mixed, as described below:

- In *Meland v. Padilla,* a conservative legal organization claimed on behalf of a public company shareholder that, in requiring a female board member, the law prevented that shareholder from voting as he desired. The U.S. District Court for the Eastern District of California ruled against the plaintiff.

- In *Crest v. Padilla*, the plaintiff sought to block Secretary of State Alex Padilla from spending taxpayer money to enforce the law on the grounds that it violated the California constitution by imposing an unconstitutional gender-based quota. In June, a state Superior Court judge overruled Padilla's argument that the plaintiffs lacked standing. The Secretary of State's office will eventually be required to answer the complaint, giving observers a view into the state's stance on challenges to this law.

No company or potential board member has been willing to serve as a plaintiff to challenge SB 826, and we expect that will also be the case for AB 979.

Regardless of the potential legal challenges, publicly held corporations headquartered in California should make preparations for compliance.

Open Questions and Ambiguities

The law contains a number of open questions, gaps, and ambiguities. These include:

- Are directors of Middle Eastern descent included in the meaning of "director from an underrepresented community"?
    - The statute is silent on the subject, but it appears that they could be included if they choose to self-identify as Asian or African–American.
- How will the California Secretary of State determine violations?
    - There is currently no requirement that public companies disclose the race, ethnicity, or LGBT self-identification of their board members, and the law is silent as to what new reporting requirements will be implemented as a result of this law. There is also no ready way to determine this information based on other required public disclosures.
- How does it apply to newly public companies that become public through an IPO or direct listing late in a year (for example, December 2020)?
    - On the face of the statute, there is no transition provision.
- The law says there is no violation if a person from an underrepresented community held a seat for at least a portion of the year, but how small is a portion?
    - Literally read, a company could wait until the very end of the year to make an appointment.
- What if there is a proxy contest or majority voting requirement for director election, and the director from an underrepresented community nominated by the company loses?
    - To penalize a company in such circumstances may be unfair and undercut shareholder democracy, but the statute appears to make no exception. In such a situation, to avoid violation of the statute the board could choose to expand the board and/or add or reappoint a director from an underrepresented community, or in the case of failure to receive a majority, appoint a new director from an underrepresented community to replace a director that did not receive a majority. Alternatively, it may provide circumstances in which a company is willing to challenge the validity of the statute (*e.g.*, on "internal affairs doctrine" grounds).
- Would a company satisfy the requirement if a company with five directors had two different directors from underrepresented communities on the board for a portion of 2021?
    - As with SB 826, the law does not state whether directors from underrepresented communities that serve for only a portion of the year need to overlap, whether they need to hold different seats, how vacancies would be counted, how the requirement is treated if the board size was adjusted during the year, or when the number of seats would be counted.
- How are biracial or multi-ethnic directors counted?
    - The statute does not specifically address biracial or multi-ethnic directors. However, if a director self-identifies as one of the groups included in the definition of a "director from an underrepresented community," we believe that they qualify under the statute, even if they also self-identify with a racial or ethnic group not included in the definition.
- How will directors be counted to meet the combined gender diversity and racial/ethnic/LGBT requirements under SB 826 and AB 979?
    - On their face, the statutory requirements are separately counted, and one person

could satisfy a requirement under each statute simultaneously. By way of example, we would expect that:

- A gay Latino would count as one director from an underrepresented community under AB 979 (but not as gender diverse under SB 826).
- A Caucasian lesbian would count as one director from an underrepresented community under AB 979 and one woman under SB 826.
- A transgender black woman would count as one director from an underrepresented community under AB 979 and as one woman under SB 826. Under the revised text of the combined statute, AB 979 has added the concept of "self-identified" to the gender diversity provisions of SB 826. While some women's groups oppose counting transgender women for these sorts of purposes (under the belief that such women have not suffered the same disadvantages that gender diversity requirements are meant to address), we expect California courts to count such individuals under SB 826.

Subject companies should also monitor any implementing regulations that the California Secretary of State may adopt and/or consult with legal advisors.

Practical Advice to Companies

Despite the expected legal challenges to AB 979 and the open questions and ambiguities related to its implementation, the topic of board diversity remains an important issue for important stakeholders: customers, employees, investors, and many of the communities in which companies operate.

Board diversity shareholder proposals are on the rise and several institutional investors, such as Blackrock and State Street Global Advisors, have announced plans to proactively campaign for increased diversity on public company boards. Shareholders have also begun to bring suits against boards based on their lack of diversity.

We advise that companies and their boards take the following steps to address board diversity and AB 979.

- Confer with counsel to develop a process for gathering and disclosing relevant self-identification information from board members.
  - Many directors may consider this information to be deeply personal and may find public identification by such categories as distasteful or demeaning (disliking any suggestion that this is the reason for their board membership). Companies will have to approach solicition of such information with sensitivity, including explaining the form in which such information will be disclosed.
  - To limit the potential that the solicitation of such information required by AB 979 will later be used as a basis for a discrimination claim, consider limiting the collection and review of individualized information to the chairman of the board's nominating committee and/or the committee itself. Those involved should work along with the company's human resources function to ensure appropriate handling of any sensitive information.
  - In the context of public securities filings, aggregated information is likely to be common, rather than individualized disclosure. We are hopeful that whatever reporting mechanism and format is developed by the California Secretary of State will accommodate such aggregated disclosure (perhaps as simply as asking a company whether it was in compliance during the prior calendar year).
  - To the extent that the information will be included in public securities filings,

companies should also have appropriate disclosure controls and procedures in connection with the recording, aggregation, and disclosure of such information.

- Have a plan to consciously consider traditional diversity factors, such as gender, race, ethnicity, and LGBT status, as a plus when recruiting new board members.
    - Consider adopting an adapted version of the "Rooney Rule" for board recruiting (for example, interview at least one woman and at least one member of an underrepresented community as potential final candidates for each open board seat).
    - Use reputable and/or diversity-focused recruiters and specify that the candidate pool must include women, LGBT, and minority candidates.
- Be prepared to discuss the gender, LGBT, racial and ethnic makeup of the board as well as these diversity plans and efforts, either in a public forum or in discussions with individual investors.
    - The company's PR and investor relations teams should have a prepared response on this subject as part of its broader communication strategy addressing the current social justice environment.
    - The company should also be prepared to discuss these subjects as part of its stockholder engagement discussions.
- Do not state a specific intent to comply with AB 979, and do not cite the statute as a reason for selecting one board candidate over another (and do not let your recruiter do so).
    - Given the expected legal challenges to AB 979, stating specific compliance with the law could put the company at risk for getting involved in a public controversy and in potentially expensive litigation.
    - Instead, consider a general statement to the effect that the company is complying with all legal requirements and that the company seeks the best-qualified candidate to suit the needs of the company, the board and its stockholders, and takes into consideration many factors, including diversity.

Compensation Clawbacks: Trends and Lessons Learned

By Joshua Agen

Executive compensation clawback policies continue to grow in popularity. Although the Securities and Exchange Commission (SEC) has not yet finalized its rules under the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank) that will require publicly-traded companies to adopt compensation recovery policies, many companies have now voluntarily adopted clawback policies.

More than 90 of the 100 largest publicly-traded companies have disclosed that they maintain compensation clawback policies. A large number of companies have been revisiting their existing clawback policies and considering potential updates, and some have sought to recover compensation under their policies.

This article summarizes trends in clawback policies and some lessons that can be learned from the growing body of experience with them. For companies that are considering adopting or updating clawback policies, these trends and experiences may help to guide their design decisions.

1. Compensation Clawback Trends

Publicly-traded companies have had mandatory clawback requirements since the Sarbanes–Oxley Act was enacted in 2002. Sarbanes–Oxley imposed a relatively narrow clawback requirement that applies only to the CEO and CFO and is triggered only if a restatement of financial results occurs as a result of misconduct.

In 2010, Dodd–Frank included a more expansive clawback requirement that would apply to all executive officers (not just the CEO and CFO) and would be triggered by restatements of financial results, whether or not they were caused by misconduct. However, the Dodd–Frank clawback requirement is not yet effective due to a delay in the publication of final rules. (Proposed rules were issued in 2015, but they have not been finalized.)

Apart from legally required clawback policies, many publicly-traded companies have voluntarily adopted clawback policies in response to pressures from proxy advisory firms or investors or out of a belief that clawbacks are part of good governance.

There has been a notable trend in these voluntarily-adopted compensation clawback policies to broaden them to apply in more circumstances and cover additional types of compensation and conduct. In addition, proxy advisory services and institutional investors have in recent years adopted policies favoring clawback policies with specific designs. Some areas in which clawback policies have broadened, as well as certain proxy advisory and investor policies, are discussed below.

A. Financial Restatements Triggering Clawbacks Without Misconduct

One way in which some clawback policies have been broadened beyond the original scope of Sarbanes–Oxley is to include as triggering events financial restatements that are not the result of executive misconduct. This trend was likely given momentum by Dodd–Frank and the SEC's anticipated rules under Dodd–Frank, which would require recovery of compensation following a qualifying restatement of financial results regardless of executive misconduct.

B. Reputational Harm

Another way in which some clawback policies have been broadened is to include as triggers events that would result in non-financial harm, such as reputational harm. Reputational harm triggers are generally intended to allow a company to recover compensation in the event there is a corporate scandal that does not directly impact financial performance. Such events are often defined to include unethical business practices, problematic corporate cultures, or #MeToo harassment or similar behavior.

C. Failure to Supervise or Identify Risk

Some recent clawback policies include as grounds for clawback failures in supervision, such as behavior by subordinates likely to cause reputational harm, or a failure to identify and elevate risks appropriately.

D. Breach of Policy or Restrictive Covenants

It is increasingly common for clawback policies to include as a triggering event for a recovery of compensation an executive's policy violation or breach of a noncompetition obligation or similar agreement.

E. Selected Proxy Advisory Firm and Investor Policies

Leading proxy advisory services, such as ISS and Glass Lewis, as well as institutional investors, have encouraged a trend toward more expansive clawback policies through their voting policies. Some of their policies are summarized below:

ISS	Glass Lewis	Blackrock	CalPERs	Council of Institutional Investors
A clawback policy satisfying certain criteria may contribute toward a higher governance score or favorable voting recommendations on equity plan proposals.	Glass Lewis favors clawbacks triggered by financial restatements regardless of misconduct in its evaluation of say on pay.	Blackrock favors clawbacks in the event of faulty financial reporting or deceptive business practices, as well as in the event of an executive's behavior causing direct financial harm to shareholders, reputational risk, or a criminal investigation.	CalPERs encourages companies to have clawback policies covering fraud, inadequate oversight, misconduct including harassment, or gross negligence that is reasonably expected to impact financial results or cause reputational harm.	CII supports clawback policies covering fraud, financial restatement, personal misconduct, or ethical lapses that could cause material reputational harm.

2. Lessons Learned

A. Advancement of Legal Fees

Recent litigation has highlighted an issue that companies may wish to consider addressing in their compensation clawback policies. After a company filed suit to recover compensation from former executives due to alleged wrongdoing, the officers responded by seeking to have their legal fees advanced and to have the company indemnify them. The executives sought these benefits under the company's bylaws, which included typical language providing that legal fees would be advanced and indemnification provided when a claim related to actions taken in a former executive's official corporate capacity was brought. The company's compensation clawback provision did not address the advancement of fees or indemnification.

The Delaware Chancery Court awarded advance payment of legal fees to the former executives. If the ultimate judgment in the case was in favor of the company on the clawback issue, the executives could be required to repay the advance legal fees. However, advancing legal fees may make it easier for executives to resist a clawback and the company may not have intended to fund clawback litigation in this instance. A similar concern may apply with respect to certain indemnification benefits. To provide clarity on this issue, a company adopting or revising a clawback policy might consider stating expressly its intention concerning advance legal fees and indemnification in the event litigation occurs over the clawback policy.

B. Investigation of Potential Wrongdoing Prior to Payment

In another high-profile instance of litigation involving an attempted clawback, the company initially agreed to pay out severance benefits to a terminated executive but subsequently uncovered alleged misconduct more egregious than initially believed. The company is now seeking to recover the severance benefits on the basis that the misconduct, and the executive's attempt to cover it up, violated the company's policies and triggered one of its clawback policies. This case illustrates the expense and negative publicity that can be triggered by a clawback action and the corresponding importance of a careful and thorough investigation before paying amounts in connection with a termination to minimize the likelihood that a later clawback will be needed.

In addition to the trends and lessons learned discussed in this article, any adoption of, or revision to, a clawback policy involves other considerations, including tax, enforceability, disclosure, and governance issues, so any company considering adopting or revising a clawback policy should consult with its advisors before taking final action.

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