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SEC Staff Publishes New Staff Legal Bulletin on Ability to Exclude Shareholder Proposals on the Basis of “Ordinary Business” and “Economic Relevance”

Today, the Staff of the SEC Division of Corporation Finance published a new [Staff Legal Bulletin No. 14M](#) (“SLB 14M”) regarding the exclusion of Rule 14a-8 shareholder proposals under Rule 14a-8(i)(5) (“economic significance”) and Rule 14a-8(i)(7) (“ordinary business”). SLB 14M broadens the ability to exclude shareholder proposals on these bases by (1) rescinding Staff Legal Bulletin No. 14L (“SLB 14L”),¹ which was issued on November 3, 2021 and narrowed the ability to exclude proposals with “broad societal impact” and (2) reinstating guidance previously rescinded by SLB 14L.²

SLB 14M should result in greater success for companies seeking exclusions of shareholder proposals, including “ESG” and “anti-ESG” proposals.³ Companies that have received one or more shareholder proposals for their upcoming shareholder meetings may wish to review their approach in light of the new Staff guidance. Even if a company’s deadline for making a no-action request has passed, the Staff will consider the publication of SLB 14M to be “good cause” for making a late request so long as the legal arguments in the request relate to the new Staff guidance.

Specifically, SLB 14M provides that, with respect to:

“Economic Relevance” Exclusion under Rule 14a-8(i)(5)—Rule 14a-8(i)(5) permits a company to exclude a proposal that “relates to operations which account for less than 5 percent of the company’s total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company’s business.” SLB 14M outlines a more company-specific Staff approach to the Rule 14a-8(i)(5) analysis compared to SLB 14L, which focused on whether the issue covered by the proposal has broad societal impact rather than the significance of the issue to the company. Under SLB 14M, “proposals that raise issues of social or

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ethical significance may be excludable, notwithstanding their importance in the abstract, based on the application and analysis of each of the factors of Rule 14a-8(i)(5) in determining the proposal's relevance to the company's business." The Staff further stated that, because Rule 14a-8(i)(5) "allows exclusion only when the matter is not 'otherwise significantly related to the company,' we view the analysis as dependent upon the particular circumstances of the company to which the proposal is submitted." Therefore, for proposals that "raise social or ethical issues," a proponent "would need to tie those matters to a significant effect on the company's business" in order to avoid exclusion under Rule 14a-8(i)(5), and "[t]he mere possibility of reputational or economic harm alone will not demonstrate that a proposal is 'otherwise significantly related to the company's business.'" In contrast, the Staff "would generally view substantive governance matters to be significantly related to almost all companies." In addition, the Staff clarified that, in analyzing whether a proposal is "otherwise significantly related" under Rule 14a-8(i)(5), the Staff will not look to its analysis under Rule 14a-8(i)(7), which has at times informed the Rule 14a-8(i)(5) analysis in the past.

"Ordinary Business" Exclusion under Rule 14a-8(i)(7)—Rule 14a-8(i)(7) permits a company to exclude a proposal that "deals with a matter relating to the company's ordinary business operations," and rests on (1) whether a proposal raises matters that are "so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight," or (2) the degree to which the proposal "micromanages" the company. With respect to the first consideration, whereas SLB 14L had directed the Staff to consider whether a proposal "raises issues with broad societal impact, such that they transcend the ordinary business of the company," SLB 14M states that the Staff "will take a company-specific approach in evaluating significance, rather than focusing solely on whether a proposal raises a policy issue with broad societal impact or whether particular issues or categories of issues are universally 'significant.'" With respect to the second consideration, SLB 14M reinstates the guidance on "micromanagement" previously rescinded by SLB 14L.

Board Analysis—Prior to SLB 14L, the Staff encouraged companies to include with their no-action requests under Rules 14a-8(i)(5) and 14a-8(i)(7) a discussion reflecting the board's analysis of the particular policy issue raised and its significance to the company. SLB 14M clarifies that the Staff will not expect a company's no-action request to include such an analysis, but that a company may submit a board analysis if it believes the analysis would help the Staff analyze the no-action request.

2022 SEC Rulemaking Proposal to Narrow Exclusions under Rule 14a-8(i)(10), Rule 14a-8(i)(11), and Rule 14a-8(i)(12)—SLB 14M states that the Staff considers no-action requests under operative SEC rules and applicable staff guidance, and specifically notes that the amendments proposed by the SEC in 2022 to narrow the "substantial implementation," "duplication" and "resubmission" exclusions⁴ have not been adopted.

Timing—SLB 14M includes a “Frequently Asked Questions” section intended to address general questions because “companies, proponents, and their representatives may have time-sensitive questions regarding the implementation of this bulletin.” Among other topics covered, the FAQs state that, consistent with Rule 14a-8(j)(1), the Staff “may permit” a company to submit its no-action request after the deadline under Rule 14a-8(j) “if the company demonstrates good cause for missing the deadline.” SLB 14M further notes “the [S]taff will consider the publication of this bulletin to be ‘good cause’ if it relates to legal arguments made by the new request. The publication of this bulletin will not constitute ‘good cause’ for a new request if it does not relate to the request.” SLB 14M instructs companies that they “should endeavor to submit any new requests as soon as possible.”

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ENDNOTES

- ¹ For more information about SLB 14L, see our publication, [New SEC Staff Guidance on Shareholder Proposals](#) (Nov. 8, 2021).
- ² Specifically, SLB 14M reinstates:
 - [Staff Legal Bulletin No. 14J Section C.2. Micromanagement](#);
 - [Staff Legal Bulletin No. 14J Section C.3 The Division’s application of Rule 14a-8\(i\)\(7\) to proposals that address senior executive and/or director compensation](#); and
 - [Staff Legal Bulletin No. 14K Section B.4. Micromanagement](#).
- ³ In addition, the Staff published Compliance and Disclosure Interpretation under Regulation 13D-G yesterday regarding the availability of Schedule 13G for a shareholder who, among other actions, “undertake[s] specific actions on a social, environmental, or political policy and, as a means of pressuring the issuer to adopt the recommendation, explicitly or implicitly conditions its support of one or more of the issuer’s director nominees at the next director election on the issuer’s adoption of its recommendation.” See our publication, [New SEC Interpretations May Risk Schedule 13G Eligibility](#) (Feb. 12, 2025).
- ⁴ For more information about the 2022 proposed amendments, see our publication, [SEC Proposes to Significantly Narrow Bases for Excluding Shareholder Proposals Under Rule 14a-8](#) (July 21, 2022).

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