

November 8, 2021

# New SEC Staff Guidance on Shareholder Proposals

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## Rescinds Previous Guidance, Enabling More Shareholder Proposals on Environmental and Social Issues

### Also Facilitates Use of Graphics and Email

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#### HIGHLIGHTS

On November 3, 2021, the staff of the Division of Corporation Finance of the Securities and Exchange Commission issued [new guidance](#) that rescinds previously issued guidance in 2017 ([SLB No. 14I](#)), 2018 ([SLB No. 14J](#)) and 2019 ([SLB No. 14K](#)) on the shareholder proposal process.

#### Narrowed exclusions for “Ordinary Business” and “Economic Significance”

- **Consideration of Broad Social Impact that Transcends an Issuer’s Business.** For the Rule 14a-8(i)(5) and Rule 14a-8(i)(7) “economic relevance” and “ordinary business” exclusions, the SEC staff will no longer evaluate the significance of a policy issue to the issuer and will instead only “consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.” The new guidance also suggests that proposals in the areas of climate change and human capital management<sup>1</sup> will not be excluded under these bases.
- **Micromanagement.** The new guidance also provides that “proposals seeking detail or seeking to promote timeframes or methods do not per se constitute micromanagement,” and the staff now will take a more limiting approach to evaluating companies’ micromanagement arguments by focusing on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management. The SEC staff may consider additional factors when evaluating companies’ micromanagement arguments, including: (1) the sophistication of investors on the particular matter; (2) the availability of data; (3) the robustness of public discussion and analysis on the topic; and (4) references to well-established national or international frameworks. The new guidance suggests that previously excluded proposals relating to changes to address climate change or mandate reporting under a climate disclosure framework would no longer be excluded so long as the proposals afford discretion to management as to how to implement the changes.<sup>2</sup>

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- **Board Analysis No Longer Expected for No-Action Requests.** In moving away from a company-specific analysis to evaluating the significance of a policy issue to society at large, the SEC staff will no longer expect a board's analysis in no-action requests arguing the ordinary business and economic relevance exclusions.

### Additional Guidance

- **Use of Graphics.** The new guidance clarifies that any words in images or graphics in a proposal<sup>3</sup> will be counted toward the 500-word limit in Rule 14a-8(d) and reiterates that, if an issuer includes its own graphics in its proxy statement, it should give similar prominence to a shareholder's graphics.<sup>4</sup>
- **Use of Email.** The new guidance recommends that both proponents and companies seek confirmation of receipt of emails for proof of delivery when submitting shareholder proposals, delivering notice of defects and responding to those notices under Rule 14a-8. The new guidance also suggests providing an email address for submitting proposals in the proxy statement, or when requested by a shareholder, and clarifies the burden of proof on companies and proponents when using email in the proposal process.<sup>5</sup>
- **Proof of Ownership.** The new guidance suggests taking a plain meaning approach to interpreting a proof of ownership letter, updates the suggested format for proponents to verify their ownership<sup>6</sup> and states that companies should identify any specific defects in the proof of ownership letter, even if the company previously sent a deficiency notice prior to receiving the proponent's proof of ownership.

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## BACKGROUND

The stated purpose of the new guidance is to (1) simplify and streamline the SEC staff's process for reviewing no-action requests for issuers seeking to omit a shareholder proposal pursuant to the ordinary business or economic relevance exclusions and (2) clarify the standards the staff will apply when evaluating these requests.

Exchange Act Rule 14a-8 addresses when a company must include a shareholder's proposal and supporting statement in its proxy statement. The Rule provides a number of substantive and procedural bases for exclusion. The new guidance addresses the following exclusions:

- A company may exclude a proposal that (1) deals with the company's ordinary business operations or "micromanages" the company regardless of whether the proposal deals with otherwise "significant" subject matter or (2) relates to the operations of the company that account for less than 5% of the company's total assets at the end of its most recent fiscal year, and for less than 5% of its net earnings and gross sales for its most recent fiscal year, and, in each case, is not otherwise significantly related to the company's business.
- A company may also exclude a proposal if (1) the proposal and any supporting statement exceed 500 words or (2) the proponent does not offer proof that it "continuously held" the required number of securities of the company for at least one, two or three years, depending on the amount of securities held by the date the proposal is submitted.

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ENDNOTES

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- <sup>1</sup> The guidance also noted that matters related to employment discrimination are an example of workforce management proposals that may rise to the level of transcending the company's ordinary business operations.
- <sup>2</sup> As an example, in a [recent letter](#) to ConocoPhillips Company, the SEC staff stated that a proposal requesting that the company set greenhouse emission reduction targets for the company's operations and products, without specifying a method for doing so, did not micromanage to such a degree as to justify exclusion.
- <sup>3</sup> Images may be subject to exclusion under Rule 14a-8(i)(3) where they: (i) make the proposal materially false or misleading; (ii) render the proposal inherently vague or indefinite; (iii) impugn character, integrity or personal reputation without factual support; (iv) make charges concerning improper, illegal or immoral conduct without factual support; or (v) are irrelevant to the consideration of the proposal.
- <sup>4</sup> The guidance notes that if an issuer's proxy statement appears in black and white the shareholder proposal and accompanying graphics may also appear in black and white. The new guidance does not specifically provide any limits to the size of the graphics.
- <sup>5</sup> The guidance states that, if using email for delivery of and responses to deficiency notices under Rule 14a-8(f)(1), the company has the burden of proving timely delivery of the notice and for responses to deficiency notices and the burden is on the proponent or representative to use an appropriate email address (e.g., an email address provided by the company, or the email address of the counsel who sent the deficiency notice).
- <sup>6</sup> The suggested format is as follows: "As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least [one year] [two years] [three years], [number of securities] shares of [company name] [class of securities]." This new format reflects last year's amendments to ownership thresholds under Rule 14a-8(b), which are described in *SEC Modernizes Shareholder Proposal Requirements*, available at <https://www.sullcrom.com/files/upload/SC-Publication-SEC-Modernizes-Shareholder-Proposal-Requirements.pdf>.

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