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SEC Staff Issues New Guidance on Shareholder Proposals and Schedule 13G Eligibility

Service

Securities & Corporate Governance

Professionals

STEVEN R. BARRETT
CHATTANOOGA:
423.757.5905
STEVE.BARRETT@
HUSCHBLACKWELL.COM

ROBERT J. JOSEPH
CHICAGO:
312.526.1536
ROBERT.JOSEPH@
HUSCHBLACKWELL.COM

ANDREW SPECTOR
BOSTON:
617.598.6700
ANDREW.SPECTOR@
HUSCHBLACKWELL.COM

On February 12, 2025, the Division of Corporation Finance of the U.S. Securities and Exchange Commission (SEC) published Staff Legal Bulletin No. 14M (SLB 14M) setting forth staff guidance on shareholder proposals submitted under the Securities Exchange Act of 1934 Rule 14a-8. SLB 14M introduces significant changes to the process of excluding shareholder proposals from an issuer's proxy statement, including by rescinding Staff Legal Bulletin No. 14L (SLB 14L) (issued November 3, 2021) and reinstating certain portions of previous staff guidance issued under Staff Legal Bulletin Nos. 14I, 14J, and 14K (SLBs 14I, 14J, and 14K) (issued November 1, 2017, October 23, 2018, and October 16, 2019, respectively). It is important to note that SLB 14L itself rescinded SLBs 14I, 14J, and 14K. So, while on its face the recission of SLB 14L may appear to be a bold measure, in reality it is a simple counter to measures taken by the staff under the previous administration. Accordingly, SLB 14M marks the return to a more traditional approach on the shareholder proposal process and should result in a higher rate of success for issuers attempting to exclude shareholder proposals from their proxy statements.

"Economic relevance" exclusion

Rule 14a-8(i)(5) permits companies to exclude a shareholder proposal that "relates to operations which account for less than five percent of the company's total assets at the end of its most recent fiscal year, and for less than five 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 focuses its analysis on a proposal's significance to a company when it otherwise does not meet the five percent thresholds set forth in Rule 14a-8(i)(5). In conducting this analysis, SLB 14L took the view that proposals

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raising issues of social or ethical concern in the abstract could not be excluded regardless of their significance to the actual company. However, SLB 14M notes that "proposals that raise issues of social or 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 indicated that when there is not prima facie evidence of significance, the burden is on the proponent to prove that the proposal is "otherwise significantly related to the company's business." Proponents can continue to raise social and ethical concerns in shareholder proposals, but the proponent "would need to tie those matters to a significant effect on the company's business" in order to avoid exclusion. Further, "[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'" and the staff will consider the proposal in light of the "total mix" of information about the issuer. SLB 14M notes that the analysis of whether an issue is "otherwise significantly related to the company" is company-specific, but substantive governance matters generally are significant to almost all companies.

In addition, the staff clarifies that, in conducting the significance analysis under Rule 14a-8(i)(5), it will not look to its analysis under the "ordinary business" exception found in Rule 14a-8(i)(7), despite some historical practices of informing the analysis under Rule 14a-8(i)(5) by the staff's findings under Rule 14a-8(i)(7). The ataff explained that "applying separate analytical frameworks will ensure that each basis for exclusion serves its intended purpose."

"Ordinary business" exclusion

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." The SEC has stated that the goal of this rule is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting." The SEC has also stated that this exclusion rests upon two central considerations: (1) the subject matter of the proposal and (2) the degree to which the proposal micromanages the company.

Subject matter significance

Under the first consideration, well-established SEC guidance indicates that certain matters 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" and, therefore, would qualify for exclusion under the "ordinary business" exclusion. However, the SEC has also noted that certain proposals are not excludable under this theory "because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." In making a determination as to whether a proposal transcends ordinary business, SLB 14L focused on "whether the proposal raises issues with a broad societal impact, such that they

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transcend the ordinary business of the company." SLB 14M, however, reverts to a more company-specific approach by focusing on whether the matters raised by a proposal are significant to the particular company at issue, rather than focusing on whether a proposal has broad societal impacts or taking a view that certain issues or categories of issues are universally "significant." The staff clarifies that this company-specific approach means "a policy issue that is significant to one company may not be significant to another."

Micromanagement

With respect to the second consideration, SLB 14M reinstates certain sections of Staff Legal Bulletin 14J and Staff Legal Bulletin 14K previously rescinded by SLB 14L. Under Rule 14a-8(i)(7), a company may exclude a shareholder proposal that seeks to "micromanage" a company "by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." The reinstated guidance will consider proposals on a case-by-case basis and take "into account factors such as the nature of the proposal and the circumstances of the company to which it is directed." The staff will consider whether the proposal "involves intricate detail, or seeks to impose specific timeframes or methods for implementing complex policies" and will apply this framework when determining whether a proposal may be excluded on the basis of micromanagement. For example, a proposal "that prescribes specific timeframes or methods for implementing complex policies…may run afoul of micromanagement," regardless of whether the policies raised by the proposal are consistent with the SEC's guidance. The staff will look not only to the resolved clause of a proposal but will review the proposal in its entirety. Therefore, when determining whether a proposal seeks to micromanage, the staff will take into account supporting statements to a resolved clause that effectively require some action or order to achieve the proposal's purpose. Lastly, the reinstated guidance clarifies that proposals relating to senior executive and/or director compensation may still micromanage a company and such proposals will not be treated differently than other types of proposals.

Board analysis

SLB 14L encouraged companies to include with their no-action letter requests a "board analysis" reflecting the board's findings on a particular policy issue raised and its significance to the company. The staff notes that, in most cases, the information needed for the staff's analysis was not included in the board analyses and such board analyses did not have a dispositive effect. Therefore, SLB 14M clarifies that the staff no longer expects companies to include a board analysis in their no-action request letters, but companies may submit a board analysis for the staff's consideration if they believe it will help the staff analyze the no-action request.

2022 proposed amendments to Rule 14a-8(i)(10), Rule 14a-8(i)(11), and Rule 14a-8(i)(12)

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In 2022, the SEC proposed amendments to modify the "substantial implementation," "duplication," and "resubmission" bases for exclusion, which would generally make it more difficult for companies to exclude proposals under the rules. SLB 14M notes that these proposed amendments have not yet been adopted by the SEC and clarifies that the staff will only consider no-action requests and supplemental correspondence in accordance with the operative SEC rules and applicable staff guidance.

Shareholder proposal length

Rule 14a-8(d) provides a basis for excluding shareholder proposals when the proposal exceeds 500 words. The staff noted that Rule 14a-8(d) "does not preclude shareholders from using graphics to convey information about their proposals." While the staff acknowledged the potential for abuse in this area, it noted that these potential abuses can be addressed by other bases for exclusion set forth in Rule 14a-8. The staff also clarifies that exclusion would be appropriate where the total number of words in a proposal (including words in the graphics) exceeds 500 words.

Proof of ownership letters

Rule 14a-8(b) provides that in order to submit a proposal, a shareholder must provide proof that it "continuously held" the required amount of securities for the required amount of time. In an effort to reduce common errors shareholders make when submitting such proof, the staff previously provided a suggested format for shareholders and their brokers or banks to follow. SLB 14M clarifies that many companies have applied an overly technical reading to proof of ownership letters submitted by shareholders and, while the staff encourages shareholders and their brokers or banks to use the sample language previously provided, "such formulation is neither mandatory nor the exclusive means of demonstrating the ownership requirements of Rule 14a-8(b)." Instead, companies should consider whether the letter is clear and sufficiently evidences the requisite ownership requirements.

Use of email

As proponents and companies have increasingly relied on the use of emails to submit proposals and make other communications in recent years, the staff encourages senders, for purposes of proving delivery under Rule 14a-8, to seek a reply email from the recipient acknowledging receipt and to reach out using another method of communication if the requested confirmation is not provided. The staff also notes that email read receipts may help to establish the delivery requirement.

When a company does not provide an email address for submitting proposals in its proxy statement, the staff advises proponents to reach out to the company to obtain the correct email address before submitting their proposals. The staff also encourages companies to provide these email addresses upon request. Similarly, if companies use email to send deficiency notices to proponents, the staff

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recommends seeking confirmation of receipt from the proponent or their representative to ensure timely delivery. Additionally, if a shareholder uses email to respond to a company's deficiency notice, the staff emphasizes that it is the shareholder's responsibility to use the appropriate email address (such as one provided by the company or the counsel who sent the deficiency notice) and again encourages them to seek confirmation of receipt.

Timing considerations

In somewhat of a surprise, SLB 14M was issued in the midst of the current proxy and annual meeting season. This has caused some confusion amongst proponents and companies regarding the correct guidance to apply when it comes to shareholder proposals and no-action letters, respectively. The staff included a question-and-answer section in SLB 14M clarifying that the staff will consider the guidance in place at the time it issues a response with respect to any no-action letters. The staff noted that no-action requests submitted prior to SLB 14M do not need to be resubmitted, but if a company wishes to raise new arguments based on the guidance provided in SLB 14M it may submit supplemental correspondence in a timely manner via the online portal. Similarly, the staff will consider the publication of SLB 14M "good cause" under Rule 14a-8(j), permitting new no-action requests to be submitted even though the prescribed deadline has passed so long as the new request relates to the guidance provided by SLB 14M.

Schedule 13D and 13G updates

On February 11, 2025, the staff issued updates to Question 103.11 of the SEC's Compliance and Disclosure Interpretations (C&DIs) and published a new Question 103.12. As background, investors that beneficially own more than five percent of a publicly traded company's voting securities must report their ownership on the more burdensome Schedule 13D, unless they meet certain requirements qualifying them as a "passive investor" entitling them to use the short-form Schedule 13G to report ownership. C&DI 103.11 and 103.12 each provide new guidance on how shareholder engagement with issuers may affect a beneficial owner's passive status, impacting their eligibility to report on short-form Schedule 13G.

C&DI 103.11

An exemption from the Hart-Scott-Rodino Act (HSR Act) is provided where the acquisition of securities was made "solely for the purpose of investment," with the acquiror having "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." The updated C&DI 103.11 clarifies that a shareholder's inability to rely on the HSR Act exemption alone does not preclude them from filing on Schedule 13G instead of Schedule 13D. The determination of whether a shareholder can file on Schedule 13G depends on whether the shareholder acquired or is holding the securities with the purpose or effect of changing or influencing "control" (as

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defined in Exchange Act Section 12b-2) of the issuer. Additionally, the staff removed from this C&DI its prior guidance that "engagement with an issuer's management on executive compensation and social or public interest issues (such as environmental policies), without more, would not preclude a shareholder from filing on Schedule 13G so long as such engagement is not undertaken with the purpose or effect of changing or influencing control of the issuer and the shareholder is otherwise eligible to file on Schedule 13G…." and that "[e]ngagement on corporate governance topics, such as removal of staggered boards, majority voting standards in director elections, and elimination of poison pill plans, without more, generally would not disqualify an otherwise eligible shareholder from filing on Schedule 13G if the discussion is being undertaken by the shareholder as part of a broad effort to promote its view of good corporate governance practices for all of its portfolio companies, rather than to facilitate a specific change in control in a particular company." As readers will see below, this guidance was replaced by a different approach taken in C&DI 103.12

C&DI 103.12

Many institutional investors that acquire greater than five percent of a public company's securities are able to avoid filing on Schedule 13D pursuant to Rule 13d-1(b) and (c), which provide for an exemption where the investor certifies that they have acquired the securities not with the purpose or effect of "changing or influencing the control of the issuer." This is also known as a "passive investor." C&DI 103.12 deviates from the approach taken by C&DI 103.11, noting that the subject matter of a shareholder's engagement alone is not sufficient for determining whether the investor is passive. In making this determination, the context in which the engagement occurs is also relevant, and an investor that "exerts pressure on management to implement specific measures or changes to a policy may be 'influencing' control over the issuer." Examples of such engagement provided by the staff include:

"recommends that the issuer remove its staggered board, switch to a majority voting standard in uncontested director elections, eliminate its poison pill plan, change its executive compensation practices, or undertake 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; or

discusses with management its voting policy on a particular topic and how the issuer fails to meet the shareholder's expectations on such topic, and, to apply pressure on management, states or implies during any such discussions that it will not support one or more of the issuer's director nominees at

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the next director election unless management makes changes to align with the shareholder's expectations."

What this means to you

SLB 14M

Companies should review the updated guidance and consider supplementing and/or submitting new no-action request letters if the guidance issued by SLB 14M would aid in excluding shareholder proposals. The timing of SLB 14M will necessitate quick action by companies, as the staff has emphasized that new no-action requests should be submitted "as soon as possible" in order to meet print deadlines for definitive proxies and provide proponents with an opportunity to submit supplemental correspondence in response to such new requests. SLB 14M represents a bold shift away from SLB 14L issued under the prior administration and reflects a focus by the current administration to support issuers and promote capital formation.

In light of the updated standards under SLB 14M that will be applied, companies going forward should consider re-engaging with shareholder proponents, who may be more willing to agree on a basis to withdraw their proposals.

Schedule 13G

Investors will need to closely consider the new guidance in determining whether their engagement with management crosses the threshold of having the "purpose or effect of changing or influencing control of the issuer." Investors may need to reconsider their interactions with management to avoid the more burdensome reporting requirements of Schedule 13D. For example, Vanguard has paused meetings with portfolio companies while it reviews the impact of the new SEC guidance, and Blackrock temporarily paused engagements in response to the new SEC guidance. In light of this, for those companies that wish to continue to engage with investors, companies should consider being more proactive in requesting engagement with investors and asking questions about key topics during such engagement, as investor responses to company-initiated inquiries regarding the investor's views on a particular issue should present less risk of being viewed as applying pressure on management or attempting to influence control of a company.

Contact us

If you have any questions, please do not hesitate to contact Steve Barrett, Robert Joseph, Victoria Sitz, Andrew Spector, Nick Pappas, or your Husch Blackwell attorney.

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