

MEMO# 33882

November 4, 2021

SEC Staff Rescinds, Issues Guidance on Shareholder Proposal Rule

[33882]

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TO: ICI Members

Investment Company Directors SUBJECTS: Compliance

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Transfer Agency RE: SEC Staff Rescinds, Issues Guidance on Shareholder Proposal Rule

Yesterday, the SEC staff rescinded prior guidance and also issued new guidance on the shareholder proposal rule (Rule 14a-8).[\[1\]](#) Rule 14a-8 under the Exchange Act conditionally permits a company's shareholders to include proposals (i.e., recommendations or requirements that a company and/or its board take specific actions) on a company's proxy statement. Chair Gensler stated that SLB 14L "will provide greater clarity to companies and shareholders on these matters, so they can better understand when exclusions may or may not apply."[\[2\]](#) Commissioners Peirce and Roisman stated that it "furthers the recent trend of erasing previous Commissions' and staffs' work and replacing it with the current Commission's flavor-of-the-day regulatory approach."[\[3\]](#)

The new guidance will restrict companies' ability to exclude proposals on certain grounds and therefore could increase the overall number shareholder proposals on companies' proxies.

Summary of the Staff Guidance

Rule 14a-8(i) provides several bases upon which a company may exclude a shareholder proposal. SLB 14L rescinds Staff Legal Bulletin Nos. 14I, 14J and 14K, which the staff issued in 2017, 2018, and 2019, respectively. Those rescinded SLBs mostly focused on the scope and application of the "ordinary business"[\[4\]](#) and "economic relevance"[\[5\]](#) exclusions.

New Guidance on the "Ordinary Business" Exclusion

Previously, "an undue emphasis was placed on evaluating the significance of a policy issue

to a particular company at the expense of whether the proposal focuses on a significant social policy... [and drew] ... the staff into factual considerations that do not advance the policy objectives behind the ordinary business exception."

Going forward, "staff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal."[\[6\]](#) By way of example, "proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company." The staff also suggests that a company board's analysis "may distract the company and the staff from the proper application of the exclusion."

Furthermore, prior "application of the micromanagement concept...expanded [it] beyond the Commission's policy directives." Now, "the staff will take a measured approach to evaluating companies' micromanagement arguments - recognizing that proposals seeking detail or seeking to promote timeframes or methods do not per se constitute micromanagement. Instead, we will focus on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management."[\[7\]](#)

Overall, the intent of this guidance is to "preserve management's discretion on ordinary business matters but not prevent shareholders from providing high-level direction on large strategic corporate matters."

New Guidance on the "Economic Relevance" Exclusion

After quoting the rule text for this exclusion,[\[8\]](#) SLB 14L states that "proposals that raise issues of broad social or ethical concern related to the company's business may not be excluded, even if the relevant business falls below the [exclusion's] economic thresholds" Also, the staff will no longer expect a board analysis for its consideration under this exclusion.

Miscellaneous Guidance

SLB 14L also addresses the following aspects of Rule 14a-8:

- **Images in shareholder proposals.** Rule 14a-8(d) provides that a "proposal, including any accompanying supporting statement, may not exceed 500 words." While recognizing circumstances where exclusion of graphs and/or images would be appropriate, SLB 14L states that the rule "does not preclude shareholders from using graphics to convey information about their proposals."
- **Proof of ownership letters.** Rule 14a-8(b) provides that a proponent must prove eligibility to submit a proposal by offering proof that it "continuously held" the required amount of securities for the required amount of time. SLB 14L suggests language that brokers and banks may (but need not) use to meet this requirement.[\[9\]](#) More generally, "companies should not seek to exclude a shareholder proposal based on drafting variances in the proof of ownership letter if the language used in such letter is clear and sufficiently evidences the requisite minimum ownership requirements."
- **Use of email.** SLB 14L notes that both proponents and companies have increasingly relied on emails to submit proposals and make other communications. The staff

provides the following related guidance:

- To prove delivery of an email, the sender should seek a reply e-mail from the recipient acknowledging receipt; both companies and shareholder proponents should acknowledge receipt of emails when requested;
- Where the company does not disclose in its proxy statement an email address for submitting proposals, shareholder proponents should contact the company to obtain the correct email address, and companies should provide such email addresses upon request;
- If companies use email to deliver deficiency notices to proponents, they should seek a confirmation of receipt from the proponent; and
- If a shareholder uses email to respond to a company's deficiency notice, the burden is on the shareholder to use an appropriate email address, and the shareholder should seek confirmation of receipt.

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endnotes

[1] *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)*, SEC Division of Corporation Finance (Nov. 3, 2021)("SLB 14L"), available at www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals.

[2] *Statement regarding Shareholder Proposals: Staff Legal Bulletin No. 14L*, SEC Chair Gensler (Nov. 3, 2021), available at www.sec.gov/news/statement/gensler-statement-shareholder-proposals-14l.

[3] *Statement on Shareholder Proposals: Staff Legal Bulletin No. 14L*, Commissioners Hester Peirce and Elad Roisman (Nov. 3, 2021), available at www.sec.gov/news/statement/peirce-roisman-statement-shareholder-proposals-staff-legal-bulletin-14l.

[4] This exclusion permits a company to exclude a proposal that "deals with a matter relating to the company's ordinary business operations."

[5] This exclusion 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."

[6] Moreover, "In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company."

[7] Illustrating this, the staff notes approvingly that it had recently denied a company's exclusion request for a shareholder proposal requesting that a company set targets covering the greenhouse gas emissions without imposing a specific method for doing so. The staff concluded this proposal did not micromanage to such a degree to justify exclusion. Also, in assessing whether a proposal probes matters "too complex" for

shareholders to make an informed judgment, the staff "may consider the sophistication of investors generally on the matter, the availability of data, and the robustness of public discussion and analysis on the topic. The staff may also consider references to well-established national or international frameworks when assessing proposals related to disclosure, target setting, and timeframes as indicative of topics that shareholders are well-equipped to evaluate."

[\[8\]](#) See *supra*, note 5.

[\[9\]](#) Specifically, "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]."

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