



Securities Law ADVISORY ■

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Latest SEC Bulletin Provides Further Guidance on Excluding Shareholder Proposals

On October 23, 2018, the staff of the Division of Corporation Finance of the U.S. Securities and Exchange Commission (SEC) released [Staff Legal Bulletin \(SLB\) No. 14J](#) to provide more guidance on the application of certain exclusions under Rule 14a-8. SLB No. 14J is a follow-up to the guidance provided by the staff last November in [SLB No. 14I](#). Specifically, SLB No. 14J provides guidance on board analyses that seek to rely on Rules 14a-8(i)(5) or 14a-8(i)(7) as a basis to exclude proposals, the scope and application of micromanagement as a basis for proposal exclusion, and the scope and application of Rule 14a-8(i)(7) for proposals that concern senior executive and director compensation.

Board Analysis of “Ordinary Business” or “Economic Relevance” Exception

Rule 14a-8(i)(7) contains the ordinary business exception, which permits a company to exclude a proposal that “deals with a matter relating to the company’s ordinary business operations.” Rule 14a-8(i)(5) contains the economic relevance exception, which 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.” However, the staff will not permit companies to exclude proposals that raise significant policy issues that may transcend ordinary business because those would be appropriate for shareholder vote.

Last fall, the staff released SLB No. 14I to address the scope and application of Rule 14a-8(i)(5) and Rule 14a-8(i)(7). In SLB No. 14I, the staff acknowledged that a company’s board of directors is best situated to make the necessary judgment call on the company’s business and invited companies to include in their no-action requests a discussion of their board’s analysis of the policy issue raised by the proposal and the significance of such policy to the company.

New staff guidance

After evaluating no-action requests during the 2018 proxy season, the staff is providing additional guidance on the discussions of the board analysis that it found to be most helpful in evaluating the exclusion of the proposals. The staff noted that discussions are most effective when they analyze the “specific substantive factors” a company’s board considered in arriving at its conclusion. Those factors include:

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- The extent to which the proposal relates to the company's core business activities.
- Quantitative data, including a financial statement impact, related to the matter that illustrate whether or not a matter is significant to the company.
- Whether the company has already addressed the issue in some manner, including the differences—or the delta—between the proposal's specific request and the actions the company has already taken, and an analysis of whether the delta presents a significant policy issue for the company.
- The extent of shareholder engagement on the issue and the level of shareholder interest expressed through that engagement.
- Whether anyone other than the proponent has requested the type of action or information sought by the proposal.
- Whether the company's shareholders have previously voted on the matter and the board's views on the related voting results.

The staff also noted that the absence of a board analysis will not create a presumption against exclusion nor will the inclusion of such analysis create a presumption of exclusion. However, without such a discussion, the staff may find it difficult in certain instances to agree that a proposal may be excluded. The staff will make determinations on a case-by-case basis after considering factors such as the board's discussion, the nature of the proposal, whether a company's shareholders have previously voted on a matter, and the circumstances of the company.

Rule 14a-8(i)(7) – Micromanagement

The ordinary business exception is based on two central considerations: the subject matter of the proposal and the degree to which the proposal micromanages the company. In SLB 14J, the staff provides additional guidance on when a proposal may be excludable on the basis of micromanagement.

The staff noted that a proposal may constitute micromanagement if it involves intricate detail or seeks to impose specific timeframes or specific methods for implementing complex policies. The staff noted that, in some situations, a proposal's subject matter may be appropriate for shareholder consideration but still be excluded because of the micromanaging manner in which the proposal attempts to address the issue.

Rule 14a-8(i)(7) – Senior Executive and Director Compensation

SLB No. 14J also provides guidance on the application of the ordinary business exception to proposals that relate to the compensation of a company's senior executives and/or directors. The staff has previously said that proposals related to general employee compensation are excludable under the ordinary business exception. Conversely, proposals focused on significant aspects of senior executive and/or director compensation are generally not excludable under Rule 14a-8(i)(7).

Proposals that address senior executive and/or director compensation and ordinary business matters

Whether a proposal should be excluded under the ordinary business exception will depend on whether the focus of the proposal is senior executive and/or director executive compensation or whether the underlying concern relates to an unrelated ordinary business matter. If the focus appears to be on the ordinary business matter, then the proposal may be excluded under Rule 14a-8(i)(7). The staff notes that this framework will ensure that a proposal is not improperly included because it addresses an otherwise excludable matter in a manner that is connected to or touches upon such compensation matters.

Proposals that address aspects of senior executive compensation that are also available or applicable to the general workforce

Rule 14a-8(i)(7) allows for the exclusion of proposals on executive pay if a “primary aspect” of the proposal concerns compensation that is broadly applicable to the general workforce and senior executives and directors. The staff finds that such broadly applicable proposals may be excluded because they do not focus on “significant compensation issues” that transcend the ordinary business threshold.

In SLB No. 14J, the staff set forth its new approach to evaluating proposals that address aspects of senior executive and/or director compensation that are also available or applicable to the company’s general workforce:

- Companies will generally not be able to rely on Rule 14a-8(i)(7) to exclude proposals that focus on aspects of compensation that apply only to senior executives and/or directors.
- Companies will generally be able to rely on Rule 14a-8(i)(7) to exclude proposals that focus on aspects of compensation that apply to executives officers, directors, and the general workforce.

Proposals that micromanage senior executive and/or director compensation practices

Lastly, the staff reversed its prior position that proposals relating to senior executive and/or director compensation may not be excluded on the basis of micromanagement. Under SLB No. 14J, the staff stated that it will treat executive compensation proposals consistently with other types of proposals. As a result, companies may exclude under 14a-8(i)(7) on the basis of micromanagement proposals on senior executive and/or director compensation that seek intricate detail or seek to impose specific timeframes or methods for implementing complex policies.

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