



Securities Law ADVISORY ■

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SEC Provides Guidance on Shareholder Proposals

On October 16, 2019, the staff of the Division of Corporation Finance of the U.S. Securities and Exchange Commission (SEC) released [Staff Legal Bulletin \(SLB\) No. 14K \(CF\)](#) to provide guidance on Rule 14a-8 under the Securities Exchange Act of 1934. This bulletin is a follow-up to guidance provided by the staff last October in [SLB 14J](#).

Specifically, SLB 14K provides guidance on:

- The analytical framework used in Rule 14a-8(i)(7).
- The analysis required by the board of directors in making no-action requests on policy issues they deemed not significant to the company.
- The scope of the micromanagement exclusion under Rule 14a-8(i)(7).
- The required format of proof of ownership letters.

The “ordinary business” exception under Rule 14a-8(i)(7) allows companies to exclude shareholder proposals that “deal with a matter relating to the company’s ordinary business operations.” This rule helps ensure ordinary business problems are the responsibility of company management and the board of directors rather than shareholders at an annual meeting. The staff looks to a proposal’s subject matter and the degree to which the proposal “micromanages” the company for whether it would qualify under the ordinary business exception.

Analytical Framework

Under the first step of the analysis, a proposal’s subject matter, the staff has previously stated that the exception depends on the connection between a policy issue and the company’s business operations. The staff uses a company-specific approach in applying this analysis because some policy issues are more “significant” to certain companies than others.

In SLB 14K, the staff further clarified that the determination for exclusion should be whether the proposal relates to a company’s ordinary business or raises an issue that “transcends” the company’s ordinary operations.

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When submitting no-action requests, companies should focus on the level of significance the issue has on the company's business. The staff noted that in the most recent proxy season, no-action requests that included a detailed analysis of the board's decision, including a nonexclusive list of substantive factors, were more helpful in determining whether to allow a Rule 14a-8(i)(7) exception. The staff suggested that a board's analysis include:

- Whether the company has previously addressed the issue, including the company's subsequent actions, intervening events, and other indicators of shareholder engagement on the issue. The staff suggests that after a previous proposal receives significant support, the company should engage with its shareholders and include a description in its no-action request on how its view on the significance of the issue was influenced by shareholder engagement and list steps the company took to address concerns expressed in the current proposal.
- The difference between a proposal's request and the actions the company previously took to address the issue.
- Insight into whether the proposal raises significant policy issues for the company.

Micromanagement

The second consideration under the ordinary business exception is whether a proposal micromanages the company. The staff has noted that this determination falls on how a proposal advocates for addressing the issue rather than the content of the issue. The staff looks to whether the strategy or method a proposal seeks to use in addressing an issue would supersede the decision-making power of management and the board. If a proposal is overly prescriptive and limits the discretion of management and the board, the staff may deem it to be micromanaging the company.

If a company wishes to exclude a proposal under the micromanagement prong, it should include a detailed analysis on how the proposal restricts management and the board from utilizing their decision-making powers and impedes their ability to meet their fiduciary duties.

Proof of Ownership Letters

Under Rule 14a-8(b), shareholders are required to prove eligibility, including that they continuously held the required amount of shares for at least one year before submitting a proposal. The staff previously released a suggested format shareholders could use to verify ownership. However, the staff rejects the exclusion of proposals simply because they did not follow the suggested format. The SEC explained its position in SLB 14K to make clear that the suggested format is not mandatory, and companies must allow proposals that meet the evidentiary requirements but deviate in their format.

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