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# Shareholder Proposals: Staff Legal Bulletin No. 14J (CF)

## Division of Corporation Finance Securities and Exchange Commission

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**Summary:** This staff legal bulletin provides information for companies and shareholders regarding Rule 14a-8 under the Securities Exchange Act of 1934.

**Supplementary Information:** The statements in this bulletin represent the views of the Division of Corporation Finance (the "Division"). This bulletin is not a rule, regulation or statement of the Securities and Exchange Commission (the "Commission"). Further, the Commission has neither approved nor disapproved its content.

**Contacts:** For further information, please contact the Division's Office of Chief Counsel by submitting a web-based request form at [https://www.sec.gov/forms/corp\\_fin\\_interpretive](https://www.sec.gov/forms/corp_fin_interpretive).

### A. The purpose of this bulletin

This bulletin is part of a continuing effort by the Division to provide guidance on important issues arising under Exchange Act Rule 14a-8. Specifically, this bulletin contains information about the Division's views on:

- board analyses provided in no-action requests that seek to rely on Rules 14a-8(i)(5) or 14a-8(i)(7) as a basis to exclude shareholder proposals;
- the scope and application of micromanagement as a basis to exclude a proposal under Rule 14a-8(i)(7); and
- the scope and application of Rule 14a-8(i)(7) for proposals that touch upon senior executive and/or director compensation matters.

You can find additional guidance about Rule 14a-8 in the following bulletins that are available on the Commission's website: [SLB No. 14](#), [SLB No. 14A](#), [SLB No. 14B](#), [SLB No. 14C](#), [SLB No. 14D](#), [SLB No. 14E](#), [SLB No. 14F](#), [SLB No. 14G](#), [SLB No. 14H](#) and [SLB No. 14I](#).

### B. Board Analysis

#### 1. Background

In SLB No. 14I, the Division addressed the scope and application of Rule 14a-8(i)(5), the "economic relevance" exception, and Rule 14a-8(i)(7), the "ordinary business" exception. Specifically, the bulletin noted that evaluating whether a proposal raises an issue that is "otherwise significantly related" to a company's business, in the case of Rule 14a-8(i)(5), or transcends ordinary business matters, in the case of Rule 14a-8(i)(7), often raises difficult judgment calls that the Division believes are matters that the board of directors generally is well-situated to analyze. To assist the staff with its review of these types of no-action requests, the bulletin invited companies to include in their no-action requests a discussion reflecting the board's analysis of the particular policy issue raised by the proposal and its significance in relation to the company.

#### 2. Discussion of a board's analysis

During the most recent proxy season, a number of no-action requests included a discussion of the board's analysis. Overall, we found these discussions helpful in evaluating the requests, even where we did not ultimately agree with the company's position. The discussions we found most helpful focused on the board's analysis and the specific substantive factors the board considered in arriving at its conclusion. Less helpful were those that described the board's conclusions or process without discussing the specific factors considered.

We continue to believe that a well-developed discussion of the board's analysis of whether the particular policy issue raised by the proposal is otherwise significantly related to the company's business, in the case of Rule 14a-8(i)(5), or is sufficiently significant in relation to the company, in the case of Rule 14a-8(i)(7), can assist the staff in evaluating a company's no-action request. The absence of a board analysis will not create a presumption against exclusion; however, without having the benefit of the board's views on the matters raised, the staff may find it difficult in some instances to agree that a proposal may be excluded.<sup>[1]</sup> This is especially the case where the significance of a particular issue to a particular company and its shareholders may depend on factors that are not self-evident and that the board may be well-positioned to consider and evaluate. Likewise, the presence of a board analysis will not create a presumption of exclusion.

In our view, a well-developed discussion will describe in sufficient detail the specific substantive factors the board considered in arriving at its conclusion that an issue is not otherwise significantly related to its business, in the case of Rule 14a-8(i)(5), or is not sufficiently significant in relation to the company, in the case of Rule 14a-8(i)(7). These may include:

- The extent to which the proposal relates to the company's core business activities.
- Quantitative data, including 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.<sup>[2]</sup>
- 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 as to the related voting results.

These factors are not exclusive or exhaustive, nor is it necessary for a board analysis to address each one of the above factors.

As noted above, to the extent a company's shareholders have previously voted on a matter, we would expect any board discussion accompanying the request to adequately address the related voting results. We will consider these results as part of the total mix of information, and the weight given to them will depend on the specific facts and circumstances. For example, if a previously voted-on matter received significant shareholder support, we will consider whether the company has taken any subsequent actions and/or whether other intervening events have occurred since the vote that may have mitigated the issue's significance to the company. Similarly, if a previously voted-on matter received insignificant shareholder support, we will consider whether any subsequent company actions or intervening events may have increased the issue's significance to the company. In addition, we will consider the length of time that has passed since a matter was last voted on by shareholders. In our view, the more recent a vote is, the more likely that such vote is indicative of the topic's significance to a company and its shareholders.

The submission of a board analysis is voluntary and the inclusion or absence of an analysis will not be dispositive in the staff's evaluation of a company's request. The staff will also consider the proponent's analysis of the issue. Determinations as to whether we agree that a proposal may be excluded "will be made on a case-by-case basis, taking into account factors such as the nature of the proposal and the circumstances of the company to which it is directed."<sup>[3]</sup> Thus, a proposal that the staff agrees is excludable for one company may not be excludable for another; conversely, a proposal that is not excludable by one company would not be dispositive as to whether it is excludable by another.

As we indicated in SLB No. 14I, we generally view substantive governance matters to be significantly related to almost all companies. Thus, we would not expect to agree with exclusion of proposals that focus on substantive governance matters.

## C. Rule 14a-8(i)(7)

### 1. Background

Rule 14a-8(i)(7), the "ordinary business" exception, permits a company to exclude a proposal that "deals with a matter relating to the company's ordinary business operations." The purpose of the exception 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."<sup>[4]</sup>

### 2. Micromanagement

The Commission has stated that the policy underlying the "ordinary business" exception rests on two central considerations.<sup>[5]</sup> The first relates to the proposal's subject matter; the second, the degree to which the proposal "micromanages" the 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."<sup>[6]</sup> The Commission has explained that the second consideration "may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies."<sup>[7]</sup>

Unlike the first consideration, which looks to a proposal's subject matter, the second consideration looks only to the degree to which a proposal seeks to micromanage. Thus, a proposal that may not be excludable under the first consideration may be excludable under the second if it micromanages the company. Determinations as to excludability of proposals "will be made on a case-by-case basis, taking into account factors such as the nature of the proposal and the circumstances of the company to which it is directed."<sup>[8]</sup>

As the Commission has explained, a proposal may probe too deeply into matters of a complex nature if it "involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies."<sup>[9]</sup> The Division applies this framework when evaluating whether a proposal micromanages a company and is therefore excludable. For example, the Division agreed that a proposal to generate a plan to reach net-zero greenhouse gas emissions by the year 2030, which sought to impose specific timeframes or methods for implementing complex policies, was excludable on the basis of micromanagement.<sup>[10]</sup>

This framework also applies to proposals that call for a study or report. For example, a proposal that seeks an intricately detailed study or report may be excluded on micromanagement grounds.<sup>[11]</sup> In addition, the staff would, consistent with Commission guidance, consider the underlying substance of the matters addressed by the study or report.<sup>[12]</sup> Thus, for example, a proposal calling for a report may be excludable if the substance of the report relates to the imposition or assumption of specific timeframes or methods for implementing complex policies.<sup>[13]</sup>

We believe that the above framework is consistent with the Commission's guidance in this area and, accordingly, we will continue to apply it when evaluating whether a proposal micromanages. It is important to note, however, that the staff's concurrence with a company's micromanagement argument does not necessarily mean that the subject matter raised by the proposal is improper for shareholder consideration. Rather, in that case, it is the manner in which a proposal seeks to address an issue that results in exclusion on micromanagement grounds.

### 3. The Division's application of Rule 14a-8(i)(7) to proposals that address senior executive and/or director compensation

Under Rule 14a-8(i)(7), proposals that raise matters that 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" may be excluded, unless such a proposal focuses on policy issues that are sufficiently significant because they transcend ordinary business and would be appropriate for a shareholder vote.<sup>[14]</sup> Whether this exception applies depends, in part, on the connection between the issue raised and the company's business operations.<sup>[15]</sup>

The Commission has said that proposals involving “the management of the workforce, such as the hiring, promotion, and termination of employees,” generally relate to ordinary business matters.<sup>[16]</sup> Consistent with this guidance, proposals that relate to general employee compensation and benefits are excludable under Rule 14a-8(i)(7).<sup>[17]</sup> On the other hand, proposals that focus on significant aspects of senior executive and/or director compensation generally are not excludable under Rule 14a-8(i)(7).<sup>[18]</sup> In determining whether the focus of a proposal is senior executive and/or director compensation or, instead, an ordinary business matter, we consider both the resolved clause and supporting statement as a whole.<sup>[19]</sup>

We are providing the additional guidance below to clarify the Division’s views with respect to proposals that implicate senior executive and/or director compensation.

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

At issue in some Rule 14a-8(i)(7) requests is whether the focus of a proposal is senior executive and/or director compensation, or whether its underlying concern relates primarily to ordinary business matters that are not sufficiently related to senior executive and/or director compensation. We have concurred in the exclusion of proposals that, while styled as senior executive and/or director compensation proposals, have had as their underlying concern ordinary business matters. For example, the staff agreed with the exclusion of a proposal requesting that the board prohibit payment of incentive compensation to executive officers unless the company first adopted a process to fund the retirement accounts of certain retired employees.<sup>[20]</sup> In that instance, the staff agreed that the company could exclude the proposal under Rule 14a-8(i)(7) on the grounds that the focus of the proposal was on the ordinary business matter of employee benefits, rather than senior executive compensation matters.

In evaluating proposals that raise both ordinary business and senior executive and/or director compensation matters, the staff examines whether the focus of the proposal is an ordinary business matter or aspects of senior executive and/or director compensation. Where the focus appears to be on the ordinary business matter, the proposal may be excludable under Rule 14a-8(i)(7). This framework ensures that form is not elevated over substance and that a proposal is not included simply because it addresses an excludable matter in a manner that is connected to or touches upon senior executive or director compensation matters. Including an aspect of senior executive or director compensation in a proposal that otherwise focuses on an ordinary business matter will not insulate a proposal from exclusion under Rule 14a-8(i)(7).

#### b. Proposals that address aspects of senior executive and/or director compensation that are also available or applicable to the general workforce

The Division believes that a proposal that addresses senior executive and/or director compensation may be excludable under Rule 14a-8(i)(7) if a primary aspect of the targeted compensation is broadly available or applicable to a company’s general workforce and the company demonstrates that the executives’ or directors’ eligibility to receive the compensation does not implicate significant compensation matters. For example, a proposal that seeks to limit when senior executive officers will receive golden parachutes may be excludable under Rule 14a-8(i)(7) if the company’s golden parachute provision broadly applies to a significant portion of its general workforce. This is because the availability of certain forms of compensation to senior executives and/or directors that are also broadly available or applicable to the general workforce does not generally raise significant compensation issues that transcend ordinary business matters. In this regard, it is difficult to conclude that a proposal does not relate to a company’s ordinary business when it addresses aspects of compensation that are broadly available or applicable to a company’s general workforce, even when the proposal is framed in terms of the senior executives and/or directors.

In SLB No. 14A, we took the position that where the focus of a proposal is on aspects of compensation that are available or apply only to the general workforce, companies may generally rely on Rule 14a-8(i)(7) to omit the proposal from their proxy materials. Similar to the approach in SLB No. 14A with respect to Rule 14a-8(i)(7) submissions concerning proposals that relate to shareholder approval of equity compensation plans, we will take the following approach with respect to proposals that address aspects of senior executive and/or director compensation that are also available or applicable to a company’s general workforce:

- *Proposals where the focus is on aspects of compensation that are available or apply only to senior executive officers and/or directors.* Companies may generally not rely on Rule 14a-8(i)(7) to omit these proposals from their proxy materials.
- *Proposals where the focus is on aspects of compensation that are available or apply to senior executive officers, directors, and the general workforce.* Companies may generally rely on Rule 14a-8(i)(7) to omit the proposal from their proxy materials.

#### c. Proposals that micromanage senior executive and/or director compensation practices

As discussed above, one of the central considerations underlying the “ordinary business” exception “relates to the degree to which the proposal seeks to ‘micro-manage’ the company.”<sup>[21]</sup> Historically, the Division has not agreed with the exclusion of proposals addressing senior executive and/or director compensation on the basis of micromanagement. We have further considered the Commission’s statements on micromanagement discussed above, however, and we do not believe there is a basis for treating executive compensation proposals differently than other types of proposals. Consistent with the Division’s treatment of shareholder proposals on other topics, therefore, the Division may agree that proposals addressing senior executive and/or director compensation that seek intricate detail, or seek to impose specific timeframes or methods for implementing complex policies can be excluded under Rule 14a-8(i)(7) on the basis of micromanagement. For example, a proposal detailing the eligible expenses covered under a company’s relocation expense policy such as the type and duration of temporary living assistance, as well as the scope of eligible participants and amounts covered, could well be excludable on the basis of micromanagement.

As discussed above, micromanagement addresses the manner in which a proposal raises an issue, and not whether a proposal’s subject matter itself is proper for a shareholder proposal under Rule 14a-8. Proposals that focus on significant executive and/or director compensation matters and do not micromanage will continue not to be excludable under Rule 14a-8(i)(7).

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<sup>[1]</sup> See, e.g., *General Motors Company* (Apr. 18, 2018).

<sup>[2]</sup> Note that this analysis differs from that of substantial implementation under Rule 14a-8(i)(10), which provides that a proposal may be omitted from a company’s proxy materials “[i]f the company has already substantially implemented the proposal.” Where a company has not substantially implemented a proposal’s specific request, and therefore cannot rely on Rule 14a-8(i)(10), it would be helpful for purposes of assessing significance under Rules 14a-8(i)

(5) and 14a-8(i)(7) to understand the degree of difference between the proposal's specific request and the actions the company has already taken to address the underlying subject matter.

[3] Release No. 34-40018 (May 21, 1998).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Apple Inc.* (Dec. 5, 2016).

[11] *See, e.g., Ford Motor Company* (Mar. 2, 2004).

[12] *See* Release No. 34-20091 (Aug. 16, 1983) ("In the past, the staff has taken the position that proposals requesting issuers to prepare reports on specific aspects of their business or to form special committees to study a segment of their business would not be excludable under Rule 14a-8(c)(7). Because this interpretation raises form over substance and renders the provisions of paragraph (c)(7) largely a nullity . . . , the staff will consider whether the subject matter of the special report or the committee involves a matter of ordinary business; where it does, the proposal will be excludable under Rule 14a-8(c)(7).").

[13] *See, e.g., PayPal Holdings, Inc.* (Mar. 6, 2018).

[14] Release No. 34-40018.

[15] *See* Staff Legal Bulletin No. 14I (Nov. 1, 2017) (*citing* Staff Legal Bulletin No. 14H (Oct. 22, 2015), which cites Staff Legal Bulletin No. 14E (Oct. 27, 2009) (*citing* Release No. 34-40018)).

[16] *See* Release No. 34-40018.

[17] *See* Staff Legal Bulletin No. 14A (Jul. 12, 2002).

[18] *See Battle Mountain Gold Company* (Feb. 13, 1992); *see also* Release No. 34-30851 (Jun. 23, 1992) (The Commission observed that "[e]ffective earlier this year, the Commission staff began to require companies to include shareholder proposals on executive compensation submitted pursuant to Rule 14a-8 in their proxy statements. While these resolutions are advisory in nature, they allow shareholders to provide direct input to the board on its compensation decisions.").

[19] *Cf.* Staff Legal Bulletin No. 14C (Jun. 28, 2005).

[20] *See Delta Air Lines, Inc.* (Mar. 27, 2012).

[21] Release No. 34-40018.

*Modified: Oct. 23, 2018*