

Corporate Counsel Daily, Shareholder proposals on social issues to be subject to tighter SEC guidance, (Feb 12, 2025)

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New SLB 14M reinstates guidance from the first Trump Administration that the intervening Democratic Administration had eased, thus again making it harder for shareholders to raise ESG issues.

For the second day in a row SEC staff have issued guidance that significantly rolls back shareholder guidance that was put in place just a few years ago. On Wednesday, the SEC's Division of Corporation Finance (CorpFin) issued new [Staff Legal Bulletin 14M](#), which rescinds [SLB 14L](#) and reimposes stricter guidance on when shareholder proposals can survive the several bases companies may invoke to exclude them, especially those proposals that touch on issues of ordinary business and economic relevancy. Just a day earlier, on Tuesday, February 11, CorpFin issued Compliance and Disclosure Interpretations that tightened staff guidance on when shareholders may have to file on Schedule 13D. The totality of this week's SEC staff guidance updates is to make it more challenging overall for shareholders to engage with companies on ESG issues.

What to do now. The arrival of SLB 14M comes as companies begin preparations for holding annual shareholder meetings during the first half of 2025. To this end, SLB 14M contains an FAQ that suggests how SEC staff would handle a variety of no-action requests from companies.

For example, a no-action request made prior to issuance of SLB 14M would be reviewed by staff under the guidance in place when the staff issues its response. A company may resubmit a no-action request to raise new legal arguments via a supplemental correspondence with the SEC through the agency's shareholder proposal portal. Moreover, SLB 14M states that SEC staff may consider SLB 14M as providing good cause to consider a new no-action request submitted after the deadline.

However, SLB 14M said that while SEC staff would try to meet companies' print deadlines, staff cannot guarantee that responses will be timely for all companies.

Ordinary business exclusion. Exchange Act Rule 14a-8(i)(7), often referred to as the ordinary business exclusion, provides that a shareholder proposal may be excluded from a company's proxy materials if the proposal deals with a matter relating to the company's ordinary business operations. The now-rescinded SLB 14L had explained that the exclusion existed to ensure that certain day-to-day matters that are impracticable to be considered at an annual shareholders' meeting would be reserved for managements and boards to decide. This approach, plus the practice of reviewing no-action requests under Rule 14a-8(i)(7)'s two prongs—subject matter and micromanagement—remain unchanged, but how those approaches will be applied by SEC staff is changing.

One of key parts of SLB 14L was its stated exception to the ordinary business exclusion for significant social policies, in which SEC staff opted not to apply a company-specific approach to whether a proposal could be excluded. Said SLB 14L: "...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. 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."

Under the rescinded SLB 14L, for example, a shareholder proposal addressing "human capital management issues with a broad societal impact" would not be excludable solely for the reason that the proponent failed to demonstrate



the significance of the issue to the company.

SLB 14L also noted that the micromanagement prong of Rule 14a-8(i)(7) analysis would not per se require exclusion of a shareholder proposal “seeking detail or seeking to promote timeframes or methods.” This language was especially critical for proposals regarding “timeframes or targets” associated with efforts to address climate change.

The newly issued SLB 14M, by contrast, reverts to a company-specific approach. Under SLB 14M, SEC staff will consider the subject matter (significance) of a proposal and whether the proposal calls for micromanagement of the company. Said SLB 14M: “As such, the staff will take a company-specific approach in evaluating significance, rather than focusing solely on whether a proposal raises a policy issue with broad societal impact or whether particular issues or categories of issues are universally ‘significant.’ Accordingly, a policy issue that is significant to one company may not be significant to another. The Division’s analysis will focus on whether the proposal deals with a matter relating to an individual company’s ordinary business operations or raises a policy issue that transcends the individual company’s ordinary business operations.”

SLB 14M also reinstates portions of several SLBs that were overwritten by SLB 14L, including, on the issue of micromanagement:

- **SLB 14J**—Under [SLB 14J](#), Section C.2, SEC staff had noted that a proposal can be includable for its subject matter but may be excludable for its attempt to micromanage the company. The SLB offered several examples of excludable proposals: (1) a proposal for a company to achieve net zero green house gas (GHG) emissions by 2030 via specific time frames or methods; and (2) a proposal to create studies or reports that are “intricately detailed.”
- **SLB 14K**—Under [SLB 14K](#), Section B.4, SEC staff will consider “...whether the proposal seeks intricate detail or imposes a specific strategy, method, action, outcome or timeline for addressing an issue, thereby supplanting the judgment of management and the board...” The precatory nature or voluntariness of the proposal would not preclude a finding that it micromanages the company if it contains too much prescriptive detail. The SLB offered examples of proposals that are and are not excludable: (1) A proposal for “annual reporting on ‘short-, medium- and long-term greenhouse gas targets aligned with the greenhouse gas reduction goals established by the Paris Climate Agreement’” was excludable because it called for an overly detailed response by the company; and (2) a proposal for “a report ‘describing if, and how, [a company] plans to reduce its total contribution to climate change and align its operations and investments with the Paris [Climate] Agreement’s goal of maintaining global temperatures well below 2 degrees Celsius’” was not excludable because it deferred to management how to achieve the desired goal.

It is noteworthy that under SLB 14K, Section B.4, SEC staff warned shareholders that staff would look not only to the “resolved clause” in the proposal but to the entirety of the proposal in evaluating whether it seeks to micromanage the company. As a result, SEC staff said a proposal that contains statements that alter the meaning of the resolved clause could be a basis for exclusion.

Lastly, SLB 14M also reinstated SLB 14J, Section C.3 regarding senior executive and director compensation.

Economic relevancy. Exchange Act Rule 14a-8(i)(5) states that a shareholder proposal may be excluded from a company’s proxy materials if it is related to operations that are less than 5 percent of the company’s total assets, and which is less than 5 percent of the company’s net earnings and gross sales, and it is not otherwise significantly related to the company’s business. This is the economic relevancy theory for excluding a shareholder proposal.

As with the last guidance on Rule 14a-8(i)(7), the prior guidance on Rule 14a-8(i)(5) was issued by SEC staff in

November 2021. That guidance sought to return analysis of economic relevancy questions to what it described as the SEC's "longstanding" reliance on *Lovenheim v. Iroquois Brands, Ltd.* (D.D.C. 1985), a district court opinion that allowed a shareholder proposal to be included in the company's proxy materials when the business it related to was far below the thresholds set in Rule 14a-8(i)(5).

"As a result, and consistent with our pre-SLB No. 14I approach and *Lovenheim*, 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 economic thresholds of Rule 14a-8(i)(5)," said SLB 14L. That guidance also said that SEC staff would cease expecting a board analysis in related no-action letter requests.

Now turn to the present. The latest version of the guidance on Rule 14a-8(i)(5) states that the SEC staff would apply all of the thresholds contained in the rule and would deemphasize viewing social or ethical issues in the abstract (i.e., the language in the rule regarding a proposal "not otherwise significantly related to the company's business").

According to SLB 14M: "Because the rule allows exclusion only when the matter is not "otherwise significantly related to the company," we view the analysis as dependent upon the particular circumstances of the company to which the proposal is submitted. That is, a matter significant to one company may not be significant to another. On the other hand, we would generally view substantive governance matters to be significantly related to almost all companies."

New SLB 14M also provides two more bits of guidance. First, with respect to proposals that may lack facial significance: "The proponent could continue to raise social or ethical issues in its arguments, but in accordance with these Commission statements it would need to tie those matters to a significant effect on the company's business. The mere possibility of reputational or economic harm alone will not demonstrate that a proposal is 'otherwise significantly related to the company's business.' In evaluating whether a proposal is 'otherwise significantly related to the company's business,' the staff will consider the proposal in light of the 'total mix' of information about the issuer."

Second, SLB 14M breaks with the prior staff practice of considering resolution of the Rule 14a-8(i)(7) ordinary business issue as being almost dispositive of the "otherwise significantly related" issue under Rule 14a-8(i)(5). SLB 14M states that SEC staff will no longer make this analytical linkage.

Board analysis. The SEC's guidance on shareholder proposals has, at times, flipped-flopped on the question of whether board analysis is necessary to bolster a no-action request to exclude a shareholder proposal. SLB 14M, briefly observed that board analyses previously had not generally swayed SEC staff. As a result, with respect to Rules 14a-8(i)(5) and 14a-8(i)(7), SEC staff will not require board analysis, although a company may voluntarily submit a board analysis.

Images in proposals. SLB 14M, as prior SLBs have done, addresses the use of images in shareholder proposals. The new SLB retains the language of now-rescinded SLB 14L and states that exclusion would be appropriate if: (1) images make the proposal materially false or misleading; (2) the images used in the proposal would make it inherently vague or indefinite; (3) images would impugn the character, integrity, or personal reputation of someone without a factual basis; (4) the images are irrelevant to a consideration of the proposal's subject matter; or (5) the total number of words in a proposal (plus the words in any graphics) exceed 500 words.

Proof of ownership letters. The language used in new SLB 14M is substantively similar to that used in rescinded SLB 14L. However, one significant item is noteworthy: SLB 14L urged companies to send a second deficiency notice, at least where the first notice did not identify a specific deficiency. New SLB 14M explicitly states that a company need not send a second deficiency notice if the first notice sent before receiving the shareholder's proof of ownership was "adequate" and the shareholder's proof of ownership letter contains a defect.

Use of email. SLB 14M and rescinded SLB 14L are consistent in their approach to the use of email and both SLBs contain substantively the same text, although SLB 14M removed language that specifically-referenced the COVID-19 pandemic.

SLB 14M, however, added that companies and proponents, who do not receive a requested email confirmation, should reach out via alternative modes of communication or by emailing another contact if the confirmation has not been received. The guidance also said that SEC staff would not consider a screen shot or photo of the sender's screen to be proof that the email was sent to its intended recipient.

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