Statement

Statement on Shareholder Proposals: Staff Legal Bulletin No. 14L

Commissioner Hester M. Peirce

Commissioner Elad L. Roisman

Nov. 3, 2021

Today the Division of Corporation Finance issued a new staff legal bulletin relating to shareholder proposals, which rescinded the last three bulletins and indicated that the staff may no longer agree that certain proposals are excludable from proxy statements under Rule 14a-8.[1] Notably, the Bulletin singles out as likely no longer excludable proposals "squarely raising human capital management issues with a broad societal impact" and proposals that "request[] companies adopt timeframes or targets to address climate change." While it is disappointing to see these two topics highlighted for special treatment, it is not altogether surprising given current SEC priorities. Today's Bulletin 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.

The rationale for today's action is a bit of a mystery. First while the bulletin lays out a case for repealing the last three bulletins, it does not fill the void left by their repeal. Specifically, it fails to address the problem those three bulletins were trying to solve, whether it still exists, and how it will be addressed going forward. For example, with respect to the significance analysis under Rule 14a-8(i)(7), the rescinded bulletins were designed to help issuers determine whether a proposal dealing with the company's ordinary business operations is nevertheless not excludable because it raises a policy issue *so* significant that it transcends the day-to-day business matters of the company. With these bulletins now rescinded, how should these proposals be analyzed? In rejecting a *company-specific* approach in evaluating significance, the Bulletin states that the staff "will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal" and "consider whether the proposal raises issues with a broad societal impact." The Bulletin assures us that such a focus is realigned with the standard articulated by the Commission in 1976 and 1998, but the practical effect is unclear. Is the analysis simply a question of whether the proposal involves any socially significant issue? What criteria, timeframe, or proof support a finding that a topic is socially significant or has a broad societal impact? The new bulletin does not say.

Second, today's Bulletin does not explain what consequences of the rescinded bulletins were problematic. For example, while the Bulletin rejects the recent micromanagement analysis because it "may have been taken to mean that any limit on company or board discretion constitutes micromanagement," in practice the staff frequently

rejected micromanagement arguments, including ones that related to climate change proposals. During the 2021 proxy season, no climate change proposals were excluded based on micromanagement arguments; and in 2020, only four climate change proposals were excluded based on micromanagement arguments.[2] Even in 2019, when twenty-one proposals (including, but not limited to climate change proposals) were excluded under micromanagement arguments, the staff denied no-action relief on micromanagement grounds for certain climate change proposals.[3]

The Rule 14a-8 process has long been an insatiable consumer of staff time. The staff traditionally has not made decisions about excludability based solely on the type of issue a proposal raises. Rather, these determinations have been the product of rigorous analysis of the language of the proposal itself. Such analysis has been informed by the text of Rule 14a-8, Commission-level guidance (much of which is outdated and vague), staff legal bulletins, court decisions, and no-action letter precedents. Based on the guidance in this bulletin, analysis under Rule 14a-8(i)(7), the ordinary business exception, and Rule 14a-8(i)(5), the economic relevance exception, will be even more difficult. We anticipate, of course, that our committed staff will approach these requests with the same diligence and nuance as they have under the rescinded analytical frameworks, but this Bulletin does not make their jobs easier.

The staff's ever-shifting standards and analytical frameworks for Rule 14a-8 communicated through staff legal bulletins over the years suggest a bigger shift may be in order. We have allowed proponents and companies to use our no-action letter process as a quick arbitration mechanism to determine questions of excludability, rather than present their arguments to a court of law. But, it is hard to see how this resource-intensive review is time (or tax dollars) well spent given that the proposals can involve issues that are, at best, only tangential to our securities laws. Why should the Commission's or its staff's views about the "significance" of non-securities issues be relevant to the analysis at all? Perhaps one day the Commission will relieve the staff of this burden and either take on consideration of these proposals itself or, better yet, amend the rule to excise the Commission and its staff from matters of state corporate law and areas outside our expertise.

---

[1] Of course, the staff's no-action responses to Rule 14a-8 submissions reflect only informal views. *See* Shareholder Proposal No-Action Responses, https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/shareholder-proposal-no-action-responses.htm (last visited Nov. 3, 2021) ("The staff of the Division of Corporation Finance states only informal, non-binding views as to whether the Division would recommend enforcement action to the Commission if a company excludes a proposal from its proxy materials. The staff does not and cannot adjudicate the merits of a company's position with respect to a proposal. Only a court can determine whether a company may legally exclude the shareholder proposal from its proxy materials.").

[2] *See* Gibson Dunn, Shareholder Proposal Developments During the 2021 Proxy Season, https://www.gibsondunn.com/wp-content/uploads/2021/08/shareholder-proposal-developments-during-the-2021-proxy-season.pdf (last visited Nov. 3, 2021) at 11.

[3] *See* Gibson Dunn, Shareholder Proposal Developments During the 2019 Proxy Season, https://www.gibsondunn.com/wp-content/uploads/2019/08/shareholder-proposal-developments-during-the-2019-proxy-season.pdf (last visited Nov. 3, 2021) at 11; *Anadarko Petroleum Corp., SEC No-Action Letter (Mar. 4, 2019),* https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/asyousowetal030419-14a8.pdf (stating that the staff was unable to concur in company's view that a proposal was excludable under Rule 14a-8(i)(7) when the proposal requested "the company issue a report describing if, and how, it plans to reduce its total contribution to climate change and align its operations and investments with the Paris Agreement's goal of maintaining global temperatures well below 2 degrees Celsius").