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# SEC Issues New Guidance on Rule 14a-8 Shareholder Proposals

On November 3, 2021, the SEC Division of Corporation Finance issued Staff Legal Bulletin 14L (“SLB 14L”), regarding shareholder proposals under Rule 14a-8 under the Exchange Act (available [here](#)). SLB 14L rescinds prior Staff Legal Bulletins 14I, 14J and 14K, regarding the exclusion of shareholder proposals on the grounds that they fall within the ordinary business and economic relevance exceptions of Rule 14a-8. SLB 14L notes that many proposals that raise significant social or environmental issues that would have previously been excludable on these grounds will no longer be excludable. We expect that this policy reversal will significantly increase the number of ESG proposals included in 2022 proxy statements. In the 2021 proxy season, 38 ESG proposals were successfully excluded from proxy statements on the basis of the ordinary business and economic relevance exceptions.

SLB 14L republishes certain portions of Staff Legal Bulletin 14I, regarding the use of images in shareholder proposals, and Staff Legal Bulletin 14K, regarding proof of ownership, and also addresses the use of email for submissions, delivery of notice of defects and responses to notices of defects.

## Ordinary Business Exception

Under Rule 14a-8(i)(7), shareholder proposals may be excluded if they deal with “a matter relating to the company’s ordinary business operations.”

## Significant Social Policies

Under the ordinary business exception, companies have historically been permitted to exclude shareholder proposals that raise significant social policy issues but are not significant to the particular company. SLB 14L reverses this position: the Staff instead will consider “whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.” Where such a significant social policy issue is raised, the proposal will not be excludable under the ordinary business exception. SLB 14L specifically notes that certain proposals raising human capital management issues with a broad social impact (such as those related to employment discrimination) may no longer be excludable under the ordinary business exception.

## Micromanagement

Companies have historically been permitted to exclude shareholder proposals that micromanage the company by inappropriately limiting the discretion of the board or management or 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.”

In SLB 14L, the Staff states that its prior guidance had over-expanded the concept of micromanagement, and that it would return to a more measured approach. As a result, details and timelines will no longer *per se* constitute grounds to exclude shareholder proposals. The Staff will focus instead on the specificity of the proposal and the degree to which it might inappropriately limit board or management discretion. In addition, when assessing whether a matter is “too complex” for shareholders, the Staff states that it will consider the sophistication of investors, availability of data and public discussion and analysis on the topic.

Where there are well-established national or international frameworks relating to disclosure, target-setting and timeframes, the topic is unlikely to be considered “too complex” for shareholders.

Under this guidance, shareholder proposals requesting companies to adopt timeframes or targets to address climate change will unlikely be excludable as micromanagement so long as the proposals afford discretion to management as to how to achieve such goals. As an example, the Staff pointed to its recent response to a request for no-action relief to exclude a proposal that the company set greenhouse gas emissions targets. Because the proposal only requested that the company set targets, and did not impose any methodology, the Staff concluded that the proposal was not excludable on the grounds of micromanagement.

### **Economic Relevance**

Under Rule 14a-8(i)(5), shareholder proposals may be excluded that relate 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.”

SLB 14L reverses prior guidance regarding the applicability of the economic relevance exception to shareholder proposals raising social issues related to the company. As a result, shareholder proposals that raise issues of broad social or ethical concern related to the company’s business will no longer be excludable under the economic relevance exception.

### **Use of Graphics and Images**

SLB 14L republishes that portion of Staff Legal Bulletin 14I permitting the use of graphics and images in shareholder proposals. Graphics and images may be excludable under Rule 14a-8(i)(3) if they would make a proposal materially false or misleading or inherently vague, would directly or indirectly impugn character, integrity or personal reputation or are irrelevant to a consideration of the subject matter of the proposal. Any text or words in the graphic or image would count towards the 500-word limit.

### **Proof of Ownership Letters**

SLB 14L republishes that portion of Staff Legal Bulletin 14K regarding proof of ownership, and reiterates that the sample language proposed by the SEC to be used by brokers for proof of ownership is not mandatory and that deviations from this form are not a grounds of exclusion, so long as the ownership requirements are demonstrated to be met. SLB 14L also clarifies that brokers do not need to calculate the share valuation (proponents may do so), and emphasizes that companies should identify specific defects in the proof of ownership letter to the proponent even where the company has already sent a deficiency notice prior to receiving the proof of ownership.

### **Use of Email**

The Staff also provides guidance in SLB 14L on the use of email to communicate regarding shareholder proposals. Senders should ensure that they can prove delivery of their email (the burden of proof of timely delivery will rest on the sender), and can do so by requesting a reply email acknowledging receipt (the Staff has also requested companies and proponents acknowledge receipt when requested) or by using email read receipts. The Staff further encourages companies and shareholder proponents to acknowledge receipt of emails when requested.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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