



SEC Issues New Guidance on Exclusion of Shareholder Proposals

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On February 12, 2025, the staff (Staff) of the Division of Corporation Finance of the Securities and Exchange Commission (SEC) issued [Staff Legal Bulletin No. 14M](#) (CF) (SLB 14M), which provides updated information for public companies and shareholders regarding shareholder proposals pursuant to Rule 14a-8 under the Securities Exchange Act of 1934 (Exchange Act) and outlines a new approach towards excluding shareholder proposals from a company's proxy statement. Released on the cusp of proxy season, SLB 14M (i) rescinds [Staff Legal Bulletin 14L](#), which was issued in November 2021 (SLB 14L), (ii) generally reinstates previous guidance relating to the scope and application of exclusions under Rule 14a-8(i)(5) under the Exchange Act (Rule 14a-8(i)(5)) and Rule 14a-8(i)(7) under the Exchange Act (Rule 14a-8(i)(7)) and (iii) addresses certain other aspects of Rule 14a-8, as discussed below. While SLB 14L previously had made it more difficult for companies to justify excluding shareholder proposals, new SLB 14M has now afforded companies some additional flexibility by loosening the criteria for exclusion.

Rule 14a-8(i)(5), the “economic relevance” exclusion, permits a public company to exclude a proposal from its proxy statement on a substantive basis if such proposal “relates to operations which account for less than 5% of the company’s total assets at the end of its most recent fiscal year, and for less than 5% of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company’s business.”

Rule 14a-8(i)(7), the “ordinary business” exclusion, permits a company to exclude a proposal from its proxy statement that “deals with a matter relating to the company’s ordinary business operations.”

SLB 14M provides that the Staff will take a “case-by-case” approach in applying Rule 14a-8(i)(5) and Rule 14a-8(i)(7), returning to a company-specific analysis that considers a particular company’s facts and circumstances when evaluating whether shareholder proposals may have a significant effect on a company’s business or raise a significant policy issue. In considering arguments relating to shareholder proposal exclusions, the Staff will weigh whether a proposal is otherwise significantly related to a particular company’s business, in the case of Rule 14a-8(i)(5), or focuses on a significant policy issue that has a sufficient nexus to a particular company, in the case of Rule 14a-8(i)(7). SLB 14M further notes that the Staff will apply separate analytical frameworks for each exclusion and will not look to one to inform the other.

RULE 14A-8(I)(5): THE “ECONOMIC RELEVANCE” EXCLUSION

Under now-rescinded SLB 14L, the Staff interpreted Rule 14a-8(i)(5) consistent with the principles set out by the court in *Lovenheim v. Iroquois Brands, Ltd.*^[1] — proposals that raised issues of broad social and ethical concern, regardless of their economic relevance or significance to a particular company, would not be excluded under the rule.

Under SLB 14M, the Staff will once again take a case-by-case, company-specific approach, whereby a proposal may only be excluded if it is not “otherwise significantly related to the company’s business.” As a result, proposals addressing social or ethical issues may be excludable if such matters are not tied to a significant effect on the company’s business (notwithstanding the importance of such issues in general). According to SLB 14M, in evaluating the significance of a proposal to a company, the Staff will analyze the particular circumstances of the company and consider the “total mix” of information about the issuer.

Moreover, SLB 14M separates the analysis of significant policy issues under Rule 14a-8(i)(5) from the analysis of ordinary business operations under Rule 14a-8(i)(7), meaning that companies may exclude proposals under Rule 14a-8(i)(5) even when the “ordinary business” exclusion is unavailable. As such, the Staff will no longer consider the scope or application of Rule 14a-8(i)(7) when assessing Rule 14a-8(i)(5) arguments.

RULE 14A-8(I)(7): THE “ORDINARY BUSINESS” EXCLUSION

The Staff has previously stated that the policy underlying the “ordinary business” exclusion rests on two central considerations, which relate to (i) the proposal’s subject matter and (ii) the degree to which the proposal “micromanages” the company. Under the first consideration, proposals relate to a company’s ordinary business operations if they address 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.”^[2] The second provides that a proposal should not micromanage a 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.”^[3]

Subject Matter Significance

The Staff has previously stated that a proposal focusing on a significant policy issue, even if related to ordinary business operations, is not excludable under the first prong of the policy, as it would transcend day-to-day business matters and raise policy concerns so important as to warrant a shareholder vote. Under now-rescinded SLB 14L, whether a shareholder proposal focused on a significant policy issue depended on whether the policy issue was associated with a broad societal impact, regardless of any connection between the policy issue and the company. SLB 14M returns to a company-specific analysis on a case-by-case basis, considering factors such as the nature of the proposal, the surrounding circumstances, and the significance of the policy issues to the specific company.

Micromanagement

With respect to the second prong, the Staff has reinstated its prior guidance, which provides that the Staff’s analysis for exclusion focuses on the manner in which a proposal addresses an issue, rather than the proposal’s subject matter itself. As such, a proposal that micromanages a company is excludable under this prong even when the proposal focuses on a significant policy issue. For example, proposals involving “the management of the workforce, such as the hiring, promotion, and termination of employees,” generally relate to ordinary business matters and are therefore excludable. Further, the guidance provides that a proposal may also be excludable as micromanaging a company if it involves “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.”

OTHER RULE 14A-8 MATTERS

While SLB 14M reinstates certain prior guidance, a key item that SLB 14M does not reinstate is the expectation for a no-action request to include a board analysis of the policy issue raised by the proposal. However, a company may still voluntarily submit a board analysis if it wishes to do so.

SLB 14M also provides guidance relating to certain procedural elements of Rule 14a-8, such as the inclusion of images in shareholder proposals, proof of ownership letters, use of email and deficiency notices, in each case as

summarized below:

- Although shareholder proposals may include graphics and/or images, Rule 14a-8(i)(3) permits the exclusion of graphics and/or images that are materially false or misleading or otherwise violate the proxy rules.
- Companies should refrain from applying an overly technical approach when reviewing proof of ownership letters, and should instead interpret letters based on their plain meaning. However, proponents are still required to provide clear and sufficient evidence of their eligibility to submit a shareholder proposal.
- Proponents and companies should request (and provide) acknowledgment confirming receipt of emails used to submit shareholder proposals, and for delivery of and responses to deficiency notices.
- A company is not required to send a second deficiency notice if its initial notice was adequate and it believes the proponent's letter contains a defect.

KEY TAKEAWAYS

SLB 14M, among other things, rescinds SLB 14L, and clarifies the scope and application of (and largely reinstates prior guidance relating to) the substantive bases for the “economic relevance” and “ordinary business” exclusions under Rule 14a-8(i)(5) and Rule 14a-8(i)(7). In the context of shareholder proposals and the no-action process, the SEC has returned to more of a middle ground, which will make it easier for a public company to exclude certain types of shareholder proposals from its proxy statement. The Staff has restored the “case-by-case” approach to the no-action process, noting that “a ‘case-by-case’ consideration of a particular company’s facts and circumstances is a key factor in the analysis of shareholder proposals that raise significant social policy issues.” The Staff has also reinstated prior guidance on micromanagement, confirming that shareholder proposals with excessive detail or that restrict management’s discretion (particularly with respect to executive compensation) may be excludable. Finally, SLB 14M clarifies several procedural aspects of the shareholder proposal and exclusion process.

Public companies should carefully review any shareholder proposals received in light of SLM 14M in determining whether the shareholder proposal can be excluded from its proxy statement. If a company that previously submitted a no-action request wishes to raise new legal arguments in light of SLB 14M, it can submit such arguments as supplemental correspondence. The Staff will also allow companies that did not submit a no-action request before the applicable deadline to submit a no-action request if the legal arguments in the new no-action request are based on SLB 14M.

Winston’s Capital Markets and Securities Law Watch and lawyers advising our public company clients will continue to monitor further developments and will provide updates to our readers as they become available.

For more information or if you have any questions, please contact the authors of this blog post or your regular Winston contacts.

[1] *Lovenheim v. Iroquois Brands, Ltd.* 618 F. Supp. 554 (D.D.C. 1985).

[2] Securities and Exchange Commission Release No. 34-40018 (May 21, 1998).

[3] *Id.*

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[Justin S. Reinus](#)

[Emily Semon](#)

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Joe Vercher

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