Governance & Securities Alert

Weil

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SEC Staff Issues New Guidance for Rule 14a-8 No-Action Review: Reinstates Need for "Nexus" between Social Policy Issues and the Company's Business

Last week, with the 2025 proxy season well underway, the Staff of the U.S. Securities and Exchange Commission ("SEC") Division of Corporation Finance (the "Staff") issued Staff Legal Bulletin No. 14M ("SLB 14M"), available here, revising guidance on the exclusion of shareholder proposals submitted pursuant to Exchange Act Rule 14a-8, specifically under Rule 14a-8(i)(5) (economic relevance) and Rule 14a-8(i)(7) (ordinary business). Most notably, SLB 14M rescinds Staff Legal Bulletin No. 14L ("SLB 14L") issued in November 2021 and reinstates certain guidance from prior Staff Legal Bulletin Nos. 14I, 14J and 14K (collectively, the "Prior SLBs"), which had been rescinded by SLB 14L. SLB 14M also addresses a number of technical interpretive issues.

SLB 14L has resulted in an increase in the number and scope of shareholder proposals, particularly those raising "ESG" and other matters of potential ethical and/or social significance, and in fewer companies receiving no-action relief on the basis of the ordinary business and economic relevance exclusions. SLB 14M marks a return to the traditional administration of Rule 14a-8 in place prior to SLB 14L. Under the reinstated framework of the Prior SLBs, the Staff will consider whether a proposal raising a policy issue with broad societal impact is significantly related to a particular company's business, in the case of Rule 14a-8(i)(5), or is focused on a significant policy issue that has a sufficient nexus to a particular company, in the case of Rule 14a-8(i)(7). We expect that the SLB 14M framework will broaden companies' ability to exclude shareholder proposals under Rules 14a-8(i)(5) and (i)(7), including those focused on ESG and anti-ESG matters.

Companies that have received shareholder proposals for an upcoming annual meeting should reexamine their approach to seeking no-action relief in light of this new guidance. Companies that have already filed no-action requests are permitted to submit supplemental correspondence that raises new legal arguments in light of SLB 14M. Furthermore, companies for whom the deadline prescribed in Rule 14a-8(j) has passed are permitted to submit new no-action requests if these no-action requests concern new legal arguments raised by the publication of SLB 14M. All supplemental correspondence should be submitted as soon as possible.

"Ordinary Business" Exclusion – Rule 14a-8(i)(7)

The "ordinary business" exclusion under Rule 14a-8(i)(7) was designed to allow the exclusion of shareholder proposals dealing with "ordinary business" operations, which are in the domain of management and the board, unless the proposal raised a significant policy issue. Pursuant to the Staff's traditional framework for evaluating no-action requests to exclude a proposal on ordinary business grounds, a "significant" policy is one that (i) transcends day-to-day business matters and (ii) is significant to the company's business. SLB 14M reestablishes the importance of the "significant to the company" prong of the framework, which was severely pared back under SLB 14L.

In issuing SLB 14L in 2021, the Staff, citing difficulty in determining whether there was a sufficient "nexus" between the policy issued raised by the proposal and the particular company's business, essentially eliminated the focus on such "nexus." As a result of SLB 14L, shareholder proposals that were previously viewed as excludable because they did not raise a policy issue "of significance to the company" – citing climate change and human capital management as two such policy issue examples – were no longer viewed as excludable pursuant to the Rule 14a-8(i)(7) ordinary business exception, or pursuant to the Rule 14a-8(i)(5) economic relevance exception. See our prior alert covering the issuance of SLB 14L.

In issuing SLB 14M and rescinding SLB 14L, the Staff is returning to its traditional evaluation framework – i.e., 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," the Staff will take a company-specific approach to evaluate 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. Under this company-specific approach, a policy issue that is significant to one company may not be significant to another. Rather, the Staff will take a "case-by-case" consideration of a particular company's facts and circumstances in its analysis of shareholder proposals that raise significant policy issues. To that end, in the case of the Rule 14a-8(i)(7) ordinary business exception, the Staff will again consider whether a proposal focuses on a significant policy issue that has "a sufficient nexus to the particular company."

Micromanagement Prong – Rule 14a-8(i)(7)

SLB 14M also reinstates the Staff's guidance on the "micromanagement" prong of Rule 14a-8(i)(7) contained in certain enumerated sections of the Prior SLBs previously rescinded by SLB 14L. Specifically, the Prior SLBs focus on the degree to which a 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." The analysis focuses on whether a proposal seeks intricate detail or imposes a specific strategy, method, action, outcome or timeline on management for addressing a significant issue in a way that supplanted the board and management's judgement in managing matters of a complex nature. Under this framework, if a method or strategy for implementing the action requested by the proposal is overly prescriptive in a way that limits the judgment and discretion of the board and management, the proposal may be viewed as micromanaging the company. For instance, the Prior SLBs cited 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, and a proposal seeking annual reporting on short-, medium- and long-term greenhouse gas targets aligned with the greenhouse gas reduction goals established by the Paris Climate Agreement, as examples of proposals excludable under micromanagement grounds.

In rescinding the Prior SLBs with the issuance of SLB 14L, the Staff adopted the view that proposals seeking detail or seeking to promote timeframes or methods were no longer *per se* micromanagement, and instead, the Staff focused on the level of granularity sought in the proposal, and whether and to what extent it inappropriately limited discretion of the board or management. SLB14M now reinstates the micromanagement evaluation guidance contained in the Prior SLBs.

"Economic Relevance" Exclusion – Rule 14a-8(i)(5)

SLB 14M reinvigorates the economic relevance exclusion under Rule 14a-8(i)(5) by reintroducing an analysis that was described under the Prior SLBs. The economic relevance exclusion of Rule 14a-8(i)(5) permits a company to seek to exclude a proposal that "relates 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." Under the SLB 14M framework, companies should now have a strong basis to challenge shareholder proposals that could raise significant social policy issues, but that are not economically significant to a company.

SLB 14L had essentially done away with the prior company-specific significance assessment, and allowed proposals to survive a request for exclusion when they raised issues of broad social or ethical concern, even if the relevant business fell below the 14a-8(i)(5) economic thresholds. Further, as noted in SLB 14M, the analysis of whether a proposal is "otherwise significantly related" under Rule 14a-8(i)(5) has at times been informed by its analysis under the "ordinary business" exception, Rule 14a-8(i)(7). As a result, the availability or unavailability of Rule 14a-8(i)(7) has at times been largely determinative of the availability or unavailability of Rule 14a-8(i)(5).

SLB 14M realigns the Staff's analysis with its prior focus on whether the proposal is significantly related to the particular company's business, rather than their importance in the abstract. SLB 14M also makes clear that the Staff will no longer look to its analysis under Rule 14a-8(i)(7) when evaluating arguments under Rule 14a-8(i)(5) and will analyze these exceptions independently.

Board Analyses

Prior SLBs encouraged companies to include with their ordinary business and economic relevance exclusion no-action requests a discussion reflecting the board's analysis of the particular policy issue raised and its significance to the company, under the belief that the board was better positioned to determine whether a matter was "not otherwise significantly related to the company's business." However, SLB 14M notes that in the Staff's experience with board analyses, in most instances the information needed for the Staff's analysis was not included and board analyses did not generally have a dispositive effect. Therefore, with the issuance of SLB 14M, the Staff will no longer *expect* a company's no-action request to include a board analysis of the particular policy issue raised and its significance to the company. A company may, however, still submit a board analysis for the Staff's consideration if it believes it will help the Staff analyze the no-action request.

"Substantial Implementation," "Duplication" and "Resubmissions"

On July 13, 2022, the SEC proposed amendments to Rule 14a-8, which would revise three of the potential bases for a company's exclusion of a Rule 14a-8 shareholder proposal – Rule 14a-8(i)(10) ("substantial implementation"), Rule 14a-8(i)(11) ("duplication") and Rule 14a-8(i)(12) ("resubmissions"). The amendments were intended to "improve the shareholder proposal process and promote consistency." As noted in our prior alert, the proposed amendments could have created confusion and posed a greater challenge for companies seeking to exclude shareholder proposals under these rule exclusions. The proposed amendments were never adopted, and SLB 14M makes clear that unless and until the SEC adopts or otherwise amends Rule 14a-8, the Staff will consider no-action requests and supplemental correspondence in accordance with operative SEC rules and Staff guidance.

Procedural Matters and Bases for Exclusion

SLB 14M also addresses certain procedural exclusion matters discussed below.

Use of Graphics/ Images

SLB 14M notes that the fact that the Rule 14a-8(d) "500 words" limit on proposal lengths does not expressly reference the use of graphics or images does not mean that using graphics or images in proposals is prohibited. Rather, exclusion would be appropriate under Rule 14a-8(d) if the total number of words in a proposal, including words in the graphics/ images, exceeds 500. Proposals may also be excluded under Rule 14a-8(i)(3) where, for example, graphics/ images are materially false or misleading, vague, or impugn character or personal reputation without factual foundation.

Proof of Ownership

SLB 14M makes clear that companies should not apply an overly technical reading to proof of ownership letters, or otherwise seek to exclude a shareholder proposal based on drafting variances in the proof of ownership letter, if the language used in such letter is clear and sufficiently evidences the requisite minimum ownership requirements. SLB 14M also notes the Staff's view that Rule 14a-8 does not require a company to send a second deficiency notice to a proponent if the company previously sent an adequate deficiency notice prior to receiving the proponent's proof of ownership and the company believes that the proponent's proof of ownership letter contains a defect.

Use of Emails

As email use has become more prevalent among both proponents and companies alike, the Staff suggests proponents and companies use electronic means that provide for proof of delivery and confirmation of receipt when, for example, making submissions, delivering notices of defect or submitting responses to notices of defect. In such instances, the parties should seek a reply email from the recipient acknowledging receipt and to prove timely delivery.

Key Takeaways

- **Enhanced Focus on Company-Specific Analysis.** SLB 14M returns to a focus of establishing a nexus between the social policy raised in a shareholder proposal and a company's business. As a result, a proposal must do more than raise a broad significant social policy issue; rather, there must be a sufficient nexus between the social policy issue and the company's business in order to survive a request for exclusion. In addition, the broadening of the "micromanagement" exclusion under Rule 14a-8(i)(7) means that climate proposals that seek to impose specific time frames or methods for GHG emissions reductions, for example, may once again be excludable.
- **Distinct Analytical Framework for Economic Relevance and Ordinary Business Exclusions.** SLB 14M clarifies that the economic relevance analysis under Rule 14a-8(i)(5) should be distinct from the ordinary business exclusion under Rule 14a-8(i)(7). The "economic relevance" exclusion under Rule 14a-8(i)(5) will now become a viable basis for exclusion on its own and no longer be tied to the availability or unavailability of the "ordinary business" exclusion under Rule 14a-8(i)(7). Companies should consider whether an argument should be made in a new or pending request, to determine whether there is a viable exclusionary argument to be made under Rule 14a-8(i)(5) for those proposals not "otherwise significantly related to the company's business,"
- **SLB 14M Transition Application.**
  - **Companies that have already submitted no-action requests.** Companies should review pending no-action requests to determine if a new or supplemental argument should be made pursuant to Rules 14a-8(i)(5) and 14a-8(i)(7) when seeking exclusion of shareholder proposals that relate to the guidance provided in SLB 14M. The Staff stated in SLB 14M that it will consider the guidance in place at the time it issues a response, meaning that pending no-action requests will be evaluated under the SLB 14M framework. Should companies or proponents wish to raise new legal arguments in light of SLB 14M, they are encouraged to submit supplemental correspondence via the online portal as soon as possible. So far during the 2024-2025 proxy season, 249 companies have submitted no-action requests between December 1, 2024 and February 16, 2025, and the Staff has issued responses to 67 of these no-action requests.
  - **Companies that have not submitted no-action requests.** Companies may submit new no-action requests even if the deadline prescribed in Rule 14a-8(j) has passed if they demonstrate "good cause" for missing the deadline. The Staff will consider the publication of SLB 14M to be "good cause" if it relates to legal arguments made by the new request. For those companies that have not yet submitted no-action requests, even if their deadline to submit a request has passed, consideration should be given as to whether there are valid exclusionary arguments to be made in response to the SLB 14M guidance, particularly for those proposals that relate to environmental or social concerns.

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If you have questions concerning the contents of this Alert, or would like more information, please speak to your regular contact at Weil or to any of the following authors:

Authors

Adé K. Heyliger	View Bio	ade.heyliger@weil.com	+1 202 682 7095
Lyuba Goltser	View Bio	lyuba.goltser@weil.com	+1 212 310 8048
Julie Rong	View Bio	julie.rong@weil.com	+1 212 310 8201