

Weil Briefing: SEC Disclosure and Corporate Governance

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SEC Staff Provides New Guidance on “Risk-Related” and “CEO Succession” Shareholder Proposals under Rule 14a-8

— Change in Staff Position Makes It More Difficult For Companies To Exclude Such Proposals

Just in time for the 2010 shareholder proposal season, the Securities and Exchange Commission’s Division of Corporation Finance has announced two substantive changes in how the staff will analyze the “ordinary business” exclusion set forth in Rule 14a-8(i)(7) under the Securities Exchange Act of 1934. In Staff Legal Bulletin No. 14E (CF) (“SLB 14E”) Shareholder Proposals, published on October 27 and available at <http://www.sec.gov/interps/legal/cfslb14e.htm>, the Division indicated that it no longer will grant expansive no-action relief on ordinary-business grounds with respect to shareholder proposals relating, respectively, to corporate risk evaluations and CEO succession planning. In addition, the Division provided specific guidance to companies and shareholder proponents on the submission of correspondence in connection with a pending no-action request. We discuss each of these three items below.

New Division Framework for Analysis of Risk-Related Proposals

Before SLB 14E’s publication, the Division generally deemed excludable under Rule 14a-8(i)(7) shareholder proposals dealing with internal corporate risk assessments. In accordance with the now-superseded guidance in Staff Legal Bulletin No. 14C (2005), available at <http://www.sec.gov/interps/legal/cfslb14c.htm>, the Division analyzed whether the proposal and accompanying supporting statement focused on a “company engaging in an internal assessment of the risks and liabilities that the company faces as a result of its operations.” If a proposal and supporting statement related to an evaluation of operational risk, no-action relief would be available under Rule 14a-8(i)(7). But if a proposal and supporting statement focused instead “on minimizing or eliminating operations that may adversely affect the environment or the public’s health,” a corresponding (i)(7) no-action request would be denied.

Faced with an increasing number of no-action requests arguing that risk-related proposals constitute ordinary business, the Division became concerned that its application of the position outlined in SLB 14C was resulting in the “unwarranted exclusion” of proposals seeking corporate risk assessments involving significant policy issues. Recognizing that risk management and its oversight can have “major consequences” for companies and shareholders, the Division now will consider whether the underlying subject-matter of a proposal (and supporting statement) relating to internal corporate risk assessment “transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote.” If so, a proposal generally will not be excludable as pertaining to ordinary-business. Consistent with its proposed proxy amendments that would (if adopted) require enhanced proxy disclosure of board oversight of risk management, the Division observed that “a proposal that focuses on the board’s role in the oversight of a company’s management of risk may transcend the day-to-day business matters of a company and raise policy issues so significant that it would be appropriate for a shareholder vote.

CEO Succession Planning Transcends Ordinary Business

To date, the Division has permitted the omission under Rule 14a-8(i)(7) of shareholder proposals requesting that companies adopt and disclose written CEO succession policies that, among other things, provide for extensive board involvement in the development and application of a formal assessment process. In taking the position that CEO succession planning proposals could be omitted, the Division relied on a statement by the Commission – set forth in the 1998 release adopting amendments to Rule 14a-8 – that “the management of the workforce, such as the hiring, promotion, and termination of employees” constituted ordinary business.¹

The Division now believes that matters pertaining to CEO succession “raised a significant policy issue regarding the governance of the corporation that transcends the day-to-day business matter of managing the workforce.” So the bottom line is this: “Going forward, we will take the view that a company generally may not rely on Rule 14a-8(i)(7) to exclude a proposal that focuses on CEO succession planning.” On the other hand, as the Division observed in a footnote to the foregoing statement, “such a proposal could be excluded ... if it seeks to micro-manage 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.”² Only time will tell where the line will be between includable and excludable proposals under this new analysis.

Companies and Shareholders are Encouraged to Contact the Staff If They Intend to Submit Correspondence

In order to afford the Division’s staff, prior to issuing a no-action response, with a better opportunity to review correspondence intended to be submitted by a company or a shareholder proponent in connection with a no-action request, the Division encourages them to provide the staff with the date by which they intend to submit their correspondence. Companies and shareholder proponents can either call (202-551-3500) or e-mail (shareholderproposals@sec.gov) the staff to provide such notice of the pending submission.

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If you have any questions on these matters, please do not hesitate to speak with your regular contact at Weil, Gotshal & Manges LLP or members of the Firm’s Public Company Advisory Group: Howard B. Dicker, howard.dicker@weil.com , 212-310-8858; Cathy Dixon, cathy.dixon@weil.com, 202-682-7147; Holly J. Gregory, holly.gregory@weil.com, 212-310-8038; P.J. Himelfarb, pj.himelfarb@weil.com, 202-682-7197; Robert L. Messineo, robert.messineo@weil.com, 212-310-8835; and Ellen J. Odoner, ellen.odoner@weil.com, 212-310-8438.

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¹ SLB 14E, citing SEC Release No. 34-40018 (May 21, 1998), available at <http://www.sec.gov/rules/final/34-40018.htm>.

² SLB 14E, note 8, citing SEC Release No. 34-40018 (May 21, 1998).