

SEC Issues Legal Bulletin Regarding Shareholder Proposals Exclusion

Article By:

Mark J. Reyes

Mark D. Wood

Brian Hecht

On October 16, the staff of the Division of Corporation Finance (Staff) of the Securities and Exchange Commission issued Staff Legal Bulletin No. 14K (SLB). The SLB provides new guidance regarding the Staff's views as to when registrants may properly exclude, pursuant to Rule 14a-8(i)(7) of the Securities Exchange Act of 1934, as amended, shareholder proposals under the "ordinary business" exception.

Generally, under Rule 14a-8, a shareholder that has continuously held for at least one year at least \$2,000 in market value, or 1 percent, of a registrant's shares may submit a proposal for the registrant and/or its board of directors to take a specific action, for consideration by the registrant's shareholders at a shareholder meeting. Notwithstanding this general provision, Rule 14a-8(i) sets forth several circumstances under which a registrant may omit a shareholder proposal, including if "the proposal deals with a matter relating the company's ordinary business operations."

The circumstances under which the Staff would grant no-action relief supporting an exclusion under this exception are discussed in detail in the SLB.

Shareholder proposals and Rule 14a-8 have been an area of focus and attention for the Staff, registrants and shareholders and the SLB follows the Staff's recent announcement on changes to the Rule 14a-8 no-action request process, discussed in the September 13, 2019 edition of [*Corporate & Financial Weekly Digest*](#).

Subject matter exclusion

The Staff has previously noted that it believes proposals may be excluded under the ordinary business exception where the subject matter is "so fundamental" to management's ability to run the business that they could not "as a practical matter" be subject to shareholder oversight. Further, the Staff has expanded its view that proposals would not be excludable under the ordinary business

exception where they “transcend the day-to day-business matters.” Now, in providing additional guidance in the SLB, the Staff noted that proposals should be analyzed, taking a company specific approach, to determine whether they are truly part of the registrant’s ordinary business operations or instead raise a “policy issue that appears significant.”

Building on prior guidance from previous legal bulletins, the Staff stresses in the SLB that in looking to exclude a shareholder proposal under the ordinary business exception, a registrant can strengthen its position by demonstrating a well-developed discussion at the board-level around analysis of the proposal. In determining to exclude a proposal, details of “specific substantive factors” that the board considered could support an argument for no action relief in favor of exclusion.

One substantive factor that a board could consider in determining to exclude a proposal under the ordinary business exception is the extent to which the registrant has already addressed the issue raised by the proposal, with the differences between the proposal and the actual actions taken being referred to as the “delta.” In the SLB, the Staff highlights that a delta analysis can be a helpful tool in supporting exclusion of a proposal where the analysis both clearly identifies the differences between the proposal and the existing actions and explains in detail why the delta does not represent a significant policy issue. Conclusory statements about only the differences, the Staff notes, would be less helpful.

In the SLB, the Staff also notes that exclusion on the basis that shareholders have previously voted on the matter in question may not be a sufficient ground for exclusion because it may not properly demonstrate that the issue is not significant to the registrant. Instead, prior voting results should be presented alongside a robust discussion of how the board’s view on significance was informed by prior votes as well as any subsequent actions the registrant may have taken or will take, other intervening events or other indicia of shareholder engagement on the issue.

Micromanaging exclusion

In addition to subject matter, a second prong under which the Staff believes a proposal may properly be excluded under the ordinary business exception is if the proposal would micromanage the registrant. This analysis turns on the manner in which a proposal seeks to address an issue, as opposed to the substantive subject matter of the issue itself. Micromanaging can be identified where the proposal seeks intricate detail or imposes a specific strategy, method or outcome or prescribes specific timeframes. A proposal that is overly prescriptive could limit the judgement and discretion of the registrant’s board and management, and thus be viewed as micromanaging and excludable under the ordinary business exception of Rule 4a-8(i)(7).

Proof of ownership

Finally, the SLB addresses proof of ownership issues. Rule 14a-8(b) requires that a shareholder proponent demonstrate its eligibility to submit a shareholder proposal by proving that it has held the requisite number of securities for at least one year. The Staff has previously provided guidance on a suggested format for shareholders to follow when supplying registrants with ownership information, although this format is not mandatory. In the SLB, the Staff noted that they have observed registrants applying “an overly technical reading of proof of ownership letters as a means to exclude a proposal.”

The Staff noted they have taken a plain meaning approach to interpreting ownership letters and have advised registrants to do the same going forward, including when the Staff’s suggested format is not

followed.

The SLB is available [here](#).

©2024 Katten Muchin Rosenman LLP

National Law Review, Volumess IX, Number 291

Source URL: <https://www.natlawreview.com/article/sec-issues-legal-bulletin-regarding-shareholder-proposals-exclusion>