

NOVEMBER 05, 2018

SEC Issues New Guidance on Shareholder Proposal Exclusions Under "Ordinary Business" and "Economic Relevance" Grounds

by John O. Newell, Daniel P. Adams

Speed Read

The Division of Corporation Finance (Staff) of the Securities and Exchange Commission (SEC) has issued new guidance on the ability of companies to exclude shareholder proposals from their proxy statements under the "ordinary business" and "economic relevance" exclusions of Rule 14a-8. Following on its November 2017 guidance, [Staff Legal Bulletin \(SLB\) No. 14J](#) provides additional information on the Staff's views on (1) the role that a discussion of the board of directors' analysis provides in no-action requests under the ordinary business or economic relevance exclusions, (2) how the Staff will apply the "micromanagement" doctrine in no-action requests under the ordinary business exclusion and (3) how the Staff will analyze shareholder proposals that relate to compensation matters involving senior executive officers and/or directors under the ordinary business exclusion. This new guidance appears to expand the circumstances in which the Staff will provide no-action relief for the exclusion of certain shareholder proposals, particularly those relating to compensation matters.

BOARD ANALYSIS

[Staff Legal Bulletin No. 14J](#), issued by the Staff in November 2017, invited companies to provide a discussion of the analysis undertaken by the board of directors concerning the policy issue presented by a shareholder proposal when the company sought to exclude the shareholder proposal from its proxy statement under the "ordinary business" or "economic relevance" provisions of Rule 14a-8, which are summarized in a later section of this alert. The Staff indicated that this analysis could assist in its review of these no-action requests by providing the company's perspective on the specific policy issue raised by the shareholder proposal and its significance to the company.

[Staff Legal Bulletin No. 14J](#) provides further guidance for companies that provide a discussion of the board's analysis of factors that the board considered in concluding that the issue presented by the shareholder proposal is not significantly related to the company's business. SLB 14J includes the following list of substantive factors that companies may include in this discussion:

- the extent to which the proposal relates to the company's core business activities.
- quantitative data, including financial statement impact, related to the matter that illustrate whether or not a matter is significant to the company.
- whether the company has already addressed the issue in some manner, including the differences – or the delta – between the proposal's specific request and the actions the company has already taken, and an analysis of whether the delta presents a significant policy issue for the company.

- the extent of shareholder engagement on the issue and the level of shareholder interest expressed through that engagement.
- whether anyone other than the proponent has requested the type of action or information sought by the proposal.
- whether the company's shareholders have previously voted on the matter and the board's views as to the related voting results.

SLB 14J states that these factors are neither exclusive nor exhaustive, and it is not necessary for a board analysis to address each one of these factors. SLB 14J provides further guidance on how the Staff will handle no-action requests under the ordinary business and economic relevance exclusions:

- Submission of a board analysis is voluntary, and the absence of a board analysis “will not create a presumption against exclusion,” although omitting the analysis may make it “difficult in some instances [for the Staff] to agree that a proposal may be excluded.”
- If the company's shareholders have previously voted on a matter, the Staff expects that any discussion of a board's analysis would address the voting results, as well as any subsequent action taken by the company, any other relevant events that have occurred since the vote and how much time has passed since shareholders last voted on the matter.
- The Staff generally views substantive governance matters as significant, and will therefore not expect to grant no-action relief for proposals that focus on substantive governance matters.

MICROMANAGEMENT

SEC policy on the ordinary business exclusion is based on (1) the subject matter of the proposal and (2) the degree to which the proposal “micromanages” the company “by probing too deeply into matters of a complex nature.” The second factor can become relevant in circumstances “such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.” The Staff's micromanagement analysis focuses on the *manner* in which a proposal seeks to address an issue, rather than the *subject matter* of the proposal. SLB 14J states that the Staff will continue to apply this analytical framework in evaluating whether to grant no-action relief.

SENIOR EXECUTIVE OR DIRECTOR COMPENSATION PROPOSALS

The SEC has said that proposals involving “the management of the workforce, such as the hiring, promotion, and termination of employees” are generally ordinary business matters. Consistent with that view, shareholder proposals that relate to general employee compensation and benefits have been excludable under the ordinary business exclusion. However, proposals that focus on “significant aspects” of senior executive and/or director compensation are generally not excludable under the ordinary business exclusion. SLB 14J provides additional guidance on how the Staff will analyze proposals that involve senior executive or director compensation.

Proposals Involving Senior Executive and/or Director Compensation and Ordinary Business Matters.

Where a proposal involves both senior executive and/or director compensation matters and ordinary business matters, the Staff will determine whether the focus of the proposal is senior executive and/or director compensation or whether its underlying concern relates primarily to ordinary business matters that are not sufficiently related to senior executive and/or director compensation. In these cases, SLB 14J states that “[i]ncluding an aspect of senior executive or director compensation in a proposal that otherwise focuses on an ordinary business matter will not insulate a proposal from exclusion” under the ordinary business exemption. As an example, SLB 14J states that the Staff agreed with the exclusion of a proposal requesting that the board prohibit payment of incentive compensation to executive officers unless the company first adopted a process to fund the retirement accounts of certain retired employees.

Proposals Involving Senior Executive and/or Director Compensation and the General Workforce. Where a proposal involves both aspects of senior executive or director compensation as well as general employee compensation and benefits, the Staff will evaluate whether the focus is only on senior executive and/or director compensation, in which case the company will generally not be able to exclude the proposal as an ordinary business matter. On the other hand, if the proposal focuses on aspects of compensation that are available or apply to both the general workforce and senior executives and/or directors, SLB 14J states that “[c]ompanies may generally rely” on the ordinary business exemption to exclude the proposal from the proxy materials. As an example, SLB 14J states that a proposal seeking to limit when senior executive officers will receive golden parachutes may be excludable under Rule 14a-8(i)(7) if the company’s golden parachute provision broadly applies to a significant portion of its general workforce.

Proposals That Micromanage Senior Executive and/or Director Compensation. In a change of position, SLB 14J states that the Staff will no longer treat proposals that micromanage senior executive and/or director compensation differently from other types of proposals. As a result, the Staff may agree that companies can exclude proposals that “seek intricate detail, or seek to impose specific timeframes or methods for implementing complex policies” from proxy statements on the basis of micromanagement. SLB 14J provides the following example:

For example, a proposal detailing the eligible expenses covered under a company’s relocation expense policy such as the type and duration of temporary living assistance, as well as the scope of eligible participants and amounts covered, could well be excludable on the basis of micromanagement.

As described above, the Staff will determine whether a proposal may be excludable because it micromanages the company’s business matters based on the manner in which a proposal raises an issue, rather than on the subject matter of the proposal. The impact of this new position in the coming proxy season will depend on how the Staff applies its views about micromanagement to specific proposals and the arguments of companies and proponents. At a minimum, the change in position offers companies another basis on which they can argue for exclusion of relevant proposals.

CONTACTS:

John O. Newell

Counsel

+1 617 570 1475

jnewell@goodwinlaw.com

Daniel P. Adams

Partner

+1 617 570 1966

dadams@goodwinlaw.com

© 2018 Goodwin Procter LLP. All rights reserved. This informational piece, which may be considered advertising under the ethical rules of certain jurisdictions, is provided with the understanding that it does not constitute the rendering of legal advice or other professional advice by Goodwin Procter LLP, Goodwin Procter (UK) LLP or their attorneys. Prior results do not guarantee similar outcome.

Goodwin Procter LLP is a limited liability partnership which operates in the United States and has a principal law office located at 100 Northern Avenue, Boston, MA 02210. Goodwin Procter (UK) LLP is a separate limited liability partnership registered in England and Wales with registered number OC362294. Its registered office is at 100 Cheapside, London EC2V 6DY. A list of the names of the members of Goodwin Procter (UK) LLP is available for inspection at the registered office. Goodwin Procter (UK) LLP is authorized and regulated by the Solicitors Regulation Authority.