

INSIGHTS

SEC Releases New Guidance on Shareholder Proposals

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On November 1, 2017, the Staff of the Division of Corporation Finance of the Securities and Exchange Commission published in Staff Legal Bulletin No. 14I guidance relating to the excludability of certain shareholder proposals from public company proxy statements under Exchange Act Rule 14a-8 and other shareholder proposal matters. Most notably, the Staff articulates that they will employ more deference toward the analysis performed by the subject company's board of directors in determining whether companies may exclude proposals using the "ordinary business" and "economic relevance" exceptions.

The full text of the Staff Legal Bulletin is available [here](#).

The "Ordinary Business" Exception

The Staff has previously stated that shareholder proposals can be excluded from a company's proxy statement under the "ordinary business" exception when the proposal deals with matters that are so fundamental to management's ability to run a company on a day-to-day basis that it would be impractical to submit such matters to shareholders except where such matters focus on significant policy issues.

The Staff explained that determining whether a proposal focuses on a sufficiently significant policy matter often involves difficult judgment calls. The Staff's new guidance clarifies that they are likely to defer to a company's judgment in these situations, so long as the company demonstrates in its no-action request that its board of directors engaged in a "well-developed discussion" and drew "well-informed and well-reasoned" conclusions regarding why the proposal should be excluded in spite of the implicated policy issues. The Staff goes on to note that boards of directors frequently act as stewards for their shareholders with fiduciary duties and significant duties of care and loyalty.

In the current and future proxy seasons, companies should ensure their boards carefully consider all shareholder proposals and document such deliberations for use in requests for no-action relief.

The "Economic Relevance" Exception

The less commonly used "economic relevance" exception provides that a company may exclude a shareholder proposal that "relates to operations which account for less than 5 percent of the company's total assets...and for less than 5 percent of its net earnings and gross sales...and is not otherwise significantly related to the company's business." In other words, a company may

exclude proposals that are not economically relevant.

The Staff has historically applied this exception very narrowly, such that companies were not permitted to exclude proposals if they conducted any amount of business related to a proposal that implicated some social or ethical concern. However, the Staff's new guidance explains that, going forward, the Staff will analyze whether a proposal's subject matter is significant to the specific company's business when it otherwise relates to operations that account for less than 5% of total assets, net earnings and gross sales. Under the Staff's new framework, proposals that raise social or ethical issues may be included or excluded, notwithstanding their importance in the abstract, based on the analysis of their relevance to the subject company's actual business.

The Staff further notes that determining whether a proposal is significantly related to a company's business can involve difficult judgment calls. As with the "ordinary business" exception, the Staff explains that they will defer to boards' judgment in making this determination. "A board acting with the knowledge of the company's business and the implications for a particular proposal on that company's business is better situated than the staff to determine whether a particular proposal is 'otherwise significantly related to the company's business.'" However, the Staff also notes that they would generally view substantive governance matters to be significantly related to almost all companies' businesses.

Proposals by Proxy or Representative

The new guidance also clarifies what types of documentation a company should expect to receive from a shareholder who submits a shareholder proposal through a representative or proxy. The Staff noted that they would expect such documentation to:

- identify the shareholder-proponent and the person or entity selected as proxy;
- identify the company to which the proposal is directed;
- identify the annual or special meeting for which the proposal is submitted;
- identify the specific proposal to be submitted; and
- be signed and dated by the shareholder.

Images and Graphs in Shareholder Proposals

Finally, the Staff's guidance clarifies that graphs and images are appropriate for use in shareholder proposals, but that any words in those graphs or images count toward the 500-word maximum. The Staff also includes a list of several grounds on which graphs and images might be excluded from the subject company's proxy statement.