

Memorandum

SEC Issues New Staff Legal Bulletin No. 14J With Shareholder Proposals Clarifications

November 1, 2018

On October 23, 2018, the Division of Corporation Finance of the Securities and Exchange Commission (the SEC) issued new Staff Legal Bulletin 14J¹, following up on previous bulletins clarifying issues arising under Exchange Act Rule 14a-8. The new bulletin addresses the Division's views on:

- Board of directors analyses provided in no-action requests that seek to rely on the “economic relevance” exception or the “ordinary business” exception as a basis to exclude shareholder proposals from a company's proxy materials;
- the scope and application of micromanagement as a basis to exclude a proposal under the “ordinary business” exception; and
- the scope and application of the “ordinary business” exception for proposals that touch upon senior executive and/or director compensation matters.

Helpfulness of Board Analysis Discussion

Previously, on November 1, 2017, the SEC staff had issued Staff Legal Bulletin 14I². Among other things, Staff Legal Bulletin 14I suggested that, in evaluating a company's no-action request to exclude a shareholder proposal based on the “economic relevance” exception or the “ordinary business” exception, the perspective of a company's board would be useful for the staff to consider when determining whether the proposal raises an issue that is “otherwise significantly related” to a company's business or transcends “ordinary business” and, therefore, is not excludable. Accordingly, Staff Legal Bulletin 14I effectively invited companies seeking

¹ See [Shareholder Proposals: Staff Legal Bulletin No. 14J \(CF\)](#) (October 23, 2018).

² See [Shareholder Proposals: Staff Legal Bulletin No. 14I \(CF\)](#) (November 1, 2017).

no-action relief on these bases to include a discussion regarding the board's analysis of the particular policy issue raised by the proposal and its significance in relation to the company.

In the newest Staff Legal Bulletin, the Division reiterates its belief that, in evaluating a company's no-action request to exclude a proposal on these bases, a well-developed discussion of an analysis by the board of whether a particular policy issue raised by a proposal is otherwise significantly related to the company's business, in the case of the "economic relevance" exception, or is sufficiently significant in relation to the company, in the case of the "ordinary business" exception, can be helpful to the staff in its evaluation of the request. According to Staff Legal Bulletin 14J, the absence of a board analysis will not create a presumption against exclusion, while the inclusion of a board's analysis in a company's no-action request will not create a presumption of exclusion either. That said, the Division also suggests that the staff may find it difficult to reach a conclusion that a proposal may be excluded on these bases without the benefit of the board's analysis.

Staff Legal Bulletin 14J suggests that the most helpful discussions will focus on a board's analysis and describe in sufficient detail the specific substantive factors the board considered in arriving at its conclusion and provides a non-exhaustive list of factors that could be relevant:

- 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 between the proposal's specific request and the actions the company has already taken, and an analysis of whether the differences present 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.

Micromanagement as a Basis to Exclude Under "Ordinary Business" Exception

In Staff Legal Bulletin 14J, the Division confirms that the SEC's policy underlying the "ordinary business" exception rests on two central considerations. The first relates to the proposal's subject matter; the second, the degree to which the 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 SEC has explained in the past that the second consideration “may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.” Pursuant to Staff Legal Bulletin 14J, it is the manner in which a proposal seeks to address an issue that results in exclusion on micromanagement grounds, and the staff’s concurrence with a company’s micromanagement argument does not necessarily mean that the subject matter raised by the proposal is improper for shareholder consideration.

Exclusion of Proposals That Address Senior Executive and/or Director Compensation Under “Ordinary Business” Exception

Staff Legal Bulletin 14J also provides guidance, clarifying the Division’s views, with respect to the exclusion under the “ordinary business” exception of proposals that implicate senior executive and/or director compensation, as follows:

Proposals that address senior executive and/or director compensation and ordinary business matters

In evaluating proposals that raise both ordinary business and senior executive and/or director compensation matters, the staff will examine whether the focus of the proposal is an ordinary business matter or aspects of senior executive and/or director compensation. Where the focus appears to be on the ordinary business matter, the proposal may be excludable. Including 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.

Proposals that address aspects of senior executive and/or director compensation that are also available or applicable to the general workforce

If a primary aspect of the targeted compensation is broadly available or applicable to a company’s general workforce and the company demonstrates that the executives’ or directors’ eligibility to receive the compensation does not implicate significant compensation matters, the proposal may be excludable. According to the Division, it is difficult to conclude that a proposal does not relate to a company’s ordinary business when it addresses aspects of compensation that are broadly available or applicable to a company’s general workforce, even when the proposal is discussed in the context of a company’s senior executives and/or directors. Likewise, companies may generally not rely on the “ordinary business” exception to omit proposals where the focus of such proposals is on aspects of compensation that are available or apply only to senior executive officers and/or directors.

Proposals that micromanage senior executive and/or director compensation practices

Staff Legal Bulletin 14J acknowledges that, historically, the Division had generally not agreed with the exclusion of proposals addressing senior executive and/or director compensation on the basis of micromanagement. In light of SEC statements relating to micromanagement, however, Staff Legal Bulletin 14J indicates that the Division has reversed its position and has determined that proposals addressing senior

executive and/or director compensation that seek intricate detail, or seek to impose specific timeframes or methods for implementing complex policies, may be excluded under the “ordinary business” exception on this basis. Proposals that focus on significant executive and/or director compensation matters and do not micromanage will continue not to be excludable under the “ordinary business” exception.

If you have any questions or would like additional information, please do not hesitate to contact **Karen Hsu Kelley** at +1-212-455-2408 or kkelley@stblaw.com, **Shari A. Ness** at +1-212-455-2383 or shari.ness@stblaw.com, or any other member of the Firm’s Public Company Advisory Practice.

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.



UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000