

# SEC Staff Reverses Certain Limitations on Issuers' Ability to Exclude Shareholder Proposals

February 18, 2025

On February 12, 2025, the Securities and Exchange Commission's Division of Corporation Finance issued Staff Legal Bulletin No. 14M ("SLB 14M"), which rescinds Staff Legal Bulletin No. 14L ("SLB 14L") and reinstates earlier guidance on the exclusion of shareholder proposals under Rule 14a-8 of the Securities Exchange Act of 1934, as amended (the "Exchange Act").

When making a no-action determination on exclusion of a shareholder proposal, the Staff will consider the guidance in place at the time it issues a response. Therefore, for the current proxy season:

- Companies that have submitted no-action requests prior to the publication of SLB 14M may raise new legal arguments by submitting supplemental correspondence via the SEC's online portal.
- A company may submit a new no-action request notwithstanding that its deadline for submitting a no-action request has passed, if the legal arguments in the request relate to SLB 14M. In those circumstances, the Staff will consider the publication of SLB 14M to be "good cause" for making a late request.
- Companies should submit new requests as soon as possible, with consideration for the print deadline for their definitive proxy statements, as well as giving proponents the opportunity to provide supplemental correspondence in response to the new request.

## RULE 14A-8

Rule 14a-8 provides a framework under which a public company shareholder can request that a proposal be included in a company's proxy statement, to be voted upon at a company's annual meeting. A company subject to Section 14A of the Exchange Act must include a shareholder proposal in its proxy statement for a shareholder meeting if the proposal complies with the procedural and eligibility requirements of Rule 14a-8,

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unless the company can exclude the proposal on one of 13 substantive bases. The SEC narrowed the substantive bases on which a Rule 14a-8 proposal could be excluded from a proxy statement under former SEC Chair Gary Gensler. SLB 14M now expands the ability to exclude shareholder proposals under Rule 14a-8(i)(5)—the “economic relevance” exclusion—and Rule 14a-8(i)(7)—the “ordinary business” exclusion.

### ECONOMIC RELEVANCE

The economic relevance ground for exclusion permits a company to exclude a shareholder proposal that (1) relates to operations that account for less than 5% of the company’s total assets at the end of its most recent fiscal year, and for less than 5% of its net earnings and gross sales for its most recent fiscal year and (2) is not otherwise significantly related to the company’s business.

SLB 14M broadens the application of the second element of the economic relevance ground. The Staff states that, because Rule 14a-8(i)(5) “allows exclusion only when the matter is not ‘otherwise significantly related to the company,’ we view the analysis as dependent upon the particular circumstances of the company to which the proposal is submitted.” In contrast to the framework in the rescinded SLB 14L, under which proposals raising broad social or ethical concerns related to the company’s business could not be excluded, the Staff states in SLB 14M that “proposals that raise issues of social or ethical significance may be excludable, notwithstanding their importance in the abstract.”

Therefore, although a proponent may raise social or ethical issues in its arguments, it would need to tie those matters to a significant effect on the company’s business. The Staff clarifies that the possibility of reputational or economic harm alone will not be sufficient to show a significant effect on the company’s business, and that in evaluating whether a proposal is “otherwise significantly related to the company’s business,” the Staff will consider the proposal in light of the total mix of information about the company.

### ORDINARY BUSINESS

The ordinary business ground for exclusion permits a company to exclude a shareholder proposal that relates to “a matter relating to the company’s ordinary business operations.” The rationale underlying the exclusion rests on two considerations: (1) the subject matter should not infringe on matters “so fundamental to management’s ability to run the company on a day-to-day basis that they could not, as a practical matter, be

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subject to direct shareholder oversight” and (2) the proposal should not “micromanage” the company.

### **Significance**

Under the rescinded SLB 14L, the ordinary business ground for exclusion was not available for a proposal that focused on social policy issues that were sufficiently significant so as to transcend ordinary business. In SLB 14M, the Staff clarifies that this “significance exception” depends on whether the policy issue raised by the proposal has sufficient nexus to the company. The Staff will take a company-specific approach in evaluating the significance of a policy issue raised by a proposal, rather than focusing on whether a proposal raises a policy issue with broad societal impact.

### **Micromanagement**

SLB 14M takes a more expansive view of the “micromanagement” element of the ordinary business ground for exclusion, focusing on the manner in which a proposal seeks to address the subject matter raised, rather than the subject matter itself. Under the rescinded SLB 14L, the Staff’s view was that proposals “seeking detail or seeking to promote timeframes or methods do not *per se* constitute micromanagement.”

SLB 14M reinstates the sections of Staff Legal Bulletin No. 14J (“SLB 14J”) and Staff Legal Bulletin No. 14K relating to micromanagement. Under the reinstated bulletins, a proposal will be excludable if it “involves intricate detail or seeks to impose specific timeframes or methods for implementing complex policies.” For example, SLB 14J refers to a previous decision of the Staff that a proposal to generate a plan to reach net-zero greenhouse gas emissions by the year 2030 would be excludable on the basis of micromanagement. SLB 14J also states that a proposal that seeks an intricately detailed study or report may be excluded on micromanagement grounds, as may a proposal calling for a report if the substance of the report relates to the imposition or assumption of specific timeframes or methods for implementing complex policies.

### **Ordinary Business and Executive/Director Compensation**

Under reinstated SLB 14J, in evaluating proposals that raise both ordinary business and senior executive or director compensation matters, the Staff will examine whether the focus of the proposal is an ordinary business matter or aspects of senior executive or director compensation.

Although proposals that focus on significant aspects of senior executive or director compensation are generally not excludable on the basis of the ordinary business ground for exclusion, the Staff notes that such proposals that “seek intricate detail, or seek to impose specific timeframes or methods for implementing complex policies can be excluded under Rule 14a-8(i)(7) on the basis of micromanagement.”

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Further, a proposal that addresses senior executive or director compensation may be excludable under the ordinary business ground 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.” In the Staff’s view, the availability of certain forms of compensation to senior executives or directors that are also broadly available or applicable to the general workforce does not generally raise significant compensation issues that transcend ordinary business matters.

### PROCEDURAL CONSIDERATIONS

In SLB 14M, the Staff also provides guidance on procedural matters, including:

- The suggested format for the proof of ownership requirement is neither mandatory nor the exclusive means of satisfying the ownership requirements. Differences in drafting are acceptable if the language is clear and requirements are met, and the Staff will take a plain meaning approach to interpreting the proof of ownership letter.
- The Staff will not expect a company’s no-action request under the economic relevance ground for exclusion or the ordinary business ground for exclusion to include the board’s analysis of the particular policy issue raised and its significance to the company. A company may submit such analysis if it believes the analysis would help the Staff analyze the no-action request.
- When using email to communicate with a company or a proponent for purposes of Rule 14a-8, the Staff recommends the sender seek a reply email acknowledging receipt from the recipient to prove delivery of an email. Email delivery confirmations, company server logs, and screenshots or photos of emails on the sender’s device may not be sufficient as proof of delivery to recipients.

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Please do not hesitate to contact us with any questions.



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