Market Trends 2019/20: Staff Legal Bulletins No. 14I, 14J, and 14K and Other Shareholder Proposal Developments

A Lexis Practice Advisor® Practice Note by
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This market trends practice note discusses Staff Legal Bulletin No. 14I, Staff Legal Bulletin No. 14J, and Staff Legal Bulletin No. 14K of the Division of Corporation Finance of the Securities and Exchange Commission (SEC), which provide guidance with respect to shareholder proposals submitted for inclusion in company proxy statements pursuant to Rule 14a-8 under the Securities Exchange Act of 1934 (Rule 14a-8). This note also describes changes in SEC procedures for processing shareholder proposal no-action requests, trends in shareholder proposals submitted for inclusion in proxy statements for the 2020 proxy season and proposed amendments to Rule 14a-8.

For additional information on shareholder proposals, see Proxy Statement and Annual Report Drafting, Solicitation, and Distribution and Rule 14a-8 Shareholder Proposals Timetable. For additional information on the proxy and annual meeting process in general, see Proxy Statement and Annual Meeting Resource Kit. For other market trends articles covering various capital markets and corporate governance topics, see Market Trends.

Staff Legal Bulletin No. 14I

On November 1, 2017, the staff (Staff) of the Division of Corporation Finance issued Staff Legal Bulletin No. 14I (SLB 14I) to provide guidance on shareholder proposals submitted pursuant to Rule 14a-8. SLB 14I, addressed four topics in the shareholder proposal area:

- The scope and application of the ordinary business grounds for exclusion under Rule 14a-8(i)(7)
- The scope and application of economic relevance grounds for exclusion under Rule 14a-8(i)(5) for proposals relating to less than 5% of a company's total assets, net earnings, and gross sales
- Proposals submitted on behalf of a shareholder by a representative, sometimes referred to as proposal by proxy
- The impact of graphs and images on the 500-word limit in Rule 14a-8(d)

Ordinary business. Shareholder proposals addressing ordinary business may be excluded from a company's proxy statement under Rule 14a-8(i)(7) if they raise matters that are "so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight," unless the proposal focuses on policy issues that are sufficiently significant because they transcend ordinary business. Many Rule 14a-8(i)(7) no-action requests focus on this analysis and require the Staff to make difficult judgment calls. SLB 14I articulated the Staff's view that a company's board of directors, in the first instance, generally is in a better position to make this determination.

In SLB 14I, the Staff indicated that it was looking for an analysis by a company's board of directors to assist the Staff in its review of no-action requests under Rule 14a-8(i)(7).

Specifically, the Staff stated that it expected companies to include in such no-action requests "a discussion that reflects the board's analysis of the particular policy issue raised and its significance." The Staff specified that it wanted to see an explanation of "the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned."

Economic relevance. Rule 14a-8(i)(5) permits a shareholder proposal that relates to operations accounting for less than 5% of a company's total assets, net earnings, and gross sales, and that is not otherwise significantly related to a company's business to be excluded from that company's proxy statement. SLB 14I indicated that the significance test for this exclusion relates to the effect on the company's business and that proposals that raise issues of social or ethical significance may be included or excluded, notwithstanding their importance in the abstract, based on the application and analysis of the factors listed in Rule 14a-8(i)(5). As with the ordinary business basis for exclusion, SLB 14I reflected the Staff's belief that a company's board of directors, in the first instance, generally is in a better position to make this determination. Accordingly, the Staff expects no-action requests under Rule 14a-8(i)(5) to include a discussion detailing the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned.

SLB 14I also clarified that the otherwise significantly related aspect of Rule 14a-8(i)(5) is distinct from the Rule 14a-8(i)(7) question of whether an issue is sufficiently significant to transcend ordinary business. Each of these exclusions represents a separate analytical framework. Accordingly, the Staff will no longer consider a Rule 14a-8(i)(7) analysis when evaluating an argument that a shareholder proposal is excludable under Rule 14a-8(i)(5).

Proposal by proxy. If a shareholder delegates authority for a shareholder proposal to another person as his or her representative or proxy, SLB 14I specified that the proponent should provide documentation that:

- Identifies the shareholder-proponent and the person or entity selected as proxy
- Identifies the company to which the proposal is directed
- Identifies the annual or special meeting for which the proposal is submitted
- Identifies the specific proposal to be submitted (e.g., proposal to lower the threshold for calling a special meeting from 25% to 10%) –and–
- Is signed and dated by the shareholder

SLB 14I indicated that Rule 14a-8(b) may provide a basis to exclude a shareholder proposal from a company's proxy statement if the above information is not provided.

Graphs and images. In SLB 14I, the Staff reiterated its previous position that graphs and images may be included in a shareholder proposal. However, the Staff clarified that words in graphics will be counted toward the word limit established by Rule 14a-8(d). In short, a proposal is subject to exclusion from a company's proxy statement if the total number of words exceeds 500, including any words that appear in graphics.

SLB 14I also clarified that graphs and images are subject to exclusion for violating proxy rules under Rule 14a-8(i)(3) if they:

- Make the proposal materially false or misleading
- Render the proposal inherently vague or indefinite
- Directly or indirectly impugn a person's character, integrity, or personal reputation, or make charges concerning improper, illegal, or immoral conduct, without factual foundation –or–
- Are irrelevant to a consideration of the subject matter of the proposal

Staff Legal Bulletin No. 14J

The Staff issued Staff Legal Bulletin No. 14J (SLB 14J) on October 23, 2018, to provide further guidance on shareholder proposals submitted pursuant to Rule 14a-8. SLB 14J, addressed three topics:

- Board analyses provided in no-action requests that seek to rely on economic relevance (Rule 14a-8(i)(5)) or ordinary business (Rule 14a-8(i)(7)) as a basis to exclude shareholder proposals
- The scope and application of micromanagement necessary to implement a proposal as a basis to exclude a proposal under Rule 14a-8(i)(7) –and–
- The scope and application of Rule 14a-8(i)(7) for proposals that touch upon senior executive and/or director compensation matters

Board analysis. SLB 14J evaluated the board analyses that the Staff received under either Rule 14a-8(i)(7) or Rule 14a-8(i)(5) as part of no-action requests during the 2018 proxy season, stating that such board analyses were helpful even when the Staff did not ultimately agree with the company's position. According to SLB 14J, the Staff found that the most helpful board analyses included a well-developed discussion of the specific substantive factors

the board considered in arriving at its conclusion. The Staff indicated that discussions were less helpful when they only described the board's conclusions or process, without discussing the specific factors considered.

SLB 14J identified the following six factors as examples of the types of considerations that may be appropriate for inclusion in the board analysis discussion of a no-action request:

- 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 – and–
- Whether the company's shareholders have previously voted on the matter and the board's views as to the related voting results

SLB 14J specified that this list was not intended to be exclusive or exhaustive. In addition, it is not necessary for the board to address each one of these factors.

While clarifying that a board analysis is optional and that the absence of such discussion will not create a presumption against exclusion, SLB 14J warned that, "without having the benefit of the board's views on the matters raised, the staff may find it difficult in some instances to agree that a proposal may be excluded." According to SLB 14J, this is especially true if "the significance of a particular issue to a particular company and its shareholders may depend on factors that are not self-evident and that the board may be well-positioned to consider and evaluate."

SLB 14J reiterated that the Staff views substantive governance matters to be significantly related to almost all companies, so it is unlikely that the Staff would agree to exclude proposals that focus on such matters.

Micromanagement. SLB 14J also addressed the scope and application of micromanagement as a basis to exclude a proposal under Rule 14a-8(i)(7), explaining that the ordinary business exception has two components. The first involves the subject matter of the proposal, while the second relates to whether a proposal probes 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.

SLB 14J made clear that the Staff applies this micromanagement framework to proposals that call for an intricately detailed report or study. In addition, SLB 14J specified that the Staff's concurrence with a micromanagement argument does not necessarily mean that the subject matter raised by the proposal is improper for shareholder consideration.

Senior executive/director compensation. Proposals involving workforce management may be excludable as ordinary business matters under Rule 14a-8(i)(7), while proposals that focus on senior executive and/or director compensation generally cannot be excluded. SLB 14J provided guidance on how the Staff determines whether a proposal implicating senior executive/director compensation could be excluded as involving ordinary business in three circumstances.

First, if a proposal raises both ordinary business and senior executive and/or director compensation matters, the Staff will evaluate whether the proposal's focus is on an ordinary business matter or on aspects of senior executive and/or director compensation. If the Staff determines the focus to be on the ordinary business matter, the proposal may be excludable under Rule 14a-8(i)(7), even though it involves senior executive and/or director compensation matters.

Also, if a primary aspect of compensation targeted by a proposal is broadly available or applicable to a company's general workforce, it may be excludable under Rule 14a-8(i)(7), even if the proposal addresses senior executive and/or director compensation, if the company demonstrates that the executives' or directors' eligibility to receive the compensation does not implicate significant compensation matters.

Finally, proposals addressing senior executive and/or director compensation can be excluded under Rule 14a-8(i)(7) on the basis of micromanagement if they seek intricate detail, or seek to impose specific time frames or methods for implementing complex policies. As an example, SLB 14J indicated that a proposal detailing the eligible expenses covered under a company's relocation expense policy could well be excludable as micromanagement. SLB 14J emphasized that micromanagement addresses the manner in which a proposal raises an issue. If the focus of the proposal is on significant executive and/or director compensation matters without micromanagement, the proposal will not be excludable under Rule 14a-8(i)(7).

Staff Legal Bulletin No. 14K

On October 16, 2019, the Staff issued Staff Legal Bulletin No. 14K (SLB 14K) to provide additional guidance on shareholder proposals submitted pursuant to Rule 14a-8 under the Securities Exchange Act of 1934. SLB 14K is the 12th Staff Legal Bulletin devoted to shareholder proposal matters. It addresses:

- The analytical framework of Rule 14a-8(i)(7)
- Board analyses provided in no-action requests to demonstrate that the policy issue raised by the proposal is not significant to the company
- The scope and application of micromanagement as a basis to exclude a proposal under Rule 14a-8(i)(7) –and–
- Proof of ownership letters

Rule 14a-8(i)(7). Rule 14a-8(i)(7) allows a shareholder proposal to be excluded from a company's proxy statement to the extent that it "deals with a matter relating to the company's ordinary business operations." According to the SEC, there are two central considerations underlying this provision: (1) the subject matter of the proposal and (2) the degree to which the proposal would micromanage the company. SLB 14K provides guidance in three areas relevant to the application of Rule 14a-8(i)(7).

Significant policy exception. For purposes of Rule 14a-8(i)(7), generally a proposal relates to a company's ordinary business operations if it raises matters that are "so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." However, proposals are not excludable as ordinary business if they "transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote."

According to SLB 14K, the appropriate focus of an ordinary business argument is whether the proposal deals with a matter relating to that company's ordinary business operations or raises a policy issue that transcends that company's ordinary business operations. In either case, a company's analysis in its no-action request should be tailored to the particular company. SLB 14K states that the Staff uses "a company-specific approach in evaluating significance, rather than recognizing particular issues or categories of issues as universally 'significant.'" Therefore, a policy issue may be significant to one company but not significant to another. If a proposal raises a policy issue that appears to be significant, the company's no-action request should explain the significance of the relevant issue to that company.

Board analysis. SLB 14K offered additional guidance on two of the six factors that the Staff raised in SLB 14J that may be appropriate for inclusion in the board analysis discussion of a no-action request. One of these considerations is whether the company has previously addressed the subject of the proposal in some manner, including a discussion of the difference between the proposal's request and the steps already taken, and whether the differences present a significant policy issue for the company. SLB 14K elaborated on the benefits of this "delta" analysis, noting that it could be useful where a company has acted to address the issues raised by a proposal but may not have substantially implemented the proposal for the purposes of Rule 14a-8(i)(10). For example, this could be the case where the company responded to a concern with a different approach than the one requested by the proposal. SLB 14K also indicated that a delta analysis can be helpful to the Staff's understanding of whether the difference between the company's prior actions and the proposal's request represents a significant policy issue for the company. For instance, this type of analysis could be relevant where the company's actions diminished the significance of the policy issue to such an extent that the proposal no longer presents a policy issue that is significant for the company. According to SLB 14K, "a delta analysis is most helpful where it clearly identifies the differences between the manner in which the company has addressed an issue and the manner in which a proposal seeks to address the issue and explains in detail why those differences do not represent a significant policy issue for the company."

SLB 14J also mentioned prior shareholder votes on a matter and the board's view of the related voting results as a factor for a board analysis being submitted with a no-action request. In this regard, SLB 14K explained that during the most recently completed proxy season, the Staff was not persuaded by discussions of prior votes when the companies argued:

- The voting results were not significant given that a majority of shareholders voted against the prior proposal
- The significance of the prior voting results was mitigated by the impact of proxy advisory firms' recommendations –or–
- When considering the voting results based on shares outstanding, instead of votes cast, the voting results were not significant

SLB 14K suggested that a board analysis may be more helpful if it contains a robust discussion explaining "how the company's subsequent actions, intervening events or other objective indicia of shareholder engagement on the issue bear on the significance of the underlying issue to the company."

Micromanagement. SLB 14K explained that the micromanagement analyses of two proposals involving the same subject matter may yield different results based on the level of prescriptiveness in each proposal. According to SLB 14K, when a proposal "prescribes specific actions that the company's management or the board must undertake without affording them sufficient flexibility or discretion in addressing the complex matter presented by the proposal, the proposal may micromanage the company to such a degree that exclusion of the proposal would be warranted." This is the case even if the proposal is advisory in nature. To determine the underlying concern or central purpose of a proposal, the Staff will look to the proposal in its entirety. Therefore, the Staff will take the supporting statement into account when determining if a proposal seeks to micromanage a company. On the other hand, the Staff is not likely to concur with a micromanagement analysis for a proposal if the proposal defers to management's discretion to consider if and how to address the issue and asks the company to consider relative benefits and drawbacks of several actions. SLB 14K advises that if a company asserts micromanagement as a basis to exclude a shareholder proposal, the Staff expects the company "to include in its analysis how the proposal may unduly limit the ability of management and the board to manage complex matters with a level of flexibility necessary to fulfill their fiduciary duties to shareholders."

Proof of ownership. A shareholder submitting a proposal pursuant to Rule 14a-8 must provide the company with proof that the shareholder continuously held the requisite amount of securities for at least one year by the date the proposal is submitted. Previously, in an effort to reduce common errors, Staff Legal Bulletin No. 14F provided a suggested format for supplying the required verification of share ownership to the company. SLB 14K emphasized that while the Staff encourages use of the sample language when providing evidence of ownership, there is no requirement to do so. SLB 14K indicated that the Staff is not generally persuaded by arguments to exclude shareholder proposals based on overly technical readings of proof of ownership letters. Indeed, SLB 14K urged companies not to "seek to exclude a shareholder proposal based on drafting variances in the proof of ownership letter if the language used in such letter is clear and sufficiently evidences the requisite minimum ownership requirements."

Staff Procedural Changes

New for the 2020 proxy season, the Staff announced that it would no longer automatically provide formal no-action letters in response to requests regarding the exclusion of shareholder proposals. When responding to a no-action request to exclude a shareholder proposal, the Staff stated that it would continue to inform the proponent and the company of its position, but the response could be that the Staff concurs, disagrees, or declines to state a view with respect to the company's asserted basis for exclusion. The Staff has posted a chart on the SEC's website, indicating, among other details, the regulatory bases for exclusion of the proposal asserted by the company, the Staff's response to the company's request for exclusion, and whether the Staff responded by letter.

While the Staff's procedural change in responding to no-action requests for exclusion of shareholder proposals pursuant to Rule 14a-8 resulted in the Staff issuing significantly fewer formal no-action letters in the 2020 proxy season, the text of company no-action requests and proponent responses are available on the SEC's website. By reviewing the arguments for and against exclusion of a proposal, and checking the Staff response as shown on the chart available on the SEC website, companies and proponents can glean a sense of applicable Staff positions that will be useful in upcoming proxy seasons.

Recent Staff Guidance and Procedural Changes and Trends in Shareholder Proposal No-Action Requests

Board analysis. The Staff's discussions around the inclusion of board analyses in no-action requests in each of its last three legal bulletins on shareholder proposals emphasized both the Staff's view that board analyses are helpful and the Staff's recognition that companies have needed guidance as to what a persuasive board analyses should contain. Many of the no-action requests submitted during the 2020 proxy season pursuant to Rule 14a-8(i)(7) and Rule 14a-8(i)(5) did not contain board analyses. However, as contemplated by SLB 14I and SLB 14K, when board or board committee analyses were provided in no-action requests made pursuant to Rule 14a-8(i)(7) and/or Rule 14a-8(i)(5), the requests that were successful often included facts specific to the particular company to bolster their board's conclusions, rather than relying on general descriptions of process.

The Staff issued several formal no-action letters involving board analyses, further indicating the importance the Staff places on them in reaching its decisions, including one instance where the Staff stated in its formal letter rejecting a no-action request that it would have found a board analysis useful. (See *The TJX Companies, Inc.* (April 9, 2020) available here.) See also *Formal No-Action Letters* below.

While SLB 14K and formal no-action letters issued by the Staff show the Staff's continued emphasis on seeking board analyses, the relatively few analyses in no-action requests this year seem to indicate some companies may have concluded that they had sufficiently effective arguments supporting the exclusion of a shareholder proposal without a board analysis and/or that their board may have had other priorities competing for the board's time. However, when the board or a board committee performs an analysis that takes into account specific facts that demonstrate the inapplicability of a proposal to that company, the Staff appears to weigh that analysis heavily.

Micromanagement. This proxy season, there were a number of shareholder proposals which asked for specific action that fell within the "level of prescriptiveness" that SLB 14K indicated could constitute micromanagement to a degree warranting exclusion, and the companies subject to these proposals were able to obtain no-action relief on that basis. This included proposals to annually reduce the pay of chief executive officers/named executive officers by a specific percentage until certain pay ratios with median employees were met (See, e.g., *Juniper Networks, Inc.* (February 25, 2020) available here); a proposal for specific changes to how products are displayed and sold (See *Amazon.com, Inc.* (March 27, 2020) available here.) and proposals calling for specific disclosure involving adjustments made to financial metrics targets for executive incentive compensation pay. (See, e.g., *Navient Corporation* (February 25, 2020) available here.)

When the Staff concurred with the exclusion of a proposal pursuant to Rule 14a-8(i)(7), its chart of responses to no-action requests often, but not always, indicated whether its concurrence was based on "ordinary business" or "micromanagement." In some cases, proposals which seem on their face to be prescriptive are listed on the Staff's chart as ordinary business. In other cases, the Staff's chart characterized similar proposals (such as proposals to reduce chief executive officer and named executive officer pay to reduce pay ratios) made to different companies as micromanagement for it response to one company and ordinary business for its response to another company, even when both companies made ordinary business and micromanagement arguments in their respective no-action requests.

The Staff did not concur in the exclusion on micromanagement grounds of proposals focused purely on governance matters, even if they were prescriptive in nature. For example, the Staff did not treat as micromanagement proposals to require independent chairs of boards (See, e.g., *Johnson & Johnson* (January 29, 2020) available here.) or proposals to change written consent rules for stockholders. (See, e.g., *The Home Depot, Inc.* (January 29, 2020) available here.) Note, however, framing a proposal as a governance matter will not prevent it from being excluded on micromanagement grounds. For example, a proposal requesting the board to charter a board committee to evaluate a specific risk may be excludable on the basis of micromanagement if it unduly limits the board's flexibility and discretion to determine how to oversee that risk.

Consistent with the guidance in SLB 14K, requests for no-action relief were often unsuccessful when shareholder proposals sought reports or recommendations from a board on how a company planned to meet certain goals. This included a number of proposals asking for the boards to outline their plans, specifically in reference to changes or amendments to charter documents, to align the company with public "statement of purposes" made by executives that outlined the (often environmental, social, and governance) goals of the company. A few of the requests for no-action relief asked for reports on if and how a company planned to align itself with the goals of the Paris Climate Agreement and companies were largely unsuccessful in obtaining relief on the basis of Rule 14a-8(i)(7). SLB 14K specifically referenced this type of proposal from the 2019 proxy season, stating that so long as they did not appear to include specific time frames for compliance they would generally be allowed, which approach was borne out this year.

Proof of ownership. Proof of ownership requirements for shareholder proposals and related Staff guidance are relatively straightforward. If a procedural violation exists, a shareholder proposal is excludable from a proxy statement, regardless of the subject. While SLB 14K emphasized that the Staff would not concur with overly technical readings of language contained in a proof of ownership letter, SLB 14K did not change the requirement that a shareholder must establish continuous ownership at least $2,000 in market value, or 1%, of the company's voting securities for at least one year by the date of submission of a proposal under Rule 14a-8. Therefore, the Staff continued to concur with exclusion of proposals on proof of ownership grounds, for example, in situations where the proponent did not satisfy the market value test or did not have its beneficial ownership attested to by a Depositary Trust Company participant as the record holder of the proponent's shares. By putting companies on notice that that the Staff would not agree to exclusion of shareholder proposals based on drafting variances in the proof of ownership letters, SLB 14K likely reduced no-action requests making arguments based on differences from sample language for proof of ownership letters suggested in earlier Staff guidance. However, the

Staff remains willing to concur with exclusions on proof of ownership grounds when it is established that the proponent has not provided proof that it has satisfied the share ownership requirement.

Shareholder proposals receiving majority approval. While most shareholder proposals do not receive majority support, there were some shareholder proposals during the 2020 proxy season that achieved approval from a majority of the shares voting. In addition, there were some shareholder proposals that received significant minority support, which may prompt further engagement between those companies and their shareholders on the matters addressed by such proposals.

Of the minority of shareholder proposals that received majority approval through June 2020, most involved governance matters. Among the topics of governance proposals receiving majority support from shareholders at multiple companies were the elimination of supermajority voting requirements, the elimination of classified boards of directors, and majority voting for the election of directors, with proposals for the elimination of classified boards, often receiving particularly high levels of shareholder support. In addition, proposals to increase the ability of shareholders to act by written consent, to call special shareholder meetings, and to require an independent board chairman, while only receiving majority votes in favor of the proposal in a relatively few number of cases where such proposals were voted upon, were numerous and frequently received support of over 30% in 2020.

Although with less frequency than governance proposals, there were also some social proposals, as well as a smaller number of environmental proposals, that achieved majority support, or significant minority support, at a number of companies this year. Through June, proposals on social issues that garnered strong support included board and workforce diversity proposals and reports on political spending/lobbying, with a few of each receiving majority support and significant levels of minority support for those that did not pass. Proposals calling for reports on various environmental risks and strategies also passed at a number of companies, and received substantial support at many other companies, just missing majority support at a few additional companies and garnering 20%–30% support at many others.

Formal no-action letters. In the many situations during the 2020 proxy season where the Staff did not reply to Rule 14a-8 no-action requests with formal no-action letters, companies and proponents were not given specific reasons why the Staff agreed with or rejected arguments for exclusion. This was a distinct change from the practice that had developed in recent years where a brief description of the Staff's rationale had been included in its replies to no-action requests. The Staff has not articulated its process for deciding which no-action requests receive a formal no-action letter.

Some of the formal no-action letters from the 2020 proxy season seem designed to emphasize, and further explain and publicize, points that Staff considers important. As discussed above, the Staff has been observing for several years that a board analysis is helpful to its consideration of no-action requests seeking to exclude proposals under Rule 14a-8(i)(7) or Rule 14a-8(i)(5). Some of the no-action letters from the 2020 proxy season provided further clarification of the Staff's position in this regard. For instance, when concurring with the exclusion of a proposal an ordinary business proposal under Rule 14a-8(i)(7), the Staff issued a no-action letter where it explained:

> In reaching our position, we considered the board's Nominating and Corporate Governance Committee's analysis and conclusion that the Proposal did not present a significant policy issue for the Company. That analysis discusses the difference – or delta – between the Proposal and the Company's current policies and practices. In addition, the committee's analysis noted that a shareholder proposal submitted to the Company's shareholders last year regarding a related issue received 1.7% of the vote.

(See *Apple Inc.* (December 20, 2019) available here.) In another no-action letter, the Staff noted the absence of a board opinion or company analysis when declining to give a no-action position on the exclusion of a proposal on Rule 14a-8(i)(7). (See *The TJX Companies, Inc.* (April 9, 2020) available here.)

In addition, the Staff wrote no-action letters that expressed Staff policies of general applicability. For example, the Staff issued a no-action letter specifying that a representative's failure to provide documentation meeting all of the guidelines of SLB 14I does not provide a grounds for exclusion where there is no ambiguity about the actual proponent and their role with respect to the proposal. (See *International Business Machines Corporation* (January 17, 2020) available here.) The Staff also issued a no-action letter stating that it declined to state a view because litigation regarding exclusion of the proposal was pending. (See *NorthWestern Corporation* (January 9, 2020) available here.)

Other no-action letters issued during the 2020 proxy season highlighted fact patterns that were determinative of Staff responses, such as whether a proposal transcends a particular company's ordinary business under Rule 14a-8(i)(7). (See *Dollar General Corporation* (March 6, 2020) available here.) Specific facts were also relevant in written no-action

letters addressing whether aspects of a proposal constituted micromanagement under Rule 14a-8(i)(7) or whether company actions compared favorably to the guidelines of a proposal from the purpose of a substantial implementation exclusion under Rule 14a-8(i)(10).

Proposed Amendments to Rule 14a-8

On November 5, 2019, the SEC proposed amendments to Rule 14a-8. The proposed amendments, which are available here, would:

- Update the criteria, including the ownership requirements, that a shareholder must satisfy to be eligible to have a shareholder proposal included in a company's proxy statement
- Amend Rule 14a-8(c) to update the "one proposal" rule to clarify that a single person may not submit multiple proposals at the same shareholder's meeting, whether the person submits a proposal as a shareholder or as a representative of a shareholder –and–
- Amend Rule 14a-8(i)(12) to increase the levels of shareholder support a proposal must receive to be eligible for resubmission at the same company's future shareholder meetings

The proposed amendments are intended to "recognize the significant changes that have taken place in our markets in the decades since these regulatory requirements were last revised . . . ." In particular, the rule proposal would amend Rule 14a-8(b) to:

- Create a range of the amount of shares required to be held in order to submit a proposal, which in some situations would increase the threshold amount of shares needed to be held in order to submit a proposal
- Potentially increase the amount of time those shares must be held
- Require a proponent to be available to meet with the company regarding the shareholder proposal –and–
- Require a proponent to provide specified information about any representative the proponent is using to submit a proposal or to act on the proponent's behalf

The comment period for the proposed amendments to Rule 14a-8 has expired. As of the date of this article, the SEC's regulatory agenda suggests that the SEC is targeting October 2020 finalizing this rulemaking, but there is no assurance that final amendments will be adopted in that time frame.

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Laura Richman's wide-ranging corporate and securities practice has a strong focus on corporate governance issues and public disclosure obligations. Laura's practice includes Securities and Exchange Commission reports, such as proxy statements and annual, quarterly and current reports. She advises on executive compensation disclosure, insider trading regulation and Dodd-Frank and Sarbanes-Oxley compliance. Laura represents listed company clients with respect to stock exchange compliance matters. She advises clients on governance policies and other board and shareholder matters. In addition, her practice includes representing clients on transactions such as securities offerings and mergers and acquisitions, as well as providing general securities, corporate, limited liability company and contract advice. Laura has practiced with Mayer Brown since 1981.

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