Market Trends 2020/21: Amendments to Rule 14a-8; Staff Legal Bulletins No. 14I, 14J, and 14K; and Other Shareholder Proposal Developments

A Practical Guidance® Practice Note by
Laura D. Richman and Matthew F. Streit, Mayer Brown LLP

Laura D. Richman
Mayer Brown LLP

Matthew F. Streit
Mayer Brown LLP

This practice note discusses recent market trends and developments, including amendments to Rule 14a-8 under the Securities Exchange Act of 1934 (Rule 14a-8), which governs the process by which shareholders can submit proposals for inclusion in company proxy statements and allows companies to exclude shareholder proposals if certain substantive, eligibility, or procedural requirements are not satisfied, and 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. This note also describes recent SEC procedures for processing shareholder proposal no-action requests and developments in shareholder proposals submitted for inclusion in proxy statements for the 2021 proxy season.

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.

Amendments to Rule 14a-8

On September 23, 2020, the SEC adopted amendments to Rule 14a-8 (2020 Amendments). The 2020 Amendments are effective and currently apply to any shareholder proposal submitted for an annual or special meeting to be held on or after January 1, 2022. The SEC's Spring 2021 regulatory agenda indicates that Division of Corporation Finance is considering recommending that the SEC propose amendments to Rule 14a-8, with the timing for such proposal currently targeted for April 2022. Meanwhile, it is important to understand what the 2020 Amendments provide.

At the time of adoption, the SEC indicated that the 2020 Amendments were "intended to help ensure that the ability to have a proposal included alongside management's in a company's proxy materials—and thus to draw on company and shareholder resources and to command the time and attention of the company and other shareholders—is appropriately calibrated and takes into consideration the interests of not only the shareholder who submits a proposal but also the company and other shareholders who bear the costs associated with the inclusion of such proposals in the company's proxy statement."

The 2020 Amendments revised Rule 14a-8(b) to:

- Replace the current ownership threshold to be eligible to submit a proposal with three alternative thresholds, starting with a requirement that a proponent hold at least $2,000 of company voting securities for at least three years, with higher values required for shorter holding periods
- Require a proponent to provide the company a written statement that says the proponent is able to meet with the company and includes specific days and times of availability during the company's regular business hours –and–
- Require a proponent to provide specified information about any representative the proponent is using to submit a proposal on the proponent's behalf

The 2020 Amendments also modified Rule 14a-8(c) to provide that any one person can submit only one proposal, directly or indirectly, to a company for a particular shareholders' meeting and Rule 14a-8(i)(12) to increase the level of support a proposal must receive to be eligible for resubmission of a proposal addressing substantially the same subject matter at future shareholders' meetings.

Share ownership requirements. Prior to the 2020 Amendments, Rule 14a-8(b)(1) provided that a shareholder "must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year" by the date the proposal is submitted to the company. The SEC amended this requirement by creating a tiered approach, based on the value of voting securities held, that provides three options for demonstrating a sufficient ownership stake in the company through a combination of amount of securities owned and length of time held.

In particular, to be eligible to submit a proposal under Rule 14a-8, as amended, a shareholder must have continuously held:

- At least $2,000 in market value of the company's securities entitled to vote on the proposal for at least three years
- At least $15,000 in market value of the company's securities entitled to vote on the proposal for at least two years –or–
- At least $25,000 in market value of the company's securities entitled to vote on the proposal for at least one year

The 2020 Amendments provided for a transition period for proposals submitted for a meeting to be held before January 1, 2023, allowing shareholders that had been eligible at the $2,000/one-year threshold to submit a proposal for inclusion in the company's proxy statement so long as they have continuously held the securities for at least one year as of January 4, 2021, and maintain this minimum investment from January 4, 2021, through the date the proposal is submitted and the date of the shareholders' meeting for which the proposal is submitted. The 2020 Amendments retained the current requirement that a proponent provide the company with a written statement that the shareholder intends to continue to hold the requisite amount of securities through the date of the shareholders' meeting.

The 2020 Amendments also made clear that the shareholder submitting the proposal must own all of the securities being used to meet this eligibility requirement. The shareholder is not permitted to aggregate holdings with any other shareholder or group of shareholders for this purpose. However, the SEC has continued to allow shareholders to co-file or co-sponsor a proposal so long as each shareholder in the group meets the eligibility requirements.

Ability to meet with the company to discuss the proposal. The 2020 Amendments added a new provision to Rule 14a-8(b)(1) that requires a proponent to provide the company with a written statement that:

- Says the shareholder is able to meet with the company in person or via teleconference no less than 10 calendar days, nor more than 30 calendar days, after submission of the shareholder proposal
- Includes the shareholder's contact information –and–
- Proposes business days and specific times that are within the regular business hours of the company's principal executive offices when the shareholder is available to discuss the proposal with the company

If the shareholder is co-filing a proposal, all co-filers must either agree to the same dates and times of availability or identify one lead filer who will provide dates and times of availability to engage on behalf of all co-filers.

Use of a representative to submit a proposal. Prior to the 2020 Amendments, Rule 14a-8 did not specify whether a shareholder may use a representative to submit a proposal. To address this, the SEC added a provision to Rule 14a-8 to clarify that a shareholder may use a representative

to submit a proposal. When a shareholder uses a representative, the shareholder must provide additional written documentation to the company that:

- Identifies the company to which the proposal is directed
- Identifies the annual or special meeting for which the proposal is submitted
- Identifies the shareholder proponent and the person acting on the shareholder's behalf as a representative
- Includes the shareholder's statement authorizing the designated representative to submit the proposal and otherwise act on the shareholder's behalf
- Identifies the specific topic of the proposal to be submitted
- Includes the shareholder's statement supporting the proposal –and–
- Is signed and dated by the shareholder

However, a shareholder using a representative need not provide this written documentation if the shareholder is an entity and the representative's authority to act on the shareholder's behalf is apparent and self-evident such that a reasonable person would understand that the representative has authority to submit the proposal and otherwise act on the shareholder's behalf.

Number of proposals a person may submit. Previously, Rule 14a-8(c) provided that a "shareholder" may submit no more than one proposal to a company for a particular shareholders' meeting. The SEC amended Rule 14a-8(c) to provide that each "person" may submit no more than one proposal, clarifying that this one-proposal rule applies to direct submissions as well as indirect submissions, expressly stating that "[a] person may not rely on the securities holdings of another person for the purpose of meeting the eligibility requirements and submitting multiple proposals for a particular shareholders' meeting."

As explained in the press release announcing the adoption of the 2020 Amendments, "a shareholder-proponent will not be permitted to submit one proposal in his or her own name and simultaneously serve as a representative to submit a different proposal on another shareholder's behalf for consideration at the same meeting," and, "[l]ikewise, a representative will not be permitted to submit more than one proposal to be considered at the same meeting, even if the representative were to submit each proposal on behalf of different shareholders."

Resubmission of proposals. Under Rule 14a-8(i)(12) if a proposal deals with substantially the same subject matter as another proposal or proposals previously included in the company's proxy materials within the preceding five calendar years, a company is able to exclude the proposal from its proxy materials if the most recent vote occurred within the preceding three calendar years and the most recent vote is below certain levels of support. The 2020 Amendments increased the thresholds of support below which a company may exclude a proposal to:

- Less than 5% of the vote if proposed once within the preceding five calendar years
- Less than 15% of the vote if proposed twice within the preceding five calendar years –and–
- Less than 25% of the vote if proposed three times or more within the preceding five calendar years

Prior to the 2020 Amendments these thresholds were 3%, 6%, and 10%, respectively, of the votes cast on the proposal.

Recent Staff Legal Bulletins on Shareholder Proposals

In the fall of each of 2017, 2018, and 2019, the staff (Staff) of the Division of Corporation Finance issued Staff Legal Bulletins relating to shareholder proposals submitted for inclusion in company proxy statements pursuant to Rule 14a-8. While the Staff did not issue a new Staff Legal Bulletin on shareholder proposals in 2020, the guidance provided in Staff Legal Bulletins during the three prior years remains relevant to shareholder proposals.

Staff Legal Bulletin No. 14I

The Staff issued Staff Legal Bulletin No. 14I (SLB 14I) on November 1, 2017, addressing 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 –and–
- 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. This guidance has since been codified and further refined by the amendments to Rule 14a-8(b), as discussed above.

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. 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

Beginning with the 2020 proxy season, the Staff no longer automatically provides 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 informs the proponent and the company of its position, indicating whether the Staff concurs, disagrees, or declines to state a view with respect to the company's asserted basis for exclusion. The Staff posts this information in a chart of shareholder proposal no-action responses appearing 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. This chart is searchable by column.

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 and 2021 proxy seasons, the text of company no-action requests and proponent responses are available on the SEC's website, with links to the no-action requests, and to the SEC no-action letter, if any, appearing on the chart of SEC responses. 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.

Developments in Shareholder Proposal No-Action Requests and Voting Support

Board analyses. The Staff's discussions around the inclusion of board analyses in no-action requests in each of SLB 14I, SLB 14J, and SLB 14K 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, but not all, no-action requests submitted during the 2021 proxy season pursuant to Rule 14a-8(i)(7) and Rule 14a-8(i)(5) contained board analyses. 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 typically included facts specific to the particular company to bolster their board's conclusions, rather than relying on general descriptions of process.

In prior proxy seasons, there have been formal no-action letters that have expressly emphasized the Staff's view that board analyses are important. This year, board analysis did not explicitly factor into the guidance given by the Staff in any of the formal no-action letters issued. To the extent that the Staff responded without a formal no-action letter to a request containing a board analysis, it is difficult to determine how much the particular analysis influenced the Staff's decision. The informal no-action responses provided only by notation on the chart on the SEC's website seem to indicate that consistent with past years, while the inclusion of a board analysis of the factors for a relevance or ordinary business exclusion argument may be helpful, its inclusion is not a panacea for an otherwise unpersuasive argument, and the lack of a board analysis is not necessarily dispositive of the result. Of the small number of formal no-action letters issued, there were a few in which the Staff emphasized that issues raised by proposals are not necessarily significant to all companies, and the fact that a particular issue is not significant to a specific company favors exclusion for that company but not necessarily for others receiving a similar proposal. Although these letters were not in the context of no-action requests that included a board analysis, consistent with past Staff guidance they suggest that when a board analysis is provided, it is helpful to clearly explain why the proposal is not significant to the company's particular circumstances.

Although SLB 14I, SLB 14J, and SLB 14K discussed board analyses in the context of ordinary business arguments under Rule 14a-8(i)(7) and economic relevance arguments under Rule 14a-8(i)(5), there also have been board analyses submitted with respect to substantial implementation under Rule 14a-8(i)(10). For example, there were a number of successful no-action requests regarding proposals involving the Business Roundtable's Statement of Corporate Purpose (BRT Statement) containing board analyses supporting a substantial implementation exclusion based on a determination that existing governance and management systems were consistent with the BRT Statement without the need for additional change.

Micromanagement. This proxy season there were a relatively few number of shareholder proposals which asked for specific action that the Staff indicated fell within the "level of prescriptiveness" that SLB 14K indicated could constitute micromanagement to a degree warranting exclusion.

When the Staff concurred with the exclusion of a proposal pursuant to Rule 14a-8(i)(7), its 2021 proxy season chart of responses to no-action requests indicated whether its concurrence was based on "ordinary business" or "micromanagement" in almost all cases. The number of cases where the Staff concurred with exclusion on the basis of micromanagement was down this year compared to last year. Also, the Staff did not concur in the exclusion on micromanagement grounds of a number of proposals focused purely on governance matters, even if they appeared prescriptive in nature. For example, several companies were unsuccessful in their attempts to get the Staff to concur with excluding proposals to amend their charters to become public benefit corporations.

Consistent with the guidance in SLB 14K, requests for no-action relief were often unsuccessful excluding proposals as micromanagement under Rule 14a-8(i)(7) 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. Also, one of the few formal no-action letters issued by the Staff explicitly distinguished prior no-action guidance that allowed for the exclusion of requests for reports on a company meeting certain climate goals within a specific timeline to state that a proposal asking the company to set emission reduction targets, but not specifying a timeline to do so, would not be excludable as micromanagement or otherwise under Rule 14a-8(i)(7). This response, together with the reduction in concurrences based on micromanagement, seems to indicate that the Staff view the micromanagement exclusion narrowly and it may be difficult for companies to rely on it going forward.

Relevance exclusion. As discussed above, SLB 14I specified that the otherwise significantly related aspect of the economic relevance exclusion set forth in 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 requires a separate analytical framework. There is more precedent for Staff no-action positions concurring with exclusions of proposals under Rule 14a-8(i)(7) ordinary business grounds than under Rule 14a-8(i)(5) economic relevance grounds. However, where an analysis of the proposal applied to the facts of a specific company demonstrate that both the economic relevance and significance to business tests of Rule 14a-8(i)(5) are satisfied (which may be easier to establish where the proposal is tailored to just one or a few companies), it can be worthwhile to seek no-action relief on economic relevance grounds. For example, in 2021 the Staff concurred with the exclusion pursuant to Rule 14a-8(i)(5) of a proposal requesting an insurance company to report on policies to reduce the potential for racist police brutality and police violation of civil rights where the operations targeted by the proposal were well below each of the rule's specified 5% thresholds and the proposal did not otherwise significantly relate to the company's business.

Procedural exclusions. Deadlines for the submission process for shareholder proposals and related Staff guidance have historically been relatively straightforward, although the Staff issued two formal no-action letters this year indicating that there may be some leeway granted to proponents for extenuating circumstances. Generally if a procedural violation exists, a shareholder proposal is excludable from a proxy statement, regardless of the subject. This year however, the Staff indicated that it would not concur with an exclusion based on Rule 14a-8(e)(2) for a proposal that was received after the deadline where the delay in the company receiving the proposal was due to "significant and well known delivery delays incurred by the United States Postal Service due to the pandemic and surge in holiday deliveries." (The original delivery date was a day before the deadline for proposals.) (See PRA Health Sciences, Inc. (March 17, 2021) available here.) Interestingly, the proponent did not advance the post office delay argument in the response to the no-action request, and instead emphasized a simultaneous email as proof that the company had received the proposal ahead of the deadline. The Staff emphasized, however, that its decision was not based on the email submission, and a proponent must obtain approval from the company for an alternative submission method if there are obstacles beyond the proponents control to timely delivery to the approved mailing address provided by the company. Another formal no-action letter excused a proponent's delay in responding to a request from a company to repair a deficiency in the proponent's submission when the company had ignored the proponent's request to communicate by email and instead mailed the request to the proponent's offices which were closed due to the pandemic. The references to the pandemic makes it unclear if the Staff will in the future view carrier delays as sufficient to make an otherwise untimely proposal timely, and it is unclear how the Staff would view a refusal by a company to provide alternative means of delivery if requested, but these formal no-action letters indicate that the Staff may allow some flexibility for procedural deficiencies in extenuating circumstances.

Formal no-action letters. In the many situations during the 2021 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. Altogether, the Staff issued only 10 formal no-action letters between August 2020 and the end of June 2021. This was a distinct change from the practice that had developed in the years prior to 2020 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 2021 proxy season seem designed to distinguish Staff decisions that might otherwise appear to contradict from no-action positions the Staff took in prior years precedents. For example, the Staff denied a proponent's reconsideration request that argued that a 2019 no-action letter denying exclusion of a proposal relating to equity grants to senior management conflicted with the Staff's concurrence with the exclusion of the proponent's similar proposal on the basis of micromanagement. In its no-action letter, the Staff explained that a company has the burden of demonstrating it is entitled to exclusion of a proposal and that the company that had submitted the 2019 no-action request that was discussed in the resubmission request had not advanced a micromanagement argument. In another no-action letter, the Staff distinguished a proposal asking that emission targets be set by a company, saying such a proposal did not constitute micromanagement and should not be excluded, from no-action positions the Staff took in prior years where proposals to meet certain goals had specific time frames or specific methods attached and were thus excludable.

In addition, the Staff wrote no-action letters emphasizing that whether or not a proposal raises a policy so significant that it would transcend ordinary business is determined on

a company by company basis, with respect to the facts of that company, and that no policy is universally "significant" in a way that it would always transcend ordinary business exclusion. In one request for reconsideration of the Staff's concurrence with the exclusion on ordinary business grounds of a proposal to a pharmacy company requesting a report on external health costs created by its retail food business, a proponent pointed out that only 10 days before the Staff announced its decision that the Staff did not agree with the exclusion of a nearly identical proposal that had been submitted to a large beverage company. In its response denying reconsideration, the Staff emphasized that while a proposal related to the external public health costs created by the food and beverage business of a company may raise a significant policy issue that transcends its ordinary business operations, the proposal that the proponent submitted to the pharmacy company did not demonstrate how external public health costs created by that company's retail food business were sufficiently significant to the company in question. Three additional formal no-action letters from the Staff also emphasized that there is no policy issue that is universally significant and concurred that the companies could exclude the proposals on paid sick leave, a report on undetected supply chain prison labor and underwriting multi-class share structure equity offerings.

Two of the no-action letters issued during the 2021 proxy season dealt with procedural timing issues, and indicated a willingness on the Staff's part to excuse what would otherwise appear to be clear procedural failures when because of the ongoing effects of the pandemic those failures were outside the control of the proponent. As discussed above, in one case a company received a proposal after the deadline for submission, but the Staff recognized that the delay was due to "significant and well known delivery delays incurred by the United States Postal Service due to the pandemic and surge in holiday deliveries." (See PRA Health Sciences, Inc. (March 17, 2021) available here.) The Staff's response explicitly highlighted that email correspondence with the company prior to the deadline (when the company had not provided an email address for proposals) was not a factor in their decision and such email submission did not count for the purposes of timeliness. However, in another case where a company did not receive a response to a request to repair a deficiency in a submission within the 14-day deadline, the fact that the proponent had explicitly asked for correspondence to an email address, and the company only sent a mailed deficiency notice to offices closed due to the pandemic, was persuasive to the Staff finding that the procedural deficiency was on the part of the company and not the proponent and the proposal could not be excluded on Rule 14a-8(b) and Rule 14a-8(f) grounds.

Other no-action letters issued during the 2021 proxy season highlighted fact patterns that were determinative of Staff responses, such as whether a proposal had been substantially implemented under Rule 14a-8(i)(10), or whether a proposal contains a false and misleading statement under Rule 14a-8(i)(3).

Shareholder proposals receiving majority approval. While most shareholder proposals do not receive majority support, there were some shareholder proposals during the 2021 proxy season that achieved approval from a majority of the shares voting and there has been an increase in shareholder proposals passing when compared to the past two years. 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 2021, most involved governance matters, as opposed to social or environmental matters. Among the topics of governance proposals receiving majority support from shareholders at multiple companies were the elimination of supermajority voting requirements, increasing the ability of shareholders to act by written consent, the elimination of classified boards of directors, increasing the ability for shareholders to call special meetings and majority voting for the election of directors, with proposals for the elimination of supermajority voting requirements representing a large proportion of the governance proposals passed, often receiving particularly high levels of shareholder support. In addition, proposals to increase shareholder aggregation allowed for proxy access and to require an independent board chairperson, while generally not receiving majority votes in favor of the proposal where such proposals were voted upon, were numerous and frequently received support of over 30% in 2021.

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. Majority support for both social and environmental proposals increased this year compared to last year. Through June 2021, 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. Also, new this year were proposals calling for racial equity audits and while none of these proposals garnered majority support through June 2021, half of such proposals that were voted on received support over 30% despite this being the first year such proposals were voted on. 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 support in excess of 30% support at many others. In two cases the companies recommend for voting in favor of shareholder proposals on environmental reports, and in both cases that recommendation likely factored into the near-universal support those proposals received.

Laura D. Richman, Partner, Mayer Brown LLP

Laura D. 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.

With regard to securities transactions, Laura represents issuers and underwriters in public and private offerings of debt and equity securities (both initial public offerings and offerings of seasoned, public companies), including guidance on federal and state securities law compliance. She also advises issuers in connection with the securities law aspects of employee benefit plans and dividend reinvestment plans.

Other transactional matters in which Laura represents corporate clients include acquisitions and dispositions of assets or stock, restructurings (such as holding company formation) and going-private transactions. She also advises investors in leveraged buyout transactions, and represents financial institutions that take equity positions in companies. Laura advises clients on shareholder rights plans and anti-takeover protection provisions.

In addition to her governance and transactional practice, Laura counsels clients on day-to-day corporate questions. She drafts and reviews contracts and other corporate documentation, prepares terms and conditions of sale, provides guidance on limited liability company and other limited liability entity issues, and assists clients with various regulatory issues. Laura was named an *Illinois Super Lawyer* for Business/Corporate in 2006 and 2008.

Matthew F. Streit, Associate, Mayer Brown LLP

Matthew F. Streit is an associate in the Chicago office of Mayer Brown's Corporate & Securities practice. He focuses on mergers, acquisitions, joint ventures, securities offerings and general corporate governance matters. Matthew represents publicly held and privately owned companies in a variety of industries, including financial services and technology, energy and steel industries.

Matthew received his JD from the University of Chicago Law School in 2014, where he served as the co-president of the board of the Mandel Legal Aid Clinic. He received a B.A. in international studies from the University of Chicago in 2010.