

November 8, 2017

Author: Anne C. Meyer  
Senior Managing Director  
Corporate Governance

## ON NOVEMBER 1, THE SEC ISSUED A NEW STAFF LEGAL BULLETIN (SLB 141) ON SHAREHOLDER PROPOSALS UNDER RULE 14A-8

SLB 141 addresses several issues which have been in the spotlight in recent years, including the scope of the “ordinary business” exception, the ability for proponents to act by proxy and the use of graphics and images in shareholder supporting statements. SLB 141 is effective immediately and it will be informative to keep abreast of related no-action requests as the 2018 proxy season kicks off.

### **Rule 14a-8(i)(7) - Ordinary Business Exception**

Under Rule 14a-8(i)(7), a company may seek to exclude a shareholder proposal if it relates to the company’s ordinary business operations. In the SEC Staff’s interpretation, proposals that 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” may be excluded, unless such a proposal focuses on policy issues that are sufficiently significant because they transcend ordinary business and would be appropriate for a shareholder vote.

No-action letters issued by the Staff over the years provide some guidance on which proposal topics constitute ordinary business. Some relatively common topics for shareholder proposals, such as environmental matters, are generally considered to constitute significant policy matters and fall outside of the ordinary business exception. However, novel issues arise each year and the SEC, companies

and proponents must grapple with how they fit within the context of the rules as well as existing precedent.

Under SLB 141, the SEC places the onus on a company’s board of directors, in the first instance, to analyze and determine whether a shareholder proposal relates to the company’s ordinary business operations or raises a potentially significant policy issue, noting that a company’s board of directors is better positioned to make these tough decisions. Companies will now be expected to include in their no-action request a discussion that reflects the board’s analysis of the particular policy issue raised by the shareholder proposal and its significance. SLB 141 notes that it would be most helpful if this discussion details “the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned.”

SLB 141 is effective immediately. As a result, companies should now be considering their grounds for exclusion, the significance of any policy issues, the extent of board level involvement and the scope of related disclosure when seeking no-action relief under Rule 14a-8(i)(7).

#### **Submission of Proposals by Proxy**

SLB 141 confirms the SEC's current position that it is acceptable under Rule 14a-8 for a shareholder's proposal to be submitted by proxy. Active individual proponents often use this approach, which allows a proponent to meet the Rule 14a-8 ownership requirements to submit proposals at numerous companies at which they may not have personal shareholdings. SLB 141 acknowledges that proposals by proxy may present challenges - including the ability to confirm ownership eligibility under Rule 14a-8(b) - but adopts only limited additional protections for companies.

Under SLB 141, a proposal submitted by a representative of a shareholder must now include documentation setting forth basic information - including the name of the shareholder-proponent and person acting by proxy, the targeted company, the topic of the proposal, and the meeting at

which the proposal will be submitted - and this documentation must be signed and dated by the shareholder.

#### **Rule 14a-8(d) - Use of Images and 500 Word Limit**

In recent no-action requests, companies have argued that shareholder proponents should not be permitted to use images and graphics in their supporting statements, citing Rule 14a-8(d), which provides that a "proposal, including any accompanying supporting statement, may not exceed 500 words." SLB 141 reaffirms the SEC Staff's position that any words used in conjunction with graphs or images will count toward the word limit, but that the use of images is not per se prohibited by the rules.

Acknowledging that there could be some room for abuse, SLB 141 concludes that the use of potentially troublesome images and graphics can be adequately addressed under current bases for excluded supporting statements under Rule 14a-8, such as because the image is false or misleading, inherently vague or indefinite, impugns character or is irrelevant.

**Rule 14a-8(i)(5) - Economic Relevance Exclusion**

The “economic relevance” exclusion under Rule 14a-8(i)(5) has not commonly been used by companies, in large part because the SEC Staff has historically granted only limited no-action relief. Under SLB 141, the Staff’s analysis for no-action relief will focus on a proposal’s “significance to the company’s business when it otherwise relates to operations that account for less than 5% of total assets, net earnings and gross sales.” Similar to the SLB 141 mandates for the ordinary business exception, if a company submits a no-action request on the grounds that the issue raised in the proposal is economically irrelevant, the company must now include disclosure reflecting, among other things, the board’s analysis of the proposal’s significance to the business of the company.