

SEC REINSTATES SHAREHOLDER PROPOSAL GUIDANCE RESCINDED UNDER CHAIRMAN GENSLER

Feb 20, 2025

WHAT HAPPENED

In one of its first actions under the new Administration, the SEC staff issued new guidance that largely reinstated older guidance that had supported the ability of public companies to exclude shareholder proposals from their proxy statements under Rule 14a-8. Under new [Staff Legal Bulletin No. 14M](#), when evaluating no-action requests to exclude a proposal, the staff will require:

- A company-specific analysis whether a proposal is otherwise significantly related to that company's business under the economic relevance exclusion.
- A "case-by-case" review of the relevance of significant policy issues to the particular company under the ordinary business exclusion.

The new guidance rescinds guidance adopted in November 2021 that in turn had rescinded three previous staff legal bulletins – which then had the effect of narrowing the ability of public companies to exclude shareholder proposals under the "ordinary business" and "economic relevance" exceptions. See our post entitled [Excluding a Shareholder Proposal? Not So Fast....](#)

TAKEAWAYS

The focus on the significance of policy issues to the particular company is likely to make it somewhat easier to exclude shareholder proposals. Companies should no longer need to contest generalized claims of social significance or broad societal impact and instead address them with respect to their particular facts and circumstances.

The new guidance became effective February 12, 2025. According to the [FAQs](#), companies may supplement no-action requests currently on file with the SEC based on the guidance. They may also submit new requests – even if less than 80 days before their proxy mailing dates – where their legal arguments are based on the new guidance. The staff views the publication of SLB 14M as "good cause" for that purpose.

The new guidance is consistent with objections raised in the [opposition statement](#) of the Republican Commissioners to the now-rescinded guidance adopted in 2021. Ironically, as they noted then: “Today’s Bulletin furthers the recent trend of erasing previous Commissions’ and staffs’ work and replacing it with the current Commission’s flavor-of-the-day regulatory approach.”

The SEC staff’s rescission of guidance published under Chairman Gensler less than four years ago may serve as a harbinger of future actions, as discussed in our post last month, [What will happen when the SEC minority becomes the majority?](#)

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ECONOMIC RELEVANCE EXCLUSION

Rule 14a-8(i)(5) allows a company to exclude a proposal that “relates to operations which account for less than 5 percent of the company’s total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company’s business.”

Going forward, the Division 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. In contrast to the rescinded guidance, proposals that raise issues of “social or ethical significance” may be excludable, even where important in the abstract, if not significantly related to the business of the company – taking into account the “total mix” of information about the company. “The mere possibility of reputational or economic harm alone” will not be enough. A proponent will need to tie social or ethical issues to a significant effect on the company’s business.

The Division noted:

- It would generally view substantive governance matters to be significantly related to almost all companies.
- It will not look to its analysis under the ordinary business exclusion when evaluating arguments under the economic relevance exclusion.

ORDINARY BUSINESS EXCLUSION

Rule 14a-8(i)(7) allows a company to exclude a proposal that “deals with a matter relating to the company’s ordinary business operations.” This leaves decisions regarding day-to-day management in the hands of management and the board. In evaluating proposals, the SEC focuses on (1) the significance of the subject matter and (2) the degree to which the proposal “micromanages” the company.

Significance. The staff will take a company-specific approach in evaluating significance. This contrasts with the rescinded guidance that focused on whether a proposal raises a policy issue with broad societal impact or whether particular issues or categories of issues are universally “significant.”

Micromanagement. The staff is reinstating guidance that had been rescinded by SLB 14L. Under the reinstated guidance, proposals that involve overly complex matters or would limit company or board discretion, such as involving intricate details or imposing specific methods, timeframes or targets, may constitute overly prescriptive and therefore impermissible micromanagement, even if precatory.

Additionally, under the reinstated guidance, proposals that raise both ordinary business and senior executive and/or director compensation matters, may be excludable depending on:

- Whether the focus is senior executive or director compensation, or whether its underlying concern relates primarily to ordinary business matters that are not sufficiently related to such compensation.
- Whether a primary aspect of the targeted compensation is broadly available or applicable to a company’s general workforce and the company demonstrates that the executives’ or directors’ eligibility to receive the compensation does not implicate significant compensation matters.
- Whether the proposal micromanages senior executive or director compensation practices.

BOARD ANALYSIS NOT REQUIRED

For both exclusions, the Division will no longer require a company’s no-action request to include a discussion that reflects the board’s analysis of the particular policy issue raised and its significance to the company. A company may submit a board analysis for the staff’s consideration if it believes it will help the staff analyze the no-action request.

OTHER MATTERS COVERED

The new guidance also addressed topics such as:

- The application of the 500-word limit to the use of graphics or images in proposals.
- Proof of ownership letters.
- Use of email for required communications between the proponent and the company.

RELATED PRACTICE AREAS

- Securities & Corporate Governance

MEET THE TEAM



R. Randall Wang

St. Louis

randy.wang@bclplaw.com

[+1 314 259 2149](tel:+13142592149)



Tyler Mark

Boulder / Denver

tyler.mark@bclplaw.com

[+1 303 866 0238](tel:+13038660238)

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