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Corp Fin's New Staff Legal Bulletin on Shareholder Proposals: Wow!

Yesterday, Corp Fin issued [Staff Legal Bulletin No. 14L](#) relating to shareholder proposals - and it is a humdinger. Here are six things to know about this new SLB:

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**1. Rescinding the Last Three Staff Legal Bulletins** - Right at the top, the new SLB rescinds the last three Staff Legal Bulletins (14I, 14J and 14K), although Corp Fin is keeping part of them - "republishing" those parts - with some technical changes.

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**2. HCM and Climate are Social Policy Exceptions to "Ordinary Business"** - The big news is that the SLB singles out two types of shareholder proposals as likely to no longer be excludable: those "squarely raising human capital management issues with a broad societal impact" and those proposals that "request companies adopt timeframes or targets to address climate change." When reviewing no-action requests on the basis that a shareholder proposal "deals with a matter relating to the company's ordinary business operations," the Staff is returning to its longstanding practice prior to SLB No. 14I for proposals that focus on policy issues that are sufficiently significant to transcend ordinary business. The Staff will no longer consider the question of whether an issue is a significant policy issue on a company-by-company basis, but instead will focus on the social policy significance in the broad sense of society generally. Because the Staff is no longer taking a company-specific approach here, it no longer expects a board analysis that was formerly necessary under the rescinded SLBs.

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**3. A Retrenchment of "Micromanagement"** - The SLB rescinds the Staff's recent approach to micromanagement arguments under the "ordinary business" exclusion. The concern expressed in the SLB is that "the rescinded guidance may have been taken to mean that any limit on company or board discretion constitutes micromanagement." In short, the revised position clarifies that a proposal that seeks detail - or promotes a particular timeframe or method for implementing the proposal - will *not necessarily* be considered micromanagement. To best explain this, consider this excerpt from the SLB: Our recent letter to [ConocoPhillips Company](#) provides an example of our current approach to micromanagement. In that letter the staff denied no-action relief for a proposal requesting that the company set targets covering the greenhouse gas emissions of the company's operations and products. The proposal requested that the company set emission reduction targets and it did not impose a specific method for doing so. The staff concluded this proposal did not micromanage to such a degree to justify exclusion under Rule 14a-8(i)(7). Additionally, in order to assess whether a proposal probes matters "too complex" for shareholders, as a group, to make an informed judgment, we may consider the sophistication of investors generally on the matter, the availability of data, and the robustness of public discussion and analysis on the topic. The staff may also consider references to well-established national or international frameworks when assessing proposals related to disclosure, target setting, and timeframes as indicative of topics that shareholders are well-equipped to evaluate.

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**4. Arguments for Exclusion Based on Economic Relevance *Not* Subject to Company-Specific Arguments About Significant Social and Ethical Concerns** - The SLB rescinds the SLB No. 14I guidance regarding "economic relevance" arguments for exclusion permitting *company-specific* arguments about whether social or ethical concerns raised by a proposal are significant. The Staff no longer expects a board analysis when processing a no-action request under Rule 14a-8(i)(5).

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**5. Guidance on Email Submissions & Communications** - The SLB provides useful guidance for companies and proponents using email for submission of proposals and related communications. It "suggests" that to prove delivery of an email for purposes of Rule 14a-8, the sender should seek a reply email from the recipient in which the recipient acknowledges receipt of the email. The Staff also encourages both companies and proponents to acknowledge receipt of emails when requested. Email read receipts, if received by the sender, may also help to

establish that emails were received. Email delivery confirmations and company server logs may *not* be sufficient to prove receipt of emails as they only serve to prove that emails were sent, not received. As many companies have found in the current remote-work world, postal mail delivery may not be the ideal way to receive shareholder proposals. Companies should consider establishing a Corporate Secretary or similarly-named email account that is regularly monitored and not tied to a single person. As long as the email is set up properly, monitored, and disclosed in the proxy statement, this approach may help avoid the possible headaches associated with proof of timing of submission of proposals, defect notices, and responses to such notices.

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**6. Republication of Graphics and Technical Defects Guidance (with Updates!)** - The SLB republishes two of the items previously included in the rescinded SLBs, along with some updates:

- Proponents can use graphics in their proposals, but the words in them count towards the 500-word limit and are also evaluated just like any textual disclosure in a proposal (e.g., whether false & misleading).
- Companies should not use an overly technical reading of proof of ownership letters to attempt to exclude proposals. While Staff guidance includes suggested language for proof of ownership, that precise language is not required. Notably, this republication includes new sample language and guidance tailored to the updated ownership threshold requirements due to the SEC's rule changes adopted last year.

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