

ALERTS AND UPDATES

SEC Revises Policies on Excluding Shareholder Proposals Concerning Risks

November 5, 2009

The U.S. Securities and Exchange Commission's ("SEC") Division of Corporation Finance ("Division") recently noted that, in reviewing shareholder proposals relating to environmental, financial or health risks, it will focus on the subject matter to which the risk relates or that gives rise to the risk, rather than on whether a proposal and supporting statement relate to the company's engaging in a risk evaluation, which historically had been viewed as relating to a company's ordinary business operations. The Division also released [Staff Legal Bulletin No. 14E \(CF\)](#) ("SLB No. 14E"), which further provides that a company generally may no longer rely on Rule 14a-8(i)(7)¹ to exclude a proposal that focuses on CEO succession planning.²

Exclusion of a Proposal Related to Risk Depends on Whether Subject Matter of Proposal Raises Significant Policy Issues

In a shift from past practice, SLB No. 14E reinterprets [Staff Legal Bulletin No. 14C \(CF\)](#) ("SLB No. 14C"), which addressed when companies could omit environmental and social policy resolutions under an "ordinary business" exception under Rule 14a-8(i)(7). In SLB No. 14C, the Division concluded that companies could exclude proposals that focused on the company's engaging in "an internal assessment of the risks or liabilities that the company faces as a result of its operations that may adversely affect the environment or the public's health" under Rule 14a-8(i)(7), but could not exclude proposals that focused on the company's "minimizing or eliminating operations that may adversely affect the environment or the public's health."

Observing that, "Over the past decade, we have received numerous no-action requests from companies seeking to exclude proposals relating to environmental, financial or health risks under Rule 14a-8(i)(7)," the Division states in SLB No. 14E that "our application of the analytical framework discussed in SLB No. 14C may have resulted in the unwarranted exclusion of proposals that relate to the evaluation of risk but that focus on significant policy issues." The Division acknowledges in SLB No. 14E that "as most corporate decisions involve some evaluation of risk, the evaluation of risk should not be viewed as an end in itself, but rather, as a means to an end. In addition, we have become increasingly cognizant that the adequacy of risk management and oversight can have major consequences for a company and its shareholders." Going forward, the Division will look to whether the subject matter to which the risk pertains or that gives rise to the risk involves a matter of ordinary business to the company or "transcend[s] the day-to-day business matters," and not to whether the proposal and supporting statement relate to the company's engaging in an evaluation of risk.

SLB No. 14E provides that a proposal will not be excludable under Rule 14a-8(i)(7) if: (i) the underlying subject matter "transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote"; and (ii) "a sufficient nexus exists between the nature of the proposal and the company." However, "in those cases in which a proposal's underlying subject matter involves an ordinary business matter to the company, the proposal generally will be excludable under Rule 14a-8(i)(7)." The Division

acknowledges that this shift in focus may lead to an increase in permitted shareholder proposals addressing climate change and other environmental and public health issues.

It is important to note the Division's recognition that a board's role in the oversight of a company's management of risk is a significant policy matter for the governance of the corporation. The Division thereupon concluded that a proposal that focuses on the board's role in the oversight of a company's management of risk may "raise policy issues so significant" that it would be appropriate for a shareholder vote. Thus, the Division will not allow company exclusion of such a proposal under Rule 14a-8(i)(7).

Companies May Not Rely on Rule 14a-8(i)(7) to Exclude a Proposal That Focuses on CEO Succession Planning

In response to a growing number of no-action requests from companies seeking to exclude proposals relating to CEO succession planning under Rule 14a-8(i)(7), the Division reviewed and revised its position, concluding that companies may not rely on Rule 14a-8(i)(7) to exclude a proposal that focuses on CEO succession planning. Previously, the Division permitted CEO succession-planning proposals to be excluded based on the SEC's determination that those proposals related to the termination, hiring or promotion of employees—and were thereby ordinary business matters. The Division's amended view notes that CEO succession planning raises "a significant policy issue regarding the governance of the corporation that transcends the day-to-day business matter of managing the workforce."

For Further Information

If you have any questions regarding this *Alert* or would like more information, please contact any [member](#) of the [Corporate Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. Rule 14a-8(i)(7) allows exclusion of a shareholder proposal if the proposal "deals with a matter relating to the company's ordinary business operations."
2. SLB No. 14E offers procedural guidance that the SEC encourages company or shareholder proponents who intend to submit correspondence in connection with a no-action request to notify the Division that they intend to submit such correspondence, allowing the Division to review the correspondence in advance of issuing a no-action response.