Market Trends 2018/19: Staff Legal Bulletins No. 14I and 14J on Shareholder Proposals

A Lexis Practice Advisor® Practice Note by
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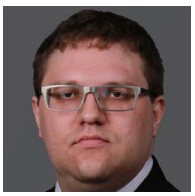

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This market trends article discusses Staff Legal Bulletin No. 14I and Staff Legal Bulletin No. 14J of the Division of Corporation Finance of the Securities and Exchange Commission, both of which provide guidance with respect to shareholder proposals submitted for inclusion in company proxy statements pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, and how such guidance was applied during the 2018 and 2019 proxy seasons.

Staff Legal Bulletin No. 14I

On November 1, 2017, the staff (Staff) of the Division of Corporation Finance of the Securities and Exchange Commission issued Staff Legal Bulletin No. 14I (SLB 14I) to provide guidance on shareholder proposals submitted pursuant to Rule 14a-8 under the Securities Exchange Act of 1934 (Rule 14a-8). SLB 14I, which is available at https://www.sec.gov/interps/legal/cfslb14i.htm, addressed 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
- 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.

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

Impact of SLB 14I on Shareholder Proposal No-Action Requests during the 2018 Proxy Season

A key impact that SLB 14I had on no-action requests for exclusion of shareholder proposals for the 2018 proxy season was the Staff's express statement that it would consider a board analysis as part of its review of requests for exclusion under Rule 14a-8(i)(5) and Rule 14a-8(i)(7). Although the language in SLB 14I could be read as a Staff expectation that no-action requests for exclusion of shareholder proposals under Rule 14a-8(i)(7) or Rule 14a-8(i)(5) should include a board analysis, the Staff made clear in subsequent public statements that a board analysis was not required.

During the 2018 proxy season, the Staff did not automatically grant no-action requests for exclusions of shareholder proposals under Rule 14a-8(i)(5) and Rule 14a-8(i)(7) that contained a board analysis. For example, the Staff rejected a no-action request when it determined that, although the board analysis "sets forth several factors the board considered in evaluating the Proposal, it does not provide a sufficient level of detail to reach a determination that exclusion of the Proposal is appropriate." (See *Entergy Corporation* (March 14, 2018), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/asyousowetal031418-14a8.pdf.) However, the Staff did not articulate the way in which the Staff found the included information to be inadequate. In addition, the Staff denied no-action requests based on such provisions where relatively substantial amounts of votes were cast supporting similar proposals in prior years, noting, for instance, "that

the Company's shareholders voted on a similar proposal last year and that 38.6% of the votes cast supported the proposal." (See *Alliant Energy Corporation* (March 30, 2018), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/nycersetal033018-14a8.pdf.)

On the other hand, the Staff granted no-action requests during the 2018 proxy season, even if the no-action request did not contain a board analysis. In one such case, the Staff permitted a proposal to be excluded under Rule 14a-8(i)(7) where the Staff concurred that the proposal sought to micromanage the company "by seeking to impose specific methods for implementing complex policies," notwithstanding the proponent's complaint that the no-action request did not include any discussion of board analysis of the matter. (See *SeaWorld Entertainment* (April 23, 2018), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/peta042318-14a8.pdf.)

Even when the Staff agreed with a no-action request that contained a board analysis under Rule 14a-8(i)(7) or Rule 14a-8(i)(5), the extent to which such analysis influenced the Staff's decision was not necessarily evident. For example, in response to a no-action request that presented a multifaceted argument under Rule 14a-8(i)(7), one component of which was a board analysis, the Staff permitted the exclusion of the shareholder proposal with just a reference to the rule, stating "[t]here appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(i)(7)." (See *Amazon.com, Inc.* (April 10, 2018), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/greencentury041018-14a8.pdf.) In granting a no-action letter permitting an exclusion under Rule 14a-8(i)(5), the Staff's reply explained that it based its decision on a review of the company's "submission, including the description of how your board of directors has analyzed this matter." The reply noted the company's "representation that the Proposal relates to operations that account for less than 5% of the Company's total assets at the end of its most recent fiscal year, and for less than 5% of its net earnings and gross sales for its most recent fiscal year." The reply also noted "that the Proposal's significance to the Company's business is not apparent on its face, and that the Proponent has not demonstrated that it is otherwise significantly related to the Company's business." (See *Dunkin' Brands Group, Inc.* (February 22, 2018), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/wannensustainvest022218-14a8.pdf.) However, it was not clear from the reply what relative weighting the Staff gave to the board analysis itself.

Staff Legal Bulletin No. 14J

Following the 2018 proxy season, 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, which is available at https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals, 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).

Impact of SLB 14J on Shareholder Proposal No-Action Requests during the 2019 Proxy Season

Board analysis. Like the 2018 proxy season, the inclusion of a board analysis in a no-action request during the 2019 proxy season did not automatically lead to the grant of no-action relief for exclusion either on economic relevance grounds under Rule 14a-8(i)(5) or on ordinary business grounds under Rule 14a-8(i)(7). Although the Staff would have considered the board analysis, as well as other arguments presented in a no-action request, the Staff did not necessarily accept the board analysis as definitive. When responding to Rule 14a-8 no-action requests, the Staff did not generally comment on whether inclusion, or absence, of a board analysis played a pivotal role in the Staff's decision. In some cases, it seemed that the Staff might have been influenced more by the

nature of the proposal than by the board's application of the proposal to the company's particular facts and circumstances.

Attempts to argue that a proposal was not significant to a company under the quantitative measures of Rule 14a-8(i)(5) accompanied by a board analysis had mixed results during the 2019 proxy season, depending on the specific facts and circumstances involved. The Staff agreed with the exclusion of a proposal seeking a report on political contributions when the company included in its no-action letter a board analysis that discussed, among other things, that the only potential political contribution either directly or indirectly made by the company during the last five years was to a trade association that is prohibited from making political contributions and that the company's dues to the trade association over the past five years were below 5% of the company's earnings, assets, or net sales, noting in its reply that the Staff based its decision "in particular the description of how your board directors has analyzed this matter." (See *Reliance Steel & Aluminum Co.* (April 2, 2019), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/cheveddenreliance040219-14a8.pdf.) However, the Staff did not agree to another company's exclusion of the same political contribution proposal that included a board analysis in its no-action request that discussed the size of the business lobbying expenditures in the last fiscal year but excluded what it characterized as onetime extraordinary expenditures from its application of the 5% test in making its argument under Rule 14a-8(i)(5). Additionally, the board analysis in this unsuccessful no-action request discussed disclosure of the company's current lobbying efforts and prior shareholder engagement on this issue in contrast to the successful no-action request where the board analysis expressly considered the absence of both direct lobbying and past shareholder interest in this topic.

The Staff did not grant a no-action request containing a board analysis for a proposal seeking an annual report on the environmental and social impacts of food waste. The company's no-action request argued the proposal was related to less than 5% of assets, earnings, and gross sales under Rule 14a-8(i)(5) and was not significant to the company generally under Rule 14a-8(i)(7). The board analysis contained in this request referenced that the costs of food waste were less than the 5% Rule 14a-8(i)(5) threshold and that food sales were not the company's core business. The proponent complained that the company did not provide proof that the food sales that generated the food waste costs fell below the 5% threshold. The Staff stated that it was unable to conclude, based on information presented in the company's correspondence, "including the discussion of the board's analysis on this matter, that this particular proposal is not sufficiently significant to the Company's business operations such that exclusion would be appropriate." (See *Amazon.com Inc.* (April 3, 2019), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/hammermanfamily040319-14a8.pdf.)

In a number of no-action requests that included a board analysis, the board analysis itself did not seem to be dispositive, as the Staff granted no-action relief to companies receiving substantially identical proposals, whether or not they provided a board analysis. For example, the Staff granted no-action relief both to companies that submitted, and that did not submit, a board analysis supporting the exclusion of a proposal seeking the adoption of a policy forbidding the acceptance of certain classes of immigrants for housing, concluding the proposal was excludable under Rule 14a-8(i)(7), because the proposal sought to micromanage and would "dictate the terms of services to be provided" and "specify the manner in which the Company implements" the policy proposed. (Compare *CoreCivic, Inc.* (March 15, 2019), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/alexfriedmann031519-14a8.pdf (including a board analysis), with *GEO Group, Inc.* (March 15, 2019), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/alexfriedmanngeo031519-14a8.pdf (not including a board analysis)). Another proposal that was also received by multiple companies, only some of which included a board analysis in their no-action requests, involved banning the use of a specific type of test that involved animals. The Staff also concluded this proposal was excludable under Rule 14a-8(i)(7), because the proposal sought to micromanage the companies by "seeking to impose specific methods for implementing complex policies." (See *Pfizer Inc.* (March 1, 2019), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/petapfizer030119-14a8.pdf.) One company that submitted a no-action request for this proposal included a detailed description of how the board analyzed the proposal under each of the six factors listed in SLB 14J and included a discussion of how the proposal was not significant to the company under Rule 14a-8(i)(5) in quantitative measures, while another company submitting a no-action request for the same proposal did neither. These outcomes seem to suggest that, in some circumstances, the Staff is comfortable making the judgment call that a proposal is excludable under Rule 14a-8(i)(5) or Rule 14a-8(i)(7) without the benefit of a board analysis.

There were also cases where similar proposals were sent to multiple companies where the Staff did not grant no-action relief to companies, regardless of whether they contained a board analysis. The Staff rejected requests for no-action relief from companies seeking to exclude a proposal to seeking a report detailing the costs to the companies from voluntary environmental efforts, noting that the proposal transcended ordinary business and did not micromanage

the companies. The Staff reached the same conclusion, even in the case where a company included a board analysis that discussed the existing environmental goals of the company, management's efforts at meeting those goals, the engagement of other shareholders on this issue, the insignificance of the additional disclosure requested when compared to existing disclosure, and the proponent's public persona as cofounder of a special interest group that the board felt did not represent views that were aligned with the vast majority of its shareholders.

In a few situations when the Staff denied Rule 14a-8 no-action requests, it explicitly stated in its response that a board analysis would have been helpful. For example, this occurred when similar proposals had been submitted to shareholders in the past and had received relatively high levels of shareholder support. In such circumstances, presumably the Staff was interested in whether the board had insights as to changed circumstances that might make the proposal less of a concern to shareholders than when shareholders were previously asked to vote on the issue.

SLB 14I and SLB 14J reflect the Staff's view that a board analysis has the potential to be useful in the no-action process for shareholder proposals where economic relevance or ordinary business may provide a basis for a company to exclude a proposal from its proxy statement by sharing the insight a board of directors has regarding the details of the company's operations and the nature of its business. Although inclusion of a board analysis in a no-action request does not necessarily result in the Staff granting a no-action position regarding the exclusion of a shareholder proposal, a board analysis is clearly one of the tools that a company may use to support its argument that a shareholder proposal can be excluded from its proxy statement. Since the Staff enumerated in SLB 14J six factors that it deems appropriate for a board analysis to consider in support of exclusion of a shareholder proposal under Rule 14a-8(i)(5) or Rule 14a-8(i)(7) grounds, it makes sense for companies to address as many of those factors as their particular circumstances support. However, the specific details discussed in a board analysis, as opposed to the existence of a board analysis, is what has the potential to influence whether the Staff finds an argument for exclusion on economic relevance or ordinary business persuasive.

Micromanagement. According to SLB 14J, proposals calling for a report or study can be excluded under Rule 14a-8(i)(7) as seeking to micromanage a company. During the 2019 proxy season, the Staff applied this position to proposals seeking "an intricately detailed study or report." For example, the Staff rejected a no-action request seeking to exclude a proposal calling for a report on the relation between public concern over drug pricing strategies and the company's executive compensation incentives, because the proposal "focuses on the performance measures used to determine awards for senior executives and on the Company's drug pricing strategy, which appear to be significant issues for the Company," despite the company's argument that the report "sought intricate detail" and was therefore micromanagement. (See *Pfizer, Inc.* (February 28, 2019), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/trinityhealthetal0228119-14a8.pdf.) The Staff also denied no-action relief for a proposal calling for a report on the impact of mandatory arbitration on sexual harassment claims, concluding that the subject transcended ordinary business matters in a situation where the company submitting that no-action request had not argued that the report was too intricate or detailed.

A number of companies that received proposals calling for a policy to be adopted that aligned their activities with the goals of the Paris Climate Agreement by adopting quantitative targets for reducing greenhouse emissions were successful in receiving no-action relief on the basis that these proposals sought to micromanage the company. The Staff noted in its responses that "the Proposal seeks to micromanage the Company by probing too deeply into matters of a complex nature upon which shareholders as a group, would not be in a position to make an informed judgement." (See *J.B. Hunt Transport Services, Inc.* (February 14, 2019), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/trilliumasset021419-14a8.pdf.) However, while companies were successful in excluding proposals requesting them to align their activities with these climate goals, when proposals sought only a report generally describing how the company's activities aligned with these goals, without specifying details that in effect called for a policy change, no-action relief was generally not granted.

Human rights represents another topic that the Staff sometimes treats as subject matter transcending ordinary business. For example, during the 2019 proxy season, the Staff concluded that a proposal generally requesting, but not providing specific parameters for, a report on how a company was implementing its existing human rights policies "transcends ordinary business matters and does not seek to micromanage the Company to such a degree that exclusion of the Proposal would be appropriate." (See *The Geo Group, Inc.* (March 15, 2019), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/usawestetal031519-14a8.pdf.) However, in other situations, the Staff permitted proposals framed in terms of human rights issues to be excluded on micromanagement grounds because they involved detailed direction on how the companies should act. For example, the Staff concurred that a proposal calling

for a human rights impact assessment for "at least three food products the Company sells that present a high risk of adverse human rights impacts" could be excluded from the company's proxy statement because of micromanagement "by seeking to impose specific methods for implementing complex policies in place of the ongoing judgments of management as overseen by its board." (See *Amazon.com Inc.* (April 3, 2019), available at https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/oxfamamerica040319-14a8.pdf.) The Staff also granted no-action relief permitting companies to exclude proposals calling for specific statements to be adopted in a company's existing human rights policy or prohibiting investments on the basis of human rights criteria.

Other areas where companies were successful in receiving no-action relief during the 2019 proxy season on the basis of micromanagement included proposals that requested detailed specific action, as opposed to reports, such as moving to 100% renewable energy by the year 2050, forbidding housing for certain immigrants or requiring stockholders approval for all new stock buybacks.

Senior executive compensation. In the 2019 proxy season, some companies had success in arguing that proposals could be excluded despite a focus on senior executive compensation. For example, the Staff permitted a proposal seeking to prohibit senior executives' equity vesting when they left the service of a company for specific reasons to be excluded on the basis of micromanagement. Similarly, the Staff agreed that a proposal calling for a review of current senior executive compensation could be excluded on micromanagement grounds where the proposed method for review was too detailed and included parameters, such as the scope of which executives' compensation should be reviewed, the time period for review, and directions to the board to act on the review. The Staff also allowed the exclusion of proposals asking for legal and regulatory compliance costs to be excluded from performance metrics used for determining the vesting of equity awarded to senior executives as micromanaging, noting that the proposal broadly prohibited certain adjustments without any room for reasonable exceptions or to account for specific circumstances.

However, the Staff did not always concur with the exclusion of executive compensation proposals containing specified metrics. For instance, several companies sought to exclude a proposal that called for an annual report on how risks relating to public concern over drug pricing is integrated into senior executive compensation by arguing both that drug pricing was complex and that the proposal related primarily to services and products of the company. In denying these requests for no-action relief, the Staff noted that the focus on both the performance measures for senior executives and drug pricing strategy were significant issues for the companies.

SLB 14J expressly conditioned the exclusion of proposals that address senior executive and/or director compensation under Rule 14a-8(i)(7) where a primary aspect of the targeted compensation is broadly available or applicable to a company's general workforce on demonstration by the company that the executives' or directors' eligibility to receive the compensation does not implicate significant compensation matters. The Staff denied no-action requests during the 2019 proxy season if it was not satisfied that the company sufficiently made this demonstration. While a proposal that targets compensation available to the general workforce, as well as to executives or directors, may be excludable under Rule 14a-8(i)(7), if the proposal implicates significant compensation matters, thereby transcending ordinary business matters, it will not be excludable on that basis. Therefore, it would be useful for companies seeking to exclude a senior executive and/or director compensation proposal involving aspects of compensation that also may be provided to the general workforce to explain in their no-action requests why the ability of senior executives and/or directors to receive the targeted compensation does not implicate significant compensation matters, rather than just arguing that these individuals receive compensation pursuant to the same plan, or of the same type, as the general workforce.

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Laura 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.

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