

## SEC/CORPORATE

### **SEC Issues Legal Bulletin Regarding Shareholder Proposals Exclusion**

On October 16, the staff of the Division of Corporation Finance (Staff) of the Securities and Exchange Commission issued Staff Legal Bulletin No. 14K (SLB). The SLB provides new guidance regarding the Staff's views as to when registrants may properly exclude, pursuant to Rule 14a-8(i)(7) of the Securities Exchange Act of 1934, as amended, shareholder proposals under the "ordinary business" exception.

Generally, under Rule 14a-8, a shareholder that has continuously held for at least one year at least \$2,000 in market value, or 1 percent, of a registrant's shares may submit a proposal for the registrant and/or its board of directors to take a specific action, for consideration by the registrant's shareholders at a shareholder meeting. Notwithstanding this general provision, Rule 14a-8(i) sets forth several circumstances under which a registrant may omit a shareholder proposal, including if "the proposal deals with a matter relating the company's ordinary business operations."

The circumstances under which the Staff would grant no-action relief supporting an exclusion under this exception are discussed in detail in the SLB.

Shareholder proposals and Rule 14a-8 have been an area of focus and attention for the Staff, registrants and shareholders and the SLB follows the Staff's recent announcement on changes to the Rule 14a-8 no-action request process, discussed in the September 13, 2019 edition of [Corporate & Financial Weekly Digest](#).

#### ***Subject matter exclusion***

The Staff has previously noted that it believes proposals may be excluded under the ordinary business exception where the subject matter is "so fundamental" to management's ability to run the business that they could not "as a practical matter" be subject to shareholder oversight. Further, the Staff has expanded its view that proposals would not be excludable under the ordinary business exception where they "transcend the day-to-day business matters." Now, in providing additional guidance in the SLB, the Staff noted that proposals should be analyzed, taking a company specific approach, to determine whether they are truly part of the registrant's ordinary business operations or instead raise a "policy issue that appears significant."

Building on prior guidance from previous legal bulletins, the Staff stresses in the SLB that in looking to exclude a shareholder proposal under the ordinary business exception, a registrant can strengthen its position by demonstrating a well-developed discussion at the board-level around analysis of the proposal. In determining to exclude a proposal, details of "specific substantive factors" that the board considered could support an argument for no action relief in favor of exclusion.

One substantive factor that a board could consider in determining to exclude a proposal under the ordinary business exception is the extent to which the registrant has already addressed the issue raised by the proposal, with the differences between the proposal and the actual actions taken being referred to as the "delta." In the SLB, the Staff highlights that a delta analysis can be a helpful tool in supporting exclusion of a proposal where the analysis both clearly identifies the differences between the proposal and the existing actions and explains in detail why the delta does not represent a significant policy issue. Conclusory statements about only the differences, the Staff notes, would be less helpful.

In the SLB, the Staff also notes that exclusion on the basis that shareholders have previously voted on the matter in question may not be a sufficient ground for exclusion because it may not properly demonstrate that the issue is not significant to the registrant. Instead, prior voting results should be presented alongside a robust discussion of how the board's view on significance was informed by prior votes as well as any subsequent actions the registrant may have taken or will take, other intervening events or other indicia of shareholder engagement on the issue.

### ***Micromanaging exclusion***

In addition to subject matter, a second prong under which the Staff believes a proposal may properly be excluded under the ordinary business exception is if the proposal would micromanage the registrant. This analysis turns on the manner in which a proposal seeks to address an issue, as opposed to the substantive subject matter of the issue itself. Micromanaging can be identified where the proposal seeks intricate detail or imposes a specific strategy, method or outcome or prescribes specific timeframes. A proposal that is overly prescriptive could limit the judgement and discretion of the registrant's board and management, and thus be viewed as micromanaging and excludable under the ordinary business exception of Rule 4a-8(i)(7).

### ***Proof of ownership***

Finally, the SLB addresses proof of ownership issues. Rule 14a-8(b) requires that a shareholder proponent demonstrate its eligibility to submit a shareholder proposal by proving that it has held the requisite number of securities for at least one year. The Staff has previously provided guidance on a suggested format for shareholders to follow when supplying registrants with ownership information, although this format is not mandatory. In the SLB, the Staff noted that they have observed registrants applying "an overly technical reading of proof of ownership letters as a means to exclude a proposal."

The Staff noted they have taken a plain meaning approach to interpreting ownership letters and have advised registrants to do the same going forward, including when the Staff's suggested format is not followed.

The SLB is available [here](#).

## **BROKER-DEALER**

### **CFTC, FinCEN, and SEC Issue Joint Statement on Activities Involving Digital Assets**

On October 11, the leaders of the Commodity Futures Trading Commission (CFTC), the Financial Crimes Enforcement Network (FinCEN), and the Securities and Exchange Commission (collectively, the Agencies) issued a joint statement reminding persons engaged in activities involving digital assets of their anti-money laundering (AML) and countering the financing of terrorism (CFT) obligations under the Bank Secrecy Act of 1970 (BSA).

In substance, the joint statement reminds various market participants — such as futures commission merchants, introducing brokers, money service businesses and broker-dealers — that AML/CFT obligations apply to entities that the BSA defines as "financial institutions." AML/CFT obligations include the implementation of an effective AML program, recordkeeping and reporting. These requirements apply to all activities in which the registrants are engaged and are not limited in their application to activities that are subject to regulation under the Commodity Exchange Act or the securities laws, as applicable.

Additionally, the leaders of the respective Agencies each added comments above and beyond the joint statement that reinforced the respective mission of the Agencies and commitment to upholding the regulations discussed in the joint statement.

The full joint statement is available [here](#).

## **SEC Announces the Formation of Asset Management Advisory Committee**

On October 9, the Securities and Exchange Commission announced the formation of its Asset Management Advisory Committee.

The committee will provide the SEC with diverse perspectives on asset management and related advice and recommendations. Topics the committee may address include trends and developments affecting investors and market participants, the effects of globalization, and changes in the role of technology and service providers. The committee features outside experts that collectively represent the views of retail and institutional investors, small and large funds, intermediaries, and other market participants.

In a public statement, SEC Chairman Jay Clayton stated that the committee will help ensure that the SEC's regulatory approach to asset management fulfills the needs of retail investors and market participants.

The committee will be formally established on November 1 and includes an initial two-year term renewable by the SEC. It is expected that the SEC will announce further details about the committee in the near future.

The SEC's press release is available [here](#).

## **DERIVATIVES**

See *"CFTC Approves Proposed Rules Relating to Uncleared Swaps"* in the *CFTC* section.

## **CFTC**

### **CFTC Approves Proposed Rules Relating to Uncleared Swaps**

On October 16, the Commodity Futures Trading Commission (CFTC) unanimously extended the compliance schedule for initial margin requirements for uncleared swaps for entities with average aggregate notional amounts in material swaps exposure of \$8 – \$50 billion until September 1, 2021. Entities with more than \$50 billion of such exposure are still subject to the September 1, 2020 compliance date.

In addition, the CFTC also voted to exclude the European Stability Mechanism from the definition of "financial end user" for purposes of margin requirements for swap dealers and major swap participants. This result is consistent with existing no-action relief.

The CFTC press release, with lists to the relevant *Federal Register* releases, is available [here](#).

## **DIGITAL ASSETS AND VIRTUAL CURRENCIES**

See *"CFTC, FinCEN, and SEC Issue Joint Statement on Activities Involving Digital Assets"* in the *Broker-Dealer* section.

## **UK DEVELOPMENTS**

### **FCA Updates Change of Control Webpages**

On October 14, the Financial Conduct Authority (FCA) published new and updated change of control webpages, including a new page on preparing change of control notifications, and a new page with links to the forms required to submit a notification for a change of control.

The FCA noted that firms sometimes submit a business plan along with their change of control notification, and the new webpages also include a business plan template with the FCA's guidance on areas where it believes such business plans should be more detailed. The template is:

- **Business to be undertaken:** explain how the business will be run going forward and any planned changes to the regulated activities and strategy of the target firm(s). The FCA also expects to see complete projected financials that explain how controller applicants will maintain the firm's minimum capital requirements.
- **Governance:** provide an overview of the firm's governance arrangements, including board composition and any board sub-committees.
- **Staff:** include an organization chart showing key staff and roles, including all controllers and close links, what business they conduct and whether they are regulated. Explain the rationale for the appointment and suitability of members of the governing board, the compliance officer and other approved persons. Describe the background and experience of those individuals performing significant influence controlled functions, such as directors or senior managers.
- **Outsourcing:** consider whether there are any areas of the business that are going to be outsourced and how this will be overseen.
- **Systems and controls and risk management:** consider how the firm will identify and manage conduct risks. Provide an overview of the firm's financial crime controls, anti-money laundering (AML) procedures and due diligence processes.

The new webpages are available [here](#).

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**For more information, contact:**

SEC/CORPORATE

<a href="#">Mark J. Reyes</a>	+1.312.902.5612	mark.reyes@katten.com
<a href="#">Mark D. Wood</a>	+1.312.902.5493	mark.wood@katten.com

FINANCIAL SERVICES

<a href="#">Henry Bregstein</a>	+1.212.940.6615	henry.bregstein@katten.com
<a href="#">Wendy E. Cohen</a>	+1.212.940.3846	wendy.cohen@katten.com
<a href="#">Guy C. Dempsey Jr.</a>	+1.212.940.8593	guy.dempsey@katten.com
<a href="#">Gary DeWaal</a>	+1.212.940.6558	gary.dewaal@katten.com
<a href="#">Kevin M. Foley</a>	+1.312.902.5372	kevin.foley@katten.com
<a href="#">Mark D. Goldstein</a>	+1.212.940.8507	mark.goldstein@katten.com
<a href="#">Jack P. Governale</a>	+1.212.940.8525	jack.governale@katten.com
<a href="#">Arthur W. Hahn</a>	+1.312.902.5241	arthur.hahn@katten.com
<a href="#">Christian B. Hennion</a>	+1.312.902.5521	christian.hennion@katten.com
<a href="#">Carolyn H. Jackson</a>	+44.20.7776.7625	carolyn.jackson@katten.co.uk
<a href="#">Susan Light</a>	+1.212.940.8599	susan.light@katten.com
<a href="#">Richard D. Marshall</a>	+1.212.94.8765	richard.marshall@katten.com
<a href="#">Fred M. Santo</a>	+1.212.940.8720	fred.santo@katten.com
<a href="#">Christopher T. Shannon</a>	+1.312.902.5322	chris.shannon@katten.com
<a href="#">Robert Weiss</a>	+1.212.940.8584	robert.weiss@katten.com
<a href="#">Lance A. Zinman</a>	+1.312.902.5212	lance.zinman@katten.com
<a href="#">Krassimira Zourkova</a>	+1.312.902.5334	krassimira.zourkova@katten.com

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<a href="#">John Ahern</a>	+44.20.7770.5253	john.ahern@katten.co.uk
<a href="#">Carolyn H. Jackson</a>	+44.20.7776.7625	carolyn.jackson@katten.co.uk
<a href="#">Neil Robson</a>	+44.20.7776.7666	neil.robson@katten.co.uk
<a href="#">Nathaniel Lalone</a>	+44.20.7776.7629	nathaniel.lalone@katten.co.uk

\* Click [here](#) to access the *Corporate & Financial Weekly Digest* archive.

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