

SHAREHOLDER PROPOSAL NO-ACTION LETTERS

2018-2019 REVIEW

**MORRISON
FOERSTER**

2018-2019 Review

Shareholder Proposal No-Action Letters

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INTRODUCTION

Morrison & Foerster is pleased to share this review of the SEC Staff's 2018-2019 shareholder proposal no-action letters. This review discusses Commission and Staff statements providing background for recent Staff no-action letters and the guidance provided by those no-action letters.

Exchange Act Rule 14a-8 permits a company's shareholders to present proposals for inclusion in the company's proxy materials for its next annual meeting. Rule 14a-8 includes eligibility and procedural requirements that a shareholder must satisfy and a list of thirteen substantive categories that a proposal may not address. If a shareholder fails to satisfy the eligibility or procedural requirements or if a proposal falls within one of the thirteen prohibited categories, a company may exclude a shareholder's proposal from its proxy materials. When a company intends to exclude a shareholder's proposal from its proxy materials, it submits a "no-action request" to the Staff of the SEC's Division of Corporation Finance. The Staff responds to each such no-action request, providing its views regarding the company's intention to exclude the shareholder proposal from its proxy materials.

The Staff's responses to no-action requests regarding shareholder proposals during the 2018-2019 proxy season provide significant guidance regarding the application of Rule 14a-8. The positions taken by the Staff are particularly useful with regard to the following three Rule 14a-8 substantive bases for exclusion on which companies often rely when taking the view that they may exclude a shareholder proposal from their proxy materials:

- Rule 14a-8(i)(3) (proposal is "materially false and misleading");
- Rule 14a-8(i)(7) (proposal relates to a company's "ordinary business" matters); and
- Rule 14a-8(i)(10) (proposal has been "substantially implemented" by a company).

OVERVIEW OF TAKEAWAYS FROM THE 2018-2019 PROXY SEASON

Rule 14a-8(i)(3)

- a company should *not* anticipate excluding a proposal or a specific statement in a supporting statement unless it can:
 - “demonstrate objectively” that the proposal or a specific statement in the supporting statement is materially false or misleading; or
 - show that a term that is absolutely fundamental to an understanding of the action sought by the proposal cannot be understood “with any reasonable certainty.”

Rule 14a-8(i)(7)

- the “micromanagement” analysis in the exclusion may be relied on where a proposal “involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies,” regardless of the subject matter of the proposal;
- applying the “ordinary business” analysis in the exclusion to a proposal addressing an aspect of senior executive or director compensation that also is available or applicable to the general workforce requires a consideration of whether:
 - the aspect of compensation addressed by a proposal is broadly available to the company’s general workforce; and
 - the senior executives’ or directors’ eligibility to receive that aspect of compensation implicates “significant compensation matters;”
- the “ordinary business” analysis in the exclusion generally may be relied on without a discussion regarding the board’s analysis of the proposal’s significance to the company where it is “self-evident” that the proposal relates to a matter that the Commission or the Staff has long considered to be “ordinary business;” and
- any no-action request discussion regarding a board’s analysis of a proposal’s significance should address the significance of the proposal *to the company* in detail, including the significance of:
 - any differences between the proposal and current company practices; and
 - any company response to prior shareholder votes on the issue presented by the proposal.

Rule 14a-8(i)(10)

- exclusion may be appropriate where a company demonstrates that its policies, practices, procedures, or disclosures “compare favorably” to the action sought by the proposal;
- a no-action request’s discussion of the manner in which a company’s policies, practices, procedures, or disclosures “compare favorably” to the action sought by the proposal should include a copy of the company’s policies, practices, procedures, or disclosures that “compare favorably” to the specific actions sought by the proposal: and
- exclusion may be appropriate where:
 - the company’s board has approved any necessary amendments for submission to a vote of company shareholders; and
 - the company intends to present those amendments to a vote of shareholders at the company’s next annual meeting.

JUST THE FACTS: THE 2018-2019 PROXY SEASON

Between October 1, 2018, and July 31, 2019, the Staff of the SEC’s Division of Corporation Finance issued 231 responses to no-action requests under Rule 14a-8. Of those 231 Staff responses:

- the Staff concurred in a company’s intention to exclude a proposal in response to 126 requests (54.5% of all responses/67.7% of responses to non-withdrawn requests);
- the Staff did not concur in a company’s intention to exclude a proposal in response to 60 requests (26.0% of all responses/32.3% of responses to non-withdrawn requests); and
- the Staff indicated that 45 requests had been withdrawn and it would take no further action (19.5% of all responses).

BASED ON WHAT? – STAFF “GRANTS” OF NO-ACTION REQUESTS

In concurring in a company’s position that it may exclude a proposal from its proxy materials – often referred to as a “grant” of a no-action request – the Staff’s response will (1) express its view with regard to only a single basis under Rule 14a-8 for concurring in a company’s exclusion of a proposal; and (2) state that it was not necessary for it to address any of the company’s other bases for exclusion. During the 2018-2019 proxy season, the 126 Staff grants of no-action requests noted the following Rule 14a-8 paragraphs as the basis for its position with the indicated frequency:

• Rule 14a-8(i)(10)	(company has substantially implemented the proposal)	41
• Rule 14a-8(i)(7)	(proposal relates to ordinary business matters)	40
• Rule 14a-8(f)	(proponent failed to satisfy eligibility or procedural requirements)	15
• Rule 14a-8(e)(2)	(proponent failed to meet deadline for submission)	6
• Rule 14a-8(i)(11)	(proposal duplicates a proposal to be included in proxy materials)	6
• Rule 14a-8(i)(8)	(proposal relates to an election of directors)	6
• Rule 14a-8(i)(2)	(proposal would cause violation of law)	3
• Rule 14a-8(h)(3)	(proponent did not appear previously to present a proposal)	2
• Rule 14a-8(i)(12)	(prior proposal on same subject did not receive sufficient vote)	2
• Rule 14a-8(i)(3)	(proposal/supporting statement is materially false or misleading)	1
• Rule 14a-8(i)(5)	(proposal is not economically relevant or significant to company)	1
• Rule 14a-8(i)(6)	(company lacks authority to implement a proposal)	1
• Rule 14a-8(i)(9)	(proposal conflicts with a company proposal)	1
• Rule 14a-8(i)(13)	(proposal relates to specific amounts of dividends)	1

RULE 14a-8(i)(3) – IS IT “IRRELEVANT”?

Background Regarding the Rule 14a-8(i)(3) Exclusion

Rule 14a-8(i)(3) permits exclusion of a proposal if “the proposal or supporting statement is contrary to any of the Commission’s proxy rules, including [Rule] 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials.” The Staff set forth its analysis of the Rule 14a-8(i)(3) exclusion in Staff Legal Bulletin No. 14B (September 15, 2004) (“SLB 14B”). The Staff stated in SLB 14B:

- “[R]ule 14a-8(i)(3), unlike the other bases for exclusion under [R]ule 14a-8, refers explicitly to the supporting statement as well as the proposal as a whole”;
- “[C]ompanies have relied on [R]ule 14a-8(i)(3) to exclude portions of the supporting statement, even if the balance of the proposal and the supporting statement may not be excluded”; and
- “Companies have requested that the [S]taff concur in the appropriateness of excluding statements in reliance on [R]ule 14a-8(i)(3) for a number of reasons, including the following”:
 - **Vagueness** – “the language of the proposal or the supporting statement render the proposal so vague and indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires”;
 - **Impugning Statements** – “exclude statements in a supporting statement because they fall within Note (b) to [R]ule 14a-9;” [Exchange Act Rule 14a-9 prohibits materially false or misleading statements in proxy solicitation materials. The Note to Rule 14a-9 provides “some

examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of [Rule 14a-9].” Part (b) of that Note provides the following example: “Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.”]

- **Irrelevant Statements** – “exclude statements in a supporting statement because they are irrelevant to the subject matter of the proposal being presented” and, as such, “mislead shareholders by making unclear the nature of the matter on which they are being asked to vote”;
- **Opinions Presented as Fact** – “exclude statements in a supporting statement because they are presented as fact when they are the opinion of the shareholder proponent” and, as such, “mislead shareholders into believing that the statements are fact and not opinion”; and
- **Statements Without Factual Support** – “exclude statements in a supporting statement because they are presented as fact, but do not cite to a source that proves that statement.”

Noting the “unintended and unwarranted extension of [R]ule 14a-8(i)(3),” the Staff stated in SLB 14B that, “[d]uring the last proxy season, nearly half the no-action requests we received asserted that the proposal or supporting statement was wholly or partially excludable under [R]ule 14a-8(i)(3).” The Staff then stated that, “going forward, we believe that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on [R]ule 14a-8(i)(3) in the following circumstances:

- the company objects to factual assertions because they are not supported;

- the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered;
- the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or
- the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.”

The Staff also stated its belief that, rather than addressing those matters in no-action requests, “it is appropriate under [R]ule 14a-8 for companies to address these objections in their statements of opposition.”

With regard to its application of the Rule 14a-8(i)(3) exclusion after SLB 14B, the Staff stated that “reliance on [R]ule 14a-8(i)(3) to exclude or modify a statement may be appropriate where:

- statements directly or indirectly impugn character, integrity, or personal reputation, or directly or indirectly make charges concerning improper, illegal, or immoral conduct or association, without factual foundation;
- the company demonstrates objectively that a factual statement is materially false or misleading;
- the resolution contained in the proposal is so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires — this objection also may be appropriate where the proposal and the supporting statement, when read together, have the same result; and
- substantial portions of the supporting statement are irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which she is being asked to vote.”

Staff Responses to Rule 14a-8(i)(3) No-Action Requests During the 2018-2019 Proxy Season

The statistics from the 2018-2019 proxy season show that the Staff applies the Rule 14a-8(i)(3) exclusion narrowly. Between October 1, 2018, and July 31, 2019, the Staff responded to 46 no-action requests seeking the Staff’s concurrence with the exclusion of a shareholder proposal, at least in part, in reliance on Rule 14a-8(i)(3). The Staff responded to those 46 requests as follows:

- in response to 23 no-action requests in which a company stated its intention to exclude a proposal in reliance on Rule 14a-8(i)(3), the Staff did not concur in a company’s reliance on the Rule 14a-8(i)(3) basis for exclusion specifically (these Staff responses are referred to below as “denied”);
- in response to 22 no-action requests in which a company stated its intention to exclude a proposal in reliance on Rule 14a-8(i)(3) and at least one other basis, the Staff concurred in a company’s intention to exclude the proposal on a basis for exclusion other than Rule 14a-8(i)(3) and did not address the company’s Rule 14a-8(i)(3) basis for exclusion (these Staff responses are referred to below as “did not address”); and
- in response to 1 no-action request, the Staff concurred specifically in a company’s stated intention to exclude a proposal in reliance on the Rule 14a-8(i)(3) basis for exclusion (these Staff responses are referred to below as “grants”).

Staff Responses that Denied or Did Not Address Requests Relying on Rule 14a-8(i)(3)

The most common reasoning in no-action requests regarding exclusion in reliance on Rule 14a-8(i)(3) was that the language of the proposal and/or the supporting statement was so irrelevant, or so vague and indefinite, as to render the entire proposal materially false or misleading. Where the Staff did not concur in that position, it generally stated that it disagreed with the analysis in the no-action request because the company had not:

- “demonstrated objectively” that the language of the proposal or a specific statement in the supporting statement was materially false or misleading;
- shown that a portion of the proposal or a specific statement in the supporting statement was so irrelevant as to cause shareholders to be uncertain as to the action sought by the proposal; or
- shown that the language of the proposal or a specific statement in the supporting statement was so vague or indefinite as to be materially false or misleading.

Staff Response that Granted a Request Relying on Rule 14a-8(i)(3)

eBay Inc. (April 10, 2019) was the only no-action response in which the Staff concurred in exclusion of a proposal in reliance on Rule 14a-8(i)(3). The subject proposal read: “Resolved: stockholders recommend that eBay Inc. reform the company’s executive compensation committee.” The supporting statement did not include any guidance regarding the nature of the “reform [of] the company’s executive compensation committee” sought by the proposal. In concurring in the company’s exclusion of the proposal, the Staff stated:

There appears to be some basis for your view that the Company may exclude the Proposal under [R]ule 14a-8(i)(3), as vague and indefinite. We note in particular your view that neither shareholders nor the Company would be able to determine with any reasonable certainty the nature of the “reform” the Proposal is requesting. Thus, the Proposal, taken as a whole, is so vague and indefinite that it is rendered materially misleading.

RULE 14a-8(i)(3) – TAKEAWAYS FROM THE 2018-2019 PROXY SEASON

Our Rule 14a-8(i)(3) takeaways from the Staff’s 2018-2019 responses to no-action requests:

- It generally will not be sufficient for a company to take the view that a proposal, when read together with its supporting statement, is so vague or indefinite that it would confuse shareholders as to the action sought and, therefore, render the proposal or a specific statement materially false or misleading. This Staff position is consistent with the view expressed in SLB 14B that companies should address these objections in their statements of opposition. Accordingly, it will require a rare and difficult facts-and-circumstances analysis for a company to show that the language of a proposal or a supporting statement is so vague and indefinite as to cause shareholders to be uncertain as to the action sought by the proposal.
- With regard to excluding a specific statement in a supporting statement:
 - it generally will be sufficient for a company to “demonstrate objectively” that the statement is materially false or misleading; and
 - Absent “demonstrating objectively” that a statement is materially false or misleading, it generally will not be sufficient for a company to take the view that a statement in a supporting statement is so irrelevant, or so vague and indefinite, that the statement may be excluded from the supporting statement.

RULE 14a-8(i)(7) – WHEN IS A MATTER “ORDINARY BUSINESS”?

Rule 14a-8(i)(7) “Ordinary Business” Issues Presented Before the 2018-2019 Proxy Season

Rule 14a-8(i)(7), captioned “Management functions,” permits exclusion of a proposal that “deals with a matter relating to the company’s ordinary business operations.” Rule 14a-8(i)(7) has always presented a significant challenge, due mainly to the subjective nature of the line between a proposal relating to a company’s “ordinary business” matters – which generally may be excluded from a company’s proxy materials – and a proposal relating to issues that are so significant as to “transcend ordinary business” matters – which generally may not be excluded from a company’s proxy materials. To provide further clarity on this issue, the Staff published Staff Legal Bulletin No. 14J (October 23, 2018) (“SLB 14J”), addressing:

- the scope and application of the “micromanagement” analysis under Rule 14a-8(i)(7); and
- the scope and application of Rule 14a-8(i)(7) for proposals related to senior executive and/or director compensation matters.

SLB 14J also addressed a company’s inclusion in a no-action request of a discussion regarding the board’s analysis of a proposal’s significance to the company.

The “Micromanagement” Analysis

No-action requests discussing the Rule 14a-8(i)(7) exclusion commonly cite the Commission’s statements in Exchange Act Release No. 34-40018 (May 21, 1998) regarding the two analyses under the exclusion: (1) whether the subject matter of the proposal deals with a matter relating to a company’s “ordinary business”; and (2) the degree to which the proposal seeks to “micromanage” the company “by probing too deeply into matters of a complex nature.” In SLB 14J, the Staff stated the

following regarding the “micromanagement” analysis under the Rule 14a-8(i)(7) exclusion:

- “Unlike the [ordinary business] consideration, which looks to a proposal’s subject matter, the [micromanagement] consideration looks only to the degree to which a proposal seeks to micromanage. Thus, a proposal that may not be excludable under the [ordinary business] consideration may be excludable under the [micromanagement consideration] if it micromanages the company.”
- “As the Commission has explained, a proposal may probe too deeply into matters of a complex nature if it ‘involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.’” [footnote omitted]
- “This framework also applies to proposals that call for a study or report. For example, a proposal that seeks an intricately detailed study or report may be excluded on micromanagement grounds. In addition, the [S]taff would, consistent with Commission guidance, consider the underlying substance of the matters addressed by the study or report. Thus, for example, a proposal calling for a report may be excludable if the substance of the report relates to the imposition or assumption of specific timeframes or methods for implementing complex policies.” [footnotes omitted]
- “It is important to note, however, that the [S]taff’s concurrence with a company’s micromanagement argument does not necessarily mean that the subject matter raised by the proposal is improper for shareholder consideration. Rather, in that case, it is the manner in which a proposal seeks to address an issue that results in exclusion on micromanagement grounds.”

Application of the Rule 14a-8(i)(7) Exclusion to Senior Executive/Director Compensation Proposals

An issue in the application of the Rule 14a-8(i)(7) exclusion is whether a proposal, when read with its supporting statement, relates to general employee compensation and benefits – which may be excluded, as it relates to an ordinary business matter – or, instead, focuses on “significant aspects of senior executive and/or director compensation” – which may not be excluded, as it relates to a significant policy issue that transcends ordinary business matters. In SLB 14J, the Staff provided its analysis of three types of proposals that address senior executive and/or director compensation.

Proposals that address senior executive and/or director compensation and ordinary business matters – In these matters, the analysis depends on the focus of the proposal:

- Where the focus of a proposal is on senior executive and/or director compensation, the Staff generally will take the view that the proposal may not be excluded, as it relates to a significant policy issue that transcends ordinary business matters.
- Where the focus of a proposal is on ordinary business matters that are not sufficiently related to senior executive and/or director compensation, the Staff may take the view that the proposal may be excluded, as it relates to ordinary business matters.

The Staff explained the basis for this analysis in SLB 14J:

This framework ensures that form is not elevated over substance and that a proposal is not included simply because it addresses an excludable matter in a manner that is connected to or touches upon senior executive or director compensation matters. Including an aspect of senior executive or director compensation in a proposal that otherwise focuses on an ordinary

business matter will not insulate a proposal from exclusion under Rule 14a-8(i)(7).

Proposals that address aspects of senior executive and/or director compensation that also may be available or applicable to the general workforce – In these matters, the Rule 14a-8(i)(7) analysis is based on two questions:

- Is a primary aspect of the targeted compensation broadly available or applicable to a company’s general workforce?
- Does the executives’ or directors’ eligibility to receive the compensation not implicate significant compensation matters?

If the answer to each question is “yes,” a company generally may exclude a proposal in reliance on Rule 14a-8(i)(7). As the Staff stated in SLB 14J:

- *“Proposals where the focus is on aspects of compensation that are available or apply only to senior executive officers and/or directors. Companies may generally not rely on Rule 14a-8(i)(7) to omit these proposals from their proxy materials.”*
- *“Proposals where the focus is on aspects of compensation that are available or apply to senior executive officers, directors, and the general workforce. Companies may generally rely on Rule 14a-8(i)(7) to omit the proposal from their proxy materials.”*

Proposals seeking to micromanage senior executive and/or director compensation practices – The Staff noted in SLB 14J that, in the past, it had “not agreed with the exclusion of proposals addressing senior executive and/or director compensation on the basis of micromanagement.” The Staff revised this view in SLB 14J, stating that it will not treat compensation proposals differently from other types of proposals, and it may agree with exclusion of those compensation proposals on the basis of micromanagement. Consistent with the Staff’s treatment of proposals on other topics, therefore, the Staff may agree that proposals “addressing senior executive and/or director compensation that

seek intricate detail, or seek to impose specific timeframes or methods for implementing complex policies can be excluded under Rule 14a-8(i)(7) on the basis of micromanagement.” The Staff also stated:

- “[M]icromanagement addresses the manner in which a proposal raises an issue, and not whether a proposal’s subject matter itself is proper for a shareholder proposal under Rule 14a-8.”
- “Proposals that focus on significant executive and/or director compensation matters and do not micromanage will continue not to be excludable under Rule 14a-8(i)(7).”

Discussion Regarding a Board Analysis in a Rule 14a-8(i)(7) No-Action Request

In SLB 14J, the Staff discussed the similarities between the Rule 14a-8(i)(7) “transcends ordinary business operations” analysis and the Rule 14a-8(i)(5) “significantly related” analysis. Accordingly, companies should apply the Staff’s guidance when considering the application of either analysis.

In SLB 14J, the Staff reiterated its statement in Staff Legal Bulletin No. 14I (November 1, 2017) (“SLB 14I”) that it may be useful for a company to include in its no-action request a discussion regarding its board’s analysis of the issue raised by the proposal and the significance of that issue to the company. The Staff stated that such discussions were most helpful where they “focused on the board’s analysis and the specific substantive factors the board considered in arriving at its conclusion”; conversely, the Staff stated that such discussions were less helpful where they “described the board’s conclusions or process without discussing the specific factors considered.” Further, the Staff reiterated its view that it “would not expect to agree with exclusion of proposals that focus on substantive governance matters.”

In SLB 14I and SLB 14J, the Staff indicated that the absence of a discussion regarding a board analysis

in a no-action request will not preclude exclusion of a proposal and that the inclusion of a board analysis in a no-action request will not create a presumption that a proposal may be excluded from a company’s proxy materials. Despite the inclusion of a discussion of a board analysis in scores of no-action requests since the publication of SLB 14I, the Staff has granted only two such requests, each of which were based on Rule 14a-8(i)(5) – *Dunkin’ Brands Group, Inc.* (February 22, 2018) and *Reliance Steel & Aluminum Co.* (April 2, 2019). Further, the Staff appeared to limit the importance of the board analysis in one of those responses (*Dunkin’ Brands Group, Inc.*), stating “We also note 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.” The Staff indicated in SLB 14J, however, that the inclusion of such a discussion may be beneficial in its consideration of a company’s views on a proposal, particularly “where 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.”

In SLB 14J, the Staff provided a non-exclusive, non-exhaustive list of the details that it considers to be useful in a discussion regarding the specific substantive factors a company’s board considered in arriving at its conclusion concerning a proposal:

- “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 – or the delta – between the proposal’s specific request and the actions the company has already taken, and an analysis of

whether the delta presents a significant policy issue for the company. [footnote omitted]

- 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.
- Whether the company’s shareholders have previously voted on the matter and the board’s views as to the related voting results.”

With regard to a board’s assessment of a previous shareholder vote concerning a matter raised by a proposal, the Staff stated its view that “the more recent a vote is, the more likely that such vote is indicative of the topic’s significance to a company and its shareholders.” Further, the Staff stated that, if a company’s shareholders have previously voted on a matter, the Staff would expect a discussion regarding the board’s analysis to address the previous voting results and:

- “if a previously voted-on matter received significant shareholder support, [the Staff] will consider whether the company has taken any subsequent actions and/or whether other intervening events have occurred since the vote that may have mitigated the issue’s significance to the company”; and
- “if a previously voted-on matter received insignificant shareholder support, [the Staff] will consider whether any subsequent company actions or intervening events may have increased the issue’s significance to the company.”

Staff Responses to Rule 14a-8(i)(7) No-Action Requests During the 2018-2019 Proxy Season

The statistics from the 2018-2019 proxy season indicate that the Staff’s analysis of the application of Rule 14a-8(i)(7) to shareholder proposals continues to develop. In its responses, the Staff clarified the “micromanagement” analysis,

described the “ordinary business” analysis in situations where the “ordinary business” nature of the proposal’s subject matter was “self-evident,” and addressed the value of a discussion of a board analysis. Between October 1, 2018, and July 31, 2019, the Staff responded to 89 no-action requests seeking the Staff’s concurrence with the exclusion of a shareholder proposal, at least in part, in reliance on Rule 14a-8(i)(7). The Staff responded to those 89 requests as follows:

- in response to 32 no-action requests in which a company stated its intention to exclude a proposal in reliance on Rule 14a-8(i)(7), the Staff did not concur in a company’s reliance on the Rule 14a-8(i)(7) basis for exclusion specifically;
- in response to 17 no-action requests in which a company stated its intention to exclude a proposal in reliance on Rule 14a-8(i)(7) and at least one other basis, the Staff concurred in a company’s intention to exclude the proposal on a basis for exclusion other than Rule 14a-8(i)(7) and did not address the company’s Rule 14a-8(i)(7) basis for exclusion; and
- in response to 40 no-action requests, the Staff concurred specifically in a company’s stated intention to exclude a proposal in reliance on the Rule 14a-8(i)(7) basis for exclusion.

Staff Responses that Granted a Request Relying on Rule 14a-8(i)(7)

In the 40 no-action responses in which the Staff concurred in the exclusion of a shareholder proposal in reliance on Rule 14a-8(i)(7), the Staff concurred in a “micromanagement” analysis in 21 no-action responses and concurred in an “ordinary business matters” analysis in 19 no-action responses.

Micromanagement grants of no-action requests – In concurring in “micromanagement” analyses, the Staff frequently stated that a proposal was micromanaging by “seeking to impose specific methods for implementing complex policies in

place of the ongoing judgments of management as overseen by its board of directors.” For example, the Staff concurred in the exclusion of proposals seeking to:

- impose specific targets on greenhouse gas emissions;
- require specific website statements;
- review or implement specific senior executive compensation decisions;
- require shareholder approval of all stock repurchases; and
- prohibit specific compensation practices.

In considering whether a proposal was “seeking to impose specific methods for implementing complex policies,” the Staff generally considered the prohibition of a practice in all situations, the “phasing out” of a practice, or the adoption of a specific practice in all situations to be excludable. For example, *Bristol-Myers Squibb Company* (March 1, 2019) addressed a proposal asking the board to “implement a policy that it will not fund, conduct or commission use of the ‘Forced Swim Test.’” In its response, the Staff stated:

There appears to be some basis for your view that the Company may exclude the Proposal under [R]ule 14a-8(i)(7), as relating to the Company’s ordinary business operations. In our view, the Proposal micromanages the Company by seeking to impose specific methods for implementing complex policies.

Walgreens Boots Alliance, Inc. (November 20, 2018) provides an example of the Staff’s views regarding a proposal that unduly supplanted management’s discretion concerning a particular matter. The proposal requested that “any open market share repurchase programs or stock buybacks adopted by the board after approval of the Proposal shall not become effective until such new programs are approved by shareholders.” In its response, the Staff stated:

There appears to be some basis for your view that the Company may exclude the Proposal under [R]ule 14a-8(i)(7), as relating to the Company’s ordinary business operations. In our view, the Proposal micromanages the Company. In particular, we note that the Proposal would make each new share repurchase program and each and every stock buyback dependent on shareholder approval.

Drawing the “micromanagement” line – Three Staff no-action responses help demonstrate whether a proposal seeks to “impose specific methods.” The proposals in each of these no-action requests addressed climate change issues and, yet, the Staff reached different positions, showing that the “micromanagement” analysis:

- should not be based on the subject matter of the proposal or the complexity of the issue addressed by the proposal; and
- should be based on the specific request set forth in the proposal and whether that request seeks to unduly limit management’s discretion with regard to a particular issue (put differently, would implementation of the proposal, as a practical matter, supplant management’s discretion with regard to a particular issue).

Exxon Mobil Corporation (April 2, 2019) addressed a proposal requesting “that the board, in annual reporting from 2020, include disclosure of short-, medium- and long-term greenhouse gas targets aligned with the greenhouse gas reduction goals established by the Paris Climate Agreement to keep the increase in global average temperature to well below 2 degrees Celsius and to pursue efforts to limit the increase to 1.5 degrees Celsius.” The Staff concurred in the company’s view that it could exclude the proposal in reliance on Rule 14a-8(i)(7), stating:

In our view, the Proposal would require the Company to adopt targets aligned with the goals established by the Paris Climate

Agreement. By imposing this requirement, the Proposal would micromanage the Company by seeking to impose specific methods for implementing complex policies in place of the ongoing judgments of management as overseen by its board of directors.

Ross Stores, Inc. (March 29, 2019) addressed a proposal requesting “that the board prepare a climate change report to shareholders by November 1, 2019 that describes how the Company is aligning its long-term business strategy with the projected long-term constraints posed by climate change, and describing medium- and long-term goals for GHG reduction.” Similarly, *Anadarko Petroleum Corporation* (March 4, 2019) addressed a proposal requesting that the company “issue a report describing if, and how, it plans to reduce its total contribution to climate change and align its operations and investments with the Paris Agreement’s goal of maintaining global temperatures well below 2 degrees Celsius.” In each case, the Staff did not concur in the company’s view that it could exclude the proposal in reliance on Rule 14a-8(i)(7), stating:

In our view, the Proposal transcends ordinary business matters and does not seek to micromanage the Company to such a degree that exclusion of the Proposal would be appropriate.

“Ordinary Business” grants of no-action requests – A recurring issue since the Staff’s publication of SLB 14I has related to the Staff’s statements that a discussion regarding a board analysis of a proposal’s significance to a company is not required in a no-action request but may be useful in certain circumstances. The Staff’s no-action responses indicate that, where it is “self-evident” that proposal topic relates to a company’s ordinary business matters, inclusion of a discussion regarding the board’s analysis of the proposal’s significance to a company may not be necessary in a no-action request. The Commission addressed a

number of these topics in Release No. 34-40018, stating: “Certain tasks 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. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers.” In this regard, the Staff concurred in the exclusion of proposals in response to the following no-action requests that *did not* include a separate discussion regarding a board analysis of the proposal’s significance to the company:

- A proposal requested that the company “offer its shareholders the same discounts on its products and services that are available to its employees” – the Staff concurred in the exclusion of the proposal in reliance on Rule 14a-8(i)(7), stating that the proposal “relates to the Company’s discount pricing policies.” (*Verizon Communications Inc.*, January 29, 2019.)
- A proposal requested that the board “conduct a face-to-face annual meeting with common shareowners starting in 2020, changing all relevant Company governance documents to require such a face-to-face meeting to replace the current ‘remote’ or ‘virtual’ meeting” – the Staff concurred in the exclusion of the proposal in reliance on Rule 14a-8(i)(7), stating that the proposal “relates to the determination of whether to hold annual meetings in person.” (*Frontier Communications Corporation*, February 19, 2019.)
- A proposal requested that the board “commission an independent study, including recommendations to shareholders regarding options for the board to amend the Company’s governance documents to enhance fiduciary oversight of matters relating to customer service and satisfaction” – the Staff concurred in the exclusion of the proposal in reliance on

Rule 14a-8(i)(7), stating that the proposal “relates to decisions concerning the Company’s customer relations.” (*Wells Fargo & Company*, February 27, 2019.)

- A proposal requested that the board “take the steps necessary to allow the Company’s Stakeholder Advisory Council to appoint an employee representative to the Stakeholder Advisory Council” – the Staff concurred in the exclusion of the proposal in reliance on Rule 14a-8(i)(7), stating that the proposal “concerns employee relations.” (*Wells Fargo & Company*, February 27, 2019.)
- A proposal requested that the board “prepare a report to evaluate the risk of discrimination that may result from the Company’s policies and practices for hourly workers taking absences from work for personal or family illness” – the Staff concurred in the exclusion of the proposal in reliance on Rule 14a-8(i)(7), stating that the proposal “relates generally to the Company’s management of its workforce, and does not focus on an issue that transcends ordinary business matters.” (*Walmart Inc.*, April 8, 2019.)

Drawing the “ordinary business” line regarding “aspects of senior executive and/or director compensation that are also available or applicable to the general workforce” – With regard to proposals that address aspects of senior executive and/or director compensation that are also available or applicable to the general workforce, the Staff stated in SLB 14J:

The Division believes that a proposal that addresses senior executive and/or director compensation may be excludable under Rule 14a-8(i)(7) if 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. For

example, a proposal that seeks to limit when senior executive officers will receive golden parachutes may be excludable under Rule 14a-8(i)(7) if the company’s golden parachute provision broadly applies to a significant portion of its general workforce. This is because the availability of certain forms of compensation to senior executives and/or directors that are also broadly available or applicable to the general workforce does not generally raise significant compensation issues that transcend ordinary business matters. In this regard, it is difficult to conclude that a proposal does not relate to a company’s ordinary business when it addresses aspects of compensation that are broadly available or applicable to a company’s general workforce, even when the proposal is framed in terms of the senior executives and/or directors.

New York Community Bancorp, Inc. (April 11, 2019) is instructive regarding the application of the Staff’s discussion in SLB 14J regarding the ability of companies to rely on Rule 14a-8(i)(7) to exclude “proposals where the focus is on aspects of compensation that are available or apply to senior executive officers, directors, and the general workforce.” *New York Community Bancorp, Inc.* concerned a proposal recommending “that the board adopt a policy that no equity compensation grant may be made to a senior executive at a time when the Company’s common stock has a market price that is lower than the grant date market price (taking into account stock dividends and stock splits) of any prior equity compensation grants to such individual.”

In its no-action request, the company expressed its view that the proposal could be excluded from its proxy materials in reliance on Rule 14a-8(i)(3), Rule 14a-8(i)(7), and Rule 14a-8(i)(10). With regard to exclusion in reliance on Rule 14a-8(i)(7), the company cited the Staff’s discussion in SLB 14J and expressed its view that:

The Proposal seeks to impose limits on the Company's Board of Directors' ability to make equity compensation grants to the Company's senior executives[, under certain circumstances, based on the market price of the Company's common stock.] The Company believes that the Proposal may be properly excluded under Rule 14a-8(i)(7) because the aspect of compensation targeted by the Proposal – namely, the granting of equity awards – relates to general employee compensation and benefits, precisely as contemplated by SLB 14J.

In a reply to the company's no-action request, the proponent disagreed with the company's analysis of the Rule 14a-8(i)(7) exclusion, stating:

[The company] likens the Proposal to one that involves a golden parachute provision broadly available to a significant portion of the general workforce, but such a "golden parachute provision" is not comparable to the Proposal. The Proposal suggests that the Board of Directors adopt a policy regarding when senior executive compensation should and should not be issued in the form of dilutive equity grants. This is the quintessential type of senior executive compensation proposal that implicates important policy concerns for shareholders. By contrast, golden parachutes are provisions generally applicable to the workforce, which are triggered by a single uniform event for senior executives and the workforce alike.

In its no-action response, the Staff did not concur in the company's views regarding Rule 14a-8(i)(3) and Rule 14a-8(i)(10). The Staff also did not concur in the company's view regarding Rule 14a-8(i)(7), stating:

We are unable to concur in your view that the Company may exclude the Proposal under [R]ule 14a-8(i)(7). In our view, the

Proposal, which focuses on policies for granting equity compensation awards to senior executives, transcends ordinary business matters. Although we note your representation that equity compensation awards are broadly available to the Company's general workforce, you have not demonstrated that the senior executives' eligibility to receive equity compensation awards does not implicate significant compensation matters. See Section C.3.b of Staff Legal Bulletin No. 14J (Oct. 23, 2018).

Staff Responses that Addressed Requests Including a Discussion Regarding a Board Analysis of the Rule 14a-8(i)(5) "Significantly Related" Issue or the Rule 14a-8(i)(7) "Transcends Ordinary Business" Issue

The Staff's discussion in SLB 14J made clear that a board analysis of a proposal's significance should not address the significance of the proposal topic in general but, rather, such a board analysis should address the proposal's significance to the company specifically. Based on SLB 14I, SLB 14J, and the Staff's no-action responses, a company should consider the following when determining whether and how a no-action request should present a discussion regarding the board's analysis:

- if the "ordinary business matter" is not "self-evident," a discussion of the board's analysis of the significance of the issue to the company likely will be necessary;
- any discussion regarding the board's analysis should address both:
 - the significance to the company of the issue presented; and
 - the significance to the company of the difference between the action(s) sought by the proposal and the company's current actions regarding the issue raised by the proposal; and
- if there has been a recent shareholder vote on a proposal relating to a similar issue:

- the discussion should address the recent vote and the actions the company has taken since that vote; and
- any discussion regarding the recent vote will not be persuasive if it emphasizes only that the vote was: (1) insufficient to adopt the proposal, or (2) influenced by proxy adviser recommendations.

Three Staff no-action responses should inform a company's determination of whether and how to include a discussion regarding a board analysis in a no-action request:

- *Eli Lilly and Company* (February 28, 2019) – The Proposal requested “that the Company prepare a report on lobbying contributions and expenditures that contains information specified in the Proposal.” The Staff stated its view that it was “unable to concur in your view that the Company may exclude the Proposal under [R]ule 14a-8(i)(5), because we are unable to conclude that the Proposal is not otherwise significantly related to the Company's business.” The Staff reached this determination despite the company's discussion regarding the board's analysis of the proposal's significance to the company that addressed: (1) the purpose of the proposal; (2) the financial insignificance of the company's trade association and lobbying expenditures; (3) the insignificance of the gap between the company's disclosures and those sought in the proposal, in which it stated that the “only ‘gap’ to be addressed by the Proposal relates to the amounts given to trade associations and other tax-exempt organizations that engage in lobbying”; (4) the absence of significant social or ethical issues raised by the company's membership in trade associations or lobbying activities; (5) the lack of shareholder interest in the company's lobbying activities or trade association memberships; and (6) the lack of shareholder support for the proposal, in which it stated that

the proposal had received 20.1% support in 2018 and 24.8% support in 2017.

- *Verizon Communications Inc.* (February 14, 2019) – The proposal requested that the board “adopt a policy that prohibits the practice of paying above-market earnings on the non-tax qualified retirement saving or deferred income account balances of senior executive officers.” The Staff did not concur in the company's view that it could exclude the proposal, stating:

We are unable to conclude that the Company has met its burden of demonstrating that it may exclude the Proposal under [R]ule 14a-8(i)(7). Although the Proposal appears to relate to a form of compensation that is available to approximately 3,200 current and former employees, pertains only to one of twenty-eight investment options available to participants and potentially represents a fraction of total compensation, we note the absence of the board's analysis addressing whether the Proposal implicates a significant compensation matter to the Company's shareholders, particularly in light of approximately 28% of the Company's shareholders supporting the same proposal at the 2018 annual meeting.

- *Reliance Steel & Aluminum Co.* (April 2, 2019) – The proposal requested that the company “provide a report on political contributions and expenditures that contains information specified in the Proposal.” The Staff concurred in the Company's view that it could exclude the proposal in reliance on Rule 14a-8(i)(5), stating:

In reaching this position, we note your representations that: the Proposal relates to operations that account for less than 5 percent of the Company's total assets, net earnings and gross sales for its most recent fiscal year; the Company does not make direct

contributions or other expenditures to any candidate for public office or to influence the general public with respect to any election or referendum nor does the Company make indirect contributions for the purpose of supporting a candidate or referendum or influencing legislation or public affairs;

and the only expenditure that could be considered an indirect political contribution or expenditure is the Company's paid dues to a single trade association that is not permitted to make contributions to political candidates or political action committees.

RULE 14a-8(i) (7) – TAKEAWAYS FROM THE 2018-2019 PROXY SEASON

Our Rule 14a-8(i) (7) takeaways from the Staff's 2018-2019 responses to no-action requests:

- The “micromanagement” analysis in the exclusion may be relied on regardless of a proposal’s subject matter, but only where the proposal involves intricate detail, seeks to impose specific time-frames or methods for implementing complex policies, or seeks to impose a specific outcome on a company. In this regard, companies should consider the following:
 - proposals seeking to impose specific outcomes or specific timeframes in all situations may be viewed as unduly supplanting management’s discretion in addressing an issue;
 - proposals seeking to prohibit an activity, phase-out an activity, or require shareholder approval of an activity in all cases may be viewed as seeking to impose a specific method for implementing a complex policy; and
 - proposals seeking a discussion of “if” or “how” management intends to address an issue on a day-to-day basis may be viewed as not unduly supplanting management’s discretion regarding that issue.
- When applying the “ordinary business” analysis in the exclusion to a proposal that addresses aspects of senior executive and/or director compensation that also are available or applicable to the general workforce, a company will need to demonstrate that:
 - the aspect of compensation addressed by the proposal is broadly available to the company’s general workforce; and
 - the senior executives’ or directors’ eligibility to receive that compensation does not “implicate significant compensation matters.”
- The “ordinary business” analysis in the exclusion generally may be relied on without a discussion regarding the board’s analysis of the proposal’s significance to the company where it is “self-evident” that the proposal relates to a matter that the Commission and the Staff has long considered to be “ordinary business.”
- A no-action request’s discussion regarding a board analysis of a proposal’s significance to the company generally should include:
 - a discussion of the specific proposal and its application to the company’s specific operations, rather than a broad discussion of the general significance of the issue presented;
 - a detailed discussion of any specific differences between the action requested by the proposal and the company’s current policies, practices, procedures, or disclosures; and
 - a discussion of (1) any recent vote regarding a proposal seeking action regarding the topic of the current proposal, including the percentage vote received in favor of the recent proposal (we doubt that a discussion that the prior vote was not sufficient to pass the proposal or that the prior vote was the result of a recommendation from one or more proxy advisers generally would be sufficient); and (2) the company’s response to the recent shareholder vote.

RULE 14a-8(i)(10) – IS IT “SUBSTANTIALLY” MORE USEFUL?

Rule 14a-8(i)(10) provides that a company may exclude a proposal “[i]f the company has already substantially implemented the proposal.” The ongoing challenge in applying this exclusion has been the analysis of the word “substantially” as, despite Commission statements that the analysis should be based on whether the company’s “policies, practices and procedures compared favorably” to the action sought by a proposal, Rule 14a-8 practitioners have expressed concern that the analysis appeared to read the word “substantially” to be the equivalent of “completely.” Based on the Staff’s responses to no-action requests during the 2018-2019 proxy season, those practitioner concerns appear to be outdated.

Staff Responses to Rule 14a-8(i)(10) No-Action Requests During the 2018-2019 Proxy Season

Between October 1, 2018, and July 31, 2019, the Staff responded to 67 no-action requests seeking the Staff’s concurrence with the exclusion of a shareholder proposal, at least in part, in reliance on Rule 14a-8(i)(10). The Staff responded to those 67 requests as follows:

- in response to 21 no-action requests in which a company stated its intention to exclude a proposal in reliance on Rule 14a-8(i)(10), the Staff did not concur in a company’s reliance on the Rule 14a-8(i)(10) basis for exclusion specifically;
- in response to 5 no-action requests in which a company stated its intention to exclude a proposal in reliance on Rule 14a-8(i)(10) and at least one other basis, the Staff concurred in a company’s intention to exclude the proposal on a basis for exclusion other than Rule 14a-8(i)(10) and did not address the company’s Rule 14a-8(i)(10) basis for exclusion; and

- in response to 41 no-action requests, the Staff concurred specifically in a company’s stated intention to exclude a proposal in reliance on the Rule 14a-8(i)(10) basis for .

Staff Responses that Granted a Request Relying on Rule 14a-8(i)(10)

In the 41 no-action responses in which the Staff concurred in the exclusion of a shareholder proposal in reliance on Rule 14a-8(i)(10), the Staff concurred that a company had “substantially implemented” a proposal based on the following:

- in 25 no-action responses – depending on whether the proposal sought one or more amendments to (1) a company’s policies, practices, or procedures, or (2) a company’s public disclosures, the Staff was of the view that the company had “substantially implemented” the proposal where the company’s policies, practices, procedures, or public disclosures “compared favorably” to the action sought by the proposal; and
- in 16 no-action responses – where a proposal sought a specific governance action (*e.g.*, bylaw amendments relating to a specific issue), the Staff was of the view that the company had “substantially implemented” the proposal where the company showed that: (1) its board had approved the necessary amendments for submission to a vote of company shareholders; and (2) the company intended to present those amendments to a vote of shareholders at the company’s next annual meeting of shareholders.

Staff Response Addressing the Burden of Proof in a Request Relying on Rule 14a-8(i)(10)

NIKE, Inc. (June 25, 2019), which originally denied a no-action request that the Staff then granted on reconsideration (July 16, 2019), provides guidance regarding the Staff’s view of a company’s burden of proof when relying on Rule 14a-8(i)(10). In *NIKE, Inc.*, the proposal requested that the board “adopt a

policy to disclose a description of the specific minimum qualifications that the nominating committee believes must be met by a nominee to be on the board of directors and each nominee's skills, ideological perspectives and experience presented in a chart or matrix form." In its no-action request, the company set forth its view that it had substantially implemented the proposal. The Staff's response stated:

We are unable to conclude that the Company has met its burden of demonstrating that it may exclude the Proposal under [R]ule 14a-8(i)(10). We note that the Company has not provided us with a copy of the board's recently adopted director skills matrix. As noted in Staff Legal Bulletin 14H, footnote 15, "the staff may not be able to agree that the company has met its burden of demonstrating that the proposal is excludable if [supporting] materials are not included with the company's no-action request." Such material would enable the [S]taff to better

evaluate whether the subject proposal has been substantially implemented for purposes of [R]ule 14a-8(i)(10).

In its request that the Staff reconsider its no-action response, the company included copies of the relevant materials that, in its view, "substantially implemented" the proposal. The Staff granted the company's request for reconsideration, stating:

The Division grants the reconsideration request, as there now appears to be some basis for your view that the Company may exclude the Proposal under [R]ule 14a-8(i)(10). Based on the information you have presented, including a copy of the Company's recently adopted director skills matrix, it appears that the Company's public disclosures compare favorably with the guidelines of the Proposal and that the Company has, therefore, substantially implemented the Proposal.

RULE 14a-8(i)(10) – TAKEAWAYS FROM THE 2018-2019 PROXY SEASON

Our Rule 14a-8(i)(10) takeaways from the Staff's 2018-2019 responses to no-action requests:

- Exclusion of a proposal may be appropriate where:
 - the board has approved the necessary amendments for submission to a vote of company shareholders; and
 - the company intends to present those amendments to a vote of shareholders at the company's next annual meeting of shareholders.
- A no-action request should address the following in its discussion of the manner in which the company has "substantially implemented" the proposal:
 - the company's current policies, practices, procedures, or disclosures; and
 - the manner in which those current policies, practices, procedures, or disclosures compare to the actions sought by the proposal.
- Where a proposal seeks a governance change or expanded public disclosure regarding a matter, a no-action request should include a copy of the company's policies, practices, procedures, or disclosures that "compare favorably" to the specific actions sought by the proposal.

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Because of the generality of this guide, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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