

A First – SEC Staff Decides in Favor of a Company Using SLB 14I

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A [company will be permitted](#) to exclude a shareholder proposal seeking a report assessing the environmental impacts of continuing to use “K-Cup Pods brand packaging.” The company argued that the proposal is not economically relevant under Rule 14a-8(i)(5) and included a discussion of considerations by its board of directors, pursuant to the recent Staff Legal Bulletin 14I (SLB 14I).

In light of SLB 14I, which stated that the board of directors of a company is best positioned to consider whether a proposal is “otherwise significantly related to the company’s business,” the nominating and corporate governance committee considered the proposal’s significance. This included both the economic contribution of licensing fees and royalty income from the sale of K-Cup pods as well as whether the proposal is otherwise significantly related to the company’s business. The committee then reported on its findings and analysis, along with its recommendation, for the entire board to consider.

In its no-action letter, the company indicated that the committee considered the significance to the company of the gross sales and net earnings generated from sale of the pods along with the significance of the assets attributable to its licensing arrangements. In terms of whether the proposal is otherwise significantly related to the company’s business, the company determined that the proposal does not address the company’s primary business operations as a franchisor of quick service restaurants, but instead focuses on “packaging used in certain products manufactured by third parties” under licensing agreements.

The company noted that it is the licensing partner that is best positioned to understand the impact of material choice on the environment, and that the issue of pod packaging has not been raised by other shareholders. A similar proposal was in the 2017 proxy materials and received less than 14% support.

The staff stated in their decision that the company may exclude the proposal “based on our review of your submission, including the description of how your board of directors has analyzed this matter.” In addition to representing less than 5% of the company’s assets, net earnings and gross sales, the staff indicated 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 [c]ompany’s business.” There did not seem to be any additional correspondence from the proponent of the proposal in response to the company’s no-action letter.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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