

What We Know So Far about the New SLB on Shareholder Proposals

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At a PLI conference, the Division of Corporation Finance Director Bill Hinman spoke about the new Staff Legal Bulletin (SLB) on shareholder proposals, which we [previously discussed here](#). Next Tuesday, I will talk to Corp Fin's Matt McNair about how the new SLB should be applied in practice on a [webcast on TheCorporateCounsel.net](#).

Here's what we know beyond the text of the SLB, including our analysis of the implications of Hinman's remarks:

- The board analysis set forth in the SLB is not required for a company to make an argument on the basis of ordinary business or economic relevance. The Staff does not expect the analysis to be included in every no-action letter making 14a-8(i)(7) arguments, especially where there is already a “well worn” path. This would seem to imply that to the extent that there is a long line of precedents supporting an ordinary business argument, those should continue to be persuasive to permit proposals on the same subject matters to be excluded. The new SLB then may only come into play on close calls, particularly if there is already a presumption that the proposal transcends ordinary business. Including a board analysis in those cases may serve to help rebut that presumption.
- The SLB represents a recognition that determining whether a proposal is significant is a difficult judgment for the Staff, and Hinman said that the process would be improved if there is a “more developed board record” that is explained in the letter. We understand that the board's analysis may well be limited to a company's specific facts and circumstances. The key finding pertains to the proposal's significance to the company, and unlike the Rule 14a-8(i)(7) analysis that the Staff undertakes, a determination of how the proposal topic weighs generally on society as a whole may be irrelevant.
- Hinman emphasized that the reason the Staff considers a board to be well positioned to take on this analysis is because of the board's fiduciary duties but also an expectation that the board has engaged with shareholders and is aware of, or has a sense of, the matters that are of interest to shareholders. The issues should be analyzed with the company's own shareholder base in mind, and the Staff believes that this will potentially foster more engagement with shareholders. This suggests to us that, for example, a company could argue that a proposal that received fairly low support the prior year, although above the thresholds for resubmission, is clearly an indication that most shareholders do not support it.
- The Staff expects most of the work to be done by the governance committee, who can develop a record and give that to the board. It appears then that although the governance committee can and is expected to handle the bulk of the workload, the board itself would need to be involved eventually. The Staff will look at the board's thoughts as described in the letter and “weigh that into the analysis.” This suggests that the Staff will consider the board's determination, but it would not be dispositive, as there is some speculation regarding how much deference the Staff would give the board's determination.
- In terms of what the analysis may entail, Hinman noted that the Staff does not expect to letter to follow any particular format, nor does the Staff need to see the board book. The Staff anticipates that the letter will explain that the board has considered the issues and may describe, although it is not required to, that they have met with the proponent. Ultimately it is up to the company to decide how much to include that it believes will be compelling to the Staff.
- The requirements under the proposal by proxy authorizations were elements that the Staff expects would “be useful for someone to give to the SEC.” Hinman emphasized that there is an opportunity to cure the defect.

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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