**Chris Netram**

*Vice President,*
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November 30, 2021

The Honorable Gary Gensler
Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Ms. Renee Jones
Director, Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: *Staff Legal Bulletin No. 14L*

Dear Chairman Gensler and Director Jones:

On behalf of the National Association of Manufacturers ("NAM"), I write to express manufacturers' concerns with the recent actions[1] taken by the Division of Corporation Finance ("Division") to rescind the existing Staff Legal Bulletins ("SLBs") guiding the Division's review of no-action requests under Exchange Act Rule 14a-8 (SLBs 14I,[2] 14J,[3] and 14K[4]) and to institute the new SLB 14L—which could undermine individual businesses' efforts to increase value for their shareholders.

The sustained success of manufacturers in the United States and the investment returns valued by millions of hardworking Americans depend on a vibrant public market that supports capital formation and long-term growth. Manufacturers know that a central factor to their success as publicly traded companies is a proxy process that enables smart business growth and strong investor returns. A well-calibrated proxy process allows company management to engage in a productive dialogue about key aspects of the business with shareholders, who are of course the ultimate owners of any publicly traded corporation.

The NAM has strongly supported the work by the Securities and Exchange Commission ("SEC" or "Commission") over the years to protect the integrity of the proxy ballot and preserve the right of investors to engage with management on important corporate governance issues while limiting the impact of activists with unrelated agendas. Manufacturers advocated for[5] the SEC's 2020 rule on the procedural requirements and resubmission thresholds for shareholder proposals,[6] and we are

[1] Staff Legal Bulletin No. 14L (3 November 2021). *Available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals.

[2] Staff Legal Bulletin No. 14I (1 November 2017). *Available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14i-shareholder-proposals.

[3] Staff Legal Bulletin No. 14J (23 October 2018). *Available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals.

[4] Staff Legal Bulletin No. 14K (16 October 2019). *Available at* https://www.sec.gov/corpfin/staff-legal-bulletin-14k-shareholder-proposals.

[5] NAM Comments on File No. S7-23-19 (3 February 2020). *Available at* https://www.sec.gov/comments/s7-23-19/s72319-6735509-207647.pdf.

[6] *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8*, 85 Fed. Reg. 214 (4 November 2020). Release No. 34-89964, *available at* https://www.govinfo.gov/content/pkg/FR-2020-11-04/pdf/2020-21580.pdf.

disappointed that the Commission is already considering revisions to these important reforms.[7] The rule's targeted amendments, including changes to the ownership requirements for shareholders to submit a proposal and the thresholds governing the resubmission of failed proposals, are scheduled to take effect on January 1, 2022. We respectfully encourage the SEC to maintain last year's rule, which is designed to center the proxy conversation on the needs of long-term shareholders and ensure that issuers and investors can focus their attention on the vital business issues that drive long-term value creation.

In addition to the submission and resubmission thresholds that were the focus of the 2020 rule, the standards governing the inclusion or exclusion of shareholder proposals on the annual proxy ballot, including the Commission's 1998 rule to amend Rule 14a-8[8] and the Division's Staff Legal Bulletins, are critical to the proxy process. These standards provide certainty to shareholders as to the criteria that must be met when submitting a proposal, as well as clear guidelines for companies seeking to exclude proposals that are not relevant to their businesses. These standards have become all the more important in recent years, as activists have often attempted to hijack the proxy process to pursue their own narrow goals rather than the long-term best interests of a company's broad shareholder base. The NAM is concerned that SLB 14L will accelerate the trend of politically motivated shareholder proposals and hamstring companies seeking to focus the proxy ballot on issues critical to business growth and investor returns.

The NAM respectfully encourages the Division to reconsider SLB 14L's significant changes to the proxy process and to incorporate the following feedback if it implements the Bulletin's new standards during the coming proxy season.

## I. SLB 14L will put a thumb on the scale in favor of social policy proposals by reversing the Division's long-standing case-by-case analytical approach to no-action requests.

The SEC's rules governing the shareholder proposal process are designed to give companies, investors, and Division staff content-neutral guardrails that allow all parties to judge the relevance and appropriateness of *specific* shareholder proposals submitted to *specific* company proxy ballots. Yet the new SLB 14L repeatedly emphasizes the *general* non-excludability, in the Division's view, of most or all shareholder proposals related to social policy issues like climate change and human capital management. While certain climate or human capital shareholder proposals submitted to certain company proxy ballots may well be appropriate and relevant, the NAM is concerned that SLB 14L appears to pre-judge these submissions and preemptively deem them all to be non-excludable, regardless of any company-specific facts or considerations. Indeed, SLB 14L fails to espouse a limiting principle that might mark a social policy proposal for exclusion, instead preferring to lean on the assumed "significance" of the proposal in question—an undefined term that provides little-to-no guidance to companies but that they should assume virtually any social policy proposal will be approved by the Division staff when businesses seek no-action relief.

Rule 14a-8(i)(7) is predicated on a "case-by-case analytical approach" to determine whether a social policy proposal interferes with a company's "ordinary business operations."[9] However, SLB 14L would put a thumb on the scale in favor of shareholder proposals related to environmental, social,

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[7] *See Securities and Exchange Commission Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions*. Office of Information and Regulatory Affairs (11 June 2021). RIN 3235-AM87, *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AM87.

[8] *Amendments To Rules On Shareholder Proposals*, 63 Fed. Reg. 102 (28 May 1998). Release No. 34-40018, *available at* https://www.govinfo.gov/content/pkg/FR-1998-05-28/pdf/98-14121.pdf.

[9] 1998 Release, *supra* note 6, at 29108.

and governance ("ESG") topics, irrespective of their relevance to any individual company. The Division's departure from a case-by-case approach, under which ESG proposals have been treated like any other shareholder proposal (which is to say, evaluated on their individual merits pursuant to the excludability standards in Rule 14a-8(i)), will have the effect of encouraging activists to further abuse the shareholder proposal process and discouraging companies from seeking no-action relief for ESG proposals. Though seemingly the intended impact of the new SLB, this thumb-on-the-scale approach is no less troubling for the marketplace and the SEC's oversight thereof.

## II. SLB 14L eschews company-specific analysis in favor of an evaluation of a proposal's "social policy significance."

SLB 14L is explicit in expressing the Division's view that SLBs 14I, 14J, and 14K placed an "undue emphasis" on "evaluating the significance of a policy issue to a particular company."[10] As such, SLB 14L states that the Division will "no longer focus on determining the nexus between a policy issue and the company" that has received a social policy-driven shareholder proposal.[11] While the Division has made clear that it is "no longer taking a company-specific approach" to evaluating shareholder proposals,[12] it remains the case that generating long-term value for shareholders in *a specific company* is the sole mission for boards of directors and company management.

As noted, politically motived shareholder proposals have become increasingly popular in recent years. The relatively low thresholds for submitting and resubmitting proposals to the proxy ballot have incentivized activists to take *de minimis* positions in a wide range of issuers so as to qualify their favored proposals on dozens of company proxy ballots, irrespective of their relationship to company performance or shareholder value creation. Nevertheless, company leadership owes a duty to investors to make decisions that improve the performance of the business and of shareholders' investments therein. The proxy ballot can and should provide a platform for issuers and investors to consider critical topics related to this duty. SLB 14L would instead turn the focus of businesses, investors, and the Division away from company-specific impacts and toward a new social policy analysis divorced from whether a given proposal would actually benefit shareholders.

While Rule 14a-8(i)(7) does allow for the inclusion of shareholder proposals that raise "significant social policy issues,"[13] the significance of a given policy issue is inextricably tied to "the connection between the significant policy issue and the company's business operations."[14] To de-link these concepts in favor of an approach that elevates social policy considerations above impacts on a business is inconsistent with the fiduciary duty that company leadership owes to shareholders. The NAM respectfully encourages the Division to reconsider its decision to reject company-specific factors from its analysis of a proposal's excludability, and manufacturers are hopeful that policy impacts on businesses and their investors will continue to be treated as "significant" throughout the no-action process.

## III. SLB 14L's "social policy significance" test is undefined, unclear, and unlikely to "yield consistent, predictable results."

In replacing the company-specific analysis at the heart of SLBs 14I, 14J, and 14K, SLB 14L establishes a new focus on the "social policy significance" of a given shareholder proposal. Under

[10] *See* SLB 14L, *supra* note 1.

[11] *Ibid.*

[12] *Ibid.*

[13] *See, e.g.,* 1998 Release, *supra* note 6, at 29108.

[14] *See* SLB 14I, *supra* note 2.

this standard, proposals that raise issues with "broad societal impact" will be deemed non-excludable by the Division.[15] SLB 14L alleges that the previous company-specific approach "dr[ew] the staff into factual considerations" and "did not yield consistent, predictable results."[16] Yet no details are provided as to how the staff will determine which social policy issues are sufficiently significant to require inclusion on the proxy ballot, and neither "social policy significance" nor "broad societal impact" are defined by the new SLB.

SLB 14L makes clear that facts related to an issue's impact on a specific company are *not* considered relevant to any analysis of social policy significance, and the Bulletin's repeated references to human capital management and climate change imply that those issues are *de facto* significant—but these details do not amount to actionable guidance for companies making important decisions about whether to include or exclude a shareholder proposal (nor to shareholders seeking to submit such a proposal). The Division alleges that a company-specific approach was not conducive to "consistent, predictable results," but evaluating the broad societal significance of a shareholder proposal—divorced from any analysis of its impact on the company whose shareholders will be asked to vote on said proposal—seems far less likely to result in consistent or predictable answers for businesses or investors.

Questions about the new no-action process abound. Will the Division evaluate the "significance" of a given policy in the United States or worldwide? Will its "societal impact" be measured by the potential effects on businesses, workers, customers, or the economy writ large? The now-rescinded SLB 14J provided an itemized list of factors to determine significance to an individual company;[17] can these tests be applied to the whole of society under SLB 14L? Absent any limiting principle from the Division or any grounding in a company's performance and its shareholders' long-term value, it is difficult to predict whether and how a given shareholder proposal can meet this new standard. The NAM is deeply concerned that, without any useful guidance from the Division, companies and investors will be forced to venture into an unproductive debate with Division staff as to the social significance of each shareholder proposal, or else simply allow every social policy proposal onto the proxy ballot rather than fighting an uphill no-action battle.

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The NAM believes strongly in the importance of a proxy process that allows concerned shareholders to bring issues before company management and their fellow shareholders that are important to the performance of a business. However, the NAM is concerned that SLB 14L will move the conversation around individual, company-specific shareholder proposals into the murky world of broad societal "impact" and "significance," making the process of including or excluding shareholder proposal more confusing, less reliable, and less fact-driven—ultimately incentivizing shareholder proposals wholly unrelated to long-term shareholder value creation.

Further, we are concerned that SLB 14L highlights two specific topics for shareholder proposals (climate change and human capital management), all but confirming that company no-action requests to exclude shareholder proposals related, however tangentially, to these social policy issues are unlikely ever to be granted. Such a change would transform the Rule 14a-8 no-action process from one that treats all proposals equally, regardless of subject matter, into an avenue for activists to apply pressure to companies on the political issues of the day.

The NAM respectfully encourages the Division to reconsider SLB 14L's significant changes to the standards for the inclusion and exclusion of shareholder proposals. Further, as the staff reviews no-

[15] *See* SLB 14L, *supra* note 1.

[16] *Ibid.*

[17] *See* SLB 14J, *supra* note 3.

action requests related to shareholder proposals over the coming months using the new standards espoused in SLB 14L, the NAM is hopeful that the Division will protect investors by remaining focused on proposals' effects on businesses and their shareholders.

Sincerely,

Chris Netram
Vice President, Tax and Domestic Economic Policy