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"Shareholder Proposals: What Now"

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The Division of Corporation Finance recently announced that it will change the way it processes no-action requests for shareholder proposals - and also issued a new Staff Legal Bulletin addressing the "ordinary business" exclusion. And the SEC has proposed major changes to the shareholder proposal and proxy advisor frameworks. These developments have all sorts of implications for the Rule 14a-8 area. Join these experts:

- **David Fredrickson**, Chief Counsel, SEC's Division of Corporation Finance
- **Ning Chiu**, Counsel, Davis Polk & Wardwell LLP
- **Marty Dunn**, Senior Of Counsel, Morrison & Foerster
- **Beth Ising**, Partner, Gibson Dunn & Crutcher LLP

Broc Romanek, *Editor, TheCorporateCounsel.net*: Hi. It's Broc Romanek, editor of TheCorporateCounsel.net. Welcome to today's program Shareholder Proposals: What Now?

Let me go ahead and introduce our panel. Always one of my favorite webcasts because this is the last webcast for this calendar year. These are definitely some of my favorite people - David Fredrickson, Chief Counsel of the Division of Corporation Finance. Ning Chiu of Davis Polk, Marty Dunn of Morrison Foerster, and Beth Ising of Gibson Dunn. And we'll have David kick us off with what the SEC recently proposed in Rule 14a-8 area.

The SEC's New Rule Proposal

Fredrickson: As an SEC employee, the views that I state here are my own and do not necessarily reflect those of the rest of the staff or the commission. On the rulemaking front, the Commission, earlier this month, on November 5th, issued proposed rules to change the procedural requirements and resubmission thresholds for shareholder proposals.

On the same day, the Commission also proposed changes to Exchange Act Rule 14a-2(b) - a couple of exemptions from the solicitation information filing requirements under the proxy rules. All of these are part of a larger program to reach elements of the proxy process.

But specifically with respect to the shareholder proposal thresholds, the primary elements of the proposal relate to the initial submission thresholds and also the resubmission thresholds. The Commission last changed the initial thresholds in 1998.

The Commission looked at the resubmission thresholds in 1998, but the current thresholds have been there since 1954. Why now? Why is the Commission acting? A couple sort of broader societal things going on.

One, just reflecting that there are now many more ways for shareholders to communicate with each other and to engage with management. Many companies have more extensive outreach programs to shareholders and, obviously, shareholder proposals are one means of that form of engagement, but given the changes in the ecosystem, to re-examine how this part works with all those other components.

And the second was thinking about the 14a-8 mechanism itself. It's a cost-shifting mechanism where a proponent could, on its own, prepare a proxy statement, file it and disseminate it and that's obviously expensive.

And so, what 14a-8 does is shift that cost and allow certain shareholders that meet the thresholds to put their proposal in the company's proxy statement. And so, that obviously creates a cost. And, when thinking about that cost over the years, we have focused on the cost of preparing a no-action letter to respond to it.

But in hearing from companies, the cost is also the time and attention of the management and board in considering how to respond to these requests. And so, taking a broader view of what that cost is - and then what's the appropriate ownership and investment interest that a shareholder proponent should have in order to take advantage of this mechanism.

So, with that as the background, the current initial filing threshold is that a proponent needs to have $2,000 or 1 percent of the value of shares for a year before submitting the proposal. As for the 1 percent, that's never been much of a factor, so we're proposing to eliminate that.

But in thinking about some variance of the amount of securities and length of holding, we considered a little more flexibility in how to submit a proposal. So, the $2,000 threshold would still be there - but a proponent would need to hold for three years.

But a proponent could hold for less, but at a higher investment amount. So, the proposal is if you hold for two years, you need to have $15,000 of company securities and, for one year, only $25,000 in securities. Those are the proposed new thresholds.

In addition, there have been questions about when a proponent uses a representative to submit a proposal for them of who the real owner is and making sure that they're entitled to submit the proposal.

And so, part of the package is to formalize the representations that would be made by a representative that they have the authorization to submit the proposal on behalf of the proponent - and the proponent, in fact, endorses the proposal that's being submitted.

And finally, as part of the initial eligibility threshold, the proponent would need to state that they are able to meet with a company between 10 days and 30 days after submitting the proposal to discuss the proposal.

This is an attempt to encourage more engagement. We note that a large percentage of proposals are withdrawn and assume it's because the company and proponent reached some type of agreement. So, this is an effort to try to facilitate that.

Separately, there's a proposal to amend 14a-8(c) which is the "one proposal rule." It currently is framed so that each shareholder can only submit a single proposal. The rule proposal is to change that so that each person - including their representatives - can only submit one proposal. And so that

would pick up if the person is acting on their own behalf as a shareholder or as a representative - they would be limited to one proposal per company per year.

On the resubmission thresholds in (i)(12), currently you look back five years and if the proposal has been submitted (or something substantially the same has been submitted) one, two or three times, then you look to see whether it attains certain percentage thresholds, currently 3%, 6% or 10%.

And the rule proposal asks whether the SEC should increase those to 5%, 15%, 25% - so that would show that there is a level of investor interest among the shareholder base generally. There would also be a separate provision that, if the proposal has been submitted over the last five years and even if it had received a 25% vote of support, it could be excluded if it received less than 50%, but had declined by more than 10%.

This is what we've been calling the "momentum requirement," that is that the proposal, even though it's received a fair degree of interest, has now stalled. And so, we've asked a number of questions around this concept to see whether the proposal has had sufficient time, but has lost momentum - so it should take a 'time out.'

And there I would emphasize that, even if a proposal were to fail to meet some of these thresholds, it's not that it's permanently excluded from being able to be submitted. It needs to take a time out for some period of time depending on the level of support and how recently it's been submitted. And so, there's still an opportunity at some later time to gauge shareholder interest as to whether or not there is greater interest at a future time for that proposal.

So, that's the group of proposals on shareholder proposal thresholds. The comment period is 60 days from publication in Federal Register, which we are told will be December 4. Assuming that is the case, the formal comment period will close on February 3, 2020.

Ning Chiu, *Counsel, Davis Polk & Wardwell LLP*: David, can I ask a question about the comment period since you just brought it up? There has been a request to extend that commend period to about 120 days. Do you have a sense of what the response to that request might be?

Fredrickson: Specifically no. I've certainly heard this and, most importantly, the people who actually make the decisions in this building have heard that request. But in order to change the comment period, it would require further Commission action. And so, I can't speculate as to whether that will happen.

I will note though that a longstanding Staff practice is that the Staff continues to review comment letters that come in after we've closed the formal comment period. It's not like we've closed off the e-mail intake.

And so, we keep looking at comment letters up until the time the Commission eventually acts. So, keep the cards and letters coming even if the comment period has closed. And obviously, if the Commission approves an extension, that will be published on the Commission website and in the Federal Register.

How the Last Proxy Season Fared

Beth Ising, *Partner, Gibson, Dunn & Crutcher LLP*: I'm going to turn now to the types of shareholder proposals and the Staff decisions that we saw last year. Just generally, the total number of shareholder proposals that were submitted - not necessarily those that were challenged - but the total number submitted was up slightly compared to the prior year.

But if you look at the five-year average, it's down approximately 9%. If you look at the topics that were addressed by the proposals that were submitted, once again, the vast majority had to do with

social and environmental issues, about 42% of the total.

In terms of what were the most common social proposals, they were often diversity related and anti-discrimination related. For the environmental ones, it was by far the most common - particularly those having to do with climate change. And then, in terms of governance - another historically popular category - the common ones were political contributions and independent chair proposals.

In terms of key Staff decisions we saw last year, several of these were actually called out in the most recent Staff Legal Bulletin 14K. We will soon discuss a couple of procedural issues as ones worth noting.

It's also notable that there was only one ‘vague and indefinite' grant this past year - a shareholder proposal asking for the compensation committee to be reformed where there was really not any context given as to what reform was being referenced or discussed. This is continuing a trend where many of these no-action requests have not been successful in recent years compared to the past.

One of the categories that has become more common is arguments involving micromanagement with the number of exclusions on micromanagement doubling during 2019 compared to prior years.

A very common proposal for which this was used was the ‘two-degree' proposals dealing with climate change. And it is worth noting that, while they weren't identical, many of them were similar in the sense that they were often specific about adopting a very specific strategy that would be used to change the company's operations to meet the Paris Agreement.

This last Staff Legal Bulletin talks about this as well - we saw a comparison given between those that are, what I will call, bossy "Do it this way," as opposed to those that did not. The micromanagement arguments were not granted where the proposal did not specifically say what management should do to implement the proposal.

Another topic that was addressed involved ordinary business arguments for executive compensation-related proposals. Previously, in SLB 14J, the Staff issued additional guidance around the excludability of proposals that both touched on executive and director compensation as well as on the application of the micromanagement prong of Rule 14a-8(i)(7) to executive and director compensation-related shareholder proposals.

On the first aspect, a proposal was excluded this year that dealt with adding the company's debt rating as a performance metric for the company's executive compensation program.

The Staff allowed that to be excluded under ordinary business because they noted that the focus of the proposal was on an ordinary business matter, specifically the management of the existing debt. So, even though it was talking about executive compensation, it was still excludable for the reasons discussed in SLB 14J.

And then there were five executive compensation shareholder proposals that were excluded under the micromanagement prong because of the prescriptive nature of the proposals.

The last category I just want to touch on is board analysis. As you may know, the Staff has addressed this topic in the last few Staff Legal Bulletins - SLBs 14I and 14J and again more in SLB 14K. There the Staff talked about that evaluating whether a proposal transcends ordinary business can be a difficult judgment call and the Staff acknowledged that the board is generally in a better situation to conduct that analysis.

We saw in the 2019 proxy season approximately 25 no-action requests that included a board analysis. The vast majority were dealing with Rule 14a-8(i)(5) arguments, also known as economic

relevance arguments. That number was lower than the prior year, and I know that some felt like it may not be a fruitful task to pursue this argument - so that could be one reason for the decrease.

It's worth noting there was one company that won an exclusion based on a board analysis included in an economic relevance argument regarding a shareholder proposal on a political contributions report. But what's notable is the company didn't really engage in the conduct that was talked about in the proposal - and so it truly wasn't relevant.

What's also notable is that in contrast there were several instances where the Staff stated in their response that the company didn't meet its burden of proof and it would have been helpful from the Staff's perspective to have a board analysis.

For example, there was a proposal that had to do with the use of the tax savings, which I think many viewed as dealing with an ordinary business matter. But the Staff still thought it would have been helpful to have that board analysis to see whether or not it really raised an issue that was significant to the company.

Similarly, another proposal dealt with an executive compensation proposal that dealt with employee compensation generally - and a different proposal dealt with opioids.

Marty Dunn, *Senior of Counsel, Morrison & Foerster*: I'll throw one thing in. I thought that the developments under (i)(10), the substantially implemented basis, were important to read last year because in years gone by the Staff seemed to read that basis as meaning ‘completely implemented.'

Last year, we saw a higher number - or at least a higher percentage - of grants under (i)(10) compared to the prior year. I thought that was a good development, because, as you get out of (i)(9) and we saw some evolution under (i)(7), I thought it showed a good reading by the Staff to say, "we're willing to look at what we have here."

I agree with you completely on the (i)(3) basis, that there were 45 or so arguments made and only one was granted. And so, (i)(3) is very limited and I think it shows the Staff's interest in not making these subjective calls.

But I do think that under (i)(10), there was some movement. So, I encourage folks to look at (i)(10). It doesn't mean it'll be granted every time, of course, but it's at least worth looking at.

Fredrickson: I have three observations on those comments. On (i)(3), we're looking at it from the perspective of the shareholder reading it - and whether they will be misled by what's said, looking at the proposal as a whole.

In other words, we're looking at the overall perspective of a reasonable shareholder as we imagine that they are reading this proposal and are they going to be misled in a way that would potential violate 14a-9. Random material that's potentially false or irrelevant may not affect the overall impression of the proposal.

Two, on (i)(7) and micromanagement, we prefer the term "prescriptive" to "bossy." Finally, on (i)(10), we wrestle with what's ‘substantial implementation.' It's clear from both the wording of the rule and from the Commission guidance that the term does not mean complete implementation. So, obviously, that's a question of judgment, but one that we have been willing to wade in on.

Dunn: One of the things I thought about as I was reading the SLB, which we'll get to, was that when you're arguing substantially implemented, you should argue the differences between what you do and what's proposed.

And one of the notions there was, looking at significance, it's going to be the difference between what the company does and what the "ask" in the proposal is, not necessarily the subject matter. We can get to that when we talk about board analyses, but I wanted to point that out.

Fredrickson: Sure, happy to take that up later.

The Staff's New No-Action Process

Chiu: Thanks, David, for that color. I am going to run through Corp Fin's new process for handling no-action requests for shareholder proposals this season. And I hope that David, Marty and Beth will contribute additional color to this topic as well.

To level-set, traditionally, the Staff has responded in writing to every no-action letter that companies send into the Division. In their requests, companies ask the Staff to concur with the company's belief that it can exclude a shareholder proposal from its proxy materials, either on a procedural basis or a substantive basis.

The Staff then writes and either agrees with the company or they disagree with the company. The company makes a decision about including or not including the proposal depending on the Staff's decision. That's how it's been running for a long time.

To give people some context, during the 2019 proxy season, the Staff responded to around 225 no-action letter requests. All of those incoming requests and those decisions are publicly available and posted on the SEC website. I went and looked at it this morning and they date back to 2007. If anybody has a lot of free time, and would like something to do, there's probably some analysis that you could dive into.

This year, in early September, there was a change. The Division announced in a brief statement that it is changing its process for administering no-action letter requests.

Going forward, for the upcoming 2020 season, instead of always responding in writing, there will now be three possibilities once they get a no-action letter. First, the Staff may respond in writing like it does now, no change there. So, it might just follow the traditional method.

Alternatively, the Staff may provide an "informal" response to both parties. In the public statement, this alternative is called an "oral" response, but "informal" response is probably a better characterization.

Third, the Staff may decline to respond at all to the no-action letter request.

First, let's talk about the informal response. And this is based on comments that senior Staff members have made in various settings. An informal response is most likely for routine matters, such as exclusions that are based on pretty clear precedents.

To me, this would suggest the procedural bases for exclusion that are very clear - late deadlines or missed deadlines, or no proof of ownership. There are always some letters on those topics every season. I would think those are the topics that would most lend themselves to an informal response without argument from anyone.

The way the informal response process is likely to work is that the Staff will contact both parties, the proponent and the company, via e-mail, alerting them that a decision will be posted soon on the SEC'S website for 14a-8 no-action responses. The website will contain a chart that will show the Staff's response to the company's no-action letter. It will be a simple yes or no response. Historically, in Staff letters, sometimes they add an explanation. But in an informal response there will not be an explanation. It'll just be a simple yes or no.

Now, as people who do this work know, a no-action request will often contain multiple basis for arguments. In the past, when the Staff says yes, they choose one of the reasons to concur with. That's in the letter and they don't speak as to the rest of the arguments. When they say no, they go through each argument and say no, no, no, no, no.

Now, the chart will show which argument the Staff's decision is based on if it's a yes decision. So, the chart will really help for precedent purposes, just because it'll make it easy for everyone to see what argument is found to be valid for excluding a proposal.

The SEC website will also include - unclear whether this will always be exactly at the same time that you get the response or eventually, but it will include all the related correspondence. Some of that correspondence can be pretty voluminous, so I know that takes some work to pull together.

That's the informal response and, as you can see, calling it an "informal" response probably makes more sense than calling it an "oral" response since it seems like the first path will probably be an e-mail to both parties.

Now, we go to the more complicated question, which is when will the Staff decline to state a view on the no-action request. It will likely depend on the facts, which isn't a great answer for anybody, especially those of us who like to plan ahead.

In the instances where the Staff declines to respond - and maybe David and others could just add some more color on this as well - we hope that the Staff will alert both parties sooner rather later, because companies and proponents may have to make some decisions about what to do given that that's a unique situation for both of them.

I do want to emphasize that the statement that the Division put out made it very clear that the Staff decision to decline to state a view should not at all be interpreted to mean that companies must include the proposal or should include the proposal. If the Staff declines to state a view, a company can still elect to exclude the proposal from their proxy statement. And as has always been the case, both parties can at any time decide to litigate the matter.

Companies should decide what to do on the basis of what's best for them. David can hopefully reinforce the fact that declining to state a view should not mean, and is not intended to mean, "no basis for exclusion."

I will touch briefly on Glass Lewis and ISS, because people have asked what consequences they'll face, including in terms of the proxy advisors' voting recommendations, if the Staff declines to respond to a no-action letter request and the company excludes the proposal.

Glass Lewis published a written policy statement when they did their 2020 update, and they have said publicly that if a company decides to exclude a proposal without an affirmative concurring decision by the Staff, Glass Lewis will recommend against the entire governance committee.

To me, it's a little unfortunate that they've taken this position when no one knows exactly how this will work, and without in any way considering the rationale that a company might have for deciding not to include a proposal that the Staff has declined to take a view on in terms of a no-action letter request.

The ISS position is as yet informal. It's not written. My understanding is that ISS is waiting for the Staff to put some meat on the bones of its plans, and they're waiting for a little more color and maybe a live example before they issue any formal policy guidance for the 2020 season. And they might do it in the form of an FAQ. So they'll figure it out and formulate and announce their approach probably in the FAQ. And Pat McGurn is likely to talk about it on our webcast on TheCorporateCounsel.net on January 16th, so I can make a plug for that.

That's a summary of what the new Staff position is. I'm going to first turn it over to David to add anything he'd like to, based on what I just said.

Fredrickson: Thanks, Ning. I would characterize the September announcement as an "expectations reset." As we mentioned, the practice for decades is that the Staff responds to every letter, and we want to tell folks that's not going to happen anymore.

In the vast majority of instances, I think that's good for everyone. Most letters don't say much. They give an answer - and I absolutely recognize the value of the answer in its crystalline form, and that will be preserved in the chart. But a lot of time is spent crafting letters that don't say that much.

And so, on our end, we expect to use the time we'll gain from not crafting these letters to identify those instances where we, in fact, have something to say. We've also heard over the years that people want more explanation of some of the harder decisions. And so, by giving simpler answers on simpler matters, we will have more time to give more nuanced answers to more nuanced questions.

Our plan is, as of today, that incoming letters will be on our website and then the final package will remain on our website as well. There's a slight delay from the time we process an answer to when it's available, but the responses will be there.

I realize there's anxiety about the possibility of not receiving a Staff answer. I can't say whether that will happen, how often that will happen and in what instances that will happen. All I know is, for the time I've been doing this, every year, there's a handful of decisions where we are debating internally what we think the response should be.

And it feels to me sometimes that I'm no longer interpreting Rule 14a-8, but I'm wading into some greater social debate that, as a securities lawyer, I'm not bringing any particular expertise to. And so, together with our emphasis on board analyses over the last few years, we recognize that there are types of issues that may be better suited for the greater experience, knowledge and expertise from others. And in those instances, we may withdraw and let the chips fall where they may. So, we will see how that plays out.

But also to follow up on one of Ning's comments, if we, in fact, don't state a view, that's not a coy "no." If we mean no, we will say no - we don't agree that there's a basis for exclusion. But if we don't express a view, it's because we, in fact, have no view as to the particular matter.

Dunn: David, I have one last question for you on that topic. The hardest questions have always been when the Staff is making social policy instead of answering distinct questions. And so, I think what we've seen - and we'll talk about this again under board analyses and under (i)(3) - what the Staff has shown is more of a desire to answer specific questions and not broad, subjective "what-we-think-of-the-world" kind of questions. And I think that's wise because it's an impossible job, and why is it yours.

But at the same time, you have to recognize, and I'm sure you know about this, that just telling companies they can do whatever they want, there is so much uncertainty and potential cost involved in that. So you can see why everybody is worried about this scenario.

Fredrickson: Right, we anticipated that - and everything we have heard since reaffirms that - and we're mindful of it. But I go back to, because we have been wrestling with this and thinking about it internally, the September announcement was to at least pre-announce before the season began that it's an option that we are thinking about. And when and how we might actually use it, we will do it advisedly and, obviously, monitor carefully how it goes and re-evaluate at the end of the season.

Chiu: David, would it be fair to say that the vast majority of letters will get some kind of response and, as a follow-up to that, will most of the responses be the informal kind or the written kind if you

have a sense?

Fredrickson: I will be a super hesitant lawyer in my answer, because one thing I've learned from being part of this process is that I can't predict anything that happens in a season. And so, to the extent that there are routine matters that are relatively well-settled in previous letters that aren't raIsing novel issues, the informal chart approach seems like an excellent way of communicating that information.

To the extent that, for whatever reason, there are a series of novel, difficult cutting-edge issues, then we may feel it necessary to write on those and/or withdraw on some of those. But we're still in this space and we still recognize the value that we provide and giving an answer that people can rely on. And so, we hope to do that to the best of our abilities.

Chiu: Thank you.

SLB 14K: Guidance on Rule 14a-8(i)(7) Analytical Framework

Dunn: I'm going to talk very briefly about what Staff Legal Bulletin 14K said about the (i)(7) analytical framework, and then Beth and Ning will go into more details on both the board analyses and micromanagement.

As a general matter, 14K did a really nice job of explaining how (i)(7) works. Remember this, everybody - the Commission said it in 1998: there are two analyses under (i)(7).

One is, is it an ordinary business matter such that it's a day-to-day decision management has to make, or is it a significant policy issue? That's the first analysis - one of those two things. The second analysis is whether the proposal seeks to micromanage. So very quickly on each of those, the analysis is divided into three buckets overall, but ordinary business has two of the three.

When analyzing ordinary business, one question is, "Do we need a board analysis discussing whether this is significant to the company?" The staff went into that in the last two Staff Legal Bulletins. There's not been regular success in writing in on them. The Staff continues to say, "We find it very useful."

Some folks have overreacted - as is common in this space. They say, "Well, the board analysis means that that's the only way to get an (i)(7) concurring response." That's, to my mind, simply not true.

I think the first bucket to think about is that there are still certain areas of proposals, large areas, where it's self-evident as day-to-day decisions. Last year you saw 40 grants of (i)(7) letters - and just about half of them were the regular ordinary business. It's self-evident that this is an everyday business matter. Examples included proposals on pricing policies, whether or not to hold the annual meeting in person, the products and services to be offered, a company's customer relations, a company's management workforce - day-to-day stuff, things that you do every day that don't raise bigger issues.

And the Staff granting of those letters, I think negates the notion that you will always have to have a board analysis. I think the board analysis is useful where it's not clear - which is the second bucket.

So, first, consider whether it's self-evident. The Staff has said, "Here are some things that always have been, always will be," and even the Commission release talks about that. And so, that's important to recognize. There are certain things that come up that are just self-evident.

The second is when the proposal relates to a policy issue more broadly. There, the Staff may need more company guidance or more board guidance- and specifically, the Staff says board - but at least

in the no-action letter, guidance as to why this is not significant, if it's beyond the self-evident test. Why is this not self-evident? So, I think that's valuable. Those are the first two.

The third is the question of what is micromanagement, and all I'll say on micromanagement, because that's a much deeper discussion, the key that is driven home is the movement away - and this comes off to what I said to David earlier about making subjective calls or looking at the specific question being asked - is what is the proposal asking for.

Is it micromanaging in the proposal? It's not the broader subject. It's the question of what is the "ask" - what is the company being asked to do and what did the company already do. And so that's very important as you go through, when you start with (i)(7), start with which of the three buckets do I fall into and then, after that, how does the analysis work out. And so, with that broad framework, Beth, do you want to talk a little bit about board analyses?

SLB 14K: Guidance on Board Analyses

Ising: Sure. And let me just echo that SLB 14K is really the continuation, as mentioned, of when a board analysis is helpful and the fact that the issue of significance may not be self-evident.

In particular, SLB 14K goes into great detail about two of the potential substantive factors that have been addressed in previous SLBs with respect to a board analysis and, specifically, the "delta" discussion and the discussion of prior votes.

So, if the significance is not self-evident, one of the things that a company can do in the board or committee analysis is to look at the "delta." That is, basically, the Staff looking for the company to analyze the difference between what the proposal is specifically requesting and the company's actions.

And if you do that analysis, the delta argument that can be included can be helpful where the company has done something that has addressed the policy issue to some degree, but we're not quite at the point of being able to say that the proposal has been substantially implemented.

And SLB 14K says that the Staff is looking for companies to clearly explain why the gap between the manner in which the company addressed the issue that's raised, and the manner in which the proposal seeks to address the issue, is not significant to the company. So, that's more guidance on one factor that's worth discussing if you're doing a board analysis.

The second factor that was discussed in SLB 14K is the issue of prior votes. This has been an issue that's been debated quite a bit the last couple of years, is how do we deal with these votes.

Sometimes there are voting outcomes that companies believe are high for a variety of different reasons. And SLB 14K addressed the factors that the Staff thinks are not helpful and the factors that it would find more helpful to know about, when shareholders have previously voted on the matter and the vote in favor might be considered significant.

And so, in that regard, the Staff is saying that what it's really looking for is a discussion of subsequent engagement with shareholders. And are there intervening events? Are there other subsequent action that the company took to address the issue? And then, an explanation of why that means the prior vote, as a result of these various factors, is not necessarily indicative of the significance of the issue to the company.

Finally SLB 14K also reviews the various factors regarding prior votes that the Staff identified as effective to focus on.

Chiu: I know it's early, but do you or Marty have a sense of whether more people will be doing board analyses this season?

Dunn: It's too early in my mind on board analysis because it's too early to see in the letters or how people are discussing it and it's also we're just getting the proposals and that takes time. I think you'll see the consideration of whether or not to do one be much more limited to the delta analysis and not the broader issue. I think that was a good learning point there.

Ising: Right. I agree.

Chiu: SLB 14K's "prior vote" explanation was helpful as well. It was hard to figure out what would be acceptable last season. Now that we have some parameters, we'll be able to explain those when people try to decide whether to discuss it in a no-action request.

Dunn: Yes. And on the prior vote, I think it's important to note that arguments of "oh it's based on ISS" or "it didn't get 50%" are not what the Staff is looking for in the discussion.

Chiu: Right. I don't think that some of us thought that that was what the Staff was looking for, but it was good that it was explained.

SLB 14K: Guidance on Micromanagement

Chiu: On micromanagement, I will say that it would be great if we are still talking about micromanagement next season because I think SLB 14K has done a really good job of explaining it in such a way that I think a lot of people who may have written proposals that got excluded on micromanagement last year probably have reframed them. I saw an early indication of that.

I'll keep it pretty simple to three things. One is, reiterating what Marty said, it's not about the subject. That means that you can have proposals on the same subject, like a climate change proposal or environmental-related proposal, where some could be viewed as micromanagement and some could not be viewed as micromanagement. To even get more specific, you could have proposals on something like GHG emissions, and some could be viewed as micromanagement and some could be viewed as not. So, it is quite clear that it's not about the subject matter.

What SLB 14K says - and I'm sorry, David, but this is a little painful phrasing - but it says it's an evaluation of the manner in which a proposal seeks to address the subject matter. I would say the "plain English" version of that is, "How was the proposal phrased about what a company is supposed be doing?"

I'll talk about some of the things the Staff has found to be micromanagement. What I've learned is that it has to be a couple of different kinds of factors at times. Sometimes one factor will drive the analysis, but it depends on what it is.

The factors include intricate detail, where the proposal lays out the specific methods of how the company should do something, specific actions asked for, specific outcomes, specific timeline. You get the "specific" point I'm trying to make. So, basically, "prescriptiveness" -- so anything that seems very prescriptive, and proposals that prohibit actions - do not do x, y and z - all seem to be micromanagement.

Some examples like the GHG emissions proposals that call for getting to net zero by a certain time or a proposal that says that every share buyback must be approved by shareholders, or proposals that tell companies not to do something. Those were all viewed to be very prescriptive.

SLB 14K makes it clear it's not about the level of complexity. Frankly, many proposals are fairly complex to implement if you actually look at what the request is. There is a lot of complexity within

shareholder proposals even if they're written in a simplified way. It is not about the complexity.

The no-action requests where companies argued micromanagement that did not succeed - again, they might have been complicated, they even might have asked for a lot of intricate detail. But if it was broad enough that it gave the company flexibility in how to implement it, and it gave the company discretion on how they wanted to deal with it, then it might not be micromanagement.

For example, proposals that said consider this, discuss the feasibility of something, evaluate the potential or whether and how and if - those kinds of proposals even if they involve very complicated matters, even if, to a company, they actually look like they are asking for a lot of information that would take a ton of time, money and resources to implement, those were not viewed to be micromanagement. I'll pause there to see if anyone has any reaction to that description and what they saw this season.

Fredrickson: I needed you as an editor. I liked your re-write on how the request is phrased.

Chiu: Thank you.

Dunn: Yes. I would just reiterate that, what is the ask versus what is the subject looking for.

Fredrickson: Can I intervene here for a couple of seconds? More broadly, in terms of thinking what (i)(7) is about, at least to me, that it's ordinary business matters and so consistent with Delaware and other laws that the board and management run the business and that this is the space in which, if a proposal interferes with that, (i)(7) is a ground for exclusion. And it can interfere with that one of two ways by subject matter or by the degree of prescriptiveness and that's sort of the two prongs.

I agree completely with Marty that a board analysis is not necessary in all instances. There are some that are pretty clear that they violate one of the other of those provisions. And so, a compelling argument can be made without board analysis and that it is most helpful in the closer cases where it may not be obvious to someone who doesn't know how a particular proposal might affect a particular company and that's when it's incredibly helpful to get a board perspective on that.

To the micromanagement point and just to amplify Marty's comment, the way I read a proposal is, first, I ask if I'm a shareholder and I get this in a proxy statement, what do I think the company's going to have to do if I vote for it.

And then, separately, if I'm the corporate secretary or general counsel of the company and this passes, what do I think I actually have to do at the company?

And that's at least how I start thinking about it - is it getting into the business of running the day-to-day company or is it raIsing some broader issue that shareholders should have some say on? And so, that's at least how I am thinking about when I'm trying to work through these issues.

And I also wanted to wholly endorse Ning's characterization that this is not about complexity, it's not about the subject matter. It's about how the request is phrased and I wholly endorse that characterization.

SLB 14K: Guidance on "Proof of Ownership" Letters

Dunn: I'll jump in here for ownership letters, but I can't resist, David, to encourage you when you're looking at (i)(3) arguments to also read them, and consider what do companies have to do to implement this and what are shareholders being asked to vote on because the "it's not clear" argument seems to have gone away in a lot of ways.

On proof of ownership, I've heard others say what we have coming out of SLB 14K is proof of ownership is the discussion proves now there are three places where "close enough is good enough"

- horseshoes, hand grenades, and proof of ownership.

But I think that's just kidding and that's just to get your attention. I think that what really is in SLB 14K about proof of ownership is important on two fronts, one is substance, one is process. On substance, if you read what the Staff said, "Companies should not seek to exclude a shareholder proposal based on drafting variances in the proof ownership letter if the language used in such letter is clear and sufficiently evidences the requisite minimum ownership standards."

Yes, that should have always been the standard, right?

But what you've seen over the years is hyper-technical reading of the standard. We all fall into it and you see it in the two examples the Staff gave with the Amazon letter and the Gilead letter.

Which, in Amazon, the proof of ownership letter stated that, as of eight days before the proponent submitted the proposal, they owned the requisite amount of stock, but then it said that the proponent has continuously held more than $2,000 worth of these shares for at least one year as of the date of the proof of ownership and the date of submission of the proposal.

And so, the Staff's response in my mind was saying that the proponent continuously owned the shares as of the date of the letter and, being that the date of that statement didn't speak to the 20th, as opposed to the 28th, the date of the letter. And so, I think what the Staff is saying there is, "Come on, just read it straight up."

And the second was, in the Gilead letter, it said that the company had owned the requisite amount continuously for at least one year prior to the date of submission. And the argument was, well, it didn't include the date of submission and the Staff, once again, said no. This is fine.

And so, I think, substantively what to take from that is the important point of, yes, everybody has to follow the rules and the company has deadlines, the proponent has deadlines, the proponent has requirements on proof. All of that is there.

If you send in a proof of ownership that says, as of three days ago, we owned it for a year or she owned for a year or they owned it or it did, then that's not good enough. It doesn't go beyond that date. But don't hyper-read it find some way to argue against it.

And so, I don't think you really changed anything. You just remind people there is no one set way to do this. If you look at it and it tells you that the proponent met the requirement, they met the requirement. Don't argue with them on that. So, that's one big point.

The second point I'd take from this is - you still have to meet the rules, and so, that's there - and David, please tell me if I'm over-reading this - but part of what I read in this is, going forward, the Staff is going to be answering more procedural stuff informally.

So, we don't want to get a ton of informal procedural arguments that are hyper-technical that might require us to answer them. We know the answers to these things. We know what the rules are. The Staff has been talking about this since the first SLB, SLB 14.

And so, I think, as you're reading this, don't look at it as the proponents don't have to meet the requirements. No, they still do. But don't over-read it to try to find a way that they don't. And that ties into the informal.

That way the Staff can answer more of these informally and move on to the substantive ones that they need the time to focus on. So, I don't know if anybody disagrees with that, feel free to. But that's what I took from the ownership side of that.

Fredrickson: That summary works for me.

Chiu: I think that's right. What I find interesting as well just thinking of the future time when the proposed rules that David started off with in this webcast might become, in some form, final rules is there's a decent number of procedural amendments there beyond just the resubmission thresholds and ownership, but just adding the engagement opportunity, making sure that only one person could submit even as a representative and as a shareholder.

Tying that together with what I talked about in terms of the Staff's new process, there's maybe some more procedural requirements, as these things always end up when there's a new process, we may need the Staff's help on interpreting some of that just like we've learned more over time about how you view proof of ownership.

It seems like we're going to need some help, David. I know we'll see how the new process works in terms of the informal requests. But the proposed rules themselves also consist of more procedures as well.

Fredrickson: I hear you. One step at a time. Let's see how this season goes. But yes, if the proposed rules or rules like them are adopted, we'll probably have another webcast and we'll probably put out another SLB and we'll help figure out how to make the process work the best we can.

Ising: Great.

Romanek: Thanks so much, David, Ning, Beth and Marty. A great program is always - so insightful. Have a good afternoon.