

## SEC Update

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### SEC Releases Guidance on Shareholder Proposals

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On October 16, 2012, the Securities and Exchange Commission, Division of Corporation Finance (the Division) published **Staff Legal Bulletin No. 14G** (SLB No. 14G). The purpose of SLB No. 14G is to provide guidance on certain aspects of the shareholder proposals rule, Rule 14a-8 under the Securities and Exchange Act of 1934. This guidance will be useful to companies and proponents in reviewing the basis upon which certain shareholder proposals may be excluded from proxy materials. SLB No. 14G focuses on proponents' proof of ownership and website references in shareholder proposals. Companies should carefully review this guidance before sending no-action requests to the Division or notices of defect to proponents.

#### Key Highlights

In SLB No. 14G, the Division explains that:

- Only Depository Trust Company (DTC) participants are considered record holders who can provide letters of ownership under Rule 14a-8(b)(2)(i);
- The Division will not concur with the exclusion of a proposal under Rules 14a-8(b) and 14a-8(f) on the basis that a proponent's proof of ownership does not cover the one-year period preceding and including the date the proposal is submitted unless the company provides a sufficiently detailed notice of defect to the proponent;
- The Division believes that a proposal with a website reference may be subject to exclusion when the information found at the referenced website is necessary to understand the proposal but not if the information on the website only supplements the information contained in the proposal;
- References to websites in proposals may not be excluded solely because the website is not yet operational if the proponent, at the time the proposal is submitted, provides the company with the materials that are intended for publication on the website and a representation that the website will become operational at, or prior to, the time the company files the definitive proxy statement; and
- A waiver may be granted to the 80-day deadline in Rule 14a-8(j) if information on a referenced website changes and the company believes the revised information renders the website reference excludable under Rule 14a-8.

#### Proof of Ownership Letters

Rule 14a-8(b)(1) states that to be eligible to submit a proposal, a shareholder must have continuously held at least \$2,000 in market value, or 1% of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date the proposal is submitted. The securities must then be held through the date of the meeting. If the shareholder is a beneficial owner of the securities—the securities are held in book-entry form through a securities intermediary—the shareholder may provide proof of its ownership with a written statement from the record holder, usually a broker or bank. The Division believes that only securities intermediaries that are participants in the DTC should be considered record holders for purposes of this rule (Rule 14a-8(b)(2)(i)). Therefore, a beneficial owner must obtain a proof of ownership letter from the DTC participant through which its securities are held at DTC in order to satisfy the proof of ownership requirements in Rule 14a-8.

The Division further explains that a securities intermediary holding shares through its affiliated DTC participant may also verify a shareholder's ownership of securities. However, if the shares are held through a securities intermediary that is not a DTC participant or affiliate of a DTC participant, then the shareholder will also need to obtain a proof of ownership letter from the DTC participant or affiliate of a DTC participant that can verify the holdings of the securities intermediary.

#### Notification of Failure to Provide Proof of Ownership

Under Rule 14a-8(f), if a shareholder submits a proposal but fails to follow one of the eligibility or procedural requirements of the rule—such as providing proof of ownership—then a company may exclude the proposal only if it notifies the proponent of the defect and the shareholder fails to correct it.

The Division is concerned that notices of defect do not adequately describe the defects or explain what the shareholder must do to correct the defect, particularly when proof of ownership for the one-year period does not properly align with the exact one-year period for which ownership is required to be proven. When a company seeks to exclude a proposal under Rules 14a-8(b) and 14a-8(f) on the basis that a proponent's proof of ownership does not cover the one-year period preceding and including the date the proposal is submitted, the company must send a notice of defect to the proponent. The Division explains in SLB No. 14G that it will not concur in the exclusion of a proposal due to this defect unless the notice of defect identifies the specific date on which the proposal was submitted and explains that the proponent must obtain a new proof of ownership letter verifying continuous ownership of the requisite amount of securities for the one-year period preceding and including such date to cure the defect.

### **Use of Website Addresses in Shareholder Proposals**

Shareholders often submit proposals or supporting statements that include website addresses. The Division reminds everyone that references to website addresses in proposals or supporting statements could be subject to exclusion under Rule 14a-8(i)(3) if the information contained on the website is materially false or misleading, irrelevant to the subject matter of the proposal, or otherwise in contravention of the proxy rules. The exclusion of a proposal under Rule 14a-8(i)(3) as vague and indefinite may be appropriate if neither the shareholders voting on the proposal, nor the company in implementing the proposal, would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.

In determining whether a proposal with a website can be excluded under Rule 14a-8(i)(3) as vague and indefinite, the company must first establish whether the website provides information necessary for shareholders and the company to understand with reasonable certainty exactly what actions or measures the proposal requires. If this information is not also in the proposal or supporting statement, then it may be excluded. However, if shareholders and the company can understand with reasonable certainty exactly what actions or measures the proposal requires without reviewing the information provided on the website, then the proposal would not be subject to exclusion because of the website reference. When the information on the website only supplements the information contained in the proposal, rather than being necessary to understand the proposal, the Division does not believe the proposal is subject to exclusion because of the website reference.

Often, a shareholder will submit a proposal that references a website that is not yet operational. The shareholder may wish to avoid making the website operational until the shareholder proposal is included in the company's proxy materials. In this case, the Division is willing to make an accommodation and will not concur that a reference to a website may be excluded as irrelevant under Rule 14a-8(i)(3) on the basis that the website is not yet operational. However, the shareholder must submit to the company at the time it submits the proposal the materials that are intended for publication on the website and a representation that the website will become operational, at, or prior to, the time the company files its definitive proxy statement.

Finally, if information on a referenced website changes after submission of the proposal and the company believes that the revised information renders the website reference excludable under Rule 14a-8, a company seeking the Division's concurrence that the website reference may be excluded must submit a letter presenting its reasons for doing so. The Division may concur that the changes to the referenced website constitute "good cause" for the company to file its reasons for excluding the website reference after the 80-day deadline in Rule 14a-8(j) and grant a request for waiver of the 80-day deadline.

### **Conclusion**

SLB No. 14G provides helpful Staff guidance regarding proof of share ownership, drafting of deficiency notices and use of website addresses in shareholder proposals. This guidance appears to be largely targeted at issues that arose during the no-action letter process during the 2012 proxy season. Going forward, companies should be sure to take these views into consideration when drafting deficiency notices and addressing website references in shareholders proposals.

If you have any questions about SLB No. 14G or shareholder proposals, please contact the Venable lawyer with whom you work, one of the authors or a member of the **Corporate Finance and Securities Group**.