

November 12, 2009

## SEC to Allow More Shareholder Proposals Related to Risk Management and CEO Succession Planning

On October 27, 2009, the staff of the Division of Corporation Finance ("Staff") of the U.S. Securities and Exchange Commission ("SEC") issued Staff Legal Bulletin No. 14E,<sup>1</sup> which provides guidance about how the Staff will consider under the SEC's proxy rules shareholder proposals relating to risk issues or to CEO succession planning. SLB No. 14E continues the Staff's trend of deferring to the greater inclusion of shareholder proposals.<sup>2</sup>

### Risk-Oriented Proposals

#### *Previous exclusion:*

Under Rule 14a-8(i)(7), a company could be granted no-action relief if a shareholder proposal focused on risk evaluation, on the basis that risk assessment is part of a company's ordinary business operations. When a shareholder proposal instead focused on management of identified risks (e.g., minimizing operations that may adversely affect public health), the Staff did not permit exclusion under Rule 14a-8(i)(7).

#### *Going forward:*

The Staff will instead consider whether the subject matter of the risk is sufficiently connected to the company and raises significant policy issues that transcend ordinary business, even if the company would be required to undertake a risk analysis in order to manage the risk.

#### *Practical effect:*

This change in analytical approach increases the likelihood that the Staff will not permit a risk-oriented shareholder proposal to be excluded from the proxy materials under Rule 14a-8(i)(7). Furthermore, if the proposal focuses on the role of the board of directors in overseeing the company's risk management, the Staff may conclude that the proposal necessarily raises significant corporate governance policy issues that transcend day-to-day business. Consequently, by emphasizing the board's role in the oversight of risk management, a shareholder proponent may virtually ensure that a risk-oriented proposal will not be excluded from the company's proxy statement under Rule 14a-8(i)(7).

<sup>1</sup> See <http://sec.gov/interps/legal/cfslb14e.htm>. SLB No. 14E also discusses how shareholders and companies can notify the Staff about correspondence in connection with a no-action request on a shareholder proposal.

<sup>2</sup> See October 29, 2009 Speech by SEC Commissioner: "The Power of the Shareholder & the Rise of Corporate Democracy" at [www.sec.gov/news/speech/2009/spch102909laa.htm](http://www.sec.gov/news/speech/2009/spch102909laa.htm).

## CEO Succession Proposals

*Previous exclusion:*

In the past, the Staff has allowed shareholder proposals related to Chief Executive Officer succession planning to be excluded under Rule 14a-8(i)(7), because termination, hiring or promotion of employees were considered day-to-day business matters.

*Going forward:*

According to SLB No. 14E, the Staff now thinks CEO succession planning raises a significant policy issue that transcends day-to-day workforce management.

*Practical effect:*

The Staff generally will not allow companies to exclude from proxy materials under Rule 14a-8(i)(7) a shareholder proposal that focuses on CEO succession planning.<sup>3</sup>

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<sup>3</sup> A proposal could be excluded under Rule 14a-8(i)(7) if it seeks to micro-manage CEO succession planning.