CCR corp
DIRECT FROM THE EXPERTS

THE CORPORATE COUNSEL

Founding Publisher: Jesse M. Brill
7600 N. Capital of Texas Highway, Bldg B STE 120, Austin, TX 78731

DIRECT FROM THE EXPERTS FOR 45 YEARS

VOL. 46, NO. 6
NOVEMBER-DECEMBER 2021

Annual Season Items

The annual reporting and proxy season is now upon us, and it is time to turn our attention to a few annual season items. It has been yet another wild ride this year, with a huge policy shift at the SEC and a wide variety of health, economic and market considerations weighing on the present and future performance of public companies. What follows is a few of the topics that remain top of mind for us as we proceed through this year's annual reporting season.

Revisiting Your Risk Factors

Let's face it — we have been living through a very dynamic environment for risk factors these past few years.

(Almost) New Disclosure Requirements. First off, the SEC has changed the risk factor disclosure requirements a couple of times over the last few years. In 2019, the SEC adopted amendments that relocated Item 503(c) of Regulation S-K, "Prospectus Summary and Risk Factors," to Item 105 of Regulation S-K. The SEC noted that this change was warranted because the risk factor disclosure covers a broad category of business information and is not limited to offering-related disclosure. The SEC also eliminated the specific risk factor examples that had been enumerated in the Item 503, in line with the SEC's policy to discourage "boiler plate" risk factors and to better align with the principles-based objectives of the disclosure requirement.

In 2020, in one of the last gasps of the decade-long Disclosure Effectiveness Initiative, the SEC adopted amendments to Item 105 that require summary risk factor disclosure of no more than two pages if the risk factor section exceeds 15 pages. Those amendments also refined the principles-based approach of Item 105 by requiring disclosure of "material" risk factors and required that risk factors be organized under relevant headings in addition to the sub-captions the were already required, with any risk factors that may generally apply to an investment in securities disclosed at the end of the risk factor section under a separate caption.

We have one annual season under our belts of dealing with the new risk factor disclosure requirements. For the most part, the first year of implementation of the new risk factor disclosure requirements was relatively uneventful. Surprisingly, some studies that came out this year after the reporting season wrapped up suggest that risk factors actually got longer for some companies, as the threat of the two-page summary risk factors did not appear to discourage issuers from continuing to blow past the 15-page mark now enshrined in Item 105.

That should probably come as no surprise, given the increase in the volume of risks that many companies need to address as the pandemic has dragged on and the economy went haywire.

Overall, we haven't heard any feedback when companies either pared back their risk factors to come in under the 15-page mark, or went ahead and just included the two-page summary. In the end, the approach continues to boil down to what level of detail companies feel is necessary to fend off private litigants or the SEC.

One question that has repeatedly come up in the context of applying the new Item 105 requirement is the placement of the two-page risk factor summary if the issuer exceeds the 15-page limit. Item 105 states: "If the discussion is longer than 15 pages, include in the *forepart* of the prospectus or annual report, as applicable, a series of concise, bulleted or numbered statements that is no more than two pages summarizing the principal factors that make an investment in the registrant or offering speculative or risky" (emphasis added). The Staff has not provided any formal guidance on what the Item means by the reference to the "forepart" of the relevant document.

We understand that, when asked, the Staff usually refers callers to footnote 219 of the adopting release (Rel. No. 33-10890 (2020)), which discusses the risk factor summary discussion in Form S-11 that pre-dated the Item 105 rules changes. The footnote states: "Item 3(b) to Form S-11 [17 CFR 239.18] includes such a requirement, stating that where appropriate to a clear understanding by investors, an introductory statement shall be made in the forepart of the prospectus, in a series of short, concise paragraphs, summarizing the principal factors which make the offering speculative. The risk factor summary included in a Form S-11 filing typically consists of a series of bulleted or numbered statements comprising no more than one page on average. Given our experience with this format in the Form S-11 context, we think it provides an appropriate model for the summary risk factor presentation required under the final amendments."

Our experience with the summary risk factor disclosure requirement in Form S-11 over the years has informed our view that the Staff appears to expect the summary risk factors description to appear at the very beginning of annual report, as opposed to, *e.g.*, immediately before where the full risk factors disclosure begins. That said, practice on this point has been mixed, and we have not seen placement of the risk factors summary emerge as a topic of comment in Staff reviews of Form 10-Ks. Some companies took the sensible approach of pairing or combining the summary risk factors disclosure with the forward-looking statement disclaimer that some companies choose to include at the beginning of the Form 10-K, prior to Item 1.

Another interpretive quagmire that companies have grappled with in the new requirement is whether the summary risk factors section should appear in a Form 10-Q when an issuer decides to include a full set of risk factors in each of their Form 10-Q filings. Again, we turn to the specifics of the regulatory text in Item 105, which states in relevant part "[i]f the discussion is longer than 15 pages, include in the forepart of the prospectus or *annual report*, as applicable" (emphasis added). We suspect that the SEC included the specific reference to annual report in the regulatory text because that is where the full risk factors are required, and generally the Commission has not encouraged including a full set of risk factors in quarterly reports.

The adopting release is ambiguous on this point, does not include any discussion of the reason why the Item was worded this way, and generally describes the new requirement as "[u]nder the final amendments, if a registrant's risk factor disclosure exceeds 15 pages, Item 105(b) will require in the forepart of the document a series of concise, bulleted or numbered statements summarizing the principal factors that make an investment in the registrant or offering speculative or risky." To our knowledge, the Staff has not provided any interpretation of this language in Item 105 of Regulation S-K, but it seems that it is a fair reading to say that the requirement appears to be limited to annual reports and prospectuses.

As companies add to their risk factors this annual reporting season to address the multitude of risks out there, it is useful to have a process in place to check whether the risk factors section would exceed fifteen pages of text in the EDGAR-filed document. The requirement for the two-page summary can easily get overlooked because it is still relatively new. It is sometimes tricky because the draft document that is reviewed prior to filing may not be the same in terms of pagination and formatting as the version that is ultimately filed on EDGAR. So this is clearly an Item that requires its own control at the end of the process to ensure compliance.

Inflation Rears Its Ugly Head. One topic that had largely gone the way of the dinosaur in risk factor disclosure and in MD&A has been the impact of inflation, obviously because we have lived in a particularly prolonged period of very low inflation and interest rates. As the negative impact of inflation has waned from our collective consciousness, the need for specific disclosure about inflation has likewise diminished over time. This is perhaps demonstrated by the fact that Item 303 of Regulation S-K included a specific requirement to address inflation up until a year ago, when the SEC felt comfortable turning to a more principles-based approach because having a specific requirement referencing inflation and changing prices "may give undue attention to the topic."

As revised, Item 303 still requires companies to discuss the impact of inflation or changing prices if they are part of a known trend or uncertainty that had, or is reasonably likely to have, a material impact on net sales, revenue, or income from continuing operations. Further, Item 303 requires that, where the financial statements reveal material changes from period-to-period in one or more line items, companies must describe the underlying reasons for these material changes in quantitative and qualitative terms, which could result in a discussion of inflation and changing prices.

Rising prices in many sectors, whether ultimately transitory or more permanent, could have a significant impact on the results of operations and financial condition of public companies, and as a result we expect to see more discussion of this topic in both risk factors and MD&A. Some companies may choose to include a separate risk factor regarding risks from inflation, or rather incorporate the discussion into the broader topic of general economic risks. We also expect the inflationary trend to prompt more discussion of the risks associated with rising interest rates, including the risk of increased costs of variable rate debt and refinancing risks for fixed rate debt.

We expect that the Staff may be focused on risk factor and MD&A disclosure about inflation in its upcoming filing reviews, to see if companies heeded the guidance from the adopting release for the 2020 MD&A amendments that such matters must still be addressed even absent the specific line item requirement when such matters represent a known trend or uncertainty that had, or is reasonably likely to have, a material impact on net sales, revenue, or income from continuing operations.

Supply Chain Risks. If you have been waiting on a couch delivery for the past nine months or observed with amazement the huge flotilla of container ships anchored off the coast of California, you are aware that we are facing some considerable supply chain problems, and these problems are likely to persist for the foreseeable future. Given that supply chain problems remain in the news and are a big focus of the Biden Administration, we expect that the Staff is closely monitoring public company disclosures about supply chain issues and evaluating whether companies are telling the complete story about the supply chain challenges that they face, as well as the potential impact on their business. Increasingly, we have seen companies addressing supply chain considerations in their earnings releases, risk factors and MD&A disclosure, and we expect that trend will continue into the annual reporting season.

Companies that are experiencing supply chain issues should consider including a stand-alone risk factor to address the considerations, rather than incorporating it into a broader COVID-19 pandemic risk factor or the discussion of general economic conditions. As always, companies should be particularly sensitive to disclosing information that is consistent with statements made in earnings releases, investor presentations and customer or client communications, as the Staff is likely to judge the disclosure in a company's Form 10-K and Form 10-Q relative to those other sources of information.

The COVID-19 Pandemic. With no apparent end in sight for the COVID-19 pandemic, companies should update their COVID-19 risk factor disclosure, whether it is now included as part of other relevant risk factors or as a standalone COVID-19 risk factor.

One particular area of concern with COVID-19 risk factors is ensuring that the risk factor language is not hypothetical, in that the company still describes the potential for risks associated with the pandemic without addressing the extent to which those risks have already occurred and have had an impact on the company. The SEC and the Staff have expressed concern with risk factor disclosure that is hypothetical and therefore does not put the risk described in appropriate context. For example, in the SEC's 2018 interpretive release on cybersecurity, the SEC stated that, "[i]n meeting their disclosure obligations, companies may need to disclose previous or ongoing cybersecurity incidents or other past events in order to place discussions of these risks in the appropriate context."

The Staff has also raised comments on risk factor disclosure, expressing the concern that the risk is presented in a hypothetical context when the company has, in fact, experienced the matters discussed in the risk, and the SEC has brought Enforcement actions emphasizing this point. As a result, companies drafting risk factors regarding COVID-19 should not present the risks from the pandemic in only hypothetical terms, but should identify specific events and circumstances that have occurred that are necessary to put the associated risks in context.

Given all that has transpired over the past two years, we think that it would be a good idea to revisit the questions raised by the Staff in CF Disclosure Guidance: Topic No. 9 – *Coronavirus (COVID-19)* when preparing the updated COVID-19 risk factors disclosure. While some of the original concerns expressed in COVID-19 risk factors may no longer be relevant, the continued uncertainty about how long the pandemic will continue and the severity of the outcome may require further details to address the full range of potential risks. Particularly for companies with global operations, there may be renewed areas of risk associated with lockdowns and restrictions on travel and commerce that may now need to be addressed, even though they may not have been as relevant at the beginning of 2021.

A new area of COVID-19 disclosure that companies have been addressing is vaccine mandates. With the rollout of vaccine mandates beginning back in September, we have seen companies increasingly addressing the risks that could arise if and to the extent that vaccine mandates apply to them. Companies have been addressing a variety of risks in this context, including the extent to which the implementation of these requirements could result in increased costs, attrition (including attrition of skilled labor or management personnel), difficulty addressing future human capital needs, labor disruptions and adverse effects on employee morale.

Cybersecurity. Don't forget about your cybersecurity risk factor disclosure! With all that has been going on (see above), it might be easy to forget about cybersecurity disclosure, but the topic remains very much at the forefront of the SEC's agenda and is of great interest to investors as well. Significant cybersecurity incidents such as the SolarWinds supply chain attack that the SEC's Division of Enforcement has been looking into over the past year makes it critical for companies to pay close attention to their cybersecurity risk factor disclosure, and evolve that disclosure over time to reflect developing threats and to avoid the hypothetical disclosure problem.

Overall, the cybersecurity risk factor should address the types of cybersecurity threats that the company faces, and the extent to which the company has been impacted in a material way by actual breaches or other incidents. The cybersecurity risk factor should also address the risk that cyber incidents may go undetected for a long period of time, which could result in significant consequences. The disclosure should address, to the extent relevant, preventative measures that have been established for the purpose of addressing cyber risks, and the risk that such measures may not be effective to avoid an incident.

Risks are often raised by third-party access to the issuer's IT systems, so the risk factor disclosure should address the extent to which access by vendors, outsourcing parties or others might expose the issuer to a cyber attack. Risk factor disclosure should also address when an issuer has insurance coverage for cyber incidents, and the extent to which costs of a cyber attack could exceed that insurance coverage.

The risk factor disclosure should highlight the actual and/or potential consequences of a cyber attack, which could include things such as reputational harm, costs to remediate the impact of the attack, and costs for implementing protective measures. One frequent Staff comment asks that a company address in the risk factor actual or attempted cyber attacks, so that the reader can understand the risks as they apply in the context of the company's business.

Climate Change. Obviously, we cannot forget about climate change disclosure. The Staff's ongoing climate change disclosure review project often raises the question: what should companies do going into the annual reporting season knowing what areas the Staff has focused on in the comment process? Our advice has generally been "stay the course." Unless you are a recipient of a one of the Staff's climate change comments letters – in which case the outcome may depend on the ultimate resolution of those comments – now is probably not the best time to completely revamp your climate-related disclosure in the Form 10-K.

As had been the case before the Staff's climate change review project got under way, it is critically important to consider the SEC's 2010 guidance (Rel. No. 33-9106 (2010)) when preparing your disclosures, and it may be appropriate to take extra steps this year to document and "pressure test" your materiality analysis when considering that guidance. Further, it is always helpful to draw on your engagement efforts to understand what information investors are interested in seeing, so that you can consider that input when preparing the Form 10-K and proxy statement.

We will undoubtedly see rule proposals regarding climate change risks in the near term, and when those rules are ultimately adopted, it will then be appropriate to reconsider the disclosure approach in light of those more specific disclosure requirements.

Revisiting the Revised MD&A and Financial Disclosure Requirements

Given that it is the holiday season, we revisit the often-cited analogy that, over the years, MD&A has been like a Christmas tree — as new issues came up over time, the SEC and the Staff would add a new ornament to MD&A to try to address it, whether through rule amendments or interpretive guidance, and as a result everything was additive and over time MD&As just got longer and more complicated. With its November 2020 rulemaking, the SEC accomplished some major pruning of the Christmas tree, and decided to pull off or lighten some of those ornaments that were weighing MD&A down.

We would not compare the end result to a Charlie Brown Christmas tree with just a couple of sad branches, because companies are actually still subject to a very robust MD&A requirement. We hope that, in the long run, Item 303 as revised will prove to be a more effective disclosure requirement, but in the short term it will take some thinking to figure out how to best adapt your existing MD&A to the new requirements. We review some general themes from the November 2020 rulemaking that you should consider as you are revising your Form 10-K to comply with the new disclosure requirements.

Gone but Not Forgotten. In a number of cases, such as selected financial data, supplementary financial information, the table of contractual obligations, inflation disclosure requirements, and the separately-captioned "off-balance sheet" arrangements section, the SEC has eliminated the disclosure requirement, but has either provided guidance or a new principles-based disclosure requirement that means we still have to consider what needs to be disclosed instead of the information that was provided in response to these former requirements. As a result, when these disclosure elements are removed, it is important to go back to the adopting release and other aspects of the relevant Item to understand what additional disclosure may be required.

What is Old is New Again. In some cases, the Commission has codified requirements that have actually been around for a long time. A good example of this is critical accounting estimates, which originated from SEC guidance issued back in 2003 and we have been including in MD&A for many years. Now we have a rule specifically requiring that disclosure and providing certain parameters around the disclosure that must be provided, including quantifying the sensitivity associated with the identified critical accounting estimate.

The SEC also revisited how companies should analyze and disclose information regarding known trends, demands, commitments or uncertainties, based on a "reasonably likely" threshold that the SEC has articulated. And now we must consider the specific requirements that the SEC adopted to disclose material cash requirements, including capital expenditures.

You Can Lead a Horse to Water, but You Can't Make it Drink. With the shift to more principles-based rules, the SEC has built more flexibility into the MD&A requirements. An example of this is the flexibility that companies will now have with respect to interim period comparisons. The item as amended permits companies to compare their most recently completed quarter to either the corresponding quarter of the prior year (as is currently required) or to the immediately preceding quarter.

However, just because companies have more flexibility does not necessarily mean that they will take advantage of that flexibility. Further, with the changes to the supplementary financial information disclosure requirements, the rules don't require fourth quarter disclosure on a standalone basis, but companies may still be interested in voluntarily providing that information.

Don't Look a Gift Horse in the Mouth. For some of the changes in the November 2020 release, particularly where the SEC eliminated a disclosure requirement that has caused issues over the years, it may be a good idea to just accept the change without over-analyzing it. We would put the elimination of the selected financial data table into this category. The selected financial data table has always caused us troubles because it contains financial information for more periods than are included in the filing, which creates headaches when you include it or incorporate it by reference into a registration statement, because then the auditors have to do procedures on that information, and sometimes that may be a nightmare because, *e.g.*, you have former auditors. We do not think that anyone is missing out on this information by virtue of it being excluded, given all of the financial information available on EDGAR, so perhaps it is a good time to say goodbye to the selected financial data table if you have not eliminated it already.

Revisiting Your Form 10-K Captions

The flurry of rulemaking and some legislation has brought about changes to the captions that you must list in your Form 10-K, so it is a good idea this annual reporting season to revisit your captions and make sure that they conform to the current version of Form 10-K that the SEC has posted. This is because for Form 10-K, all of the Items specified in the form must be stated, even if they are inapplicable to the issuer.

Exchange Act Rule 12b-13 applies to the preparation of Form 10-K and Form 10-Q, and provides applicable guidance regarding the inclusion of item numbers and captions in all Exchange Act reports. It states, in part — "The statement or report shall contain the numbers and captions of all items of the appropriate form, but the text of the items may be omitted provided the answers thereto are so prepared as to indicate to the reader the coverage of the items without the necessity of his referring to the text of the items or instructions thereto… Unless expressly provided otherwise, if any item is inapplicable or the answer thereto is in the negative, an appropriate statement to that effect shall be made."

Form 10-K does not include an instruction that "expressly provide[s] otherwise" with regard to inapplicable items, so for that reason the Form 10-K must include all of the item headings, regardless of their applicability to the issuer. Form 10-Q is different, because it has an instruction that "expressly provide[s] otherwise" with regard to inapplicable items. Specifically, the instruction at the beginning of Part II of Form 10-Q includes the following — "Any item which is inapplicable or to which the answer is negative may be omitted and no reference thereto need be made in the report."

Some of the items that we have seen companies omitting or forgetting are: Item 6. [Reserved] (what used to be the selected financial data table item); Item 9C. Disclosure Regarding Foreign Jurisdictions that Prevent Inspections (requiring disclosure under the Holding Foreign Companies Accountable Act and related rules); and Item 16. Form 10-K Summary (adopted a few years ago, and while few companies voluntarily provide the optional Form 10-K summary, you still need to list the item and say "None" if you don't include the summary).

SEC Adopts Mandatory Use of Universal Proxy in Contested Elections

On November 17, 2021, the SEC adopted rules mandating the use of a "universal proxy" in contested director elections. Release No. 34-93596, *Universal Proxy*, (Nov. 17, 2021). The rules were adopted by a 4 to 1 vote, with only Commissioner Peirce dissenting. The SEC's action occurred more than five years after the universal proxy rules were originally proposed, and despite the significant changes in corporate governance and annual meeting practices that have occurred since then, the rules the agency adopted in large part track those contained in the proposing release.

Perhaps that's because the fundamental objective of the universal proxy proposal has not changed over the years — it remains permitting shareholders voting by proxy to cast their votes in the same way as they could if they attended the meeting in person. Investors who attend a meeting in person may vote for any of the individuals nominated by management or dissident shareholders. In contrast, shareholders voting by proxy have generally been unable to freely pick and choose candidates from the competing slates.

That limitation on shareholders' ability to vote for the candidates of their choice results from restrictions imposed under both state and federal law. While each of the contesting sides will distribute proxy cards, state law provides that a later dated proxy card has the effect of revoking an earlier one, so shareholders can only complete one card and must accordingly cast their votes only with respect to the directors listed on that card.

On the federal level, Exchange Act Rule 14a-4(d)(1)'s "bona fide nominee rule" effectively limits shareholder choice by generally prohibiting a party from naming a nominee who has not consented to be included in its proxy statement. Management nominees almost never provide their consent to being named in a dissident's proxy statement, so except for situations covered by the SEC's "short slate" rule, shareholders are effectively precluded from voting a "split ticket" between management and dissident nominees.

The new rules attempt to level the playing field for shareholders voting by proxy by mandating the use, in all contested elections, of a universal proxy card that includes the names of all candidates duly nominated by any party soliciting proxies. Requiring a universal proxy card in non-exempt director election contests is the most effective means to ensure that shareholders voting by proxy are able to elect directors in a manner consistent with their right to vote in person at a shareholder meeting.

In addition to requiring the use of a universal proxy card, the final rules make a number of important changes that will significantly influence the way that proxy contests are conducted and that may (or may not) result in a significant uptick in the number of proxy contests. These changes:

- Expand the "bona fide nominee" concept to include anyone who consents to being named in any proxy statement for a company's next shareholder meeting for the election of directors.
- Require dissidents to provide notice of their intent to solicit proxies and to identify their nominees no later than 60 days before the anniversary of the previous year's annual meeting and require companies to notify dissidents of the names of their own nominees no later than 50 days before such date.
- Require dissidents to file their definitive proxy statement by the later of 25 calendar days before the shareholder meeting or five days after the company files its definitive proxy statement.
- Require each side in a proxy contest to refer shareholders to the other party's proxy statement for information about the other party's nominees and refer shareholders to the SEC's website to access the other side's proxy statement free of charge.
- Require that dissidents solicit the holders of shares representing at least 67% of the voting power of the shares entitled to vote at the meeting.
- Establish presentation and formatting requirements for universal proxy cards that are intended to ensure that each party's nominees are presented in a clear, neutral manner; and
- Require proxy cards to (i) include an "against" voting option in director elections, when such a vote has a legal effect, (ii) provide shareholders with the ability to "abstain" in a director election where a majority voting standard applies, and (ii) require disclosure about the effect of a "withhold" vote in an election of directors.

Mandatory Universal Proxy

New Rule 14a-19(e) mandates the use of universal proxy cards in all non-exempt director election contests, with the exception of those involving funds registered under the Investment Company Act. The SEC rejected calls for a voluntary system, observing that a mandatory system better protects the shareholder voting franchise, while avoiding the confusion that might result from the potential for strategic behavior in a voluntary system.

In making the use of universal proxy cards mandatory, the SEC returned to the fundamental underpinnings of the rule proposal. It stressed the existing disparity between the ability of retail investors and large shareholders to split their tickets in director elections. The adopting release notes that institutional shareholders can split their vote between candidates on competing slates because they can arrange for a representative to attend the shareholder meeting and vote in person, but that retail investors generally lack the resources or sophistication to do that. The SEC said that mandatory use of universal proxies addresses that disparity and allows shareholders voting by proxy the same range of options provided to those attending in person.

Critics of the universal proxy proposal contended that it would promote the interests of activist investors and increase the influence of proxy advisors. The SEC rejected both of these claims, although your mileage may vary on how compelling you find the arguments supporting that position — which depend heavily on its views of the obligations imposed by the various parties' fiduciary duties — to be.

In any event, the adopting release also makes it clear that the SEC is indifferent to the possibility that more proxy contests may result from the implementation of a universal proxy card, noting that the "ultimate decision" on who is elected to the board belongs to the shareholders. The adopting release goes on to point out that there's a big difference between launching a proxy contest and winning one, and that "these decisions at the heart of corporate governance are best left to shareholders."

Dissident Notice Obligations

The new rules impose a variety of notice obligations on the parties involved in a contested election. New Rule 14a-19(b) generally requires a dissident to provide the company with the names of its nominees no later than 60 calendar days before the anniversary of the previous year's annual meeting date. If the date of that meeting has changed by more than 30 days (or if no annual meeting was held during the prior year), the dissident must provide the required notice by the later of 60 calendar days before the annual meeting or the tenth calendar following the company's public announcement of the date of that meeting.

A dissident will not have to comply with this notice obligation if the required information is contained in the dissident's preliminary or definitive proxy statement that has been filed by the applicable notice deadline. While public proxy disclosure may avoid the need to provide the notice that would otherwise be required, it is important to note that Rule 14a-19 does not require a dissident to file its notice with the SEC or otherwise make it publicly available.

Rule 14a-19 also requires a dissident to include in its notice a statement that it intends to solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote on the election of directors, and to notify the company promptly of any change in that intent or in the names of its nominees.

If a dissident failed to comply with these notice requirements, it would be unable to conduct an election contest, but the adopting release points out that it would not be prevented from other actions seeking changes to the board, such as "vote no" campaigns, conducting an exempt solicitation, or, if permitted under the company's charter documents, calling a special meeting to remove existing directors and appoint its own nominees to fill the resulting vacancies. In other words, dissidents keep all of the other arrows that they had in their quiver prior to the adoption of the new rules.

Company Notice Obligations

Dissidents are not the only parties subject to notice requirements. New Rule 14a-19(d) obligates a company to provide notice of the names of all of the nominees for whom it intends to solicit proxies no later than 50 days prior to the anniversary of its annual meeting, unless the company provided those names in its preliminary or definitive proxy statement filed prior to the deadline. According to the adopting release, the rationale for this requirement is that without it, "dissidents could face an informational and timing disadvantage in a universal proxy system."

That disadvantage would arise from the fact that although companies would know the names of dissident nominees no later than 60 days before the annual meeting, the company could withhold that information until it filed its preliminary proxy statement, which would not be required until at least 10 calendar days before the mailing date of the definitive proxy statement. That would mean that dissidents could not file their own definitive proxy card until the company filed its preliminary proxy statement identifying its nominees.

The adopting release says that the 10-day period between the required delivery of the dissident's notice and the date the company must provide its own is sufficient for the company to finalize its own slate and respond to the dissident's notice. At the same time, the 50-day deadline provides dissidents with timely access to the names of registrant nominees (which it is likely to know already from prior proxy statement filings).

As with the notice requirement for dissidents, Rule 14a-19(d), as adopted, requires a registrant to promptly notify the dissident of any change in the registrant's nominees. If there is a change in the registrant's nominees after the dissident has disseminated a universal proxy card, the dissident would have the option of disseminating a new universal proxy card reflecting that change.

Minimum Solicitation Requirement for Dissidents

As originally proposed, the universal proxy rule would have required that dissidents solicit holders of shares representing a majority of the voting power of the company. In the final rule, the SEC opted to increase the minimum solicitation threshold to 67% of the voting power of shares entitled to vote on the election of directors.

In the June-July 2021 issue of *The Corporate Counsel,* we noted that multiple constituencies had coalesced around a minimum solicitation requirement of 67% of the total voting power, so the fact that the SEC determined to increase the minimum solicitation percentage to this level is not surprising. However, the final rules do not incorporate any requirement as to the minimum number of shareholders solicited. This is despite concerns expressed by former SEC Chair Jay Clayton at a 2018 Council of Institutional Investors conference that "depending on the concentration of holding you could effectively accomplish solicitation by going to much less than a roomful of people, maybe a dinner table full of people. Not sure that that's really where we want to be."

In the adopting release, the SEC acknowledged similar concerns, but contended that increasing the minimum percentage from a majority to 67% incentivizes dissidents to solicit a greater number of shareholders without unduly burdening them.

The SEC also opted not to adopt any mechanism for enforcing the minimum solicitation requirement. It pointed out that failure to comply with that requirement would itself be a violation of the proxy rules and subject the dissident to the same liability that it would face in connection with any other violation. The SEC also noted that since Rule 14a-19(a)(3) requires dissidents to disclose in the proxy statement or card that they intend to comply with the minimum solicitation requirement, failure to do so would subject dissidents to liability under Rule 14a-9, which prohibits false or misleading statements or omissions in proxy materials.

When the SEC reopened the comment process on the universal proxy proposal earlier this year, it sought input on the costs and benefits of "nominal" proxy contests under the current system and under a universal proxy regime. Commenters did not provide much input concerning whether and the extent to which the rules should accommodate nominal solicitations, and the SEC did not directly address those issues in the final rule.

However, the adopting release does note that the new rules do not accommodate purely nominal contests. It acknowledges that while "some dissidents might have chosen to initiate contests to pursue goals other than changes in board composition, such as to publicize a particular issue or to encourage management to engage with the dissident," those contests will not be possible without meaningful solicitation efforts under the new rules.

Despite that statement, the SEC also did not impose any specific method of furnishing proxy materials to shareholders. As a result, dissidents are free to use the “notice and access” method of mailing a notice of internet availability and posting proxy materials on a website in order to minimize their solicitation costs. So, for some dissidents, complying with the minimum solicitation requirement through notice and access may still allow them to engage in “quasi-nominal” solicitations intended to further their specific goals.

Dissidents Must File Definitive Proxies 25 Days in Advance

New Rule 14a-19(a)(2) requires a dissident to file its definitive proxy statement by the later of 25 calendar days prior to the meeting date or five calendar days after the company files its definitive proxy statement. The rationale for this requirement is that because shareholders will likely not have seen information about the dissident’s nominees when they receive the company’s universal proxy card, some kind of filing deadline for the dissident is necessary to ensure that they have access to information about all nominees sufficiently in advance of the meeting — and with enough time to change votes they may have cast on the company’s proxy card if they so desire.

This is an area in which the SEC did not opt to impose parallel obligations on companies, believing that state corporate law requirements obligating companies to hold annual meetings and satisfy quorum requirements provide sufficient incentives to solicit proxies well in advance of the meeting date.

Access to Information About All Nominees

In order to permit shareholders to access information about all nominees when they receive a universal proxy card, the SEC adopted new Item 7(h) of Schedule 14A, which requires each party to refer shareholders to the other side’s proxy statement for information about their nominees and indicate that the other party’s proxy statement can be obtained without cost on the SEC’s website. The SEC also revised Rule 14a-5(c), which in its current form permits parties to refer to information contained in another party’s filing in order to satisfy their disclosure obligations. As revised, parties will be permitted to refer to information that *will be furnished* in a filing of the other party to satisfy their disclosure obligations.

The SEC also changed the definition of “participant” in Instruction 3 to Items 4 and 5 of Schedule 14A to ensure that, despite appearing on the other party’s proxy card, only the party’s own nominees would be considered “participants” in that party’s solicitation.

Formatting and Presentation of the Universal Proxy Card

New Rule 14a-19(e) sets forth certain formatting and presentation requirements applicable to universal proxy cards:

- The proxy card must set forth the names of all duly nominated director candidates.
- The proxy card must provide a means for shareholders to grant authority to vote for the nominees set forth.
- The proxy card must clearly distinguish among registrant nominees, dissident nominees, and any proxy access nominees.
- Within each group of nominees, the nominees must be listed in alphabetical order by last name on the proxy card.

- The same font type, style and size must be used to present all nominees on the proxy card.
- The proxy card must prominently disclose the maximum number of nominees for which authority to vote can be granted; and
- The proxy card must prominently disclose the treatment and effect of a proxy executed in a manner that grants authority to vote for more nominees than the number of directors being elected, in a manner that grants authority to vote for fewer nominees than the number of directors being elected, or in a manner that does not grant authority to vote with respect to any nominees.

In addition, where both parties have presented a full slate of nominees and there are no proxy access nominees, Rule 14a-19(f) permits the universal proxy card to provide the ability to vote for all dissident nominees as a group and all registrant nominees as a group. However, the proxy card must provide a similar means for withholding authority to vote for such group of nominees, unless the number of nominees of the company or of any other soliciting person is less than the number of directors being elected.

The new rules do not mandate a set format for each proxy card, nor do they require the cards to look identical to each other. Instead, the SEC permitted some flexibility to the parties in designing their own proxy cards. However, in order to avoid concerns about drawing attention to specific candidates, the rules require that font type, style and size must be consistent for all nominees presented on the same card.

In our July-August 2021 issue, we highlighted some of the concerns about the disparate presentation of nominees on the universal proxy card used by the Rice Team in its successful proxy contest with EQT. In particular, the Rice Team's card presented the EQT nominees that it opposed in a separate column from both its own nominees and those of EQT. The new requirement for each group of nominees to appear in alphabetical order would appear to address this particular tactic, but given the stakes involved in these elections, efforts to "push the envelope" in exercising the design flexibility that the SEC has permitted should not come as a surprise.

Director Election Voting Standards Disclosure and Voting Options

New Rule 14a-4(b) requires the inclusion of an "against" voting option in lieu of a "withhold authority to vote" option on the form of proxy for the election of directors if state law gives legal effect to such a vote, and also permits shareholders to abstain in an election governed by a majority voting standard. This provision is independent of the adoption of the universal proxy requirement and will apply to both contested and uncontested elections.

As originally proposed, the rule would have amended Item 21(b) of Schedule 14A to expressly require the disclosure of the effect of a "withhold" vote, and would have modified the text of Item 21(b), which currently reads "Disclose the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state law as well as registrant charter and by-law provisions" to delete the phrase "the method by which votes will be counted."

The final rule includes the first proposed change to Item 21(b), but not the second. The SEC agreed with a commenter who argued that the phrase "the method by which votes will be counted" in Item 21 of Schedule 14A should be retained, "in order to clarify for shareholders the effect of each voting option presented on the proxy card, as well as how each voting option will be counted."

In addition, Item 21(c) requires companies to disclose how they intend to treat proxy authority granted in favor of a dissident's nominees if the dissident abandons its solicitation or fails to comply with Rule 14a-19.

Elimination of the Short Slate Rule

The SEC amended Rule 14a-4(d) to eliminate the "short slate" rule for registrants other than funds. The short slate rule previously permitted dissidents soliciting in support of a partial slate of nominees that would make up a minority of the board of directors to seek authority to vote for some of a registrant's nominees. The new rules eliminate the short slate rule for operating companies because it would be unnecessary with a universal proxy requirement and the revised bona fide nominee rule. The short slate rule for funds has been retained because they are not included in the universal proxy requirement.

Amendment of the Bona Fide Nominee Definition

The current "bona fide nominee" rule prohibits naming a candidate in proxy materials who has not consented to his or her inclusion in them. In order to accommodate the use of a universal proxy card, Rule 14a-4(d) was amended. Instead of requiring that a nominee consent to being named in "the" proxy statement of the party listing that nominee on its card, the amended rule requires a nominee consent to being named in "a" proxy statement of either side in order to be a bona fide nominee.

In the adopting release, the SEC pointed out that change will also allow a dissident soliciting in favor of a proposal or conducting a "vote no" campaign, but not running its own slate director nominees, to include some or all of the company's nominees on its proxy card.

Mandatory Compliance Date: What Should Companies Do Now?

The rule changes adopted by the SEC — including those that apply to non-contested elections — will apply to shareholder meetings held after August 31, 2022. That gives companies some time to prepare for the new regime. Here are some of the ways we think they can put that time to good use.

- *Review and Update Advance Notice Bylaws*. With the ability of dissidents to launch proxy contests in which universal proxy cards will be required with only 60 days' notice, the notice and information requirements contained in advance notice bylaws are likely to be even more important. Those provisions typically require dissidents to provide notice of any proposals, including director nominations, between 90 and 120 days prior to the anniversary of the prior year's annual meeting.

  As a result, these bylaws may be the only mechanism that provides the board with sufficient time to review the background and qualifications of prospective dissident nominees and information about their sponsors in advance of the notice required under the new rules or a dissident's own proxy filing. Since that is the case, those bylaws — and the judicial decisions interpreting them — should be carefully reviewed to ensure that they accomplish their intended purposes.

- *Review Voting Standards and State Law*. The new rules will require companies to include an “against” option in lieu of a “withhold” option on the form of proxy for the election of directors if state law gives legal effect to such a vote. As a practical matter, this means that companies with charter provisions that provide for true majority voting in director elections will be required to include an “against” option in any proxy card involving a non-contested election.

While many companies without majority voting bylaws (or with “plurality plus” bylaws) will still be able to use the “withhold” language in their proxy cards, they should review provisions of applicable state corporate law in order to determine whether there are statutory provisions that might require them to give effect to an against vote in director elections.

This change, as well as related amendments to Item 21(b) of Schedule 14A, and the requirement to provide notice of the date by which notice of nominations must be provided are independent of the adoption of the universal proxy requirement and will apply to both contested and uncontested elections. It seems reasonable to expect that the new disclosure requirements will again result in close scrutiny by the Staff of proxy disclosures relating to the vote required to elect directors and the effect of “against,” “withhold” and “abstain” votes.

Companies should note that this new disclosure requirement also is consistent with Staff practice with respect to its review of proxy disclosure concerning the vote required to elect directors and the effect of various voting options provided to shareholders. In the past, the Staff has expressed concerns about the lack of clarity in these disclosures. Since that is the case, close attention should be paid to the preparation of these disclosures in any new proxy statement, including one relating to a meeting in advance of the mandatory compliance date.

- *Prepare for More Proxy Contests — But Keep in Mind Alternatives*. Some commenters have suggested that the adoption of universal proxy may lead to a significant increase in proxy contests, by reducing their overall costs and increasing their likelihood of success. Others, citing the costs associated with the minimum solicitation requirement, suggest that the rules may serve as a disincentive to some proxy contests. Still others, including Gibson Dunn, suggest that while universal proxy may be a boon to activists seeking board representation, it may not be viewed favorably by those seeking to engage in a control contest:

> “For those looking for the silver lining, it is not difficult to imagine a scenario where an activist might have been better off forcing shareholders into a binary choice of voting on the company’s proxy card (for all of the company’s nominees) versus the activist’s card (for the activist’s nominees). This phenomenon might be more pronounced where the activist was seeking to take control of the board, including hostile M&A situations.”

Gibson Dunn, *SEC Adopts Rules Mandating Use of Universal Proxy Card,* (Nov. 18, 2021) at 3.

Regardless of its impact on the overall number of proxy contests, one thing seems apparent: the implementation of universal proxy requirement provides dissidents with another arrow in their quiver. Sidley's memo on the new rules points out the implications of this:

> "It is uncertain whether the new regime will give dissidents new advantages at the ballot box. Public advocates of shareholder activism have, however, championed the adoption of the new rules. Their enthusiasm may reflect a premonition that the universal proxy card will afford dissidents with additional leverage when negotiating with boards and ultimately allow them to place more dissident candidates on boards through negotiations and proxy contests."

Sidley Update, *SEC Dramatically Changes the Rules for Proxy Contests, Adopts Universal Proxy,* (Nov. 17, 2021).

Importantly, while the adoption of the universal proxy requirement may affect the prevalence of proxy contests in uncertain ways, the adopting release makes it clear that the rules do not preempt any of the other alternatives available to dissident shareholders, including "vote no" campaigns, exempt solicitations or, if permitted under the company's charter documents, calling a special meeting to remove and replace incumbent directors. Companies navigating the new rules need to keep the continued availability of these alternatives in mind, because they can be certain that dissidents will.

- *Some New Rules Do Not Apply Only to Contested Elections*. The adopting release includes changes to disclosure requirements that will apply to future proxy statements regardless of whether an election is contested. Companies need to adjust their disclosure controls and procedures in order to incorporate compliance with these requirements.

Staff Legal Bulletin 14L: Corp Fin Lays Out The Welcome Mat for ESG-Related Shareholder Proposals

On November 3, 2021, the SEC's Division of Corporation Finance issued Staff Legal Bulletin 14L, which rescinds Staff Legal Bulletins 14I, 14J and 14K, and effectively wipes away four years of interpretive guidance on the exclusion of ESG-related shareholder proposals from proxy statements. In doing so, the new SLB may open the door for the inclusion of a wide range of previously excludable ESG proposals.

SLB 14I was issued in 2017 and addressed, among other things, the scope and application of Rule14a-8(i)(5) (the "economic relevance" exception) and Rule 14a-8(i)(7) (the "ordinary business" exception). In SLB 14I, Corp Fin observed that the key issue in evaluating both the economic relevance and ordinary business exceptions was whether a particular proposal focused on a policy issue that was sufficiently significant to the company's business, and called for no-action requests to include the board's analysis of the significance issue.

SLB 14J and 14K subsequently provided further interpretive guidance on these topics, and also addressed in some detail when proposals may be excluded under the ordinary business exception because they involve "micromanagement."

Business Significance No Longer a Factor in Evaluating Social Policy Proposals

In issuing SLB 14L, Corp Fin effectively uncoupled proposals relating to significant social policy issues from considerations relating to their significance to the company's business. Instead, SLB 14L says that Corp Fin will return to its traditional approach to social policy proposals:

> Going forward, the staff will realign its approach for determining whether a proposal relates to "ordinary business" with the standard the Commission initially articulated in 1976, which provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release. This exception is essential for preserving shareholders' right to bring important issues before other shareholders by means of the company's proxy statement, while also recognizing the board's authority over most day-to-day business matters.
>
> For these reasons, staff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.

Corp Fin was upfront in SLB 14L about the effect of this change in approach, noting that "proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7)." SLB 14L cites proposals raising "human capital management issues with a broad societal impact," as the kind of proposals that would no longer be subject to exclusion simply because the proponent did not demonstrate that the issue in question was significant to the company.

In light of Corp Fin's return to a non-company-specific approach to the significance of a social policy issue, Corp Fin says that it will no longer expect a board analysis as described in the rescinded SLBs as part of demonstrating that the proposal is excludable under the ordinary business exclusion. SLB 14L adopts a similar approach to the economic relevance exclusion, and therefore will also no longer require a board analysis here either.

Proposals Limiting Discretion Do Not Always Involve "Micromanagement"

Another basis for excluding a shareholder proposal under the ordinary business exception is that it "micromanages" the company. In evaluating no-action requests on this basis, the Staff has focused on the specificity and complexity of the proposal as well as its subject matter. In the past, the Staff has frequently permitted companies to exclude a proposal that prescribed specific actions to be taken by the board or the company on a specific timeline.

In SLB 14L, Corp Fin observed that the rescinded guidance may have been taken to mean that any limit on the company's discretion would result in a proposal being subject to exclusion on the basis of micromanagement. The new guidance clarifies that, consistent with the Staff's approach in more recent no-action requests, it will not concur in the exclusion of proposals that suggest targets or timelines "so long as the proposals afford discretion to management as to how to achieve such goals." Corp Fin went on to note that "specific methods, timelines, or detail do not necessarily amount to micromanagement and are not dispositive of excludability."

Other Topics Addressed in SLB 14L

Corp Fin addressed several other topics in SLB 14L, including the use of images in shareholder proponents' supporting statements, issues surrounding proof of ownership letters, and the use of emails to submit proposals and deficiency notices.

Use of images in supporting statements – SLB 14L reiterated the Staff's position that references to a limit of "500 words" in Rule 14a-8(d) and the absence of a reference to the use of graphics or images in supporting statements do not mean that the inclusion of graphs or images in supporting statements is impermissible. However, words included within graphics do count toward the 500-word maximum on the length of supporting statements.

While Corp Fin acknowledged the potential for abuse, it said that the existing grounds for exclusion under Rule 14a-(8)(i)(3), which would include material that rendered the proposal false or misleading, impugned someone's character or integrity or was irrelevant to the proposal's subject matter were sufficient to address those concerns.

Proof of ownership letters – SLB 14L reminds companies that the Staff takes a "plain meaning" approach to interpreting the text of proof of ownership letters, and is not likely to be persuaded by "overly technical" readings of those letters in an effort to exclude a proposal. Corp Fin specifically noted that it had not concurred with arguments that deviations from the format for those letters laid out in SLB 14F justified the exclusion of a proposal where the proponent had still provided documentary support sufficiently evidencing the required minimum ownership requirements.

SLB 14L also includes the following updated suggested language for inclusion in brokers and banks letters reflecting the 2020 revisions to the required ownership thresholds:

> "As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least [one year] [two years] [three years], [number of securities] shares of [company name] [class of securities]."

Corp Fin stressed, however, that this is merely a suggested format, and not one that brokers and banks must follow.

Almost immediately after SLB 14L was issued, several members of TheCorporateCounsel.net highlighted another issue that SLB 14L raises regarding proof of ownership letters. At one point in the discussion, Corp Fin says that "we believe that companies should identify any specific defects in the proof of ownership letter, even if the company previously sent a deficiency notice prior to receiving the proponent's proof of ownership if such deficiency notice did not identify the specific defect(s)." This kind of "double notice" is something that the Staff has not required before now.

Use of email – SLB 14 cautions companies and proponents about some of the verification issues associated with the use of email communications. Specifically, Corp Fin points out that email delivery confirmations and company server logs only show that an email was sent, not that it was received, and that spam filters or incorrect addresses may prevent delivery. Accordingly, the Staff recommends that the sender should seek a reply e-mail from the recipient in which the recipient acknowledges receipt of the e-mail.

It also suggests a little common courtesy — that both companies and shareholder proponents to acknowledge receipt of emails when requested.

What Companies Should Do Now

It is a certainty that there will be a lot of commentary in the coming weeks about how much of a departure SLB 14L represents from actual Staff practice versus what was laid out in the now rescinded SLBs. But in any event, Corp Fin is plainly sending a message that the proponents of ESG-related topics are likely to face a friendlier environment than they have in recent years.

That message will not be lost on those proponents, who still have plenty of time to submit proposals for next proxy season. Since that is the case, we think there are a handful of things that companies should keep in mind as they prepare to deal with ESG-related proposals in the post-SLB 14L environment.

- *Prepare for More ESG Proposals.* The first, and most obvious, thing that companies should do is prepare to receive more ESG-related proposals than they have in years past. Of course, proposals of this type are not exactly starting from a low base. According to Gibson Dunn's report on the 2021 proxy season, social and environmental proposals were up 37% and 13%, respectively, from 2020. Governance proposals were relatively flat, but still represented 36% of proposals submitted in 2021. Gibson Dunn & Crutcher LLP, *Shareholder Proposal Developments During the 2021 Proxy Season,* Aug. 19, 2021.

- *More Proposals Means More Work for the Corp Fin Staff.* The likely increase in the volume of ESG proposals means not only more work for the public companies receiving them, but also for the Staff, which already receives an avalanche of no-action requests each proxy season. Companies seeking a no-action position from the Staff would be smart to submit no-action requests at the earliest possible date, and to focus on their best arguments for exclusion rather than throwing the kitchen sink at a proponent (and at the Staff).

- *Consider Alternative Grounds for Exclusion.* While reciting a litany of far-fetched arguments for exclusion in the hope that one of them sticks is particularly poor strategy in the current environment, companies may wish to think about alternatives to ordinary course of business or economic relevance arguments. Companies should also explore procedural grounds for excluding a proposal.

- *Negotiated Resolution May be More Attractive.* Given the way in which SLB 14L shifts the playing field in favor of proponents of ESG-related proposals, increasing shareholder support for those proposals and an increasing willingness on the part of companies to prioritize ESG issues, many companies may find that the best strategy is to negotiate an arrangement with the proponent that will result in withdrawal of the proposal.

- *Rule 14a-8 Amendments May Offset Some of the Increases.* In considering the implications of SLB 14L, it is important that companies not lose sight of the Rule 14a-8 amendments adopted by the SEC last year. Those amendments are currently in effect, and we discussed them in the September-October 2020 issue of *The Corporate Counsel.* It is possible that their higher ownership and resubmission thresholds and the prohibition on the submission of multiple proposals in a representative capacity may offset some of the potential increase in the number of shareholder proposals resulting from SLB 14L.

- *Look Beyond SLB 14L's Headlines*. While attention has been focused on the change in Corp Fin's approach to the ordinary course of business and economic relevance exceptions, SLB 14L devoted a lot of time to proof of ownership letters and the hazards of relying on email communications to satisfy the delivery requirements contained in Rule 14a-8. Companies should take the Staff's guidance on those issues to heart, particularly when it comes to expectations about changes in existing practices — such as the possible need to deliver two notices of deficiency to a proponent in the context of proof of ownership disputes.

- *Consider the Litigation Alternative?* Many companies find the idea of litigating against a shareholder proponent distasteful. After all, most companies place a premium on maintaining good relations with their shareholders, and in many cases seeking to exclude a proposal is viewed as a last resort after efforts to resolve the proponent's concerns through negotiation have failed. But litigation is an option, and recent cases suggest that courts do not necessarily see the parameters of the grounds for exclusion set forth in Rule 14a-8 the same way that the Staff does. For example, in *Tosdal v. Northwestern Corp.*, 440 F.Supp.3d 1186 (D. Mont. 2020), a Montana federal district court permitted the exclusion of a shareholder proposal on ordinary business grounds despite the fact that a prior SLB had indicated the Staff's disagreement with the type of argument the company made. As a Jones Day memo on the decision points out, this kind of precedent may provide companies with additional room to maneuver:

> "Informal SEC staff pronouncements, such as Staff Legal Bulletins and no-action letters, may not be accorded even "persuasive" weight in determining the application of Rule 14a-8 exclusions in shareholder litigation. This development creates room for issuers to advance arguments based on the text, original purpose, history, and other attributes of Rule 14a-8's exclusions."

Jones Day Commentaries, *Court Ruling May Shift the Contours of Shareholder Proposal Litigation Under Rule 14a-8,* (Feb. 2020). We would be surprised if the changes implemented by SLB 14L resulted in a rush of lawsuits seeking to exclude shareholder proposals, but the option may be more attractive than it has been in the past.

- DL, JJ

FOUNDING PUBLISHER - Jesse M. Brill, J.D. Yale Law School
Brill is recognized as one of the country's leading authorities on insiders' transactions and executive compensation practices and disclosure.

EDITORS
John Jenkins, Senior Editor of TheCorporateCounsel.net and Partner of Calfee, Halter & Griswold LLP
Dave Lynn, Senior Editor of TheCorporateCounsel.net and former Chief Counsel of the SEC's Division of Corporation Finance
Alan Dye, Senior Editor of Section16.net and former Special Counsel to the SEC Chair
Michael Gettelman, LL.B. Harvard University

CCRcorp • 7600 N. Capital of Texas Highway, Bldg B STE 120 • Austin, TX 78731 • 1-800-737-1271 • info@ccrcorp.com