

February 26, 2018

SEC Staff Issues First No-Action Letter Under “Economic Relevance” Exclusion Following Updated Guidance

On February 22, 2018, the staff of the SEC’s Division of Corporation Finance (the Division) issued a favorable no-action response to Dunkin’ Brands Group, Inc. under Rule 14a-8(i)(5) (the economic relevance exception) representing the first successful use of the economic relevance exception following the issuance of Staff Legal Bulletin No. 14I (the SLB). The Ropes & Gray alert discussing the SLB may be accessed [here](#).

Rule 14a-8(i)(5) permits a company to exclude a proposal that relates to operations that account for less than 5% of its total assets, net earnings and gross sales, and is not otherwise significantly related to the company’s business. Under the staff’s historical application, the “otherwise significantly related” clause had swallowed the exclusion. Any proposal that raised social or ethical issues involving a matter that related to business the company conducted, no matter how small, could not be excluded. The SLB states that for proposals that are below the quantitative thresholds, the Division’s analysis, going forward, will focus on a proposal’s significance to the company’s business. In other words, “otherwise significantly related” will assess whether the matter has a significant impact on the company’s business. Under the SLB’s revised analysis, when the subject matter of the proposal is below the 5% quantitative thresholds, and the “proposal’s significance to a company’s business is not apparent on its face,” the burden shifts to the proponent to demonstrate that it is “otherwise significantly related to the company’s business.” A proponent can still raise social or ethical issues in its arguments, but it must tie them to a significant effect on the company’s business and the “mere possibility of reputational or economic harm will not preclude no-action relief.” The SLB also acknowledges that the board of directors is generally in a better position than the SEC staff to determine whether a shareholder proposal is “otherwise significantly related to the company’s business.” Thus, a company seeking no-action relief under Rule 14a-8(i)(5) will want to include in its request its board’s analysis of why the subject matter of the proposal does not have a significant effect on the company.

Dunkin’ Brands Group, Inc. sought to exclude a proposal requesting that its board issue a report assessing the environmental impacts of continuing to use K-Cup Pods brand packaging. In its no-action request letter, the company included a detailed description of the factors its board considered in determining that the subject matter of the proposal was not significantly related to the company’s business. These factors included: (i) the fact that sales of K-Cup Pods and related operations accounted for less than 5% of total assets, net earnings and gross sales in 2016 and were expected to account for similar percentages in 2017, (ii) the subject matter of the proposal did not address the company’s primary business operations (i.e., acting as a franchisor of Dunkin’ Donuts and Baskin-Robbins quick service restaurants), but instead focused on the packaging used in certain products manufactured by a third party under licensing arrangements, (iii) the absence of engagement with the company by any of its other shareholders on the proposal’s topic, (iv) the fact that a substantially identical proposal included in the prior year’s proxy statement garnered only approximately 14% support, (v) the staff’s guidance in SLB 14I that the mere possibility of reputational or economic harm is insufficient on its own to support a conclusion that a matter is significantly related to a company’s business, and (vi) the fact that the proponent provided no factual or other support in its proposal or supporting statement to carry its burden of demonstrating that the proposal is otherwise significantly related to the company’s business.

The thorough and fact-specific analysis undertaken by the company’s board appears to be precisely what the staff envisioned when it issued the SLB, and the renewed viability of Rule 14a-8(i)(5) should enable companies to exclude

proposals seeking to address social or ethical issues to the extent such issues do not significantly relate to the company's business. While the staff has followed through on its willingness to focus the decision on whether to exclude a proposal on the significance of the policy issue to the particular company's business, and is willing to give deference to the board's assessment of such significance, companies and boards of directors must still attend to their analyses with the care that they bring to their duties as fiduciaries generally. The result of their work will be very public and they risk reputational and shareholder relations damage with analyses that are less than convincing.

Ropes & Gray was pleased to assist Dunkin' Brands in the preparation of its no-action letter. Please feel free to contact any member of Ropes & Gray's [securities & public companies](#) practice group or your usual Ropes & Gray contact with any questions about this Alert.