See note below about Hogan Lovells

SEC staff updates guidance on shareholder proposals

On October 18, the staff of the SEC's Division of Corporation Finance published Staff Legal Bulletin No. 14F (SLB 14F) with guidance on interpretive issues under Exchange Act Rule 14a-8. Rule 14a-8 sets forth the requirements applicable to proposals submitted by shareholders for inclusion in their company's proxy materials for annual and special meetings. SLB 14F provides guidance to companies on how to verify a proponent's eligibility to submit a proposal, how to address submissions of revised proposals, and how to withdraw no-action requests for proposals with multiple proponents. SLB 14F is the staff's seventh legal bulletin on Rule 14a-8, which highlights the procedural and substantive complexities associated with shareholder proposals. The new legal bulletin can be found at www.sec.gov/interps/legal/cfslb14f.htm.

Verifying eligibility under Rule 14a-8(b)

SLB 14F (1) clarifies which brokers and banks are considered "record" holders for purposes of verifying whether a beneficial owner of a company's voting securities is eligible to submit a proposal under Rule 14a-8, and (2) explains how to avoid common errors in proving share ownership in connection with the eligibility determination.

Determining record ownership of securities deposited with DTC. SLB 14F alleviates the confusion over shareholder eligibility verification that has resulted in part from a series of conflicting staff and judicial positions. The new guidance confirms that, for Rule 14a-8(b) purposes, only participants in The Depository Trust Company (DTC), and not "introducing" brokers, are considered "record" holders of securities deposited with DTC who may provide written verification that the securities are owned by a particular beneficial holder.

At the time a proposal is submitted under Rule 14a-8, the proponent must have continuously held at least $2,000 in market value, or 1%, of the company's voting securities for at least one year, and must continue to hold the securities through the date of the shareholder meeting. When a shareholder holds its securities in "street name" through an intermediary such as a bank or broker, it generally...
must provide proof of its beneficial ownership by delivering to the company a statement from the "record" holder of the securities verifying the shareholder's ownership, in accordance with Rule 14a-8 (b)(2)(i).

SLB 14F distinguishes between DTC participants and other types of brokers and banks for verification purposes. Securities intermediaries typically deposit their customers' securities with DTC and are listed with DTC as "participants." Although the intermediaries do not appear on the company's records as the record holder (which is shown as DTC or its nominee, Cede & Co.), the staff considers DTC participants to be record holders for purposes of Rule 14a-8(b)'s verification requirements. SLB 14F indicates that the staff will not extend this treatment to "introducing" brokers that engage in sales and other activities involving customer contact, but do not maintain custody of customer's securities and generally are not DTC participants. In drawing this distinction, the staff highlights the transparency of the DTC participant listing with respect to a company's securities, which permits the company to identify the number of its securities held by each participant. For the purpose of assisting both companies and shareholders in determining whether a particular bank or broker is a DTC participant, SLB 14F refers to the current DTC participant list available at www.dtcc.com/downloads/membership/directories/dtc/alpha.pdf.

Avoiding errors in submitting proof of ownership. SLB 14F identifies two common errors by beneficial owners in attempting to provide proof of ownership from a record holder:

- In some cases, a letter with proof of ownership does not cover the full one-year period up to and including the date on which the proposal is submitted to the company. For example, if the letter is dated two days before the submission of the proposal and verifies that the proponent has continuously held the securities for one year as of the date of the letter, a gap of two days will exist from the date of the proof of ownership letter and the date on which the proposal was submitted to the company.

- In other cases, a letter with proof of ownership simply will refer to a shareholder's ownership as of a particular date, but will fail to confirm continuous ownership.

To assist shareholders (and their banks or brokers) in avoiding these errors, SLB 14F provides the following sample language to include in a proof of ownership letter that would satisfy the requirements of Rule 14a-8(b).

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

Addressing submissions of revised proposals

SLB 14F answers common questions concerning whether a company must accept a revised proposal and whether updated proof of ownership under Rule 14a-8(b) is required from a shareholder submitting a revised proposal.

The staff indicates that the company must accept a revised proposal if the shareholder submits it before the Rule 14a-8(e) proposal deadline. In this event, the initial proposal will be deemed withdrawn and the shareholder will not be viewed as having violated the one-proposal limit of Rule 14a-8(c). By contrast, if a revised proposal is received after the Rule 14a-8(e) deadline, a company may accept the revisions, but is not required to do so. If the company does not accept the revisions, however, the company must treat the revised proposal as a second proposal and submit a notice, in accordance with Rule 14a-8(j), stating its intention to exclude the revised proposal. The notice may cite Rule 14a-8(e) as the basis for the exclusion.

In all cases involving revised proposals, SLB 14F clarifies that there is no requirement for the shareholder to submit new or updated proof of ownership under Rule 14a-8(b). The staff notes that the existing requirement that a shareholder must hold the minimum amounts of securities through the date of the shareholder meeting should serve as a safeguard for the company in this circumstance.

Procedures for withdrawing no-action requests for proposals with multiple proponents

SLB 14F relaxes somewhat the procedures for companies to withdraw a no-action request
concerning a shareholder proposal.

In Staff Legal Bulletin No. 14C (CF), issued on June 28, 2005, the staff directed companies withdrawing a no-action request for a proposal submitted by multiple proponents to include documentation indicating that each proponent has agreed to withdraw the proposal. Alternatively, under this prior guidance, where the proponents have designated a lead proponent to act on their behalf, and the company can demonstrate that the designated individual or entity is authorized to act on behalf of the other proponents, the company need only include a letter from the lead proponent stating that it is authorized to withdraw the proposal on behalf of all proponents. SLB 14F indicates that the staff will now process a withdrawal request if the company merely submits a letter from the lead proponent that includes a representation that the lead proponent is authorized to withdraw the proposal on behalf of the other proponents.

Staff e-mail responses to no-action requests

Finally, in a welcome procedural change, SLB 14F notes the staff's intention to respond to Rule 14a-8 no-action requests by e-mail rather than by U.S. mail. The staff encourages companies and shareholders to include e-mail contact information in no-action requests and related correspondence. The staff will continue to transmit the no-action response by U.S. mail to any company or proponent for which the staff does not have e-mail contact information. The staff intends to provide only its response in its e-mail communications, and not include the incoming no-action request or related correspondence. Those additional documents will continue to be available on the SEC's website when the staff's response is posted. The staff's use of e-mail to deliver its responses is expected to help speed the delivery of staff responses to companies and shareholders.

Note
Hogan Lovells is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.
For more information, see www.hoganlovells.com

Disclaimer
This publication is for information only. It is not intended to create, and receipt of it does not constitute, a lawyer-client relationship.

So that we can send you this email and other marketing material we believe may interest you, we keep your email address and other information supplied by you on a database. The database is accessible by all Hogan Lovells' offices, which includes offices both inside and outside the European Economic Area (EEA). The level of protection for personal data outside the EEA may not be as comprehensive as within the EEA. To stop receiving email communications from us please click here.

The word "partner" is used to refer to a member of Hogan Lovells International LLP or a partner of Hogan Lovells US LLP, or an employee or consultant with equivalent standing and qualifications, and to a partner, member, employee or consultant in any of their affiliated businesses who has equivalent standing. Where case studies are included, results achieved do not guarantee similar outcomes for other clients.

© Hogan Lovells 2011. All rights reserved. Attorney advertising.