U.S. Chamber of Commerce
Center for Capital Markets
Competitiveness

November 16, 2021

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
Washington, DC 20549

Re: Staff Legal Bulletin 14L (CF)

Dear Chair Gensler:

We are writing to express our significant concerns regarding the announcement on November 3, 2021, that the Securities and Exchange Commission ("SEC") Division of Corporation Finance ("Division") rescinded three recent Staff Legal Bulletins ("rescinded SLBs") and replaced them with Staff Legal Bulletin No. 14L ("SLB 14L"). It is our considered opinion, as outlined below, that SLB 14L injects uncertainty into the shareholder proposal process, degrades investor protection, and harms competition and capital formation. We believe the Division should immediately reverse this decision. If the SEC or its staff believes that changes to the shareholder proposal process are necessary and in the best interest of investors, then the SEC should solicit input from the public and consider changes in an open and transparent manner.

Instead, however, in releasing SLB 14L, the Division has acted in an opaque and seemingly capricious manner under your direction. The issuance of SLB 14L jettisons decades of SEC policy for the sake of political expediency. Coupled with other recent announcements not to enforce recent duly-enacted rules, we fear that the SEC is putting its hard-earned reputation for even-handedness and rationality at risk. The SEC cannot expect the many thousands of businesses it regulates to respect the rule of law when the agency itself does not. Nor will the SEC be able to lead global public policy discussions if it is perceived as following a politically motivated regulatory philosophy that changes each time there is a presidential election.

Since its origins in the 1940s, the shareholder proposal process under Rule 14a-8 has evolved from a modest effort to give shareholders an additional tool for influencing corporate

governance to a complex and over-politicized process that is neither satisfactory to issuers nor their investors. On the one hand, the issuer community often finds itself devoting significant time and attention to proposals that are not germane to the business and are, in the majority of cases, destined to fail when put to a vote. The small minority of investors who avail themselves of the Rule 14a-8 process also often find the process to be an unsatisfactory one, both from a resource and outcome perspective.

For better or worse, the SEC staff has found itself at ground zero under Rule 14a-8 and often acts to mediate disagreements between issuers and investors during the no-action letter process. In recent years, the SEC staff has increasingly found itself weighing in on social and political issues. Given the tight timelines for printing proxy materials and the cost of litigation as an alternative to seeking SEC staff advice, the no-action letter process, though flawed, provides a form of rough justice for the participants.

Over the past several decades, boards have increased their communication with investors to understand their priorities. Some shareholders have increasingly used proposals at annual meetings as a means to raise the profile of an issue. Recently, the SEC promulgated reforms to further improve these communications channels.[1] Additionally, the rescinded SLBs provided businesses and their investors with the certainty of those items that would be appropriately considered with shareholder proposals. Undergirding this entire process was the prioritization of economic return for investors in the companies that they have invested in.

A recent study of 3,903 proposals, between 2007-2019, examined the impact on stock price where no action was requested.[2] This study found that the stock price appreciated in value by 0.11% and 0.58% immediately upon the issuance of a no action decision. The study found that the no action process was an important mechanism in weeding out non-relevant proposals and ensuring that the shareholder proposal process was focused on building corporate and investor value. The authors of the study also found no difference in the decisions reached by the SEC when it was controlled by a Democratic or Republican majority.

The no action process that existed under the rescinded SLBs was an important mechanism to refocus return as a priority and promote investor protection and competition.

The evolution of 14a-8 over the years has, until t SLB 14L was issued, been premised on due process and public input. Notice-and-comment rulemaking has been the basis for substantive amendments to the rule. The staff legal bulletin process, though imperfect, has also been premised on gradual, incremental evolution based on public feedback. New staff

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[1] Exemptions from the Proxy Rules for Proxy Voting Advice (July 22, 2020); Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 (September 23, 2020)

[2] Matsusaka, John G. and Ozbas, Oguzhan and Yi, Irene, Can Shareholder Proposals Hurt Shareholders? Evidence from SEC No-Action Letter Decisions (April 1, 2019). USC CLASS Research Paper No. CLASS17-4, Marshall School of Business Working Paper No. 17-7, Available at SSRN: https://ssrn.com/abstract=2881408 or http://dx.doi.org/10.2139/ssrn.2881408

legal bulletins have typically been informed by an annual stakeholders meeting sponsored by the staff with input from investors, asset managers, issuers and service providers. Here, the Division did not seek public comment, the Commission did not engage in notice-and-comment rulemaking, and the annual stakeholder meeting was not held. With SLB 14L, the SEC is moving away from this carefully constructed balance and moving toward rule by regulatory fiat.

Under rule 14a-8(i)(7), a company may exclude a shareholder proposal if it deals with a subject involving a company's ordinary business operation. This exception allows the day-to-day operational issues of a business to remain with its management and board. Nonetheless, shareholders may bring forth proposals on issues such as governance or on items that impact the strategy and direction of a business. In issuing SLB 14L, the Division stated:

> [S]taff 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.
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> Under this realigned approach, 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)....
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> Because the staff is no longer taking a company-specific approach to evaluating the significance of a policy issue under Rule 14a-8(i)(7), 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.

Accordingly, under SLB 14L, the SEC will no longer look at proposals on a company by company basis. Instead of determining how a proposal can impact investors and a board of the impacted company, the SEC will now examine issues through the lens of 'broad societal impact'. Consequently, investor protection, competition, and capital formation will be ignored, and the SEC will now have to opine on societal issues well outside of its legal remit. Where the SEC has waded into social issues before, such as with the conflict minerals disclosure rule, it has failed to use the securities laws to solve the problem at hand. The courts have raised First Amendment concerns.

At best, SLB 14L fails to provide companies, boards and investors with any certainty. At worst, the SEC has now positioned itself as a subjective governmental arbiter of how the capital markets should assess social issues. By moving forward with SLB 14L, the SEC will be out of its depth both operationally and conceptually.

In numerous SEC reform reports issued over the past 12 years, the Chamber has illustrated how the SEC has lacked the expertise to perform its statutory mandates and suggested reforms to the no action process.[3] Fortunately, past SEC Chairs, both Democrat and Republican, have attempted to address those staffing issues, albeit with varying degrees of success. It is unclear what process the SEC will use to determine its decisions of what is a broad societal issue, nor is it clear whether the SEC has the staff it will need to undertake such an effort. Many issues of broad societal impact lead to differing and reasonably held opinions. How will the SEC staff decide on a viewpoint when there's an active and ongoing societal debate on a hot topic? Wading into controversial issues will impact the SEC's prestige, affecting its ability to perform its legally mandated missions. It is also unclear how the SEC will empower personnel to determine agency positions on societal issues or how it will factor in opposing points of view.

With SLB 14L, the SEC has sought to redefine its mission to define broad societal impacts and how the capital markets should react to them. The SEC has neither the statutory authority, capacity, nor capability to perform such a function. In a representative democracy, opinions on broad societal impacts are generally the purview of the citizen. Has the SEC taken procedural steps to address important process issues such as:

- Does the Division have a comprehensive list of issues it considers implicating "broad societal impact" beyond the few teased in SLB 14L? If so, due process demands that such a list be made publicly available.

- If the Division has not already formulated a list of issues implicating "broad societal impact," what criteria will it consider in doing so going forward? What guiderails are in place to ensure that the staff does not act arbitrarily and capriciously in formulating other categories? How will the Division ensure it does not engage in constitutionally impermissible viewpoint discrimination to favor certain political issues over other ones?

- What policies and procedures does the SEC have in place to ensure that the staff does not violate the Hatch Act and other federal laws governing political corruption as the Division engages in inherently political activity under the guise of Rule 14a-8? Has the SEC sought the advice of the Office of Personnel Management or the Office of the U.S. Special Counsel on these matters? If so, what is the substance of that advice?

- What policies and procedures does the SEC have in place to protect whistleblowers on the staff who wish to report misconduct under the Hatch Act or otherwise as the staff veers into territory in which it has no institutional expertise?

[3] Cite SEC reform reports

To some degree, in requiring staff to make a determination about broad societal impact, the SEC will be taking a position on the worthiness of an issue and therefore could be seen as weighing in on one side or another, even if it is not the Agency's intention to do so.

SLB 14L creates an unworkable system that is beyond the mission of the SEC. We urge the SEC to withdraw SLB 14L and reinstate SLBs 14I, 14J and 14K forthwith.

Sincerely,

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce