

THE EVOLVING ROLE OF RULE 14A-8 IN THE CORPORATE GOVERNANCE PROCESS

J. ROBERT BROWN, JR.¹

I. OVERVIEW

Rule 14a-8 represents the epicenter of the shareholder rights movement. Every year, shareholders submit proposals that can exceed 1,000 in number to public companies for inclusion in their proxy statements.² Invariably phrased as a recommendation, the proposals advise rather than command.³ Proposals, therefore, provide management with the collective views of shareholders on particular issues.

A straightforward concept, the Rule originally weighed in at a lithe 215 words (including the title) and operated with an elegant simplicity.⁴ Any “qualified security holder” could submit proposals. There were no minimum ownership requirements, no holding periods, no limits on the number of proposals. Moreover, management could exclude proposals only when not a “proper subject for action” by shareholders, a standard dependent not upon the interpretations of the staff at the Securities and Exchange Commission (SEC or Commission) but upon the boundaries set by state law.⁵

The elegant simplicity did not last. Almost as the ink dried on the Rule, buyer’s remorse set in. Companies were surprised at the number of proposals and began lobbying the Commission for additional restrictions

1. Professor of Law, Director, Corporate & Commercial Law Program, University of Denver Sturm College of Law; Secretary, Investor Advisory Committee, Securities and Exchange Commission. Brok Romanek read earlier versions of the article and provided helpful comments. Help does not, of course, imply agreement.

2. See *Shareholder Developments During the 2015 Proxy Season*, GIBSON DUNN, (July 15, 2015), <http://www.gibsondunn.com/publications/Pages/Shareholder-Proposal-Developments-During-the-2015-Proxy-Season.aspx> (shareholders submitted 943 proposals in 2015). The number of proposals submitted each year may have little bearing on the number actually submitted to a vote of shareholders. *Id.* (providing voting data on only 447 of the shareholder proposals). Some are excluded by the company while others are withdrawn. A proposal may be withdrawn as a result of an agreement between the company and the proponent. See *JPMorgan Chase and Shareholder Proponents Reach Agreement Resulting in Withdrawal of Shareholder Proposals*, JPMORGAN CHASE & CO. (Feb. 20, 2014), <https://www.jpmorganchase.com/corporate/investor-relations/pr/id-827315.htm>.

3. See Div. of Corp. FIN., Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors n.20 (2003), <https://www.sec.gov/news/studies/proxyrpt.htm> (“most proposals are precatory in nature”).

4. See Exchange Act Release No. 3347 (Dec. 11, 1942).

5. Opinion by Baldwin B. Bane, Exchange Act Release No. 3638 (Jan. 3, 1945) (“Speaking generally, it is the purpose of Rule X-14A-7 to place stockholders in a position to bring before their fellow . . . such matters relating to the affairs of the company concerned as are proper subjects for stockholders’ action under the laws of the state under which it is organized.”).

and limitations.⁶ For the first five decades, the Rule existed in an environment largely defined by issuer consternation and shareholder disinterest. Unhappy shareholders preferred to invoke the Wall Street Rule rather than demonstrate their disagreement at the ballot box.⁷ Management viewed feedback and advice from shareholders, for the most part, as unwanted. To the extent shareholder friendly reforms occurred, they often were forced on the Commission by the courts.⁸

Pressure for revision typically followed spikes in the use of the Rule⁹ and, on at least some occasions, coincided with changes in administration.¹⁰ Restrictions were sometimes explained as necessary to prevent abuse and often justified as good for shareholders. The changes would improve the efficiency of the proxy process by permitting the exclusion of proposals that were duplicative, or moot, or irrelevant. They would enhance shareholder communications and eliminate confusion. The result was a Rule that grew to almost 3,000 words and included a host of procedural limitations and substantive restrictions.¹¹

Much has changed since that first half-century of the Rule's development. Shareholders are more organized.¹² Communication between owners and management has improved. Use of Rule 14a-8 as a mechanism for obtaining the collective views of shareholders is more widely accepted. Despite these shifts, however, the Rule has not been adequately updated. The limitations and restrictions developed in an earlier era remain in place.

This piece will first examine the broad evolution of Rule 14a-8. Evolution can be divided into four epochs, with the changes made from 1942 through the late 1990s almost uniformly designed to limit the availability of the Rule to shareholders and to reduce the number of proposals.¹³ Once the Rule was rewritten into plain English in 1998, evolution became more balanced. Indeed, in 2010, the Commission amended Rule 14a-8 in order to narrow one of the exclusions.¹⁴ As the final section notes, reform on a

6. See discussion *infra* notes 21, 29.

7. See Susan W. Liebler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GEORGIA L. REV. 425, 426 (1984) ("The Wall Street Rule is the only practical rule by which sensible investors are governed. Small investors who do not like management sell their shares. . . . Market forces—such as competition for capital, products, jobs, and corporate control—discipline the management of widely held firms."). Through the early 1980s, only two shareholder proposals received majority support, one accidentally. See *infra* note 192.

8. See *infra* notes 46, 74, 127.

9. See *infra* notes 27, 54.

10. See *infra* notes 28, 55.

11. See Rule 14a-8, 17 C.F.R. § 240.14a-8 (2016).

12. See *infra* note 76.

13. See Herbert Alan Gocha, Jr., *The 1980's Amendments to Shareholder Proposal Rule 14a-8: A final Dampener on Dissent?*, 17 U. TOL. L. REV. 411, 438 (1986) ("The evolution of rule 14a-8 has been toward restricting shareholder access to the proxy.").

14. See *infra* notes 130–32. The Third and Fourth Epochs are more problematic. Both entail periods of greater shareholder involvement and a more balanced approach to the evolution of Rule 14a-8. The Third Epoch was designed to illustrate a period of successful shareholder opposition to

going-forward basis will need to focus on updating the language of the Rule and the accompanying administrative interpretations so that they better reflect the current state of corporate governance.

The student articles in this issue examine the evolution of Rule 14a-8 but on a more granular level. Each piece studies a specific exclusion or procedural requirement and traces its administrative development. The evolution tells a unique story about the evolution of Rule 14a-8.

II. AN EVOLUTIONARY TALE

The administrative history of Rule 14a-8 can be set out in four broad epochs, with a number of smaller seismic events in between. Each epoch, with the exception of the last, entailed a significant rewrite of the Rule. Until the late 1990s, the evolution of the Rule was largely one-sided. Comprehensive revisions were driven mostly by the concerns of issuers and invariably resulted in a reduction in the number of shareholder proposals.¹⁵

A. *The First Epoch*

Adopted in 1942, the shareholder proposal rule was, from the very beginning, designed to benefit management not shareholders.¹⁶ Under the Commission's then prevailing interpretation of the antifraud provisions, companies aware of an impending shareholder proposal were required to describe the matter in the proxy materials.¹⁷ To relieve management of this responsibility, the Commission shifted the burden to the shareholder by requiring submission to the company of the text of the proposal and any narrative description.¹⁸

Early resort to the Rule was modest, with nineteen shareholders submitting sixty-six proposals in the first year following adoption.¹⁹ The Commission viewed the operation of the Rule favorably.²⁰ Nonetheless,

changes to Rule 14a-8. The Fourth was used to connote a period when shareholders actively sought to change existing provisions in, or administrative interpretations applicable to, Rule 14a-8.

15. See *infra* notes 41, 73.

16. See Exchange Act Release No. 3347 (Dec. 18, 1942).

17. See J. Robert Brown, Jr., *The SEC, Corporate Governance, and Shareholder Access to the Board Room*, 2008 UTAH L. REV. 1339, 1344–45 (2008), for a discussion of the evolution of shareholder involvement in the corporate governance debate.

18. *Id.*

19. 13 S.E.C. ANN. REP. 42 (1947), https://www.sec.gov/about/annual_report/1947.pdf.

20. Letter from Ganson Purcell, Chair, U.S. Sec. & Exch. Comm'n, to Honorable John Taber (Mar. 15, 1943), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1940/1943_0315_TaberPurcellT.pdf (“Our observation is that on the whole it has been used by stockholders with restraint and has not imposed any undue hardship on management.”).

others reacted as if a “bomb [had] exploded.”²¹ Pressure descended on the Commission to act.²²

The Commission embarked on an approach that would be repeated throughout the history of the Rule. The agency identified but did not quantify ostensible abuses by shareholders and used them as a catalyst to add restrictions and exclusions to the Rule.²³ The amendments adopted in 1948 allowed for the exclusion of proposals submitted “for the purpose of achieving personal ends rather than for the common good of the issuer and its security holders.”²⁴ The need for the exclusion to prevent “harassment” of management was not established in the accompanying releases²⁵ and, in fact, given the low volume of proposals during this period, was unlikely to have been a widespread concern.²⁶

21. Edward T. McCormick, Address at the Corporate Secretary and the Proxy Rules (1950), <https://www.sec.gov/news/speech/1950/051350mccormick.pdf> (“When our proxy rules were amended to permit stockholders to make and justify proposals within the sphere of proper stockholder action a bomb exploded.”).

22. Some viewed the adoption as a subterfuge. See J. Sinclair Armstrong, Comm’r, U.S. Sec. & Exch. Comm’n, Address at the Meeting of the New York Chapter of the American Society of Corporate Secretaries at the Harvard Club of New York City (Feb. 18, 1954), <https://www.sec.gov/news/speech/1954/021854armstrong.pdf> (“An industry representative at the hearing before the present Commission on December 16, 1953, argued that the earlier Commission had lulled the Congress to sleep in promulgating the rule after the session adjourned in 1942.”).

23. See Exchange Act Release No. 4114 (July 6, 1948) (“In order to relieve the management of harassment in cases where such proposals are submitted for the purpose of achieving personal ends rather than for the common good of the issuer and its security holders, it is proposed to amend the rule so as to permit the omission of a security holder’s proposal in certain specified cases.”).

24. See *id.*

25. See Robert K. McConaughy, Comm’r, U.S. Sec. & Exch. Comm’n, Address at the American Society of Corporate Secretaries at the Harvard Club of New York City (Nov. 10, 1948), <https://www.sec.gov/news/speech/1948/111048mcconnaughy.pdf> (“You are also aware, of course, that in a few cases managements have been badgered by proposals which apparently were not submitted in good faith, or were submitted for the purpose of achieving some ulterior personal objective unrelated to the interests of the corporation.”).

26. Armstrong Address, *supra* note 22 (“In ten years of the shareholder proposal rule, only 181 shareholders out of the millions of American shareholders of registered companies submitted proposals, a large proportion of all shareholder proposals were submitted by three individuals or groups, no proposals so submitted have carried and the vast preponderance have been voted down by overwhelming vote of the shareholders voting.”).

Use of the Rule spiked in the early 1950s,²⁷ and with the change in administration,²⁸ pressure built for a more comprehensive set of limitations.²⁹ Issuers objected to the use of the Rule by shareholders to make recommendations about a company's business.³⁰ To address the concerns, the Commission added an exclusion for proposals "relating to the conduct of the ordinary business operations of the issuer" but only if phrased as a "recommendation or request."³¹ The provision effectively allowed for the exclusion of a type of proposal³² permitted under state law.³³ Other restrictions were added to the Rule.³⁴

Shareholders did not come away from the process entirely empty-handed but early victories under Rule 14a-8 were often Pyrrhic. The Commission proposed allowing issuers to delete the name of the proponent from the proxy materials³⁵ in order to "discourage the use of this rule by

27. During the three year period from 1951 to 1953, shareholders submitted a total of 203 proposals, more than in the first ten years of the rule's existence. The largest number addressed cumulative voting. Clarence H. Adams, Comm'r, U.S. Sec. & Exch. Comm'n, Comments on the Proxy Rules at the Annual Meeting of the American Society of Corporate Secretaries, Inc., in Hot Springs, Va. (June 1, 1953), <https://www.sec.gov/news/speech/speecharchive/1953speech.shtml>.

28. Ralph Demmler, an Eisenhower appointee, assumed office as chair on June 17, 1953. *SEC Historical Summary of Chairmen and Commissioners*, U.S. SEC. & EXCH. COMM'N (Jan. 4, 2016), <http://www.sec.gov/about/sechistoricalsummary.htm>; see also Lewis D. Gilbert, *The Proxy Proposal Rule of the Securities and Exchange Commission*, 33 U. DET. L.J. 191-92 (1955) (noting that companies disliking shareholder proposal rule "felt that the time had arrived for counter-attack with the election of General Eisenhower to the Presidency in 1952 That feeling was intensified in certain quarters when the new Republican members of the SEC were appointed under the chairmanship of Ralph H. Demmler"). See Brok Romanek, *The Pioneer of Corporate Governance*, 19 CORP. GOVERNANCE 1 (2011), for background on Lexis Gilbert, an early and repeated user of Rule 14a-8.

29. *Hearings before a Subcommittee of the Senate Committee on Banking and Currency on S. 879, Stock Market Study (Corporate Proxy Contests)*, 84th Cong., 1st Sess. pt. 3, at 1658 (July 6, 1956) (written testimony) (statement of Abraham Weiner on behalf of the Alliance of Independent Telephone Unions) (stating that the Society of Corporate Secretaries "first wanted the SEC proxy rule X-14a-8 eliminated completely. It then decided to accomplish the same objective by proposing amendments").

30. The Commission permitted these types of proposals. See Note, *Proxy Rule 14a-8: Omission of Shareholder Proposals*, 84 HARV. L. REV. 700, 708-09 (1971) ("Prior to that year [1954] the Commission had taken the view that while a state statute or valid charter or bylaw provision committing a matter to the exclusive discretion of the directors would preclude a binding shareholder proposal on the matter, these state and corporate provisions would not preclude a proposal which merely recommended or requested that the directors take certain action on the matter.").

31. Exchange Act Release No. 4979 (Jan. 6, 1954) (allowing exclusion "[i]f the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer").

32. As one shareholder noted at the time: "And it seemed hard indeed that owners of a company would not be allowed even to recommend possible action to their employees." Gilbert, *supra* note 28, at 195.

33. See *Miller v. Vanderlip*, 633 N.E.2d 51 (N.Y. 1941); see also Note, *Proxy Rule 14a-8: Omission of Shareholder Proposals*, 84 HARV. L. REV. 700, 709 (1971) ("Thus, the Commission has decided that at least in this context management need not include in its proxy solicitation materials a proposal which would be a proper subject under state law and which therefore could not properly be ruled out of order at the stockholders' meeting."); Comment, *Corporate Political Affairs Program*, 70 YALE L.J. 821, 843 (1961) ("Where a proposal merely recommends a course of action to management, the few relevant state cases indicate that it would constitute a 'proper subject.'").

34. The Commission also addressed issuer concern with repeat submissions, another area of issuer concern. See Gilbert, *supra* note 28, at 203.

35. The original version of the rule required disclosure of the proponent's identity. See Exchange Act Release No. 3347 (Dec. 18, 1942).

persons who are motivated by a desire for publicity rather than the interests of the company and its security holders.”³⁶

Although the provision was not adopted, the victory proved short lived. The following decade the Commission amended the Rule to allow the omission of a proponent’s identity.³⁷ Despite a subsequent staff study recommending the inclusion of the information,³⁸ the current version of the Rule continues to permit omission of the identity of the shareholder proponent.³⁹

Seen as a victory for corporate America,⁴⁰ the 1954 amendments had their intended effect, at least temporarily. In the immediate aftermath, the number of proposals declined.⁴¹

B. The Second Epoch

Changes occurred in the 1960s⁴² and early 1970s⁴³ but generally did not involve a fundamental realignment of the Rule. Amendments later in

36. Exchange Act Release No. 4950 (Oct. 9, 1953) (“In order to discourage the use of this rule by persons who are motivated by a desire for publicity rather than the interests of the company and its security holders, it is proposed to provide that the managements’ proxy material need not contain the name and address of the security holder if it contains, in lieu thereof, a statement that the name and address of the security holder will be furnished upon request.”).

37. Exchange Act Release No. 8206 (Dec. 14, 1967) (“This paragraph has been amended to permit the issuer to omit the name and address of the proponent provided a statement is contained in the proxy material to the effect that the name and address of the proponent will be promptly furnished to any person, upon receipt of any oral or written request therefor, by the issuer or the Commission.”).

38. DIV. OF CORP. FIN., SECS. & EXCH. COMM’N, S. COMM. ON BANKING, HOUS. AND URBAN AFFAIRS, STAFF REPORT ON CORPORATE ACCOUNTABILITY, 96th Cong., 2d Sess. (Sept. 4, 1980) (recommending as a “minor” amendment that proxy statements disclose “the names, addresses and shareholders of shareholder proponent”).

39. Rule 14a-8 does, however, require that the issuer disclose the availability of the information. See Rule 14a-8(L)(1), 17 C.F.R. § 240.14a-8(L)(1) (“the company may instead include a statement that it will provide the information to shareholders promptly upon receiving an oral or written request.”).

40. See Gilbert, *supra* note 28, at 210–11 (“It was apparent that spokesmen for the corporations had been more persuasive, as far as members of the Commission were concerned, than had spokesmen for the shareholders. Although the latter had won some victories, even important ones, as a result of their testimony, commentators’ were unanimous in declaring that the new SEC amendments constituted a victory for America’s corporate giants over America’s shareholders, increasing management’s already preponderant power at the expense of the already limited rights of the independent stockholder.”).

41. Frank D. Emerson, *Congressional Investigation of Proxy Regulation: A Case Study of Committee Exploratory Methods and Techniques*, 2 VILL. L. REV. 1 (1956) (“Concerning shareholder proposals, the SEC’s schedules show that the number of shareholders whose proposals were carried in management proxies statements in both 1954 and 1955, thirty-one and thirty six, respectively, in absolute terms was lower than the thirty-nine for 1953, the last year before the 1954 amendments to the shareholder proposal rule became effective.”).

42. Changes made in 1967 added an exclusion for proposals counter to those submitted by management, the precursor to the exclusion currently in subsection (i)(9). Exchange Act Release No. 8206, 31 Fed. Reg. 20960 (Dec. 14, 1967). See Staff Legal Bulletin No. 14H (CF), 2015 WL 6503673 (Oct. 22, 2015) (noting that exclusion in subsection (i)(9) first added in 1967).

43. By some measures, the transparency of the process had improved. Materials submitted under Rule 14a-8 as part of the no action letter process were deemed confidential and unavailable to the public. That changed in 1972. See Exchange Act Release No. 9785 (Sept. 22, 1972) (adopting 17 CFR § 200.82 and providing that information submitted under the Rule and any no action letter issued as a result “shall be made available to any person upon request”).

the decade limited to two the number of proposals that could be submitted to a single company,⁴⁴ an apparent response to a particular shareholder.⁴⁵ Most significantly, the Commission added a “public policy” exception to the “ordinary business” exclusion, a reform arising at least in part as a by-product of judicial intervention.⁴⁶

An equilibrium of sorts had set in. Experienced shareholders learned how to avoid the exclusions⁴⁷ and use of the Rule remained relatively constant. Although jumping from 221 proposals in 1969⁴⁸ to 602 in 1971,⁴⁹ the number essentially plateaued thereafter. Shareholders submitted 645 proposals in 1972,⁵⁰ 595 in 1974,⁵¹ and 731 in 1977.⁵² A “general consensus” existed that the Rule was “operating well.”⁵³

44. See Exchange Act Release No. 12999 (Nov. 22, 1976) (adopting limitation of “a maximum of two proposals of not more than 300 words each to an issuer”). The staff also added new exclusions for proposals that violated the proxy rules or were deemed moot. *Id.* The changes were described as mostly intended “to make the Rule more functional, or to codify SEC Staff interpretive positions.” Marilyn B. Cane, *The Revised SEC Shareholder Proxy Proposal System: Attitudes, Results and Perspectives*, 11 J. CORP. L. 57, 63 (1985).

45. See Gen. Elec. Co., SEC No-Action Letter, 1976 WL 9226 (Jan. 22, 1976) (shareholder submitted 14 proposals for inclusion in GE proxy materials); Gen. Elec. Co., SEC No-Action Letter, 1975 WL 9433 (Feb. 7, 1975) (shareholder submitted 14 proposals for inclusion in GE proxy materials); Gen. Elec. Co., SEC No-Action Letter, 1974 WL 8843 (Feb. 6, 1974) (shareholder submitted 12 proposals for inclusion in GE proxy materials); Gen. Elec. Co., SEC No-Action Letter, 1973 WL 20874 (Jan. 31, 1973) (shareholder submitted ten proposals for inclusion in GE proxy materials).

46. See Exchange Act Release No. 12999 (Nov. 22, 1976) (adopting release); see also Exchange Act Release No. 12598 (July 7, 1976) (proposing release) (“As the Court of Appeals for the D.C. Circuit pointed out, the overriding purpose of Section 14(a) ‘is to assure to corporate shareholders the ability to exercise their right - some would say their duty - to control the important decisions which affect them in their capacity as stockholders and owners of the corporation.’”). The same amendments also amended the “ordinary business” exclusion to provide that the provision applied to all proposals, not just those phrased as a recommendation or request. See Exchange Act Release No. 12999 (Nov. 22, 1976).

47. See Memorandum from Bill Morley to John Huber & Linda Quinn (Nov. 16, 1983), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cfl.rackcdn.com/collection/papers/1980/1983_1116_StatisticalShareholder.pdf (listing “gadflies” who were “responsible for a large number of proposals every year” and noting that “they are not involved in a great many of the contested proposals because their continued use of the process has resulted in their being able to frame proposals which are proper for inclusion under Rule 14a-8”).

48. 35 S.E.C. ANN. REP. 47 (1960), https://www.sec.gov/about/annual_report/1969.pdf (173 proposals included; 48 proposals omitted). The Commission during this period provided data on the number included and the number excluded. The annual reports do not expressly address proposals that were withdrawn.

49. 37 S.E.C. ANN. REP. 53–54 (1971), https://www.sec.gov/about/annual_report/1971.pdf (489 proposals included; 113 excluded).

50. 38 S.E.C. ANN. REP. 30–31 (1972), https://www.sec.gov/about/annual_report/1972.pdf (411 included; 234 excluded).

51. 40 S.E.C. ANN. REP. 34 (1974), https://www.sec.gov/about/annual_report/1974.pdf (434 proposals included; 161 excluded).

52. 43 S.E.C. ANN. REP. 107 (1977), https://www.sec.gov/about/annual_report/1977.pdf (492 proposals included in proxy materials; 239 proposals excluded).

53. STAFF REPORT ON CORPORATE ACCOUNTABILITY, *supra* note 38, at B32 (“Despite the wide range of comments on particular aspects of the shareholder proposal rule, the general consensus was that the rule is operating well.”).

With another spike in the number of proposals⁵⁴ and a change in administration, however, the consensus disappeared.⁵⁵ Instead, Rule 14a-8 was characterized as a vehicle for harassing⁵⁶ and abusing⁵⁷ management. The entire foundation of the Rule was put at issue,⁵⁸ and restrictions that had been rejected in 1976 as unsupported by sufficient evidence of abuse were resurrected and added to the Rule.⁵⁹

For the first time shareholders were subjected to a minimum ownership requirement and a mandatory holding period.⁶⁰ With most proponents easily meeting the standards,⁶¹ the change did little more than increase the administrative burden on street name owners, adding cost and facilitating the exclusion of proposals on process grounds.⁶²

54. Exchange Act Release No. 19135 (Oct. 14, 1982) (according to data by Corporate Secretaries, shareholders had submitted 991 proposals to 376 companies in the year that ended June 30, 1981; 850 proposals to 300 companies in 1982). In 1982, 43 companies received five or more proposals and accounted for 350 of the 850 proposals. *Id.*

55. John Shad, appointed by Ronald Reagan, assumed office on May 6, 1981. *See SEC Historical Summary of Chairmen and Commissioners*, U.S. SEC. & EXCH. COMM'N (Jan. 4, 2016), <http://www.sec.gov/about/sechistoricalsummary.htm>.

56. Exchange Act Release No. 19135 (Oct. 14, 1982) ("There has been an increase in the number of proposals used to harass issuers into giving the proponent some particular benefit or to accomplish objectives particular to the proponent.").

57. *Id.* ("The commentators supporting the proposed amendment felt that it was an appropriate response to counter the abuse of the security holder proposal process by certain proponents who make minor changes in proposals each year so that they can keep raising the same issue despite the fact that other shareholders have indicated by their votes that they are not interested in that issue.").

58. *Id.* ("Fundamental to the Commission's present re-examination of the security holder process, however, is a reevaluation of the need for and desirability of providing a right of security holder access to the issuer's proxy statement under the Exchange Act, and if such right of access is to be continued, what the nature of such right should be."); *see also* Cane, *supra* note 44, at 64 ("Thus, for the first time since the adoption of the Rule in 1942, the SEC proposed to totally reexamine the underlying reasons for the Rule's existence, as opposed to its operation.").

59. Compare Exchange Act Release No. 12999 (Nov. 22, 1976) (declining to add a holding period for shareholders submitting proposals, finding that there was insufficient evidence of "abuse") with Exchange Act Release No. 19135 (Oct. 14, 1982) (adding a mandatory one year holding period for shareholders submitting proposals).

60. Exchange Act Release No. 20091 (Aug. 16, 1983) ("Many of those commentators expressed the view that abuse of the security holder proposal rule could be curtailed by requiring shareholders who put the company and other shareholders to the expense of including a proposal in a proxy statement to have some measured economic stake or investment interest in the corporation. The Commission believes that there is merit to those views and is adopting the eligibility requirement as proposed.").

61. According to one internal Commission memo, the imposition of ownership requirements on shareholders, unless made "unreasonably high," would "do little to lower the number of proposals." Memorandum from Bill Morley & Mike Kargula to Lee B. Spencer, Jr., John Huber & Linda Quinn, at 2 (March 18, 1982), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1982_0318_MorleyKargula.pdf ("Unless the required amount of shares was placed unreasonably high, most frequent users of the Rule would be able to meet the requirements; accordingly, such a change would do little to lower the number of proposals.").

62. Shareholders might easily meet the ownership and holding period requirements but must provide companies the relevant documentation within the time periods specified in the Rule. Shareholders, particularly when owning shares in street name accounts, are not always able to meet these procedural requirements. *See infra* note 171.

Staff interpretations of the exclusions that were viewed as too “restrictive” were overturned.⁶³ The Rule was made more subjective, at least where doing so would expand the scope of the exclusion,⁶⁴ despite objections from some staff members.⁶⁵ Shareholder opposition notwithstanding,⁶⁶ the Commission further reduced the number of proposals per company by a shareholder to one,⁶⁷ providing issuers with additional grounds for seeking exclusion.⁶⁸

At least some of the changes were explained as beneficial to shareholders. Amendments were designed to improve shareholder communications or to reduce costs.⁶⁹ In one instance, a restriction was justified by increased shareholder use of the Rule.⁷⁰ Mostly though, the revisions were

63. Exchange Act Release No. 19135 (Oct. 14, 1982) (“In this regard, it has been suggested that the staff’s interpretations of some of the existing provisions are ‘formalistic’ and more restrictive than is necessary to achieve the purposes of the rule and have contributed to the abuse of its provisions.”); *see also id.* (“In the past, the staff has taken the position that proposals requesting issuers to prepare reports on specific aspects of their business or to form special committees to study a segment of their business would not be excludable under Rule 14a-8(c)(7). . . . Henceforth, the staff will consider whether the subject matter of the special report or the committee involves a matter of ordinary business; where it does, the proposal will be excludable under Rule 14a-8(c)(7).”).

64. Exchange Act Release No. 19135 (Oct. 14, 1982) (“The Commission proposed an interpretative change to permit the omission of proposals that have been ‘substantially implemented by the issuer.’ While the new interpretative position will add more subjectivity to the application of the provision, the Commission has determined that the previous formalistic application of this provision defeated its purpose.”).

65. Memorandum from Bill Morley to Lee B. Spencer, Jr., on the Proposed Revision of Rule 14a-8, at 20 (1982) (“[I]t has been suggested that we should go to a test of permitting the exclusion of proposals where the company is doing substantially what the proponents asks. We would recommend that such a test not be applied. We already have enough trouble with rests based on ‘significantly’ and ‘substantially’ without increasing the number of situations where we have to make subjective judgments. The provision as interpreted may limit its usefulness, but at least everyone has a good idea of how it will be interpreted.”).

66. Memorandum from Linda Quinn, Bill Morley & John Gorman to John Huber & Lee Spencer, at 11 (June 7, 1983) http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1983_0607_Revision14a8.pdf (“The comments split along predictable lines. Issuers supported the change, proponents were opposed. Supporters suggested that the change could result in cost savings for issuers. The opponents indicated that there was no evidence of excessive burdens in connection with the present rule.”).

67. Morley & Kargula Memorandum, *supra* note 61, at 9 (“This would be one method of proposals received in the current proxy season suggests that such a change would have reducing the total number of proposals submitted each year. A review of the contested reduced the number of proposals by about 25%.”).

68. Shareholders were thereafter susceptible to an argument that the single proposal really contained multiple matters and could therefore be excluded. *See* Goldman Sachs Grp., SEC No-Action Letter, 2012 WL 167221 (Mar. 7, 2012).

69. *See* Exchange Act Release No. 19135 (Oct. 14, 1982) (“Since its adoption in 1942, the security holder proposal rule has undergone a number of revisions, generally directed at . . . assuring the goal of security holder communication.”).

70. Exchange Act Release No. 19135 (Oct. 14, 1982) (“The Commission believes that given the increased voting activities of institutional investors with respect to security holder proposals and the greater potential support for such proposals, it is appropriate to raise the thresholds for resubmission.”).

written as if “the active use of the proxy machinery by shareholders [was], of itself, an abuse.”⁷¹

The overall outcome benefited issuers. As one Commissioner described, the amendments “in the aggregate, [tilt] significantly and unnecessarily against shareholders seeking access to the proxy machinery.”⁷² The changes had their apparent effect. In the immediate aftermath, the number of proposals dropped.⁷³

C. The Third Epoch

Other revisions occurred in the late 1980s but were relatively modest. One change resulted from a court decision overturning an earlier amendment on process grounds.⁷⁴ The number of proposals, however, continued to increase. By 1996, from 300 to 400 issuers received approximately 900 proposals.⁷⁵ With shareholders more organized⁷⁶ and the area becoming more “contentious,”⁷⁷ revisions designed to restrict access to the Rule were likely to and did generate considerable controversy.⁷⁸

71. See Exchange Act Release No. 20091, 48 Fed. Reg. 38218-01 (Aug. 16, 1983) (Longstreth, Comm’r, dissenting).

72. See *id.*; see also Leila N. Sadat-Keeling, Comment, *The 1983 Amendments to Shareholder Proposal Rule 14a-8: A Retreat from Corporate Democracy*, 59 TUL. L. REV. 161, 196 (1984) (“While the ultimate effect of the new provisions will turn on their interpretation by the Commission, the amendments represent a serious restriction on shareholder participation in corporate governance and a retreat from the goal of management accountability.”).

73. Virginia J. Harnisch, *Rule 14a-8 After Reagan: Does It Protect Social Responsibility Shareholder Proposals?*, 6 J.L. & POL. 415, 438 (1990) (“Forty-two percent fewer proposals were recorded in 1983–84 than in 1982–83.”).

74. See Exchange Act Release No. 22625 (Nov. 14, 1985) (reinstating percentages required for resubmission of same proposal the following year that were in place prior to the 1983 amendments following a court order); see also Exchange Act Release No. 25217 (Dec. 21, 1987) (deleting provision that allowed for the exclusion of a proposals anytime the proponent delivered proxy materials to shareholders with more than 25% of the voting shares).

75. Exchange Act Release No. 39093 (Sept. 18, 1997) (“Between 300 and 400 companies typically receive a total of about 900 shareholder proposals each year.”).

76. The Council of Institutional Investors was formed in 1985. See *History*, COUNCIL OF INSTITUTIONAL INV., http://www.cii.org/cii_history; see also James C. Treadway, Jr., Comm’r, U.S. Sec. & Exch. Comm’n, Remarks to The Leroy Jeffers Memorial Lectures on Theology and Law at Christ Church Cathedral, Hous., Tex., (Oct. 17, 1983), in *Shareholder Activism and Corporate Ethics: The Government As Referee*, <https://www.sec.gov/news/speech/1983/101783treadway.pdf> (“[P]erhaps for the first time, we have seen a substantial movement of large, institutional shareholders . . . away from traditional support of management by voting in favor of proposals of dissident shareholders challenging management. This is a dramatic change in the prevailing attitude, which held that institutions should vote with management or sellout. That attitude had come to be known as the ‘Wall Street Rule,’ or more colorfully, ‘Voting With Your Feet.’”).

77. U.S. SEC. & EXCH. COMM’N, REPORT OF THE TASK FORCE ON DISCLOSURE SIMPLIFICATION (1996), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1990/1996_0305_TF_DiscSimpl.pdf (“Few areas of the federal securities laws have been as contentious as shareholder proposals under Exchange Act Rule 14a-8.”).

78. In fact this occurred. See Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No Action Letters*, 83 CORNELL L. REV. 921, 965 n.202 (1998) (“Although shareholder groups are clearly enthusiastic about the SEC’s proposals to rescind the Cracker Barrel policy, they have mounted substantial opposition to a number of other proposed changes to Rule 14a-8 that the SEC included in its September 1997 Release.”).

Significant revisions were proposed in 1997.⁷⁹ The outcome, however, differed from past epochs.⁸⁰ For the most part, the result was a stand-off. Where the proposed amendments received little opposition from issuers or shareholders, the Commission implemented the changes.⁸¹ Proposals strongly opposed by shareholders⁸² or issuers⁸³ were not included in the final rule.⁸⁴ Efforts to change the requirements to reduce the administrative burden imposed on the staff were generally unsuccessful.⁸⁵

The Rule that emerged, therefore, remained largely unchanged, at least substantively. Unlike the 1954 and 1983 revisions, no new exclusions were added and no shareholder friendly interpretations were overturned. In fact, the reverse occurred. The Commission for the first time reinstated a shareholder friendly interpretation by reversing the analysis in *Cracker Barrel*.⁸⁶

D. The Fourth Epoch

In the new millennium, two things changed. Shareholders were more willing to play an affirmative role in the evolution of Rule 14a-8. In addition, the Rule emerged as a more routine part of the corporate governance process. Proposals seeking majority vote bylaws and the repeal of classi-

79. Exchange Act Release No. 39093 (Sept. 18, 1997).

80. The Commission received 2,000 comment letters on the proposal. Exchange Act Release No. 40018 (May 21, 1998).

81. *Id.* (noting that “[t]here was little opposition to the proposed increase among commenters, although several do not believe the increase is great enough to be meaningful, especially in light of the overall increase in stock prices over the last few years”).

82. *Id.* (“A number of commenters from the shareholder community opposed elimination of these procedures because they believed that the potential for proponent objections deters companies from making materially false or misleading statements, and encourages negotiation between the company and proponent.”); *see also id.* (“Many commenters from the shareholder community expressed serious concerns about this proposal. We have decided not to adopt the proposal, and to leave the thresholds at their current levels.”).

83. The holding period, for example, was not shortened. Exchange Act Release No. 39093 (Sept. 18, 1997) (“We also request your comments on whether we should modify or eliminate the one-year continuous ownership period.”). Similarly a proposal to require the inclusion on the proxy card of a box that allowed shareholders to decide whether to provide management with discretionary voting authority in some instances was not adopted. *See* Exchange Act Release No. 40018 (May 21, 1998) (“We agree that inclusion of the proposed box on companies’ proxy cards may be confusing in some circumstances.”). Nor was a proposal to allow larger shareholders to “override” exclusions. *Id.*

84. Not every issue was resolved in a manner consistent with shareholder comments. The Rule did include, over the opposition of shareholders, a 14 day period to respond to an alleged failure to meet certain procedural requirements under the rule. Exchange Act Release No. 40018 (May 21, 1998).

85. *Id.* (“While we have tried to provide the most fair, predictable, and efficient system possible, these rules, even as amended, will continue to require us to make difficult judgments about interpretations of proposals, the motives of those submitting them, and the policies to which they relate. We will continue to explore ways to improve the process as opportunities present themselves.”).

86. *Id.* (reversing “the *Cracker Barrel* position, which provided that all employment-related shareholder proposals raising social policy issues would be excludable under the ‘ordinary business’ exclusion”). Reversals had previously gone in the opposite direction. *See supra* note 63.

fied boards provided shareholders with an opportunity to collectively express their views on these governance issuers. As a result, the former became more,⁸⁷ while the latter became less,⁸⁸ common.

The new millennium saw efforts by shareholders to obtain amendments to the Rule that narrowed the scope of the exclusions, with some success.⁸⁹ In addition, pressure built for changes to administrative interpretations. An example occurred in connection with the staff's perspective on Rule 14a-8(i)(9). The subsection was originally intended to permit the exclusion of proposals that were designed to counter management initiatives.⁹⁰ Over time, however, the provision was applied to shareholder proposals that merely differed from those submitted by management.

Pressure from shareholders resulted in a narrowing of the interpretation. A conflict would only arise anytime "a reasonable shareholder could not logically vote in favor of both proposals."⁹¹ Success in obtaining the revision was, however, modest. The altered interpretation retained a significant amount of administrative discretion. Moreover, the change made no reference to the strategic use of the exclusion by issuers.

The development was also preceded by a perfect storm of events. A shareholder proponent appealed a staff decision directly to the Commission, a usually unsuccessful endeavor.⁹² Investors weighed in⁹³ and criticism appeared in the press.⁹⁴ The Chair of the SEC intervened directly and ordered the original letter withdrawn, accompanied by instructions to the

87. Most companies in the Fortune 500 have adopted these bylaws. *See also* Choi, Fisch, Kahan & Rock, *Does Majority Voting Improve Board Accountability?* (U. CH. L. REV.), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2661560 ("As recently as 2005, only nine of the S&P 100 companies used majority voting in director elections. The shift since then has been dramatic. As of January 2014, almost 90% of S&P 500 companies have adopted some form of majority voting.").

88. *See* Shearman & Sterling, *Corporate Governance and Executive Compensation Survey* (2015), <http://shearman.uberflip.com/i/581509-2015-corporate-governance-executive-compensation-survey> at 32 (noting that only 9 of the 100 largest companies have classified boards and that two are in the process of declassifying).

89. The Commission amended and narrowed the scope of the election exclusion in subsection (i)(8). *See* discussion at *infra* notes 129-132.

90. As the staff noted: "When a shareholder solicits in opposition to a management proposal, the Commission's proxy rules contain additional procedural and disclosure requirements that are not required by Rule 14a-8. We do not believe the shareholder proposal process should be used as a means to conduct a solicitation in opposition without complying with these requirements." Staff Legal Bulletin 14H, *supra* note 42.

91. *Id.*

92. The article by Courtney Bartkus demonstrates just how unusual the Commission's intervention was. *See* Courtney Bartkus, *Appealing No-Action Responses under Rule 14a-8: Informal Procedures of the SEC and the Availability of Meaningful Review*, 93 DENV. L. REV. ONLINE 199 (2016).

93. *See* Amy Borrus, *CII Responds to Whole Foods Challenge on Proxy Access* (Jan. 8, 2015), http://www.cii.org/article_content.asp?edition=4§ion=13&article=477.

94. *See* Gretchen Morgenson, *Whole Foods' High Hurdle for Investors*, N.Y. TIMES (Jan. 3, 2015), http://www.nytimes.com/2015/01/04/business/whole-foods-high-hurdle-for-investors.html?_r=0.

staff to revisit the issue.⁹⁵ Absent all of these factors, the policy revision may not have occurred.

III. STUDENT PAPERS AND ADMINISTRATIVE INTERPRETATIONS

A. Introduction

Evolution of Rule 14a-8 is perhaps best understood by an examination of the changes that have occurred on a section-by-section basis. Exclusions and other requirements have undergone significant evolution over the 80 year life of the Rule, both through changes to the language of Rule 14a-8 and shifts in administrative interpretation. Student articles in this issue took that approach, addressing specific exclusions or other requirements in the Rule.

Understanding the evolution of the provisions of Rule 14a-8 involved challenges. For one thing, the data was not always complete. Databases did not provide access to no action letters issued before 1970,⁹⁶ although the SEC's Historical Society filled in some of the gaps.⁹⁷

For another, the staff's reasoning was frequently unclear. The letters from the 1970s and 1980s, often written by Bill Morley and Peter Romeo,⁹⁸ were wonderfully loquacious and thoughtful. They commonly set out at length their reasoning with respect to a particular exclusion or requirement. By the new millennium, however, the analysis had all but disappeared, often consisting of no more than a sentence fragment. These limitations notwithstanding, the students largely succeeded in piecing together the evolutionary history of the examined sections.

B. The Substantive Provisions of the Rule

Rule 14a-8 contains 13 substantive grounds for excluding a proposal. Students wrote papers on seven of them, violations of the law, relevance, ordinary business, elections, conflicts, mootness and duplicative.

Rule 14a-8(i)(2): *Violation of law*. The exclusion permits the omission of proposals that would "if implemented, cause the company to violate any state, federal, or foreign law to which it is subject."⁹⁹ As Jason

95. *Statement of Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Proxy Proposals*, U.S. SEC. & EXCH. COMM'N (Jan. 16, 2015), <https://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html>.

96. WestLaw, BloombergLaw and Lexis have no action letters starting in 1970.

97. The SEC Historical Society has some staff memoranda that also discuss no action letters issued from 1960 through February 1964. See *Summary of Interpretations*, DIV. OF CORP. FIN. (1964), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collec-tion/papers/1960/1960_1964_Interprt_Corp_Finance.pdf.

98. Both served as chief counsel, with Romeo in office from 1980-1984. Hogan Lovells, *Our People*, <http://www.hoganlovells.com/peter-romeo/>. Morley was his successor. See *SEC News Digest*, U.S. SEC. & EXCH. COMM'N (Mar. 15, 1988), <https://www.sec.gov/news/digest/1988/dig031588.pdf>.

99. 17 C.F.R. § 240.14a-8(i)(2).

Haubenreiser discusses in his article, *Rule 14a-8 and the Exclusion of Proposals that Violate the Law*,¹⁰⁰ the exclusion was designed to be, and has largely remained, narrow. It was not enough to show the possibility of a violation, at a proposal might violate the law. Moreover, issuers were expected to back up any assertions through the submission of an opinion of counsel. Shareholders sometimes responded with a countervailing opinion.

Perhaps reflecting the difficulty in resolving the relevant substantive legal issues, the staff developed a policy under the exclusion that routinely allowed shareholders to make revisions designed to prevent application of the exclusion. From 1998 through early 2016, about one-third of the proposals otherwise excluded under the subsection were subject to “cure.”¹⁰¹ Few proposals, therefore, are ultimately omitted under this provision.¹⁰²

Rule 14a-8(i)(5): *Relevance*. The exclusion in subsection (i)(5) was originally designed to address proposals deemed irrelevant.¹⁰³ Irrelevance meant proposals that implicated an insignificant portion of the company’s business. As originally formulated, therefore, the exclusion applied to any proposal “not significantly related to the business of the issuer.”¹⁰⁴ A relevance exclusion was viewed as necessary to “create greater certainty in the application of the rule.”¹⁰⁵

As Kathryn R. Kaoudis, in *SEC Rule 14a-8(i)(5): is it Still Relevant?*,¹⁰⁶ points out, however, the concept of “significance” had “a both a subjective and objective component.” As a result, a proposal insignificant from an economic perspective could still be significant to the company (and shareholders).¹⁰⁷ The approach, therefore, belied certainty.

Ms. Kaoudis notes that the evolution of the exclusion involved a constant struggle between the subjective and objective elements. In the 1970s, proposals arising out of the Arab boycott of Israel were excluded where the company conducted less than 1% of its business with the relevant countries. The social importance of the issue was not, therefore, sufficient to render the proposal “relevant.” In 1983, the Commission made the objective component explicit by adding a 5% threshold for proposals. The subjective element, however, remained in the Rule.

Ultimately, the search for relevance itself largely became irrelevant. The provision often overlapped with the ordinary business exclusion. The

100. 93 DENV. L. REV. ONLINE 213 (2016).

101. *Id.*

102. *Id.*

103. Rule 14a-8(i)(5), 17 C.F.R. § 240.14a-8(i)(5).

104. Exchange Act Release No. 9784 (Sept. 22, 1972).

105. See Exchange Act Release No. 9432 (Dec. 22, 1971) (proposing release).

106. 93 DENV. L. REV. ONLINE 251 (2016).

107. See Exchange Act Release No. 19602 (July 7, 1976) (as the Commission subsequently noted: “[T]here are many instances in which the matter involved in a proposal is significant to an issuer’s business, even though such significance may not be apparent from an economic viewpoint”).

ordinary business exclusion applied irrespective of the actual impact on earnings or assets. As a result, proposals could be excluded without the need to assess the economic significance to the company. Given that result, Ms. Kaoudis suggests that the exclusion be eliminated from the Rule.¹⁰⁸

Rule 14a-8(i)(7): *Ordinary Business*.¹⁰⁹ The ordinary business exclusion can be rightfully described as a staff “oak” that “has grown from little more than” an administrative acorn.¹¹⁰

The exclusion originally only applied to proposals phrased as a recommendation or request. In 1976, however, the limitation was removed, extending the exclusion to all proposals relating to a company’s ordinary business. Seven years later, the Commission overturned a staff position by extending the exclusion to proposals calling for reports on a company’s business.¹¹¹

Perhaps the most significant change, however, was, as Megan Livingston writes in her article, *The “Unordinary Business” Exclusion and Changes to Board Structure*,¹¹² the reading of the concept of “ordinary” almost entirely out of the exclusion. Once having been described as applicable to the “routine,” the exclusion was extended to the extraordinary. As Ms. Livingston writes:

In construing the exclusion, the fundamental problem has been the failure of the staff to limit application to “ordinary” matters. The staff has treated as “ordinary” the selection of outside auditors, a policy of auditor rotation, the impact of legislative reform on the company, efforts to prevent tax inversion transactions with foreign companies, limits on stock buyback programs, and the consideration of strategic alternatives where the proposal “relate[s] in part to non-extraordinary transactions.” The staff has treated as “ordinary” matters that are uniquely suited for shareholder consideration and address the “relationship between management and stock holders.” The exclusion, therefore, has been applied to proposals involving actions that are neither routine nor usual nor beyond the capacity of shareholders to understand or address.¹¹³

108. As she notes in her article, the one surviving area of application for the exclusion concerns proposals that implicate no aspect of a company’s business. To the extent that the exclusion was eliminated, these proposals would presumably need to be subject to omission under another exclusion, whether (i)(2) (not a proper subject for shareholders) or (i)(7) (ordinary business).

109. Rule 14a-8(i)(7), 17 C.F.R. § 240.14a-8(i)(7).

110. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (“When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn.”).

111. See *supra* note 63.

112. 93 DENV. L. REV. ONLINE 263 (2016).

113. *Id.*

Given the broad application, it is unsurprising that the provision represents “the most commonly used substantive basis for excluding shareholder proposals.”¹¹⁴

The interpretation of ordinary business was, therefore, unmoored from any external standard, providing maximum administrative discretion. The phrase had no nexus with state law and was not limited to matters deemed “manifestly impracticable” for shareholders to resolve.¹¹⁵ The approach made interpretation easy. Any proposal implicating a company’s business could be excluded, “whether mandatory or advisory, whether merely seeking information or board consideration that implicates the activities of the company.”¹¹⁶

But that is only half of the extraordinarily broad use of the ordinary business exclusion. Largely forced to act by Congress and the courts, the Commission in the 1970s added a public policy exception to the exclusion.¹¹⁷ Even if a proposal implicated a company’s ordinary business, exclusion was not permitted to the extent implicating an important social issue.

As Adrien Anderson writes in *The Policy of Determining Significant Policy under Rule 14a-8(i)(7)*,¹¹⁸ the approach created a quandary. Having defined almost everything implicating the activities of the company as ordinary business, the Commission confronted the equally common assertion that every ordinary business proposal implicated public policy. After all, shareholders for the most part were not interested in the location of the company’s offices or the manufacturing process for widgets. They submitted proposals that implicated the broader social concerns relating to a company’s business, whether discriminatory hiring practices, the sale of dangerous products, or the impact of the business on the climate.

As Ms. Anderson observes, the exception has been applied “in the absence of meaningful and objective standards, resulting in ambiguous and inconsistent interpretations.” The uncertainty of the area “encourages challenges to these proposals, imposes the cost of defending a proposal on the proponent, and taxes the resources of the Staff.”¹¹⁹

114. *Id.*

115. *Hearings on a Report from the SEC on its Problems in Enforcing the Securities Laws Before a Subcomm. Of the Senate Comm. on Banking and Currency, 85th Cong., supra* note 12, at 118 (“The policy motivating the Commission in adopting the Rule . . . is basically the same as the underlying policy of most State corporation laws to confine the solution of ordinary business problems to the board of directors and place such problems beyond the competence and direction of the shareholders. The basic reason for this policy is that it is manifestly impracticable in most cases for stockholders to decide management problems at corporate meetings.”).

116. 93 DENV. L. REV. ONLINE 263 (2016).

117. *See supra* note 48.

118. 93 DENV. L. REV. ONLINE 183 (2016).

119. *Id.*

What can be done? She recommends a more consistent application of the exception, one that would treat a matter as important to the public “upon a showing of any widespread discussion of a particular issue.” She further suggests that the proper analysis could be the importance of the matter to shareholders. As in the *Wal Mart* case,¹²⁰ a case Ms. Anderson discusses, this would presumably include proposals that, while having modest public policy implications, does have the potential to affect share prices by threatening the reputation of the business.

Rule 14a-8(i)(8): *Director Elections*. Subsection (i)(8) represented another one of those exclusions that reflected an early effort to limit shareholder access to the proxy statement. As originally proposed, Rule 14a-8 would have applied not only to proposals but also to nominees. The former made it into the rule; the latter did not.¹²¹

The reason for the differentiation was not substantive. State law permitted shareholders to make both proposals and nominees from the floor of a meeting. Instead, the deletion reflected the opposition of issuers and their supporters to changes that would facilitate the election of shareholder nominated directors.¹²² Not content to render the Rule inapplicable to the actual nominating process, the Commission a few years later explicitly made the rule unavailable to proposals relating to “elections to office.”¹²³

The “elections” exclusion, therefore, threw up a wall around the board of directors. As Nicole L. Jones describes in *Shareholder Proposals, Director Elections, and Proxy Access: The History of the SEC’s Impediments to Shareholder Franchise*,¹²⁴ the staff quickly had to wrestle with an exclusion that in a few words encompassed perhaps the single most important governance function performed by shareholders.

The Commission eventually fashioned a Solomon’s like solution. Most proposals relating to the board could be included so long as they did

120. *Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323 (3d Cir. 2015).

121. This is discussed in Brown, *supra* note 17, at 1344. *See also* Summary of Proposed Revision of Proxy Rules, SEC (Aug. 19, 1942) (“The proposed rules also require that minority stockholders be given an opportunity to nominate directors or auditors to be submitted to their fellow stockholders by means of a proxy.”).

122. Brown, *supra* note 17, at 1344; *see also* Letter from Edward A. Le Roy, Jr., Phx. Sec. Corp., to Milton Freeman, Office of the Gen. Counsel, U.S. Sec. & Exch. Comm’n (Sept. 14, 1942), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1940/1942_0914_LeRoyFreemanT.pdf (“The proposal to permit stockholders to nominate twice as many nominees as there are directors of the issuer confers, in our opinion, a specious right and altogether too liberal a one . . . I cannot recall a case where any of the corporations with which I have been connected have had suggested to them the names of additional nominees where that action has not been connected with some effort to make trouble, and I mean by this to make trouble for the corporation, not just to make trouble for the incumbents.”).

123. Exchange Act Release No. 3998 (Oct. 10, 1947) (“This rule does not apply, however, to elections to office.”).

124. 93 DENV. L. REV. ONLINE 233 (2016).

not impact an impending election. Moreover, in a rare example of shareholder munificence, shareholders were sometimes allowed to provide revisions to clarify the inapplicability to an upcoming election.¹²⁵

The exclusion, however, was also interpreted to apply to bylaws that increased the role of shareholders in the nominating process. This came to the forefront in connection with proposals submitted by the American Federation of State, County and Municipal Employees (AFSCME) seeking shareholder access. The proposal was omitted under the elections exclusion.¹²⁶ The position ended up in litigation and the Second Circuit ruled the exclusion inapplicable.¹²⁷

Ultimately, the Commission overturned the court's decision but the die was cast.¹²⁸ Shareholders lobbied for the right to access and, in 2010, in the aftermath of Dodd-Frank, the Commission both adopted a shareholder access rule and amended subsection (i)(8). The amendments, as Ms. Jones described, "significantly tightened the language of the election exclusion"¹²⁹ and, as a result, "access bylaws were no longer subject to automatic exclusion."¹³⁰ Omission was still possible but the battle would shift to other exclusions.¹³¹

Nonetheless, the provision continued to allow for the exclusion of any proposals that "[o]therwise could affect the outcome of the upcoming election of directors."¹³² Under the broad language, therefore, the Commission retained significant discretion. Ms. Jones discusses one proposal where proponents called for the board to "hold a competition for giving public advice on the voting items in the proxy filing for the [] 2015 annual shareowners meeting."¹³³

The proposal made no mention of the election of directors. Nonetheless, the company argued for the application of the elections exclusion contending that the proposal sought to provide shareholders with alternative advice on candidates and that this would facilitate the selection of "proxy advisors that may encourage votes in opposition to the director candidates nominated by management"¹³⁴ Omission was permitted, suggesting that proposals seeking alternative, non-management sources on information about directors would be at risk under the exclusion.

125. The staff also permits revisions under subsection (i)(2). *See supra* notes 101–02.

126. *See* Am. Int'l Grp., Inc., SEC No-Action Letter, 2005 WL 372266, 1 (Feb. 14, 2005).

127. *AFSCME v. Am. Int'l Grp., Inc.*, 462 F.3d 121, 129–30 (2d Cir. 2006).

128. *See* S'holder Proposals Relating to the Election of Dirs., Exchange Act Release No. 34-56914, 72 Fed. Reg. 70450-01, 70450 (Dec. 11, 2007).

129. 93 DENV. L. REV. ONLINE 233 (2016).

130. *Id.*

131. *See infra* notes 141–44.

132. Rule 14a-8(i)(8), 17 C.F.R. § 240.14a-8(i)(8).

133. 93 DENV. L. REV. ONLINE 233 (2016).

134. *Id.*

As a result, the exclusion continues to remain a potential impediment to structural changes in the election process. Ms. Jones suggests a further narrowing of the exclusion.

Although specifying the types of proposals that could be excluded, subsection (i)(8) also contained a catch all that applied to any proposal that “[o]therwise could affect the outcome of the upcoming election of directors.” Initial interpretations suggest that the staff intends to broadly construe the language. Thus, as the election exclusion stands today, shareholder franchise will continue to be impeded. The purpose of proxy regulation was to ensure “fair corporate suffrage” and to facilitate shareholder involvement in internal governance affairs. Accordingly, to ensure shareholders’ rights under state corporate law are not further impeded, the staff must limit its interpretation of the election exclusion to apply solely to proposals that specifically affect upcoming elections for the board of directors.¹³⁵

Rule 14a-8(i)(9): *Conflicts with company’s proposal*.¹³⁶ Subsection (i)(9) represents another exclusion originally designed for a narrow purpose that subsequently lost contact with its original intent. More than any other exclusion in the Rule, the subsection allows for the strategic omission of a shareholder proposal.¹³⁷ The exclusion enables companies to wait for a shareholder proposal then submit a less favorable alternative. Having created a conflict, the company can at least sometimes obtain exclusion under the subsection.¹³⁸

As Philip Nickerson discusses in *SEC Rule 14a-8(i)(9): The Conflict with Conflicting Proposals*,¹³⁹ the exclusion arose out of the belief that shareholders should not be allowed to use Rule 14a-8 to include matters that were the functional equivalent of a negative vote on an existing management proposal. To the extent management proposed a merger, shareholders were not authorized to use the rule to include a proposal that effectively made the merger impossible.

135. 93 DENV. L. REV. ONLINE 233 (2016).

136. Rule 14a-8(i)(9), 17 C.F.R. § 240.14a-8(i)(9).

137. Subsection (i)(10) likewise has that potential. *See infra* notes 142–44.

138. In two instances, the staff declined to permit exclusion in part because management’s proposals was “in response to” the one submitted by shareholders. That interpretation, however, has rarely been part of the analysis. *See* Cypress Semiconductor Corp., SEC No-Action Letter, 1998 WL 113674 (Mar. 11, 1998) (“The Division is unable to concur in your view that the proposal may be excluded under rule 14a-8(c)(9). Among other factors that the staff considered in reaching this result, the staff notes that it appears that the Company prepared its proposal on the same subject matter significant part in response to the Mercy Health Services proposal.”); *see also* Genzyme Corp., SEC No-Action Letter, 2007 WL 869705 (Mar. 20, 2007) (“We are unable to concur in your view that Genzyme may exclude the proposal under rule 14a-8(i)(9). Among other factors that we considered in reaching this result, we note your representation that you decided to submit the company proposal on the same subject matter to shareholders, in part, in response to your receipt of the AFL-CIO Reserve Fund proposal.”).

139. 93 DENV. L. REV. ONLINE 275 (2016).

The rationale for the exclusion was never particularly clear. To some degree, the exclusion promoted efficiency. Shareholders opposing the merger could simply vote against the transaction; submitting an alternative proposal that effectively accomplished the same thing was unnecessary. The logic, however, had limits. Shareholders seeking a permanent separation of chair and CEO could not achieve the same goal by voting against a management initiative seeking to combine the two positions. Yet the shareholder alternative could be excluded. The clearest effect of the exclusion was to prevent proponents from strategically introducing alternatives that could encourage shareholders to vote against the management initiative.¹⁴⁰

As Mr. Nickerson shows, the provision was at first narrowly applied and limited mostly to conflicting proposals arising in the context of mergers and compensation plans, complex and difficult areas.¹⁴¹ In the new millennium, however, the exclusion expanded to include proposals that covered the same subject matter but contained a different term. A shareholder proposal calling for the right to call a special meeting at a specified percentage of shares could be omitted if management submitted an alternative with a higher, even significantly higher, percentage.¹⁴²

Mr. Nickerson's article discusses the Commission's decision to revisit and change this interpretation. The application of the exclusion to exploded with a vengeance when Whole Foods asked for permission to delete a shareholder proposal seeking access to the company's proxy statement.¹⁴³ The shareholders wanted the company to give a group of shareholders owning 3% of the voting shares for three years the right to submit a short slate of directors for inclusion in the proxy statement. Whole Foods responded with an alternative that would extend access to a single shareholder owning 9% of the shares for at least five years. At the time, no current shareholder qualified. Nonetheless, the company received a no action letter permitting exclusion.

Eventually the *Whole Foods* decision was set aside and the interpretation of (i)(9) narrowed.¹⁴⁴ Nonetheless considerable administrative discretion remained. Mr. Nickerson suggests that perhaps the staff ought not to be in the middle of deciding what proposals a shareholder should have

140. See *supra* note 89.

141. See Memorandum from Morley & Kargula, *supra* note 61, at 19 (noting that counter proposal exclusion "is not frequently used or commented upon").

142. See EMC Corp., SEC No-Action Letter, 2009 WL 851504 (Feb. 24, 2009) (shareholder proposal seeking right of 10% of shareholders to call special meeting excluded as a result of submission of management proposal seeking to provide shareholders with the right to call a special meeting at 40%).

143. See Whole Foods Mkt., Inc., SEC No-Action Letter (Jan. 16, 2015), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/jamesmcritchiechevedden-recon011615-14a8.pdf>.

144. Staff Legal Bulletin 14H, *supra* note 42.

the right to consider as a result of a conflict. To the extent that a shareholder and management proposal have similar content with material differences, the shareholders should determine the outcome. As he writes: “This result suggests that narrowing is not enough but that repeal of the exclusion may be a better alternative.”

Rule 14a-8(i)(10): *Substantially implemented*. The exclusion permits the omission of proposals that have been “substantially” omitted. As Aren Sharifi points out in *Rule 14a-8(i)(10): How Substantial is “Substantially” Implemented in the Context of Social Policy Proposals?*¹⁴⁵ the exclusion eventually included in subsection to (i)(10) initially allowed for the omission of proposals deemed moot.¹⁴⁶ The original intent was hard to oppose. Shareholders had no need to vote on matters already implemented. In the beginning, the staff applied the provision consistent with the purpose and only permitted exclusion where the issuer had “fully effected” the shareholder proposal.

The narrow interpretation, however, came under challenge with a change in administration and the appointment of a new Commission.¹⁴⁷ The Commission ordered the staff to jettison the narrow approach and to add a subjective element that would facilitate the exclusion of proposals. Rather than rely on mootness, proposals could be excluded if they were “substantially” identical. It fell to the staff to determine whether a difference was substantial.¹⁴⁸ Although the change threatened to “raise further interpretive problems”, the Commission viewed the price as acceptable in order to overturn a “current interpretation” which could “lead to an abuse of the security holder proposal process.”¹⁴⁹

The Rule, however, provided a way out of the more difficult interpretive issues. The burden of establishing that a proposal had been “substantially implemented” rested with the company. Where the issue was difficult to determine, the failure to meet the burden would result in inclusion of the proposal. In fact, however, administrative interpretation did not always properly reflect the burden of proof included in the Rule.

145. 93 DENV. L. REV. ONLINE 301 (2016).

146. The exclusion originally applied to proposals deemed moot. See Exchange Act Release No. 12999 (Nov. 22, 1976) (noting that mootness “has not been formally stated in Rule 14a-8 in the past but which has informally been deemed to exist”).

147. See *supra* note 65.

148. Exchange Act Release No. 20091 (Aug. 16, 1983) (“The Commission proposed an interpretative change to permit the omission of proposals that have been ‘substantially implemented by the issuer.’ While the new interpretative position will add more subjectivity to the application of the provision, the Commission has determined that the previous formalistic application of this provision defeated its purpose.”).

149. Exchange Act Release No. 19135 (Oct. 14, 1982).

This was illustrated in letters issued to *AGL Resources*¹⁵⁰ and *Windstream Holdings*.¹⁵¹ In both cases, the companies received precatory proposals asking the board to change the bylaws to facilitate the ability of shareholders to call a special meeting. In *Windstream*, the shareholder asked that the authority be given to the owners of 20% of the company's outstanding common stock; in *AGL*, the requested percentage was 25% of the outstanding shares.

The two companies responded by agreeing to amend the articles to provide shareholders with the requested authority and promised to use the same percentages at those sought by shareholders. Both, however, added a restriction not present in the shareholder proposals. Shares eligible to call a special meeting had to be held in a net long position for at least a year.

A holding period of any length made the right to call a special meeting more difficult. Moreover, the degree of difficulty depended upon the percentage of shares subject to annual turnover. For companies with liquid trading markets, turnover could be significant. Data from the NYSE suggests that turnover rate for exchange traded companies annually exceeds 50%¹⁵² and in some years 100%.¹⁵³ The companies provided no meaningful discussion of the impact of the holding period on the number of eligible shares. Nor was there any significant discussion of the logistical burdens imposed on shareholders as a result of the net long requirement.¹⁵⁴

The effect of the holding periods and the net long requirements, including the possibility that they could make the calling of a special meeting impossible, was speculative. The no action record for both letters, however, contained no significant empirical evidence on the impact of the

150. AGL Res. Inc., SEC No-Action Letter (Mar. 5, 2015), <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/johncheveddenagltrecon030515-14a8.pdf>.

151. See *id.*; see also *Windstream Holdings, Inc.*, SEC No-Action Letter (Mar. 5, 2015), <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/kennethsteinerwindstream030515-14a8.pdf>. See http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620417, for a letter discussing these letters and the position of the staff.

152. NYSE Group Turnover: 2010-Current, NYXDATA.COM, http://www.nyxdata.com/nysedata/asp/factbook/viewer_edition.asp?mode=table&key=3149&category=3.

153. NYSE Group Turnover: 2000-2009, NYXDATA.COM, http://www.nyxdata.com/nysedata/asp/factbook/viewer_edition.asp?mode=table&key=2992&category=3.

154. In *Windstream*, the company did make an argument for the provision on the merits. See *Windstream Holdings, Inc.*, SEC No-Action Letter (Mar. 5, 2015), <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/kennethsteinerwindstream030515-14a8.pdf> ("Taking into account the extent to which stockholders requesting a special meeting hedge their shares (or otherwise reduce or offset their economic exposure in their shares) and how long they have held those shares ensures that on balance, stockholders seeking to call a special meeting share the same economic interest in the Company as the majority of stockholders. Requiring that stockholders have held their shares for at least one year helps to ensure that their economic interest in the Company's affairs is more than transitory.").

requirement¹⁵⁵ and therefore provided no basis for determining the substantial or insubstantial nature of the matter.¹⁵⁶

The failure to enforce the issuer's burden can also be seen with respect to the use of subsection (i)(10) to exclude proposals seeking proxy access. In the aftermath of *Whole Foods*, a number of companies implemented shareholder access bylaws then sought exclusion of proposals submitted by shareholders. Exclusion was not permitted where management conditioned eligibility on a higher percentage of shares than that proposed by shareholders. Thus, proposals that set the ownership threshold at 5% did not substantially implement proposals calling for a 3% threshold.¹⁵⁷

Companies that set the ownership at 3% also, however, typically included limits not contained in the shareholder proposals. They commonly restricted the number of shareholders that could collectively meet the threshold to no more than twenty.¹⁵⁸ Companies generally did not discuss the impact of the requirement on the right to access. The letters did not examine the ownership configuration of the company to assess whether the limitation imposed a meaningful restriction on the ability of shareholders to assemble the required block. The letters did not typically discuss the impact of the requirement on small shareholders or their participation becoming irrelevant in the access process. Despite the absence of this type of evidence, exclusion of the shareholder proposals was permitted.

155. In *Windstream*, the issuer argued that the holding period benefited the company. *See id.* (noting that a holding period "is intended to ensure those stockholders requesting a special meeting, rather than merely benefitting their own transitory interest, share the same long-term positive economic interest in the Company's affairs as the majority of stockholders" and that such mechanisms "were intended to avoid the substantial cost and disruption that would result from holding multiple special stockholder meetings over a short period of time, or holding such meetings so close to the Company's annual meeting of stockholders as to make a separate meeting cost prohibitive, duplicative and unnecessary").

156. Likewise, the no action process lacked any serious consideration of the logistical burdens imposed on shareholders as a result of the holding period. *See CSX Corp.*, SEC No-Action Letter (Mar. 14, 2008), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2008/csx031308-14a8.pdf> (declining to allow for exclusion under (i)(10) where company sought to require that shareholders retain "beneficial ownership by the proponent of shares representing at least 15% of the Company's outstanding voting stock at the time of the special meeting").

157. *See Flowserve Corp.*, SEC No-Action Letter (Feb. 12, 2016), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/johncheveddenflowserve021216-14a8.pdf> (exclusion not permitted where company provision at 5% and shareholder proposal at 3%); *SBA Commc'ns Corp.* (Feb. 12, 2016), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/nycityemployees021216-14a8.pdf> (same); *NVR Inc.*, SEC No-Action Letter (Feb. 12, 2016), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/comptrollercityny021216-14a8.pdf> (same).

158. *See, e.g., Gen. Elec.*, SEC No-Action Letter (Mar. 3, 2015), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/kevinmaharrecon030315-14a8.pdf> ("The Amended Bylaws are similar in this respect to those in General Electric Company, where the company's bylaws imposed the same 20-shareholder aggregation limit, whereas the shareholder proposal provided for no such limit."); *see also Alaska Air Grp.*, SEC No-Action Letter (Feb. 12, 2016), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/johncheveddenalaska021216-14a8.pdf>; *Baxter Int'l Inc.*, SEC No-Action Letter (Feb. 12, 2016), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2016/johncheveddenbaxter021216-14a8.pdf> ("The Proxy Access Bylaw permits multiple shareholders to aggregate their shares for the purposes of meeting the 3% ownership threshold; provided that the number of such shareholders does not exceed 20.").

As Mr. Sharifi notes, the result has been an interpretive approach that results in “increasingly inconsistent determinations by an overburdened SEC staff who applied the exclusion on a case-by-case basis.” Moreover, rather than promote efficiency by excluding matters that are moot, he concludes that the standard effectively “supplanted shareholders by making subjective determinations about the importance of these differences, typically over the objection of the proponent.”

Ultimately, the interpretation treats shareholders as lacking in the capacity to understand the differences in proposals. As Mr. Sharifi notes:

The approach paints an unfortunate picture of shareholders. A reasonable proponent would generally not waste the time or resources to recommend action that has already been taken. By disregarding the differences in the shareholder proposal and the management action, the staff implies that the proponent and other shareholders are not able to evaluate current policies in relation to those suggested.¹⁵⁹

Mr. Sharifi instead recommends that substantial differences be left to shareholders to determine, with management able in the statement of opposition to make the case for mootness. Such an approach would suggest a return to something like the fully effected standard originally used under the Rule.

Rule 14a-8(i)(11): *Duplication*.¹⁶⁰ Allowing for the omission of duplicative proposals would seem obvious. Asking shareholders to vote on the same matter twice provides no benefit and adds complexity to the proxy process. Consistent with this narrow approach, Hillary Sullivan, in her article, *The Exclusion of Duplicative Proposals under Rule 14a-8(i)(11)*,¹⁶¹ notes that the exclusion originally applied to proposals deemed identical. Shareholders would avoid “the possibility . . . of . . . having to consider two or more substantially identical proposals submitted to an issuer by proponents acting independently of each other.” Doing so had “no useful purpose.”¹⁶²

By the new millennium, however, that laudable and narrow goal had long ceased to control the interpretation of the exclusion. Instead, proposals were excluded where the justification was shareholder confusion.¹⁶³ This approach was used in a particularly aggressive fashion when the exclusion was applied to the submission of proposals seeking a report on a

159. 93 DENV. L. REV. ONLINE 301 (2016).

160. Rule 14a-8(i)(11), 17 C.F.R. § 240.14a-8(i)(11).

161. 93 DENV. L. REV. ONLINE 315 (2016).

162. Cont'l Airlines, SEC No-Action Letter, 1975 WL 9901 (Mar. 12, 1975).

163. See Ford Motor Co., SEC No-Action Letter, 2008 WL 591032 (Mar. 3, 2008) (proposal excluded where company argued that “shareholders will likely be confused when asked to vote on two separate proposals that relate to substantially the same subject matter”).

company's lobbying activities and proposals asking for a report on political contributions.¹⁶⁴ Although shareholders objected to the characterization as duplicative, the subsection was interpreted to permit the exclusion of the proposal received last in time.

The approach, therefore, purports to apply to duplicative proposals. In fact, the exclusion allows the omission of proposals with varying terms and goals. The elimination of these proposals effectively deprives shareholders, at least in some cases, of the ability to consider proposals with material differences. As Ms. Sullivan concludes, the approach "effectively denies rather than protects the voting rights of shareholders, the opposite of the intent of Rule 14a-8."¹⁶⁵

C. Procedural Concerns

Rule 14a-8 also includes a litany of procedural requirements that can result in exclusion of proposals for non-substantive reasons. Shareholders can only submit a single proposal to each company.¹⁶⁶ Submission of more than one can result in exclusion. In general, shareholders must submit proposals not later than 120 calendar days before the date of the distribution of the prior year's proxy statement.¹⁶⁷ Failure to do so will often result in exclusion.¹⁶⁸

Assuming a timely submission, beneficial owners also must "prove their eligibility."¹⁶⁹ To the extent they do not, the company must provide a "notice of deficiency" within fourteen calendar days of receipt of the proposal. The owner then has fourteen calendar days from receipt of the notice to send in the required proof.¹⁷⁰ Failure to respond in a timely fashion is a basis for exclusion.¹⁷¹

164. Citigroup Inc., SEC No-Action Letter, 2010 WL 5179480 (Jan. 28, 2011).

165. 93 DENV. L. REV. ONLINE 315 (2016).

166. Companies can seek exclusion by arguing that a single submission by a shareholder contains multiple proposals. *See supra* note 68.

167. Rule 14a-8(e)(2), 17 C.F.R. § 240.14a-8(e)(2). Different deadlines apply if the company did not hold an annual meeting in the prior year or the date has been changed by more than 30 days. *Id.*

168. *See* Zions Bancorporation, SEC No-Action Letter, 2016 WL 591788 (Feb. 11, 2016) ("There appears to be some basis for your view that Zions may exclude the proposal under rule 14a-8(e)(2) because Zions received it after the deadline for submitting proposals. We note in particular your representation that Zions did not receive the proposal until after this deadline.").

169. Rule 14a-8(b)(2), 17 C.F.R. § 240.14a-8(b)(2).

170. Rule 14a-8(f), 17 C.F.R. § 240.14a-8(f).

171. *See* Intel Corp., SEC No-Action Letter, 2016 WL 232395 (Mar. 11, 2016) ("We note that the proponent appears to have failed to supply, within 14 days of receipt of Intel's request, documentary support sufficiently evidencing that it satisfied the minimum ownership requirement for the one-year period as required by rule 14a-8(b)."). Shareholder proposals were subject to exclusion even when company failed to provide the notice of deficiency within the time period required by the Rule. *See* Dell Comput. Corp., SEC No-Action Letter, 2002 WL 1058539 (Apr. 5, 2002) (although the company "acknowledge[d] that it failed to notify" the shareholder of eligibility deficiencies with 14 calendar days of receipt of the proposal, staff permitted exclusion where shareholder failed to "respond[]" to Dell's request for documentary support indicating that the proponent has satisfied the minimum ownership requirement for the one-year period required by rule 14a-8(b)"); *see also* SEC No Action Letter, Exelon Corp. (Feb. 23, 2009) (although company "did not notify the Proponents in writing of the

Not all of the deadlines apply to shareholders. Two of the student articles in this issue examined those applicable to issuers. For the most part, the articles demonstrated that these deadlines were often not enforced. Unlike the situation with shareholders, issuer transgressions rarely resulted in any negative consequences, a result that at least sometimes undermined the purpose of the requirement.

Rule 14a-8(j): *Procedurals for Excluding Proposals*. Issuers seeking to omit a proposal must disclose the intent to the Commission “no later than 80 calendar days before it filed its definitive proxy statement” with a copy simultaneously provided to the shareholder.¹⁷² The provision allows a company to file within the 80 day period upon a showing of “good cause.”¹⁷³

As Mark G. Proust writes in his article, *The Evolution of Rule 14a-8(j): The Good Cause to Clarify Good Cause*,¹⁷⁴ the deadline has largely been unenforced. As he notes, good cause is commonly found. Even where good cause is not present, however, “issuers incur no meaningful consequences” of failing to file in a timely fashion. The approach, he writes, “seems to be fundamentally unfair to shareholders.” He recommends that the Commission increase enforcement of the requirement.

A potential option to try and afford more protection to the shareholders would be for the SEC to require that the eighty day period be fixed in the proxy statement. Additionally, the Rule could provide that, absent a showing of good cause, the proposal cannot be omitted if the eighty day period is violated.¹⁷⁵

Rule 14a-8(m): *Disagreements with the Opposition Statement*. The Rule imposes on issuers an obligation to provide shareholders with a copy of the opposition statement within thirty days of the filing of the definitive proxy materials.¹⁷⁶ As Alex Hinz notes in his article, *Issuer Opposition and Shareholder Disagreement: Rule 14a-8(m)*,¹⁷⁷ the timely receipt of the opposition statement allows shareholders to raise concerns over the accuracy of the disclosure with both the company and, if necessary, the Commission. Moreover, the requirement is designed to promote communications. As the Commission has described, the requirement allows the two sides to “work out their differences.”

Ownership Affirmation Deficiency within the 14-day period required by Rule 14a-8(f)(1)” the staff allowed for the exclusion of the proposal where the proponent failed “to provide this statement within 14 calendar days from the date the proponents received Exelon’s request under rule 14a-8(f)”.

172. Rule 14a-8(j), 17 CFR § 240.14a-8(j).

173. Rule 14a-8(k), 17 CFR § 240.14a-8(k).

174. 93 DENV. L. REV. ONLINE 289 (2016).

175. *Id.*

176. Rule 14a-8(m)(3)(ii), 17 CFR § 240.14a-8(m)(3)(ii).

177. 93 DENV. L. REV. ONLINE 223 (2016).

Yet there is reason to be concerned with the enforcement of the requirement. As Mr. Hinz notes, issuers do not always comply with the letter or spirit of the requirement.

The history of the exemption indicates that the SEC a lack of enforcement of the requirement. Companies do not always provide shareholders with the required copy of the opposition statement. The staff has never responded to allegations of false disclosure by bringing an action against the company. Instead, the no action record suggests that, for the most part, the staff simply ignores concerns raised by shareholders about the accuracy of the opposition statement.¹⁷⁸

In contrast, changes to supporting statements submitted by shareholders are often required.¹⁷⁹

As Mr. Hinz writes, this lack of enforcement imposes costs. The approach provides an appearance that Rule 14a-8 is not enforced in an even handed manner. As a result, companies have little incentive to “work out their differences.”¹⁸⁰

D. Reconsiderations and Appeals

Informal administrative interpretations of the Rule can be changed. The Supreme Court has made clear that shifts to staff positions can be done without significant process.¹⁸¹ Notice and comment are not required.¹⁸² Significant changes in interpretation, however, will likely need to emanate from the Commission.

Commission intervention in the no action letter process can be logistically difficult.¹⁸³ Appeals, however, represent a mechanism for doing so. Owners or managers disagreeing with an interpretation can seek review by the Commission. As Courtney Bartkus’ paper, *Appealing No-Action Responses under Rule 14a-8: Informal Procedures of the SEC and the Availability of Meaningful Review*,¹⁸⁴ shows, this has not been a particularly

178. *Id.*

179. *Id.*

180. *Id.*

181. The Supreme Court has made clear that changes in interpretive positions by an agency do not require notice and comment. See Letter from J. Robert Brown, Jr., to Keith F. Higgins, Director, Div. of Corp. Fin., U.S. Sec. & Exch. Comm’n (June 30, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2630319, for a discussion of this issue.

182. This issue was much debated in connection with the staff’s reconsideration of its interpretation of subsection (i)(9). *See id.*

183. Unlike delegated authority, no automatic mechanism exists for ensuring that interpretive matters are considered by the full Commission. *Contra* Securities Exchange Act of 1934 § 4A, 15 U.S.C. § 78d-1 (2012). The Chair or a majority of the commissioners likely add the matter to the agenda of a Commission meeting. *See* J. Robert Brown, *Essay: The Politicization of Corporate Governance: Bureaucratic Discretion, the SEC and Shareholder Ratification of Auditors*, 2 HARV. BUS. L. REV. 61 (2012).

184. 93 DENV. L. REV. ONLINE 199 (2016).

useful mechanism for involving the Commission in the no action letter process.

The Division of Corporation Finance acts as the gatekeeper for appeals to the Commission. Only appeals involving issues “of substantial importance” that are “novel or highly complex” are to be forwarded to the Commission.¹⁸⁵ This almost never occurs.

Ms. Bartkus shows that, from 2005 to 2015, shareholders and companies filed 320 cases for reconsideration, including 80 that were also appealed to the Commission. Petitions for reconsideration were rarely granted although issuers were far more likely to succeed than shareholders. With respect to appeals to the Commission, Ms. Bartkus noted only one instance during the relevant time period where “the approach taken by the staff” was altered.¹⁸⁶

The lack of successful appeals, as she points out, may have a resource explanation. As she notes:

The no action letter process puts unique demand on the staff’s resources. With nearly one thousand shareholder proposals and more than three hundred no action requests submitted each year, most arrive at the Commission in a three month period between January and April. Already inundated with initial decisions, the need for additional reconsiderations further strains the already limited time and resources of the SEC staff.¹⁸⁷

The lack of Commission review, however, may have other explanations. The Commission can influence these informal interpretations without directly intervening. Views of the commissioners can be informally conveyed and used to influence administrative interpretations. The result can be a lack of transparency. As she contends:

Greater involvement by the Commission would improve the quality of the decision making. Doing so would help ensure that the staff acted in a consistent manner and observed the goals of the Commission. The best way to achieve this is to have more oversight from the Commission. The Commission should direct the staff to forward them any requests for Commission review and should construe the requirements of 202.1(d) more liberally, so that it can refocus the agency and provide better guidance to industry actors.¹⁸⁸

185. 17 C.F.R. § 201.1(d) (2011).

186. Whole Foods Mkt., Inc., SEC No-Action Letter, 2015 BL116161 (Jan. 16, 2015). One additional reversal occurred as a result of the decision in Whole Foods. *See* BorgWarner Inc., SEC No-Action Letter, 2015 BL 116173 (Feb. 6, 2015) (“[W]e express no view concerning whether BorgWarner may exclude the proposal under rule 14a-8(i)(9).”).

187. 93 DENV. L. REV. ONLINE 199 (2016).

188. *Id.*

IV. FUTURE DIRECTIONS

Rule 14a-8 remains a remarkable provision. Put in place long before the era of significant shareholder participation in the corporate governance process, the Rule existed during a time when the primary mechanism for investor-management communication was the Wall Street Rule and the concomitant drop in share prices.¹⁸⁹

In this environment, the mere submission of a proposal could be viewed as a form of abuse.¹⁹⁰ Moreover, when involving social issues, companies confronted the additional indignity of having to fund negative publicity about their own activities. The fact that, through the early 1980s, only two proposals opposed by management ever receive majority support, one accidentally, added to the perception.¹⁹¹

The relationship between the two constituencies has, however, undergone dramatic, although incomplete, change. Companies and shareholders talk to each other more often, a trend perhaps accelerated by “say on pay” proposals.¹⁹² In addition to the potential for additional dialogue,¹⁹³ say on pay has resulted in non-management proposals becoming a routine part of the proxy process. The practice has arguably reduced some of the concerns over the use of Rule 14a-8 to obtain the collective views of shareholders.¹⁹⁴

The Rule, however, was drafted in an earlier era and has not been updated to reflect the change in the relationship between owners and man-

189. See *supra* note 7. The approach has not entirely disappeared. See Exchange Act Release No. 47304 (Sept. 23, 2003) (“Funds have often followed the so-called ‘Wall Street rule,’ according to which an investor should either vote as management recommends or, if dissatisfied with management, sell the stock.”).

190. See *supra* note 71.

191. See Bevis Longstreth, Comm’r, U.S. Sec. & Exch. Comm’n, Address Before the National Association of Manufacturers (Dec. 11, 1981), <http://www.sec.gov/news/speech/1981/121181longstreth.pdf>.

192. Public companies must provide shareholders with the right, at least every three years, to have an advisory vote on executive compensation paid to certain specified officers. See Rule 14a-21, 17 C.F.R. § 240.14a-21.

193. These advisory votes have likely increased communications between management and shareholders. See Paul H. Edelman et al., *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CALIF. L. REV. 1359, 1427 (2014) (“Say on Pay may improve communication between shareholders and managers on compensation issues, which could result in a general improvement of corporate governance.”); Lisa M. Fairfax, *Sue on Pay: Say on Pay’s Impact on Directors’ Fiduciary Duties*, 55 ARIZONA L. REV. 1, 37 (2013) (“One potential benefit of say on pay is that it encourages more effective board-shareholder communication, allowing directors and shareholders to reach consensus on pay structures and policies, thereby eliminating the need for conflict and any negative votes.”).

194. With communications, management may succeed in having the proposal withdrawn. See Elizabeth A. Ising & Kasey L. Robinson, Recent Developments Related to the SEC’s Shareholder Proposal Rule, *BUS. LAW TODAY* (July 1, 2015), http://www.americanbar.org/publications/blt/2015/07/01_ising.html (“Not all shareholder proposals submitted to companies are voted on by the shareholders. Some are withdrawn by the proponents, often after dialogue with the company.”). A significant number of proposals are regularly withdrawn. See GIBSON DUNN, *supra* note 2 (“Shareholder proponents withdrew approximately 17% of the proposals submitted for 2015 shareholder meetings.”).

agers. In the existing environment, there is less need for Commission intermediation. To the extent believing that a proposal has already been implemented or has become irrelevant, management can make the case in the opposition statement, leaving the ultimate outcome to shareholders. Only in extreme cases should the Commission remove an issue from the governance process.

In revising the Rule, some exclusions could be eliminated entirely. An exclusion that permits omission solely because of a “conflict” with a management proposal denies shareholders the right to choose among competing alternatives. For the most part, however, revision of Rule 14a-8 should at least initially focus on the elimination of subjective and vague terms that create uncertainty in application.¹⁹⁵ To the extent excluding moot proposals, “substantially implemented” should be replaced with a more limited standard.¹⁹⁶

Rulemaking, particularly in the context of Rule 14a-8, would, however, remain controversial and logistically difficult.¹⁹⁷ As a practical matter, therefore, reform would be easier to implement to the extent focused on changes in administrative interpretations.¹⁹⁸ As the development in *Whole Foods* demonstrates, interpretations can gradually become disconnected from an exclusion’s original intent.¹⁹⁹

As was the case with the reforms to the changes in the interpretation of subsection (i)(9), a shift in administrative approach would likely require Commission intervention. While this could occur in any number of ways,

195. Others have suggested something similar. See Bevis Longstreth, Comm’r, U.S. Sec. & Exch. Comm’n, Address Before the National Association of Manufacturers, in Denver, Colo. (Dec. 11, 1981), <https://www.sec.gov/news/speech/1981/121181longstreth.pdf> (“A return to the simple, bright line approach should protect the good, discourage the bad, and minimize the active, ongoing interference of federal mediators in the relationship between a company and its shareholders.”).

196. The Commission could still exclude proposals as moot but could instead rely on the more narrow “identical” standard previously used under the Rule. See *supra* note 150.

197. Rule proposals in the proxy area can generate a substantial number of comment letters. The proposal to require companies to include a ratio between the compensation paid to the CEO and the median employee generated somewhere around 285,000 comments. See Testimony on the Fiscal Year 2017 Budget Request of the US Securities and Exchange Commission, Mary Jo White, Chair, Securities and Exchange Commission, before the Subcommittee on Financial Services and General Government Committee on Appropriations, United States Senate (April 12, 2016) (noting receipt of “some 285,500 total comment letters, 1,500 of them unique”), <https://www.sec.gov/news/testimony/testimony-white-budget-request-2017-senate.html> Controversial rules are also susceptible to legal challenge on procedural grounds. See J. Robert Brown, Jr., *Shareholder Access and Uneconomic Economic Analysis: Business Roundtable v. SEC*, 88 DENV. L. REV. ONLINE (Aug. 26, 2011).

198. See Letter from J. Robert Brown, Jr., to Keith F. Higgins, *supra* note 181.

199. The language of the “ordinary business” exclusion could, for example, be interpreted in a manner more consistent with state law. Narrowing the scope of the “ordinary business” exclusion would still leave a state law avenue for challenging the proposal. See generally Testimony of Vice Chancellor Strine, Roundtable Discussions Regarding the Federal Proxy Rules and State Corporation Law, Securities and Exchange Commission, Washington DC, May 7, 2007, at 34 (“I think those of us from Delaware would say one of the things the Commission could do to facilitate this is to make clear that if it’s uncertain under state law and it’s a by-law proposal, then it shouldn’t be excluded and they should be able to put it on absent some showing, and then leave it to us, hold us accountable, and if we make the wrong decisions, you can bet we are going to hear about it from the institutional investor community and from the management community.”).

the Commission could accelerate the process by accepting more appeals.²⁰⁰ Greater involvement by the Commission would have the potential to bring clarity to the Rule. Moreover, emanating from the Commission, the positions would be more certain and less susceptible to alteration as part of the no action letter process. The result would likely be a reduction in the number of no action requests, saving the resources of the parties and the staff.

The shift would likely not increase appreciably the number of proposals included in the proxy materials of public companies. Although the staff continues to permit the exclusion of a significant percentage of contested proposals (with percentages reaching 75% in 2012, 66% in 2013,²⁰¹ 61% in 2014, and 71% of in 2015²⁰²), somewhat less than 200 proposals are actually excluded each year.²⁰³ Inclusion of even a majority of these proposals would have modest effect on the proxy process.

Likewise, the concern with an increase in the number of proposals that could accompany a reduced role for the staff is not supported by past practice. Statistics suggest a relatively steady use of the Rule by shareholders. The number of proposals in recent years has vacillated from a high of 1,126 in 2009²⁰⁴ to a low of 691 in 2011.²⁰⁵ The level of use is broadly consistent with earlier eras.²⁰⁶ Moreover, the frequency is modest in comparison to the number of say on pay proposals.²⁰⁷

To the extent a shift in administrative interpretation does result in an increase in shareholder proposals, the raw number is not an appropriate measure for assessing costs or determining burdens. The number of pro-

200. This currently occurs only rarely. *See supra* note 189.

201. Matteo Tonello & Melissa Aguilar, *Shareholder Proposals: Trends from Recent Proxy Seasons (2007-2011)* (Feb. 2, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998378.

202. GIBSON DUNN, *supra* note 2.

203. The staff allowed for the exclusion of 130 proposals in 2015, 161 in 2014, 173 in 2013, and 196 in 2012. *See id.*; *see also Shareholder Developments During the 2013 Proxy Season*, GIBSON DUNN (July 9, 2013), <http://www.gibsondunn.com/publications/pages/Shareholder-Proposal-Developments-2013-Proxy-Season.aspx>.

204. *Excluding Shareholder Proposals: Lessons from the 2009 Proxy Season*, DAVIS POLK (July 7, 2009), http://www.davispolk.com/sites/default/files/files/Publication/5d627f2c-3794-456f-8096-01628c698869/Preview/PublicationAttachment/9a2619e5-d032-43f9-b5c5-018f0a542410/070709_GC_Update.html.

205. *See supra* note 194. Increases can often be traced to the prevalence of a particular type of proposal. The increase from 2014 to 2015 was traced almost entirely to the number of shareholder access proposals submitted in 2015. *See GIBSON DUNN, supra* note 2 (noting that “the most frequently submitted proposals were governance and shareholder rights proposals (with approximately 352 submitted), largely due to the unprecedented number of proxy access proposals (108 proposals).”).

206. *See supra* notes 48–52, 73.

207. Under Rule 14a-21, public companies making a solicitation must include a say on pay proposal at least every three years. 17 CFR § 240.14a-21(b). Apparently most companies in the Russell 3000 submit proposals annually. *See* Emily Chasen, *Most Companies Opt for Annual Say-On-Pay Votes*, WALL ST. JOURNAL (April 9, 2013), <http://blogs.wsj.com/cfo/2013/04/09/most-companies-opt-for-annual-say-on-pay-votes/> (80% of companies in the Russell 3000 providing annual voting on say on pay proposals).

posals per company represents a more appropriate way to examine the impact of the data. In 2015, companies in the Fortune 250 averaged less than 1.39 proposals.²⁰⁸ The highest average in the last ten years occurred in 2007 when companies averaged 1.55 proposals. Large companies, therefore, typically include one or two proposals each year in their proxy statement, a seemingly manageable number.²⁰⁹

Restrictions and limitations in Rule 14a-8 and at least some administrative interpretations represent vestiges of earlier eras when communications between shareholders and managers were less robust. As that relationship evolves, however, the need to update Rule 14a-8 and staff interpretations to reflect the current reality is increasingly important.

208. See Figure 1, James R. Copland, 2015 Proxy Season Early Report, Proxy Monitor (2016), <http://www.proxymonitor.org/Forms/2015Finding1.aspx>

209. A small number of companies do confront the need to include a larger number of proposals each year. In the 2016 proxy statement, for example, Exxon included 11 shareholder proposals. See Schedule 14A, Exxon Mobil Corporation, April 13, 2016, at 56-74, <https://www.sec.gov/Archives/edgar/data/34088/000119312516539460/d14941ddef14a.htm>. To the extent this remains a concern, the solution should not be an administrative policy designed to reduce the aggregate number of proposals. A better alternative would be to cap the total number of proposals on a per company basis. The number, however, would need to be high enough to avoid restricting legitimate interests of shareholders.