THE EXCLUSION OF DUPLICATIVE PROPOSALS UNDER RULE 14A-8(I)(11)

I. INTRODUCTION

Rule 14a-8 (the Rule) allows shareholders to include proposals in a company's proxy materials.[1] The Rule, however, also contains thirteen substantive grounds for excluding a proposal. Specifically, subsection (i)(11) allows a company to exclude a proposal that "substantially duplicates" a previously submitted proposal.[2]

Duplicative proposals need not be identical.[3] Instead, they only must have the same "principal thrust" or "principal focus,"[4] or must address the same "core issue."[5] Proposals deemed duplicative may, therefore, vary in terms and scope, and may even be phrased differently.[6] Although narrowly interpreted and rarely used in its early history, subsection (i)(11) has been interpreted more broadly and applied to proposals with substantial and material differences. This has been particularly clear with respect to proposals seeking disclosure of corporate lobbying activities.

This paper will address the adoption of, and justification for, this subsection. The paper will focus on the Securities and Exchange Commission (SEC or Commission) Staff interpretation of this subsection, and the underlying process of allowing companies to exclude shareholder proposals as duplicative. Since the adoption of the Rule, the Staff has broadened the scope in permitting exclusions.

II. ADMINISTRATIVE HISTORY OF RULE 14A-8(I)(11)

Early versions of Rule 14a-8 did not address the issue of duplicative proposals. The SEC Commission did express concern with practices that added costs to the proxy process while providing little value to the company or shareholders.[7] Perhaps as a result, the Staff relied on an informal position allowing for the exclusion of proposals viewed as moot.[8]

---

1. *See* 17 C.F.R. § 240.14a–8 (2011).
2. *Id.*
3. *See* Pacific Gas & Electric Co., SEC No-Action Letter, 1993 WL 28726 (Feb. 1, 1993) [hereinafter Pacific Gas].
4. Chevron Corp., SEC No-Action Letter, 2012 WL 160560 (Feb. 21, 2012) [hereinafter Chevron].
5. Kraft Foods Grp., Inc., SEC No-Action Letter, 2014 WL 7326033 (Jan. 28, 2015) [hereinafter Kraft Food Grp.]; *see also* Abbott Labs., SEC No-Action Letter, 2004 WL 260369 (Feb. 4, 2004).
6. *See* Wells Fargo & Co., SEC No-Action Letter, 2011 WL 494127 (Feb. 8, 2011).
7. *See* Shareholder Proposals, Exchange Act Release No. 9432 (Dec. 22, 1971) (Concern arose over the practice of shareholders submitting a vast number of identical proposals without

The Commission amended Rule 14a-8 to explicitly allow for the omission of duplicative proposals in 1976. The Rule permitted companies to exclude proposals that "substantially duplicate[d]" those "previously submitted" by another shareholder.[9] The provision only allowed for the exclusion of the second proposal and applied only when the company agreed to include the first.[10] The exclusion was designed to benefit shareholders by eliminating "the possibility of shareholders having to consider two or more substantially identical proposals submitted to an issuer by proponents acting independently of each other."[11] Omission was therefore permitted when voting on the second proposal served "no useful purpose."[12]

Substantial duplication required that the proposals be indistinguishable in both legal and practical effect.[13] The exclusion, therefore, applied

---

attending the meeting. The Commission addressed the concern by emphasizing the obligation to submit proposals in "good faith.").

8. *See* Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders (S7-643), Exchange Act Release No. 9393 (July 7, 1976) (explaining that exclusion "would formalize a ground for omission that is not mentioned in the current Rule but reasonably has been implied therefrom."); *see also* Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No 12999 (Nov. 22, 1976) [hereinafter Adoption of Amendments Relating to Proposals by Security Holders] (In adopting the exclusion, the Commission noted that the ground for omission had "existed solely on an informal basis in the past.").

9. Adoption of Amendments Relating to Proposals by Security Holders, *supra* note 8 ("Specifically, the new subparagraph provides that the management may omit a proposal that is substantially duplicative of a proposal submitted by another proponent which the management intends to include in its proxy materials.").

10. *See* The Timken Co., SEC No-Action Letter 1986 WL 66485 (Jan. 6, 1986) (The Staff has concurred that "paragraph (c)(11) permits the omission of a proposal and any statement in support thereof from a company's proxy statement and form of proxy if it is substantially duplicative of a proposal 'previously submitted to the issuer by another proponent . . . .' In the absence of the requirement, another shareholder might learn of a prior proposal of which it did not approve, draft a similar proposal more to its liking and have its proposal substituted for the prior proposal. In a simultaneous receipt situation, such potential for manipulation does not exist, and paragraph (c)(11) should apply to permit the omission of one proposal that is substantially duplicative of another proposal.").

11. Continental Airlines, SEC No-Action Letter, 1975 WL 9901 (March 12, 1975) ("After consideration of the foregoing information, this Division has determined not to recommend any enforcement action to the Commission if Mr. Armstrong's proposal is omitted from the company's proxy material. As you indicate, his proposal is substantially similar to a proposal previously submitted to the company by Mr. Korba which the management intends to include in the company's proxy material. Although Rule 14a–8 does not deal specifically with a matter of this nature, the Division believes it is reasonable to take the position that where two substantially similar shareholder proposals relating to the same meeting of security holders are submitted to a company by two independent stockholders, no useful purpose would be served by including both such proposals in the company's proxy material. That is, both proposals are essentially the same, and it would be redundant to include each in the proxy material.").

12. *Id.* ("[T]he Division believes it is reasonable to take the position that where two substantially similar shareholder proposals relating to the same meeting of security holders are submitted to a company by two independent stockholders, no useful purpose would be served by including both such proposals in the company's proxy material. That is, both proposals are essentially the same, and it would be redundant to include each in the proxy material.").

13. *See* Standard Oil Co. of Cal., SEC No-Action Letter, 1977 WL 13728 (Feb. 7, 1977) ("The two forms of the proposal are identical except that one would request the Board of Directors to establish a specified policy while the other would amend the Company's by-laws to add such policy as a by-law. The proponents have expressed in such letters their preference for the proposal in

to proposals considered "identical."[14] Mere variations in structure and supporting statement did not prevent a finding that proposals were duplicative.[15] From the outset, however, the Staff confronted proposals with overlapping content but differences in substantive terms.[16] A proposal asking to establish a ceiling for executive officers and directors at twice the salary of the President of the United States was deemed substantially duplicative of a proposal to limit executive officers and directors' compensation to 150% of the President of the United States.[17] The Staff viewed the differences in the method of calculating the ceilings as immaterial.[18]

Duplication did not occur, however, where shareholders sought different outcomes. For example, the Staff determined that an initial proposal recommending the establishment of a policy restricting educational grants was not substantially duplicative of a request to require the company to disclose educational grants. Although the subject matter overlapped, one sought disclosure and the other the establishment of policies.[19]

Similarly, a proposal requesting that General Electric make no contributions to schools employing Communists, Marxists, Leninists, or Maoists was not substantially duplicative of a proposal recommending that the corporation make no contributions to any organizations that advocated employment of Communists, Marxists, Leninists, or Maoists in educational institutions.[20] The Staff noted that one proposal related to advocacy and the other to employment.[21] A proposal calling for a ceiling on total compensation did not duplicate a proposal linking non-salary

---

the form of a request that the Company's Board establish the specified policy. It also appears that the two forms of the proposal are indistinguishable in legal and practical effect.").

14. PepsiCo, Inc., SEC No-Action Letter, 1992 WL 68057 (Mar. 25, 1992).

15. *See* CBS, Inc., SEC No-Action Letter, 1978 WL 13061 (July 10, 1978) *(*"The two proposals vary in structure and supporting statements but are substantially duplicative.").

16. *See* Stanhome Inc., SEC No-Action Letter, 1997 WL 20482 (Jan. 10, 1997).

17. *See* Am. Elec. Power Co., SEC No-Action Letter, 1993 WL 530042 (Dec. 22, 1993).

18. *See id*. (The Staff also determined that proposals seeking limits and/or freezes on executive and director compensation substantially duplicated another that requested a cap on executive compensation at fixed amounts and a suspension on executive pay raises, stock option grants, and bonuses.).

19. *See* Garnett Co., Inc., SEC No-Action Letter, 1983 WL 30942 (Mar. 16, 1982) ("In our view [the view of the Staff], however, although there appears to be some similarities between the proposals at issue, we do not agree that they are substantially the same. We note that the first proposal recommends that the Company establish a policy restricting educational grants, while the second proposal seeks to require disclosure concerning educational grants."); *see also* BankAmerica Corp., SEC No-Action Letter, 1979 WL 13826 (Jan. 29, 1979) ("Mr. Ritz's proposal requests that the Company adopt a policy which prohibits the Company from making any new loans or renewing any existing loans to certain communist countries. Mrs. Cordoba's proposal, on the other hand, not only requests the Company to adopt a similar proposal, but also directs the Company's board of directors to prepare and deliver to stockholders annually a report describing the extent of the Company's business dealings with communist countries.").

20. *See* Gen. Electric Co., SEC No-Action Letter, 1979 WL 13810 (Jan. 24, 1979).

21. *See id*.

compensation and performance.[22] Nor did a proposal addressing the compensation of directors duplicate another regarding compensation of management.[23]

The exclusion for duplicative proposals was, however, used infrequently.[24] The Staff excluded only six proposals under the exclusion in 1981[25] and only two the following year.[26] For the most part, the exclusion applied to the rare circumstance of different shareholders accidentally submitting substantially identical proposals.

The exclusion remained unchanged until 1998 when the Commission redrafted the Rule into plain English and used a Q&A format.[27] The exclusion for duplicative proposals was renumbered and received only "minor stylistic revisions."[28]

III. STAFF INTERPRETATION

Entering the new millennium, the use of the exclusion changed. The Staff broadened the interpretation of the duplicative proposal exclusion. No longer limited to proposals that served "no useful purpose," application resulted in the exclusion of proposals with substantial and material differences. This could be seen with particular clarity in connection with proposals involving political contributions and lobbying activities.

A. Traditional Analysis

In the immediate aftermath of the 1998 amendments, the Staff for the most part adhered to a relatively narrow approach in interpreting subsection (i)(11). The Staff deemed proposals duplicative if identical[29] or distinguished only by minor variations such as capitalization and spelling.[30] Proposals could also be excluded if they addressed the same core issues[31] or had the same "principal focus or thrust."[32]

---

22. *See* Pacific Gas & Electric Co., *supra* note 3.

23. *See id.*; *see also* Ford Motor Co., SEC No-Action Letter, 2005 WL 608205 (Mar. 14, 2005) (A proposal limiting total compensation was not duplicative of one limiting stock options.).

24. *See* Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 19135 (Oct. 14, 1982).

25. *Id.*

26. *Id.*

27. *See* Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 23200 (May 21, 1998).

28. *See* Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 39093 (Sept. 18, 1997).

29. *See* AT&T Corp., 1999 WL 33414 (Jan. 26, 1999) (describing second proposal as an "exact copy" of an earlier proposal).

30. *See* United Therapeutics Corp., SEC No-Action Letter, 2015 WL 535327 (Mar. 5, 2015).

31. *See* Freeport-McMoRan Copper & Gold Inc., SEC No-Action Letter 1999 WL 95481 (Feb. 22, 1999) (This may occur even where they differ somewhat in terms or breadth. In those circumstances, the proposal need only "substantially mirror" an earlier submission. For example, a first proposal to Freeport-McMoRan Copper & Gold Inc. requested that the board take the "needed steps to prove that, at future elections of directors, new directors be elected annually and not by classes . . . and that on expiration of present terms of directors their subsequent election shall also be

Companies could not exclude proposals that, while broadly similar, had differing goals and requested *very* different actions.[33] For example, in Exxon Mobil the first proposal requested that the company set quantitative goals for greenhouse emissions.[34] The second sought disclosure of devalued assets resulting from climate change.[35] Exxon argued that the principal focus was climate change and the related risks.[36] The Commission disagreed and did not permit exclusion.[37]

Similarly, proposals seeking unique disclosures and actions, even if overlapping in subject matter, were not treated as substantially duplicative.[38] For example, a first proposal requesting quantitative goals for reducing greenhouse gas emissions did not duplicate a proposal requesting a report on carbon asset risk.[39] Each proposal focused narrowly on a specific activity, although both broadly dealt with climate change.[40]

---

on an annual basis. The second requested the board to "take the necessary steps to declassify the Board of Directors and establish annual elections of directors, whereby directors would be elected annually and not by classes . . . ." Although using different terminology, the Staff allowed for exclusion as substantially duplicative.).

32. Qwest Communications Int'l, Inc., SEC No-Action Letter, 2009 WL 799987 (Mar. 2, 2009) [hereinafter Qwest]; *see also* Constellation Energy Grp., SEC No-Action Letter, 2004 WL 346073 (Feb. 19, 2004) [hereinafter Constellation] (This in turn occurs where the proposals have the same effect. In Constellation Energy Corp, a shareholder submitted a proposal requesting the board to develop a "performance-based equity grant program for executive officers." The Staff agreed that the proposal substantially duplicated a previously submitted proposal requesting "the company to implement a 'commonsense executive compensation program'" that included an equity compensation component.); Tri-Continental Corp., SEC No-Action Letter, 1998 WL 89104 (Mar. 2, 1998) (Similarly, Tri-Continental received two proposals seeking to transform the company into an open-end investment company, specifically to eliminate "the current market price discount to the net asset value per share of the Corporation's common stock." The initial proposal requested that the board permit the purchase or sale of shares at net asset value. The subsequent proposal recommended a tax-free exchange or merger with a comparable open-end mutual fund. Although somewhat different in approach, the proposals sought the same ultimate goal. The Staff, therefore, granted the requested no action relief.).

33. *See* Exxon Mobil Corp., SEC No-Action Letter, 2014 WL 262978 (Mar. 17, 2014) [hereinafter Exxon Mobil Corp.].

34. *Id.*

35. *Id.*

36. *See id.* (Compensation proposals often fall within the same broad category but have a different thrust and focus. Proposals relating to stock options do not necessarily duplicate those involving the retention of stock. Further, a policy that senior executives retain 75% of all equity-based compensation for a minimum of two years after departing from the company is not substantially duplicative of a policy barring senior executives and directors from engaging in speculative transactions in the company's stock.).

37. *See id.*; *see also* Pharma-Bio Serv, Inc., SEC No-Action Letter, 2013 WL 6701971 (Jan. 17, 2014) (In Pharma-Bio Serv, Inc. two proposals addressed the issuance of dividends. The first requested "the board establish a quarterly dividend policy" while the second requested "the board immediately adopt and issue a special case dividend." Although the proposals involved the same broad subject matter, the Staff declined to permit exclusion as substantially duplicative.).

38. *See* Kraft Food Grp., *supra* note 5; *see also* Exxon Mobil Corp., *supra* note 33.

39. *See* Exxon Mobil Corp., *supra* note 33.

40. *See id.* (Additionally, a proposal requesting a report on lobbying contributions is distinct from the principal thrust of a report on political disclosures.); *see also* The Allstate Corp., SEC No-Action Letter, 2014 WL 253599 (Mar. 12, 2014); Bank of America Corp., SEC No-Action Letter, 2013 WL 706894 (Feb. 15, 2013); AT&T Inc., SEC No-Action Letter 2012 WL 380433 (Feb. 2, 2012).

B. Political Contributions and Lobbying Proposals

Nonetheless, the use of (i)(11) significantly increased in the second decade of the new millennium. In 2010, four proposals were excluded as duplicative, with three addressing the need for an independent director as chair of the board.[41] A year later, the number of exclusions jumped to fifteen (out of 192 granted by the Staff)[42] and twenty the following year.[43]

This increase had a specific explanation. The Staff determined that proposals seeking disclosure of lobbying activities and proposals seeking disclosure of political contributions were duplicative. When companies received separate proposals on each of these topics, the later-received proposal could be excluded.[44]

The approach first appeared in a no-action letter to Citigroup, Inc.[45] The bank received a proposal from the Kansas City Firefighters calling for the disclosure of political expenditures. Specifically, the proposal resolved that:

> [T]he shareholders of Citigroup ("Company") hereby request that the Company provide a report, updated semi-annually, disclosing the

41. *See* Exxon Mobil Corp., SEC No-Action Letter, 2010 WL 1046718 (Mar. 19, 2010); *see also* The Goldman Sachs Grp., Inc., SEC No-Action Letter, 2010 WL 943084 (Mar. 9, 2010); JPMorgan Chase & Co., SEC No-Action Letter, 2010 WL 128066 (Mar. 5, 2010); Honeywell Int'l Inc., SEC No-Action Letter, 2010 WL 4922427 (Jan. 19, 2010).

42. Frank Zarb, *Preparing for the 2012 Proxy Season: Looking Back at the Last Season and Forward to the Next*, PROSKAUER (2011), http://www.proskauer.com/files/News/10a6fd8a-63f6-48bb-bf56-2edbb2606c51/Presentation/NewsAttachment/42b80dd4-32c7-493e-a200-2f27dc783a74/Preparing-for-the-2012-Proxy-Season.pdf.

43. *See* News Corp., SEC No-Action Letter, 2012 WL 2127516 (July 16, 2012) [hereinafter News Corp.]; *see also* J.M. Smucker Co., SEC No-Action Letter, 2012 WL 1357552 (May 17, 2012); Nabors Indus. Ltd., SEC No-Action Letter, 2012 WL 457969; Goldman Sachs Grp. Inc., SEC No-Action Letter, 2012 WL 561908 (Mar. 14, 2012) [hereinafter Goldman Sachs]; AT&T Inc., SEC No-Action Letter, 2012 WL 748855 (Mar. 1, 2012); Xcel Energy Inc., SEC No-Action Letter, 2012 WL 160557 (Feb. 28, 2012) [hereinafter Xcel]; Wellpoint, Inc., SEC No-Action Letter, 2012 WL 160556 (Feb. 24, 2012); JPMorgan Chase & Co, SEC No-Action Letter, 2012 WL 109888 (Feb. 24, 2012); Johnson & Johnson, SEC No-Action Letter, 2012 WL 605023 (Feb. 23, 2012); Chevron, *supra* note 4; Pfizer Inc., SEC No-Action Letter, 2011 WL 6837552 (Feb. 17, 2012); Allergan, Inc., SEC No-Action Letter, 2012 WL 417664 (Feb. 9, 2012); Johnson & Johnson, SEC No-Action Letter, 2011 WL 6837553 (Feb. 3, 2012) [hereinafter Johnson & Johnson]; Caterpillar Inc., SEC No-Action Letter, 2012 WL 173781 (Feb. 1, 2012); Vornado Realty Trust, SEC No-Action Letter, 2012 WL 258592 (Feb. 1, 2012); Mylan Inc., SEC No-Action Letter, 2012 WL 71854 (Feb. 1, 2012); CVS Caremark Corp., SEC No-Action Letter, 2012 WL 173779 (Feb. 1, 2012) [hereinafter CVS Caremark]; Union Pac. Corp., SEC No-Action Letter, 2012 WL 36454 (Feb. 1, 2012) [hereinafter Union Pac.]; Occidental Petroleum Corp., SEC No-Action Letter, 2011 WL 6837538 (Jan. 31, 2012) [hereinafter Occidental]; Lockheed Martin Corp., SEC No-Action Letter, 2011 WL 6470982 (Jan. 12, 2012); Am. Express Co., SEC No-Action Letter, 2011 WL 6425343 (Jan. 11, 2012).

44. *Shareholder Proposal Developments During the 2013 Proxy Season*, GIBSON DUNN (July 9, 2013), http://www.gibsondunn.com/publications/pages/Shareholder-Proposal-Developments-2013-Proxy-Season.aspx.

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

> Company's: 1. Policies and procedures for political contributions and expenditures (both direct and indirect) made with corporate funds.[46]

The proposal sought review by the audit committee and posting on the company's website.

Thereafter, the company received a proposal from AFSCME Employees Pension Plan calling for the disclosure of lobbying expenditures. The proposal resolved that:

> [T]he stockholders of Citigroup Inc. . . . hereby request that Citigroup provide a report, updated annually, disclosing Citigroup's: 1. Policies and procedures for lobbying contributions and expenditures (both direct and indirect) made with corporate funds and payments (both direct and indirect, including payments to trade associations) used for direct lobbying and grassroots lobbying communications, including internal guidelines or policies, if any, for engaging in direct and grassroots lobbying communications. 2. Payments (both direct and indirect, including payments to trade associations) used for direct lobbying and grassroots lobbying communications, including the amount of the payment and the recipient.[47]

In seeking the exclusion of the AFSCME proposal, the bank asserted that both lobbying and political expenditures were "nondeductible expenses" under the Internal Revenue Code (the IRC) and that inclusion of both would result in shareholder confusion. AFSCME, however, asserted that the IRC drew "a number of distinctions between 'lobbying' or 'influencing legislation' on the one hand, and, on the other hand, participation in political campaigns and other activities" and that the company was seeking to "lump[] together [the proposals] as part of some unitary view of what Citigroup calls the 'political process.'"[48] Without analysis, the Staff allowed for the exclusion of the proposals as duplicative.[49]

---

46. *Id.* ("2. Monetary and non-monetary contributions and expenditures (direct and indirect) used to participate or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, and used in any attempt to influence the general public, or segments thereof, with respect to elections or referenda. The report shall include: a. An accounting through an itemized report that includes the identity of the recipient as well as the amount paid to each recipient of the Company's funds that are used for political contributions or expenditures as described above; and b. The title(s) of the person(s) in the Company who participated in making the decisions to make the political contribution or expenditure.").

47. *Id.* (The proposal defined grassroots lobbying communication as a "communication directed to the general public that (a) refers to specific legislation, (b) reflects a view on the legislation and (c) encourages the recipient of the communication to take action with respect to the legislation.").

48. *Id.*

49. *See id.* (The first proposal "requests that Citigroup provide an annual report disclosing Citigroup's payments, both direct and indirect and including payments to trade associations, used for direct lobbying and grassroots lobbying communications and the policy, procedures, and participants involved in making such payments." While the second proposal is articulated as "relying on publicly available data does not provide a complete picture of the Company's political expenditures. For example, the Company's payments to trade associations used for political activities are undisclosed and unknown. In many cases, even management does not know how trade associations use their

In 2011, the Citigroup analysis was used as a basis to exclude a significant number of other proposals requesting disclosure of a company's political contributions or lobbying expenses. For example, in Occidental Petroleum Corp., a proposal requesting disclosure of lobbying contributions and communications was substantially duplicative of one requesting a review of political expenditures and spending processes.[50]

In FedEx Corp., a first proposal sought for the board to adopt a policy permitting a shareholder advisory vote on corporate electioneering contributions.[51] The second asked for the board to provide a report on policies and procedures relating to political contributions and expenditures made with corporate funds.[52] The proponent argued that the second proposal did not duplicate the first.[53]

> The Company mistakenly asserts that the Proposal's essential objective is to provide shareholders with information on the company's political giving; by contrast, the Proposal, from its title to its resolve clause is clearly intended to create an advisory shareholder franchise, the opportunity for shareholders to review and vote on an advisory basis regarding company policies and implementation regarding electioneering contributions. As such, the Proposal is not substantially duplicated by the earlier proposal.[54]

The Staff nonetheless allowed for the exclusion of the second proposal as duplicative.[55] A significant number of the 2011 letters cited shareholder confusion as a basis for exclusion.

In 2012, the Staff relied on the same approach to exclude other proposals addressing political contributions or lobbying.[56] For example, in Goldman Sachs Group, Inc. the Staff determined that a proposal on political contributions entirely subsumed one on lobbying.[57] The Staff took the same position in CVS Caremark Corp.[58] In 2012, of the twenty-seven letters addressing political contributions and lobbying, and excluded as duplicative, nine referred to shareholder confusion.[59]

---

company's money politically. The proposal asks the Company to disclose all of its political spending, including payments to trade associations and other tax exempt organizations for political purposes.").

50. *See* Occidental Petroleum Corp., SEC No-Action Letter, 2010 WL 5409422 (Feb. 25, 2011).

51. *See* FedEx Corp., SEC No-Action Letter, 2011 WL 3017397 (July 21, 2011).

52. *See id.*

53. *See id.*

54. *Id.*

55. *See id.*

56. *See* Ford Motor Co., SEC No-Action Letter, 2011 WL 50596 (Feb. 15, 2011); *see also supra* note 51; General Motors Corp., SEC No-Action Letter, 2007 WL 1125502 (Apr. 5, 2007); Goldman Sachs Grp., *supra* note 43.

57. *See* Goldman Sachs Grp., *supra* note 43.

58. *See* CVS Caremark, *supra* note 43.

59. *See* FedEx Corp., SEC No-Action Letter, 2012 WL 1901986 (May 24, 2012); *see also* Occidental, *supra* note 43; CVS Caremark, *supra* note 43; Union Pac., *supra* note 43; Johnson &

In 2013, shareholders drafted around the Staff's interpretation. Proposals addressing political contributions disclaimed application to lobbying and visa versa.[60] For example, in CVS Caremark Corp., the first proposal from the Clean Yield Asset Management requested a report on policies and procedures related to "contributions and expenditures . . . to (a) participate or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, or (b) influence the general public or any segment thereof, with respect to an election or referendum."[61] The second proposal from Sisters of St. Francis of Philadelphia requested that the board authorize the preparation of a report disclosing "Company policy and procedures governing lobbying, both direct and indirect, and grassroots lobbying communications."[62] The second proposal, however, specifically stated that "[n]either 'lobbying' nor 'grassroots lobbying communications' include efforts to participate or intervene in any political campaign or to influence the general public or any segment thereof with respect to an election or referendum."[63] Given the explicit disclaimer, the Staff declined to find the proposals duplicative and denied the requested no-action relief.[64]

Where shareholders failed to make the disclaimer, the Staff has continued to treat the proposals as duplicative.[65] In Union Pacific Corp. the Staff deemed the second proposal duplicative where the first broadly addressed policy and procedures related to lobbying, and the second addressed policy and procedures related to political contributions.[66] This approach was reaffirmed again in PepsiCo, Inc., when the first proposal pertained to political contributions, while the second pertained to lobbying, electioneering, and political expenditures.[67] Despite having different

---

Johnson, *supra* note 43; News Corp., *supra* note 43; Xcel, *supra* note 43; Chevron, *supra* note 43; IBM, SEC No-Action Letter, 2012 WL 6138120 (Dec. 6, 2012).

60. *Shareholder Proposal Developments During the 2013 Proxy Season*, *supra* note 44.

61. *See* CVS Caremark Corp., SEC No-Action Letter, 2013 WL 178208 (March 15, 2013) [hereinafter CVS Caremark 2013].

62. *Id.*

63. *Id.*

64. *Shareholder Proposal Developments During the 2013 Proxy Season*, *supra* note 44.

65. *Id.*

66. *See* Union Pacific Corp., SEC No-Action Letter, 2012 WL 1119680 (Mar. 30, 2012) (The AFSME Resolution called for a report on the company's "policy and procedures governing the lobbying of legislators and regulators" and a "listing of payments . . . used for direct lobbying." The proposal also sought payments to "any tax-exempt organization that writes and endorses model legislation" and a description of the board's oversight of these expenditures. The Fund proposal sought a report on "[p]olicies and procedures for political contributions and expenditures" and contributions "used to participate . . . in any political campaign.").

67. *See* PepsiCo, Inc., SEC No-Action Letter, 2013 WL 6730888 (Jan. 29, 2014) ("The first proposal provides that the company shall have a policy pertaining to making political contributions only if such a policy is approved by at least 75% of its shares outstanding. The second proposal requests that the board create and implement a policy requiring consistent incorporation of corporate values into lobbying, political and electioneering expenditures and to report specified information relating to lobbying, electioneering or political contribution expenditures.").

requests, the Staff determined that the second is excludable under the Rule.[68]

In Duke Energy Corp., the Staff permitted the exclusion of the second after finding that they both encompassed "disclosure of contributions and expenditures made by the Company to participate or intervene in any political campaign or to influence the public with respect to elections or legislation as well as the disclosure of the recipients and amounts paid to such recipients."[69] Thus, because both proposals addressed the same principal focus or thrust, exclusion was permitted.[70]

IV. ANALYSIS

Subsection (i)(11) was originally designed to permit the exclusion of proposals deemed moot. Shareholders benefited because they no longer needed to consider a matter already included in the proxy statement. As the Staff reasoned, voting on two "substantially identical" proposals served "no useful purpose." For much of the history of the exclusion, the Staff adhered to this approach and maintained a narrow interpretation of the Rule in limiting exclusions.

Over time, however, the rationalization for the exclusion changed. Investor confusion became the underlying justification.[71] In doing so, the Staff effectively broadened the scope of (i)(11).[72] This broad expansion

---

68. *See id.*

69. Duke Energy Corp., SEC No-Action Letter, 2013 WL 6844383 (Jan. 24, 2014).

70. *See id.*

71. *See* Verizon Communications Inc., SEC No-Action Letter, 2013 WL 6844388 (Feb. 5, 2014) (Thus, while Rule 14a-8(i)(11) protects shareholders from the confusion caused by substantially duplicative proposals, it also protects the board from being placed in a position where it may be unable to properly determine the shareholders' will because the terms of such proposals are different, even though the subject matter is the same. As one no-action request asserted, the subsection "protects the board of directors from being placed in a position where the board cannot, for all practical purposes, implement the stockholders' will because the board does not have clear terms on which to proceed where duplicative proposals, while sharing the same subject matter, differ as to terms, breadth, or intended implementation."); *see also* Bristol-Myers Squibb Co., SEC No-Action Letter, 2004 WL 224539 (Jan. 30, 2004); TCF Fin. Corp., SEC No-Action Letter, 2014 WL 7274810 (Feb. 13, 2015) (company arguing that "[t]he rationale behind the 'principal thrust or focus' concept is that the presence in one proxy statement of multiple proposals that address the same issue in different terms creates the risk that, if the shareholders approve each of the proposals, the board of directors would not be left with a clear expression of shareholder intent on the issue."); Centerior Energy Corp., SEC No-Action Letter, 1995 WL 82758 (Feb. 27, 1995); Pinnacle W. Capital Corp., SEC No-Action Letter, 1993 WL 78521 (Mar. 16, 1993); Pacific Gas, *supra* note 3; Procter & Gamble Co., SEC No-Action Letter, 1983 28300 (June 15, 2983); Monsanto Co., SEC No-Action Letter, 2000 WL 217449 (Feb. 7, 2000); General Electric Co., SEC No-Action Letter, 2003 WL 360097 (Jan. 22, 2003).

72. David M. Lynn & Anna T. Pinedo, *Frequently Asked Questions about Shareholder Proposals and Proxy Access*, MORRISON & FOERSTER (2015), http://media.mofo.com/files/Uploads/Images/Frequently-Asked-Questions-about-Shareholder-Proposals-and-Proxy-Access.pdf (describing the exclusion as intending to "avoid shareholder confusion and to prevent various proponents from including in proxy materials several versions of essentially the same proposal."); *see also* Qwest, *supra* note 32 (arguing that proposal should be excluded where "the inclusion in a single proxy statement of multiple proposals addressing the same issue in different terms may confuse stockholders and place a company and its board of directors in a position where they are unable to determine the stockholders' will."); Kraft Foods Grp., *supra* note 5

of the Rule is exemplified by the interpretations associated with lobbying and political contributions. The Staff took the position that very different proposals dealing with these topics could be excluded if they overlapped. The Staff viewed them as duplicative, presumably agreeing with companies that the two proposals were confusing to investors, despite shareholders strenuously objecting and dictionary definitions that suggested otherwise.[73]

This perspective, based upon the desire to avoid confusion, demonstrates a broad lack of confidence in shareholders. By relying on "confusion" rather than the absence of a useful purpose, the Staff puts itself in the position of deciding what shareholders can and cannot understand. Moreover, even if proposals are adopted that have the capacity to send mixed messages to the board, such as an unproven assertion, they are invariably precatory. As a result, they do not command but merely provide information about shareholder views. Management, not the Staff, is in the best position to assess the meaning of the information. Yet by excluding materially different proposals as duplicative, the Staff effectively prevents such information from reaching the board.

The Rule benefits from a provision that excludes duplicative proposals. However, the Rule does not benefit from an interpretation of the concept of duplicative to exclude materially different proposals from consideration by shareholders. In those circumstances, the Staff effectively denies rather than protects the voting rights of shareholders, the opposite of the purpose of Rule 14a-8.

Hillary Sullivan[*]

("In addition, because the Sustainable Packaging Report Proposal and the Sustainability Report Proposal substantially duplicate the Sustainable Forestry Report Proposal, there is a strong likelihood that Kraft's shareholders may be confused if asked to vote on all three proposals, as shareholders could assume incorrectly that there must be a substantive difference among the proposals."); Exxon Mobil Corp., SEC No-Action Letter, 2009 WL 890020 (Mar. 23, 2009) ("Gibson Dunn further states that the primary rationale behind the "principal thrust/principal focus" concept is that the inclusion in a single proxy statement of multiple proposals addressing the same issue in different terms may confuse shareholders and place a company and its board of directors in a position where they are unable to determine the shareholders' will. As we point out above, there is no basis for the argument that the inclusion of the Proposal and the Prior Proposal would create confusion for shareholders and no basis for the argument that the company would be unable to determine the shareholders' will if one proposal were adopted and the other failed. "); Wal-Mart Stores, Inc., SEC No-Action Letter 2002 WL 975855 (Apr. 3, 2002); Constellation, *supra* note 32.

73. *See* CVS Caremark 2013, *supra* note 61.

* J.D. Candidate and Corporate and Commercial Law Certificate Candidate, University of Denver Sturm College of Law, May 2017. I would like to thank Professor Brown for his guidance, support, and feedback. I would also like to thank the *Denver Law Review* for providing comments and feedback, and for making this publication possible.