

# FINDING THE GRIEVANCE IN THE PERSONAL GRIEVANCE EXCLUSION

## I. INTRODUCTION

Rule 14a-8 (the Rule) requires the inclusion of a shareholder proposal in a company's proxy statement. The Rule, however, provides thirteen substantive grounds for exclusion.<sup>1</sup> Subsection (i)(4) allows for the omission of proposals relating to the "redress of a personal claim or grievance against the company or any other person."<sup>2</sup> Originally introduced to prevent "abuse of the [shareholder proposal] rule," the exclusion sought to eliminate proposals intending to "achieve personal ends . . . not necessarily in the common interest of . . . security holders generally."<sup>3</sup>

Establishing a personal grievance sometimes required an analysis of the subjective motivation of the proponent, placing the Securities and Exchange Commission (the Commission or SEC) in the position as finder of fact. Uncomfortable in this role, the Commission has at various times altered the exclusion in an attempt to create more objective standards. A subjective analysis, however, always remained part of the review process.

This Article will examine the history and development of Rule 14a-8(i)(4). Part I addresses the administrative history of the exclusion. Part II discusses post-1998 interpretations by the staff of the Commission. Part III suggests possible reforms.

## II. ADMINISTRATIVE HISTORY

The SEC added an exclusion for personal grievances in 1948.<sup>4</sup> The provision permitted omission "if it clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or of redressing a personal grievance against the issuer or its management."<sup>5</sup> The exclusion purportedly arose out of "a few cases" where management had "been badgered" by proposals seeking a "personal objective unrelated to the interests of the corporation."<sup>6</sup> The provision

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1. 17 C.F.R. § 240.14a-8 (2016).

2. § 240.14a-8(i)(4). 14a-8(i)(4) is commonly referred to as the "personal grievance exclusion."

3. Adoption of Amendments to Proxy Rules, Exchange Act Release No. 4185, 1948 WL 28695, at \*3 (Nov. 5, 1948).

4. *Id.* The personal grievance exclusion was originally introduced as "Rule X-14A-8(c)(1)."

5. *Id.*

6. Robert K. McConnaughey, 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) (transcript available at <https://www.sec.gov/news/speech/1948/111048mcconnaughey.pdf>) ("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.").

sought 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.”<sup>7</sup>

The personal grievance exclusion applied to a shareholder proposal that was otherwise includable, but subject to omission on the basis of the proponent’s motivation. The need to determine motive threatened to transform the Commission into a finder of fact. The staff sought to minimize this by limiting the exclusion to a proposal “indicat[ing] on its face that a personal grievance existed.”<sup>8</sup> Thus, in *Columbia Broadcasting*,<sup>9</sup> two shareholders with pending litigation against the company submitted a proposal, one requesting that the company “recover sums paid to a certain . . . director” and the other requesting the formation of an independent committee to investigate “conflicting and adverse interests of directors.”<sup>10</sup> The Commission found a “direct connection between the subject matter . . . and pending litigation against the company” and permitted exclusion.<sup>11</sup>

The Commission amended the exclusion in 1972 to replace “subjective terms of the provision with objective standards.”<sup>12</sup> The change refocused the application of the exclusion away from the proponents’ state of mind and on to the subject matter of the proposal. The amended exclusion only required that the proposal “relates to” a personal claim or grievance.<sup>13</sup> The changes also extended the exclusion to grievances involving not only management but “any other person.”<sup>14</sup> The change sought to prevent the

7. Notice of Proposal to Amend Proxy Rules, Exchange Act Release No. 4114, 1948 WL 28637, at \*2 (July 6, 1948).

8. Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 19135, 1982 WL 600869, at \*13 (Oct. 14, 1982) (“The staff initially interpreted the provision very narrowly and required that the issuer . . . clearly demonstrate that the proposal under scrutiny relates to a personal claim or grievance. . . . The staff determined that this requirement was met in those instances where the proposal or its supporting statement indicated on its face that a personal grievance existed.”).

9. DIV. OF CORP. FIN., SUMMARY OF INTERPRETATIONS 206 (1964), [http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1960/1960\\_1964\\_Interprt\\_Corp\\_Finance.pdf](http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1960/1960_1964_Interprt_Corp_Finance.pdf).

10. *Id.*

11. *Id.*

12. Solicitation of Proxies, Exchange Act Release No. 9784, 1972 WL 125400, at \*2 (Sept. 22, 1972). When the SEC amended the Rule in 1972, the personal grievance exclusion became “Rule 14a-8(c)(2).”

13. *Id.* at \*4. (“Management may omit a proposal . . . if the proposal . . . relates to the enforcement of a personal claim or the redress of a personal grievance against the issuer, its management, or any other person.”).

14. William J. Casey, Chairman, U.S. Sec. & Exch. Comm’n, Address at the Corporate Law Conference at the Washington Hilton Hotel of Washington D.C. (Sept. 21, 1972) (transcript available at <https://www.sec.gov/news/speech/1972/092172casey.pdf>) (“Formerly, the provision did not permit the omission of proposals which involved a personal claim or grievance against someone other than the issuer or its management. Since we don’t believe that the proxy machinery should be used as a forum for airing personal disagreements or differences, we have amended the provision so that all proposals relating to a personal claim or grievance against any person may be omitted from an issuer’s proxy material.”).

use of the proxy machinery as a “forum for airing personal disagreements or differences.”<sup>15</sup>

In applying the exclusion, the burden rested on the company to demonstrate a basis for omission. To do so, management had to provide evidence of a personal grievance, then establish that the proposal related directly to the grievance.<sup>16</sup> Evidence of a grievance most commonly arose out of the interaction between the shareholder and management, including the proponent’s dealings with the company,<sup>17</sup> hostile statements about the issuer,<sup>18</sup> and employment history.<sup>19</sup>

The clearest application of the Rule occurred in connection with a proposal that, if implemented, would directly rectify a grievance. In *Soo Line Railroad*,<sup>20</sup> the staff permitted the exclusion of a proposal submitted by a former employee that could have resulted in his reinstatement.<sup>21</sup> Similarly, in *Warnaco*,<sup>22</sup> the staff omitted a proposal requesting the disclosure of financial documents that the proponent had previously sought from the company.<sup>23</sup>

By the mid-1970s, however, the staff routinely denied omission of proposals that, while potentially addressing a grievance, constituted a

15. *Id.*

16. See First Mortgage Investors, SEC No-Action Letter, 1973 WL 9194, at \*2 (Apr. 23, 1973) (“This Division does not agree with your opinion that [the proposals] may be omitted... In this regard, we note that you have not specified what [the shareholders] alleged grievance against [the company] consists of, nor have you demonstrated any relation between the text of each proposal and the alleged grievance.”).

17. See Evans Prod.’s Co., SEC No-Action Letter, 1973 WL 9162, at \*3 (Mar. 12, 1973) (allowing omission of a proposal that “appears to be directly related to [the shareholder’s] dispute with the company over the construction of a home out of building materials purchased from the company”).

18. See Procter & Gamble Co., SEC No-Action Letter, 1975 WL 9951, at \*9 (July 17, 1975) (“Support for the view that [the shareholder] has this personal grievance against the company and its management, and has submitted his proposal for the purpose of redressing it, can be found in his letters [submitted to issuer’s executives] . . . in this correspondence [the shareholder] describes the company as being guilty of ‘insidious corporate criminality,’ ‘overt and covert discrimination,’ ‘racism and male chauvinism’ and ‘racial discrimination against black newspapers.’”).

19. See Hercules Inc., SEC No-Action Letter, 1973 WL 20871, at \*4 (Jan. 23, 1973) (allowing omission of two proposals seeking to reduce pension plan qualification requirements). In *Hercules*, the staff concluded, “Both proposals appear to be directly related to the fact that [the shareholders] employment was terminated before he was able to accrue the 15 years of service with the company necessary to receive a vested interest in its retirement plan.” *Id.*

20. *Soo Line Railroad Co.*, SEC No-Action Letter, 1974 WL 8861 (Feb. 21, 1974).

21. *Id.* at \*2 (allowing omission of a proposal that was “directly related to the fact that [the shareholder] was disqualified by the company’s medical director from service as a locomotive engineer or fireman after open heart surgery had been performed upon him”). The staff found that “the proposal, in specifying that the company establish a program to return employees who have had open heart surgery to their former occupations upon the recommendations of their cardio-vascular specialists or surgeons, appears intended to require the company to reinstate Mr. Hintz to his former position as locomotive engineer or fireman.” *Id.*

22. *Warnaco, Inc.*, SEC No-Action Letter, 1975 WL 9878 (Feb. 24, 1975).

23. *Id.* at \*10 (“[The] proposal seems to be directly related to a personal claim or grievance by [the shareholder] against the company and/or its management . . . arising from the fact that the management declined in February 1974 to furnish [the shareholder] with certain information of the type now requested in the proposal.”).

topic of interest to all shareholders.<sup>24</sup> In *Pfizer*,<sup>25</sup> a shareholder submitted a proposal seeking to change the date of the annual shareholder meeting.<sup>26</sup> The company produced a letter documenting the proponent's displeasure with the annual meeting date due to her inability to attend.<sup>27</sup> Nonetheless, the staff declined to issue the requested no-action letter reasoning that "the proposal to change the date of the annual meeting is of general interest to all of the shareholders of the Company and we are unable to conclude that you have demonstrated that this proposal is directly related to a personal grievance of the proponent."<sup>28</sup>

This approach, however, created new problems. As the Commission later noted, "[I]ncreasingly sophisticated proponents and their counsel . . . draft[ed] proposals in broad terms 'of interest to all shareholders,' rather than in narrow terms reflecting the personal circumstances which had sparked their concern."<sup>29</sup> To address this issue, the staff permitted the exclusion of proposals with a broad purpose where companies produced significant additional evidence of a personal grievance.

The staff confronted these circumstances in *RCA Corporation*.<sup>30</sup> The proposal sought to require a news broadcasting company to, among other things, release the names of authors of any editorial policy.<sup>31</sup> The company demonstrated that the proposal came from a proponent criticized in a broadcast.<sup>32</sup> The Commission permitted exclusion of the proposal, stating, "[D]espite the fact that the proposal is drafted in such a way which may be of interest to all shareholders, the information . . . submitted suggests that the proponent is using the proposal as one of many tactics to redress an existing personal grievance against the company."<sup>33</sup>

Likewise, in *AT&T*,<sup>34</sup> a shareholder proposal requested company reports disclosing the hiring practices of men in traditionally female roles.<sup>35</sup>

24. The SEC amended the Rule in 1976 and the personal grievance exclusion became "Rule 14a-8(c)(4)." See *Adoption of Amendment's Relating to Proposals by Security Holders*, Exchange Act Release No. 12999, 1976 WL 160347 (Nov. 22, 1976). The language of the exclusion was left unaltered. *Id.* at \*13-14.

25. *Pfizer, Inc.*, SEC, No-Action Letter, 1978 WL 13028 (Jan. 9, 1978).

26. *Id.* at \*1.

27. *Id.* at \*3.

28. *Id.* at \*7.

29. SEC. & EXCH. COMM'N, STAFF REPORT ON CORPORATE ACCOUNTABILITY 176 (Sept. 4, 1989), <https://babel.hathitrust.org/cgi/pt?id=pur1.32754067965669;view=1up;seq=1> (discussing the challenge of broadly written proposals).

30. *RCA Corp.*, SEC No-Action Letter, 1979 WL 13870 (Feb. 7, 1979).

31. *Id.* at \*6-7.

32. *Id.* at \*3-6 (illustrating that the company provided letters from the shareholder threatening litigation in response to the broadcast).

33. *Id.* at \*2. See also *Time Inc.*, SEC No-Action Letter, 1979 WL 13477 (Feb. 8, 1979); *Times Mirror Co.*, SEC No-Action Letter, 1979 WL 14597 (Feb. 28, 1979); *Cox Broad.*, SEC No-Action Letter, 1979 WL 13600 (Apr. 9, 1979) (illustrating instances where the staff affirmed its ruling in *RCA* finding that the proponent was using the security holder process to redress a personal grievance against the issuer for adverse publicity the proponent had received).

34. *American Tel. & Tel.*, SEC No-Action Letter, 1981 WL 26696 (Jan. 26, 1981).

35. *Id.* at \*5.

Although arguably seeking information of broad importance to all shareholders, the company demonstrated through evidence of comments made by the proponent that the proposal related to the “redress of an existing grievance against women employees and directors.”<sup>36</sup> The staff permitted exclusion.<sup>37</sup>

The staff viewed some proposals as “thinly disguised personal grievances which threatened to abuse the . . . process.”<sup>38</sup> At the same time, allegations of a grievance could “reflect management’s opposition to the proponent’s raising of the issue.”<sup>39</sup> Moreover, by allowing for the exclusion of proposals on subjective grounds, however narrowly, the staff effectively encouraged companies to continue “to offer information regarding the proponent’s prior conduct or particular circumstances” to demonstrate the requisite “personal claim or grievance.”<sup>40</sup> Despite these discrepancies, the Commission viewed the administration of the exclusion as “sensitive to the [inherent] conflicts.”<sup>41</sup>

Nonetheless, the Commission continued to try to reduce the fact-finding element of the exclusion. In the early 1980s, the staff experimented with a response letter that expressed “no view” on the applicability of the exclusion.<sup>42</sup> A proponent submitted the same proposal to four companies requesting reports disclosing company hiring practices.<sup>43</sup> Declining to resolve the issue, the staff was “unable to determine whether or not the proposal relates to a personal grievance” and therefore expressed “no view” on the matter.<sup>44</sup> The approach, however, was rarely used and ultimately abandoned.

Amendments proposed in 1982 sought to bring the exclusion “in line with existing interpretations.”<sup>45</sup> Noting that the personal grievance exclu-

36. *Id.* at \*6. The evidence presented came from transcripts of prior shareholder meetings where the proponent made several statements similar to ones in 1981: “[O]f course, I’m opposed and against women directors and women officers. I’d much rather deal any time with the worse men than the friendliest woman.” *Id.* at \*2.

37. *Id.* at \*5.

38. SEC. & EXCH. COMM’N, STAFF REPORT ON CORPORATE ACCOUNTABILITY 176–77 (Sept. 4, 1980), <https://babel.hathitrust.org/cgi/pt?id=pur1.32754067965669;view=1up;seq=1>.

39. *Id.* at 179.

40. *Id.* at 176.

41. *Id.* at 185–86.

42. *See infra* note 44.

43. This proposal was originally submitted to AT&T. *See* American Tel. & Tel., *supra* note 35. After the staff granted omission to AT&T, the proponent submitted the same proposal to four additional companies. *See* Bendix Corp., SEC No-Action Letter, 1981 WL 25434 (Nov. 16, 1981). *See also* Eastern Airlines Inc., SEC No-Action Letter, 1982 WL 28689 (Jan. 11, 1982); Bristol-Meyers Co., SEC No-Action Letter, 1982 WL 28740 (Feb. 9, 1982); Procter & Gamble Co., SEC No-Action Letter, 1982 WL 29343 (July 16, 1982) (standing as the only instances in which the staff made a “no view” determination in relation to the personal grievance exclusion).

44. Bendix Corp., SEC No-Action Letter, 1981 WL 25434, at \*1 (Nov. 16, 1981).

45. Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 19135, 1982 WL 600869, at \*4 (Oct 14,

sion was “perhaps the most subjective provision [in the Rule] and definitely the most difficult to administer,”<sup>46</sup> the Commission sought to clarify the reach of the provision.<sup>47</sup> Proposals would be subject to exclusion “where the proposal is of general interest to all security holders but the issuer demonstrated that it was submitted to redress a personal grievance.”<sup>48</sup>

Proposals omitted under the exclusion mostly entailed evidence of a personal benefit not shared with shareholders at large.<sup>49</sup> Proposals provided benefits proposals through adjustments to employee retirement benefits,<sup>50</sup> indirect reputational gains,<sup>51</sup> and allocation of company resources to organizations supported by the proponent.<sup>52</sup>

In rare instances, the staff excluded proposals involving a grievance notwithstanding a topic that benefited all shareholders. In *Medalist*,<sup>53</sup> the shareholder submitted a proposal that would require the company to obtain approval from a majority of outstanding shares before “enter[ing] into or extend[ing] any contract, agreement, [or] transaction” which contained certain anti-takeover provisions.<sup>54</sup> Although potentially benefiting all shareholders, the company produced evidence that the proponent would withdraw the matter if the issuer waived certain statutory protections in

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1982) (explicitly allowing for the omission of a proposal “designed to result in a benefit to the proponent or to further a personal interest, which benefit or interest is not shared with the other security holders at large”). *Id.* at \*14.

46. *Id.* at \*13.

47. From the 1972 to 1983 amendments, the staff averaged just under seven omission per year relying on the exclusion. See Spreadsheet of No Action Letters Addressing Proposals under Rule 14a-8(i)(4) from 1973 through January 2017 [hereinafter *Spreadsheet*] (on file with the DENVER LAW REVIEW). Shortly after the 1983 amendments, the staff altered its approach to no-action responses. The staff declined to give extensive explanation on its rulings, instead, responses were limited to agreeing or disagreeing with the issuers reasons for requesting omission.

48. Sec. & Exch. Comm’n, *supra* note 46, at \*14. Commentators expressed concern over the personal interest clause. They asserted the amendment could allow for the omission of proposals “relating to an issue which a proponent was personally committed or intellectual and emotionally interested.” Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 20091, 1983 WL 33272, at \*6 (Aug. 16, 1983). The final rule addressed this by applying the same limitation on the exclusion of a personal interest as applied to a personal benefit. The exclusion of proposals providing a “personal interest” required it not be “shared with the other security holders at large.” *Id.*

49. *Spreadsheet*, *supra* note 48.

50. *See* RLC Corp., SEC No-Action Letter, 1983 WL 28790 (Nov. 3, 1983) (allowing omission of a proposal that retroactively qualified the proponent, and other employees, for early retirement benefits).

51. *See* Strawbridge & Clothier, SEC No-Action Letter, 1984 WL 45840 (Mar. 13, 1984) (allowing omission of a proposal that would likely increase the chance of a buyout or merger). The company argued the shareholder made statements in several investment magazines that the issuer was ripe for takeover, and the proposal was an attempt to make his statements correct, thereby increasing his reputation in the investment community. *Id.* at \*2-5.

52. *See* Comprehensive Care Corp., SEC No-Action Letter, 1984 WL 45436 (July 6, 1984) (allowing omission of a proposal that would allocate corporate funds into an organization, of which the proponent was a member).

53. *Medalist Indus., Inc.*, SEC No-Action Letter, 1989 WL 245577 (Feb. 17, 1989).

54. *Id.* at \*8 (allowing omission of a proposal where the issuer demonstrated the proposal was submitted as leverage to benefit the proponent in future negotiations).

dealing with his company.<sup>55</sup> The Commission permitted omission of the proposal.<sup>56</sup>

The staff also used the personal grievance exclusion to ban future submissions by some shareholders, at least in instances perceived as an abuse of the proposal process. In *Fluor Corporation*,<sup>57</sup> the proponent submitted the same proposal four years in a row.<sup>58</sup> On each occasion, the staff granted omission.<sup>59</sup> In doing so, the staff provided that “this response shall also apply to any future submission to the company of the same proposal by the same proponent.”<sup>60</sup> The response also “satisf[ies] the Company’s future obligations under [14a-8(j)] with respect to the same or similar proposals by the proponent.”<sup>61</sup>

Amendments proposed in 1997 sought to address the challenges faced by the Commission in “mak[ing] factual determinations, sometimes involving the proponent’s or the company’s credibility based normally on circumstantial evidence presented in the parties’ submissions.”<sup>62</sup> The Commission suggested modifying the Rule to allow for the exclusion “only if the proposal (including any supporting statement) on its face relat[ed] to a personal grievance.”<sup>63</sup> In cases where the proposal did not, “[A] company would still be required to make a submission under 14a-

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55. *Id.* at \*2 (“Katz Group . . . has asked the company to waive certain Wisconsin statutory rights so it could communicate with other shareholders without being limited as to future activities.”) (“While the Proposal ostensibly seeks to protect shareholders in general, it appears that Katz may be using the Proposal as leverage to pressure the directors of Medalist to assist him in achieving his unique personal goals. It is of note that in the letter . . . from counsel for Katz to counsel for Medalist it is stated that the [company] would be willing to withdraw the Proposal if equivalent contractual protection were given to the [company].”).

56. *Id.* at \*1 (“In arriving at this position, the staff has particularly noted that while the proposal is drafted in such a way that it could be of interest to all of the Company’s security holders, it appears from the facts presented, particularly the November 28, 1988 letter to the Company from the proponent’s counsel, that the proponent is using the proposal as a tactic designed to result in a benefit to, or further the personnel interest of, the proponent not shared with the Company’s other security holders.”).

57. Fluor Corp., SEC No-Action Letter, 1993 WL 521098 (Dec. 15, 1993).

58. *Id.* at \*1.

59. *Id.*

60. *Id.*

61. *Id.* 14a-8(j) requires a company to submit six copies of the proposal requesting omission, an explanation as to why omission should be permitted, and a supporting opinion of counsel. 17 C.F.R. § 240.14a-8(j) (2016). *See also* Cabot Corp., SEC No-Action Letter, 1994 WL 601587 (Nov. 4, 1994) (allowing omission, and future omission, of two proposals). One requested the creation of an ethics committee and the other sought to repeal a vote which limited the liability of directors. Both proposals had been omitted on a combined nine prior occasions. Cabot Corp., SEC No-Action Letter, 1994 WL 601587, at \*2 (Nov. 4, 1994).

62. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 39093, 1997 WL 578696, at \*8 (Sept. 18, 1997).

63. *Id.* Between the 1983 and 1998 amendments, the staff averaged just over nine omission per year relying on the exclusion. *See Spreadsheet, supra* note 48.

8.”<sup>64</sup> Instead of resolving the subjective issues, the staff resurrected an approach used decades before<sup>65</sup> and proposed to “express ‘no view,’ rather than concur or decline to concur in its exclusion.”<sup>66</sup>

Commenters worried that the approach would increase the number of omissions and force shareholders to litigate.<sup>67</sup> Ultimately, the Commission did not adopt the “no view” approach and left the exclusion substantively unchanged.<sup>68</sup> The Rule, including the personal grievance exclusion, was, however, rewritten into “plain-English.”<sup>69</sup>

### III. STAFF INTERPRETATION

Application of the exclusion remained consistent immediately following the 1998 amendments. That changed in 2001, when the number of shareholder proposals omitted under the personal grievance exclusion declined sharply.<sup>70</sup> The exclusion averages less than two successful applications per year.<sup>71</sup> Of these, roughly half involve repeat submissions.<sup>72</sup> Moreover, the staff has largely ceased issuing forward-looking relief.<sup>73</sup> For the most part, the decline reflects an unwillingness by the staff to act as a fact finder with respect to a proponent’s motivation.

The staff will grant omission only where there is a strong correlation between the proposal and an alleged personal grievance and does not require significant analysis of the proponent’s subjective motivation. In *ConocoPhillips*,<sup>74</sup> a proposal requested the creation of a special committee to investigate the company’s involvement with “states, including Libya

64. Sec. & Exch. Comm’n, *supra* note 63, at \*8.

65. Sec. & Exch. Comm’n, *supra* note 45.

66. Sec. & Exch. Comm’n, *supra* note 63, at \*8.

67. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 40018, 1998 WL 254809, at \*2 (May 21, 1998).

68. *Id.* at \*11.

69. *Id.* at \*4–5. The amendment also updated the personal grievance exclusion to “Rule 14a-8(i)(4).”

70. *Spreadsheet*, *supra* note 48. In 2001, a significant decline began in the use of the exclusion. From the 1983 amendments to 2001, the staff averaged over nine omissions per year relying on the exclusion. From 2001 through January of 2017, however, the rate of omission dropped below an average of two omission per year. No omissions relied on the exclusion in 2002, 2004, 2010, 2015, or 2016.

71. *Spreadsheet*, *supra* note 48. Twenty-seven proposals were omitted under the exclusion from 2001 through January of 2017. This includes proposals omitted by confirming the future relief given from a prior proposal.

72. *Id.* (illustrating that, of the twenty-seven omissions, six relied on future relief granted in a prior proposal, nine reached the same conclusion as a prior ruling on an identical or substantially similar proposal by the same shareholder, and twelve were first time omissions).

73. The staff reiterated in 2001 that the exclusion could be used to “grant forward-looking relief if a company . . . [demonstrates] . . . a shareholder is abusing [the Rule] by continually submitting similar proposals.” Since this statement, the Commission has allowed for the omission of future proposals in only two instances. *See* Gen. Elec., SEC No-Action Letter, 2007 WL 162273 (Jan. 12, 2007); D.R. Horton, Inc., SEC No-Action Letter, 2013 WL 5428475 (Nov. 1, 2013).

74. *ConocoPhillips* by Roger K. Parsons, SEC No-Action Letter, 2008 WL 653403 (Mar. 7, 2008).



and Iran, that have sponsored terrorism.”<sup>75</sup> The company presented evidence of the proponents’ prior litigation with the company arising out of the death of his wife in a plane crash, while on route to hold discussions with an Iranian-based oil company.<sup>76</sup> The staff permitted omission of the proposal.<sup>77</sup> In *State Street*,<sup>78</sup> a proposal requested removal of the CEO as overseer of shareholder meetings.<sup>79</sup> The Commission permitted exclusion upon a showing that the CEO had previously removed the proponent from a meeting.<sup>80</sup> In only a single instance since 2001 has the staff omitted a proposal under the personal grievance exclusion where the submission had no direct relationship to the grievance.<sup>81</sup>

In part, the reduction in the number of no-action letters relying on the exclusion has occurred as a result of a change in the interpretation. The staff has effectively added a public interest exception. Even where the proponent has a grievance or may benefit from the proposal, the staff has not permitted exclusion if the matter involved an important social policy issue.<sup>82</sup> In *Corrections Corporations*,<sup>83</sup> for example, the proposal requested reports on company efforts to reduce incidents of rape and sexual abuse of prisoners housed in facilities operated by the company.<sup>84</sup> Although the issuer presented evidence that the proposal related to a grievance from the proponent’s own incarceration in the companies’ housing facilities, the staff did not permit omission.<sup>85</sup>

In rare instances the Commission has allowed for the omission of a proposal believed to address a grievance by someone other than the shareholder. In *MGM*,<sup>86</sup> a shareholder proposal recommended that the board adopt a written policy requiring disclosure of political contributions.<sup>87</sup> The proponent admitted he submitted the proposal on behalf of another shareholder who did not meet certain eligibility requirements.<sup>88</sup> The company

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75. *Id.* at \*2.

76. *Id.* at \*3.

77. *Id.* at \*1.

78. *State Street Corp.*, SEC No-Action Letter, 2007 WL 80452 (Jan. 5, 2007).

79. *Id.* at \*2 (allowing omission of a proposal that would prevent the CEO from presiding over shareholder meetings, after the issuer provided evidence the proponent was removed by the CEO from a prior shareholder meeting.).

80. *Id.* at \*5–11.

81. *See MGM Mirage*, SEC No-Action Letter, 2001 WL 294174 (Mar. 19, 2001) (allowing omission of a proposal requesting the disclosure of political contributions by board members). The company argued the personal grievance arose from the proponent being banned from the issuer’s property. *Id.* at \*1.

82. *See Emerson Elec. Co.*, SEC No-Action Letter, 2000 WL 1634117 (Oct. 27, 2000) (rejecting omission of a proposal requesting the company amend its equal employment opportunity policy to ban discrimination on the basis of sexual orientation).

83. *Corr. Corp. of America*, SEC No-Action Letter, 2011 WL 6837534 (Feb. 10, 2012).

84. *Id.* at \*3.

85. *Id.* at \*1.

86. *MGM Mirage*, SEC No-Action Letter, 2001 WL 294174 (Mar. 19, 2001).

87. *Id.* at \*5.

88. *Id.* at \*5–7 (the non-qualifying shareholder lacked the required number of shares to submit a proposal).

presented evidence of the non-qualifying shareholder's prior conflicts with the company.<sup>89</sup> The staff allowed omission on the grounds that the proposal related to a personal grievance with the non-qualifying shareholder.<sup>90</sup>

With the staff increasingly avoiding subjective determinations of motive, findings of personal grievance have mostly involved litigants against the company or former employees. In effect, corporate and judicial records provide the requisite evidence of a grievance. In *American Express*,<sup>91</sup> a shareholder proposal requested "mandatory penalties for non-compliance [with the company's employee code of conduct] . . . especially with regard to discrimination against employees."<sup>92</sup> The issuer demonstrated, by providing court transcripts of the proponent's gender discrimination suit against the company, that the proposal related to a personal grievance.<sup>93</sup> Similarly, the staff continues to allow for exclusion where evidence of grievance arises out of the proponent's prior employment with the company.<sup>94</sup>

#### IV. ANALYSIS

At least since 1948, the Commission has recognized that proxy process is not the proper forum for shareholders to resolve personal grievances. A straightforward concept to articulate, the implementation of a personal grievance exclusion creates a number of difficulties. The exclusion most clearly applies to proposals that would only benefit the proponent by directly remedying a grievance. In those circumstances, exclusion is appropriate. These proposals complicate the voting process with little to no benefit to the remaining owners of the company.

At the same time, the mere existence of a grievance should not automatically deprive a proponent of his or her rights as a shareholder. Moreover, when the Commission added the exclusion in 1948, the Rule had very few other provisions that addressed possible abuses. Thus, with no limits on the number of proposals, a shareholder could submit ten or more items to the same company and do so repeatedly. In at least one instance

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89. *Id.* at \*1 (the non-qualifying shareholder and the issuer had engaged in prior litigation and the shareholder was barred from entering company property).

90. *Id.* at \*14.

91. *Am. Express Co.*, SEC No-Action Letter, 2016 WL 7370134 (Jan. 6, 2017).

92. *Id.* at \*3.

93. *Id.* See *Spreadsheet*, *supra* note 48. (illustrating that, of the twelve omissions since 2001 of non-repeat filers, nine included evidence of litigation, five involved a submission by a former employee, and two involved neither). Some of these omissions involved both a former employee and litigation. *Id.*

94. See *Am. Express Co.*, SEC No-Action Letter, 2016 WL 7370134 (Jan. 6, 2017). See also *Int'l Bus. Mach.'s Corp.*, SEC No-Action Letter, 2016 WL 7426889; *Gen. Elec. Co.*, SEC No-Action Letter, 2016 WL 7370136 (Jan. 12, 2017).

where this occurred, the staff used the personal grievance exclusion to omit the proposals.<sup>95</sup>

The Rule, however, has evolved. The Commission has added additional exclusions and procedural limitations.<sup>96</sup> These types of potential abuses have been addressed through limits on the number of proposals a shareholder can submit to a single company.<sup>97</sup> The instances, therefore, where proposals addressing grievances also involved a general abuse of the Rule have declined.

Finally, while the staff currently applies the personal grievance standard in a relatively limited and objective manner, this behavior could, as the history of the exclusion has demonstrated, change. The Rule merely requires that the proposal “relates” to a grievance or personal benefit.<sup>98</sup> Moreover, the Rule applies to grievances not only “against the company” but also against “any other person.” The staff could in the future interpret the broad language to permit the exclusion of a much wider array of proposals than permitted under current practice. The staff could likewise eliminate the implicit public interest exception that appears to have been added to the Rule.

The exclusion should, therefore, be updated to reflect the current state of Rule 14a-8. The goal of this update is threefold: (1) to eliminate the subjective interpretation and evidentiary process; (2) to leave the concept of “grievance” and “benefit” broad enough to allow for flexibility in interpreting uncommon forms of these terms;<sup>99</sup> and (3) to narrowly tailor the exclusion to apply only to those proposals that objectively evince a grievance or promote a benefit not in common with other shareholders.

To accomplish this, the exclusion should focus not on motivation but effect. The exclusion should therefore apply to proposals that address a grievance or provide a unique benefit in a manner that applies only, or primarily, to the submitting shareholder. Whatever the purpose, shareholders have little interest in considering proposals that are designed to advance a single proponent’s agenda. This would effectively eliminate the

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95. See Gen. Elec. Co., SEC No-Action Letter, 1989 WL 245514 (Jan. 19, 1989) (allowing omission of twenty-five proposals, submitted by a single shareholder, relying on the personal grievance exclusion.). The same twenty-five proposals were also granted omission the prior year, relying on the exclusion. See Gen. Elec. Co., SEC No-Action Letter, 1989 WL 233660 (Feb. 4, 1988).

96. See J. Robert Brown, Jr., *The Evolving Role of Rule 14a-8 in the Corporate Governance Process*, 93 DENV. L. REV. ONLINE 151, 152 (2016) (noting that the first version of Rule 14a-8 consisted of approximately 215 words and that the current version contains, as a result of additional limitations and exclusions, almost 3000 words).

97. See 17 C.F.R. § 240.14a-8(c) (2016).

98. § 240.14a-8(i)(4).

99. See *supra* note 52 (benefits found to include reputational gain); See *supra* note 55 (benefit includes the act of submitting a proposal if to be used as leverage in negotiations with the issuer); See *supra* note 91 (personal grievance includes the grievance of a third party when the proposal is submitted on behalf of that party).

evidentiary process of establishing motive and allow for omission of any proposal where the benefit is not shared with other shareholders.<sup>100</sup>

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100. One possible formulation would be to rewrite the exclusion to provide that: "(4) Grievance; benefit: *If the language of the proposal or supporting statement relates to the redress of a grievance, or is designed to result in a benefit not shared by the other shareholders.*"

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