EXCLUDING PROPOSALS IN THE ABSENCE OF CORPORATE AUTHORITY

I. INTRODUCTION

Rule 14a-8 requires inclusion of a properly submitted shareholder proposal in the company's proxy statement.[1] The Rule, however, also includes thirteen substantive grounds for exclusion. Specifically, subsections (i)(6) permits omission of a proposal if "the company would lack the power or authority to implement the proposal."[2]

The exclusion originally received little attention. The staff historically applied the exclusion to proposals that required actions outside the control of the board and company, actions contrary to the law, or actions that resulted in a breach of contracts.[3] The staff, however broadened the application to omit a wider range of proposals, including those that would be impossible to implement within the proposed timeframe, or would interfere with the authority of the shareholders.[4] In recent years, the exclusion has become a more common ground for the omission of proposals.[5]

This article will examine the history and application of subsection (i)(6). Part II will trace the adoption in 1972 and the changes in language, culminating with a rewriting in plain English in 1998. Part III will examine the no action letters employing the power or authority exclusion and changes in staff interpretation that have occurred over time. Finally, Part IV critically analyzes why the use of this exclusion has increased exponentially in recent years and suggests possible changes in the staff's interpretive approach.

II. THE EARLY YEARS

In the early 1970s, shareholders increasingly began to use the proxy process to debate the social responsibility of public corporations.[6] In response to this trend and *Medical Committee for Human Rights v. SEC (Dow Chemical)*,[7] the Securities and Exchange Commission (the Com-

1. 17 C.F.R. § 240.14a-8 (Sept. 20, 2011).
2. Staff Legal Bulletin No. 14 (July 13, 2001), https://www.sec.gov/interps/legal/cfslb14.htm.
3. Discussed *infra*, notes 12–14.
4. Discussed *infra*, notes 23–28.
5. Discussed *infra*, notes 38–41.
6. *See* Robert N. Leavell, *Corporate Social-Reform, The Business Judgment Rule and Other Considerations*, 20 GA. L. REV. 565 at *577–84 (1986).
7. Med. Comm. for Human Rights v. Sec. & Exch. Comm'n, 432 F.2d 659 (D.C. Cir. 1970), *vacated by* 404 U.S. 403 (1972). In 1970, the Court of Appeals for the District of Columbia decided this case. The case was in response to a shareholder challenging the Commission's omission of a proposal that sought to have the company discontinue the manufacturing of napalm, the court deter-

mission) amended Rule 14a-8.[8] The changes sought, at least in part, to clarify the application to proposals addressing issues of public interest.

The Commission sought to allow proposals involving social policy issues but permit exclusion where the required action was "not within the control of the issuer."[9] The adopting release, however, clarified that the exclusion applied to "all proposals" and was not "limited to those which involve general economic, political, racial, religious, social, or similar causes."[10] The exclusion was not, however, intended to serve as a basis for the omission of traditional shareholder proposals dealing with stockholder relationships.[11] As a result, the exclusion did not apply to "proposals dealing with stockholder relationships with the management" such as "cumulative voting, annual meetings, and ratification or auditors."

The Staff initially employed a narrow construction of the exclusion. For example, in *Allis-Chalmers Corporation*,[12] the shareholder submitted a proposal that sought to recover compensation paid to an officer under a contract with the company.[13] The company took the position that the proposal would require management to "dishonor valid contractual obligations" and therefore should be excluded. The staff, however, disagreed:

> [I]t does not appear that the proposal on its face, would necessitate action that is beyond the company's control. In this connection, we recognize that no shareholder proposal can ever authorize a company to perform an illegal act, but we do not believe you have provided adequate support for the view that the subject proposal necessarily would require the performance of illegal acts. Accordingly, we do not believe that the management may rely on the reasons set forth in your letter for the omission of the subject proposal from the company's proxy material.

The exclusion, therefore, was "seldom [used] and received little comment."[14] Statistics illustrated the infrequent reliance on the provision.

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mined that shareholders' could express their opinion on the goals of corporate activity so long as it was related to on-going activity of the corporation and the shareholder's proposal must be reconsidered for inclusion.

8. *Title 17-Commodity & Sec. Exchanges Chapter II-Securities & Exch. Comm'n*, Exchange Act Release No. 7375 (Sept. 22, 1972).

9. *S'holder Proposals*, Exchange Act Release No. 6908 at *2 (Dec. 22, 1971).

10. *Title 17-Commodity*, *supra* note 9. Changes made in 1976 did not substantively alter the exclusion. See *Adoption of Amendments Relating to Proposals by Sec. Holders*, Exchange Act Release No. 12999 at *10 (Nov. 22, 1976) (In 1976, the exclusion was renumbered but "in terms of scope and effect, the provision [was] unchanged from the former rule.").

11. *Id.*

12. Allis-Chalmers Corporation, SEC No Action Letter, 1974 SEC No-Act. LEXIS 1725, at *1-4 (March 4, 1974).

13. *Id.* (The proposal noted that "it is the opinion of the Shareholders" that compensation paid to an officer was "irregular, and the Board shall take the necessary steps to recover" the shares or payment for the shares.).

14. Memorandum from Bill Morley and Mike Kargula to Lee Spencer, John Huber, and Linda Quinn, at 17 (Mar. 18, 1982), http://3197d6d14b5f19f2f440-

In 1981, the Commission allowed the exclusion of 211 out of 387 contested proposals, with only one[15] considered beyond the issuer's control.[16] The same pattern occurred in 1982 when the Commission allowed the omission of 278 of 487 contested proposals, with only two deemed beyond the control of the issuer.[17] In 1983, the staff permitted the exclusion of three such proposals.[18]

At the same time, the staff administratively grafted onto the exclusion a right of shareholders to cure a proposal allegedly beyond the issuer's power to implement. In *Indianapolis Power & Light Company*,[19] the proposal sought to have the company appoint a committee to study and report a plan of implementation for moving overhead power lines underground. The company, however, lacked the ability to implement and report on the study at the same meeting. The staff noted the defect could be cured, "if the [shareholder] promptly amended the proposal to indicate that the study and report should be completed for the 1982 annual meeting."[20]

In 1983, the Commission revised Rule 14a-8, but the exclusion remained unchanged.[21] Administratively, however, the staff expanded the circumstances that were outside the control of the issuer. The staff applied the exclusion to proposals that interfered with shareholder authority, as beyond the company's power to effectuate. In *GTE Corporation*,[22] for example, the shareholder submitted a proposal that sought to require some of the elected directors of the corporation to be women. The company took the position, and the staff agreed, that only shareholders had the power to elect directors. As a result, management had no ability to implement the proposal.[23] Additional grounds for omission under the

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15. Indianapolis Power & Light Co., SEC No-Action Letter, 1981 SEC No-Act. LEXIS 2928 (Jan. 14, 1981) (a proposal requesting the committee to study and report a plan of implementation for transitioning overhead line to underground line at the 1981 annual meeting was beyond the power to effectuate as it would be impossible to effectuate the study and report at the same meeting. The Commission noted this defect could be cured in the proposal was amended to indicate the study and report should be completed for the 1982 annual meeting).

16. Exchange Act Release No. 34-19135, 1982 SEC LEXIS 691, at *26 (Oct. 14, 1982).

17. *Id.*

18. Memorandum from Bill Morley to John Huber and Linda Quinn, at 3 (Nov. 16, 1983), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1983_1116_StatisticalShareholder.pdf.

19. Indianapolis Power & Light Co., SEC No-Action Letter, 1981 SEC No-Act. LEXIS 2928 (Jan. 14, 1981).

20. *Id.* at *4.

21. Outline for Revision of 14a-8 Memorandum, at 20 (June 7, 1983), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1983_0607_Revision14a8.pdf.

22. GTE Corporation, SEC No-Action Letter, 1984 SEC No-ACT. LEXIS 1602 (Jan. 10, 1984).

23. *Id.*

exclusion included proposals requiring action by companies not under the control of the issuer,[24] causing the breach of an existing contract,[25] resulting in illegal action,[26] or contravening federal regulation.[27]

The staff, however, did not always accept assertions that a company lacked the ability to effectuate a proposal. In *Amdahl Corporation*,[28] the proposal requested that the board take all necessary steps to prevent certain government entities in South Africa from purchasing the company's products. The company took the position that the proposal would have required a breach of obligations under existing agreements. The staff, however, disagreed. "In the staff's view those necessary steps would only include those steps that could be taken legally, and that taking those legal steps would be within the Company's power to effectuate."[29]

The staff also did not permit the exclusion of proposals deemed difficult to implement. This included proposals that sought to require inclusion in the proxy materials of "statements submitted by qualified beneficial owners of Company voting equity securities,"[30] to require disclosure of more detailed information about officer compensation,[31] to adopt restrictions on board membership,[32] to impose a salary cap on employees

24. Texaco Inc., SEC No-Action Letter, 1986 No-Act. LEXIS 1584 (Jan. 3, 1986). (A proposal which sought to prohibit a subsidiary of Texaco from selling petroleum or petroleum products to the South African military, police, and agencies until legal inequality of apartheid was addressed was outside the company's power to effectuate as they were only a 50% equity holder of the subsidiary, could not control its sales, and could not control the distribution and resale of their products beyond their own facilities.).

25. Honeywell Inc., SEC No-Action Letter, 1988 SEC No-Act. LEXIS 272 (Feb. 29, 1988). (A proposal which sought for Honeywell to terminate all economic relationships with South Africa was beyond the company's power to effectuate as it would require the company to breach existing contracts by terminating licensing and distributorship arrangements.).

26. Dravo Corp., SEC No-Action Letter, 1992 SEC No-Act. LEXIS 362 (Mar. 12, 1992). (a proposal that sought to have the board consider a sale or a merger was not beyond the company's power to effectuate as it required the board to take all such proper actions which does not require a violation of applicable law).

27. Johnson & Johnson, SEC No-Action Letter, 1997 No-Act. LEXIS 213 (Jan. 30, 1997) (a proposal that sought for the company to add warnings that the product caused the death of a human life to the labels and advertising of contraceptive products was outside the company's power to effectuate since it was unclear the proposal related strictly to contraceptive products and the FDA strictly regulated the labeling of such products).

28. Amdahl Corp., SEC No-Action Letter, 1989 SEC No-Act. LEXIS 149 (Jan. 30, 1989).

29. *Id.*

30. Amoco Corp, SEC No-Action Letter, 1989 SEC No-Act. LEXIS 369 (Feb. 3, 1989) (a proposal which sought for the company to include statements of qualified beneficial owners of voting securities to receive equal treatment in proxy statements was not beyond the company's power to effectuate as in was within the power of management despite potential problems determining how to implement).

31. IBM, SEC No-Action Letter, 1992 SEC No-Act. LEXIS 222 (Feb. 13, 1992) (a proposal seeking inclusion of more detailed information about officer compensation was not beyond the company's power to effectuate as it could be implemented without confusing readers or violating Regulation 14A).

32. Sears, Roebuck and Co., SEC No-Action Letter, 1993 SEC No-Act. LEXIS 174 (Feb. 4, 1993) (a proposal that sought to prohibit any person who derives primary income from the tobacco industry from serving on the board was not beyond the company's power to effectuate, so long as the proposal was amended to not affect the terms of current directors, as it could be viewed as a request to take the necessary steps to amend the by-laws or articles of incorporation).

and consultants[33] and, to prepare reports about the impact of its marketing on, and consumption of, beer by underage persons.[34]

The Commission rewrote Rule 14a-8 into a plain English format in 1998. Subsection (i)(6) permitted the omission of a proposal where "the company would lack the power or authority to implement the proposal."[35] The language, however, did not change the substantive meaning of the exclusion.[36]

III. STAFF INTERPRETATION

The use of subsection (i)(6) as a basis for excluding proposals has progressively increased since the 1980's.[37] In 1995, approximately eight proposals were omitted pursuant to the exclusion[38] and eleven in 2001.[39] In 2016, the exclusion applied to approximately fourteen proposals, ten percent of all proposals contested by management that year.[40]

For the most part, the exclusion had applied to proposals that would result in a breach of contract; contravene the articles, bylaws or other-

33. CIPSCO, SEC No-Action Letter, 1993 SEC No-Act. LEXIS 264 (Feb. 18, 1993) (a proposal that sought to impose a salary cap for employees and consultants was not beyond the company's power to effectuate as the terms were not so vague as to risk improper implementation).

34. Anheuser-Bush Companies, Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 261 (Feb. 28. 1994) (a proposal that asked the company to prepare a report about the impact of marketing, and consumption, by underage persons, as well as the company's compliance with guidelines was not beyond the company's power to effectuate as similar studies had in fact been made by social scientists and others).

35. Amendments to Rules on Shareholder Proposals, 62 FR 50682-01 (Sept. 26, 1997).

36. The Commission believed "that the revised language is clearer, without altering the meaning of the paragraph. *Id.* at *50685.

37. Discussed *supra*, notes 15-21.

38. Boston Edison Company, SEC No-Action Letter, 1995 SEC No-Act. LEXIS 146 (Jan. 20, 1995); Ford Motor Company, SEC No-Action Letter, 1995 SEC No-Act. LEXIS 158 (Jan. 23, 1995); IBM Corporation, SEC No-Action Letter, 1995 SEC No-Act. LEXIS 168 (Jan. 27, 1995); IBM, SEC No-Action Letter, 1995 SEC No-Act. LEXIS 208 (Jan. 31, 1995); The Southern Company, SEC No-Action Letter, 1995 SEC No-Act. LEXIS 321 (Feb. 23, 1995); Goldfield Corporation, SEC No-Action Letter, 1995 SEC No-Act. LEXIS 360 (Mar. 2, 1995); FPL Group, Inc., SEC No-Action Letter, 1995 SEC No-Act. LEXIS 382 (Mar. 6, 1995); SCEcorp, SEC No-Action Letter, 1995 SEC No-Act. LEXIS 964 (Dec. 20, 1995).

39. PG&E Corporation, SEC No-Action Letter, 2001 SEC No-Act. LEXIS 111 (Jan. 22, 2001); AT&T Corporation, SEC No-Action Letter, 2001 SEC No-Act. LEXIS 207 (Feb. 13, 2001); The Boeing Corporation, SEC No-Action Letter, 2001 SEC No-Act. LEXIS 212 (Feb. 13, 2001); Bank of America Corporation, SEC No-Action Letter, 2001 SEC No-Act. LEXIS 256 (Feb. 20, 2001); Marriot International, Inc., SEC No-Action Letter, 2001 SEC No-Act. LEXIS 291 (Feb. 26, 2001); Mattel, Inc., SEC No-Action Letter, 2001 SEC No-Act. LEXIS 406 (Mar. 21, 2001); The Goldfield Corporation, SEC No-Action Letter, 2001 SEC No-Act. LEXIS 452 (Mar. 28, 2001); LESCO, Inc., SEC No-Action Letter, 2001 SEC No-Act. LEXIS 471 (April 2, 2001); Putnam High Income Convertible and Bond Fund, SEC No-Action Letter, 2001 SEC No-Act. LEXIS 470 (April 6, 2001); Sensar Corporation, SEC No-Action Letter, 2001 SEC No-Act. LEXIS 570 (May 14, 2001); NetCurrents, Inc., SEC No-Action Letter, 2001 SEC No-Act. LEXIS 589 (Jun. 1, 2001).

40. *Shareholder Proposal Developments During the 2016 Proxy Season*, at 16, GIBSON DUNN (June 28, 2016), http://www.gibsondunn.com/publications/Documents/Shareholder-Proposal-Developments-2016-Proxy-Season.pdf (In 2016, 143 proposals were excluded under the Rule, 10.3% being pursuant to the exclusion, or not less than 14 proposals. The percentage of the use of each exclusion exceeds 100% as many no-action letters are omitted pursuant to more than one exclusion.).

wise interfere with the authority of shareholders; or violate the law. The staff has also allowed for the exclusion of proposals that would be impossible to implement within the specified timeframe. The staff has, however, continued to occasionally provide the shareholder a right to cure the omitted proposal.[41]

Section 3.01 Breach of Contract

The Commission has consistently allowed the exclusion of a proposal that requires the company to breach an existing contract. For example, in *Whitman Corp.*,[42] the shareholder submitted a proposal that sought for the board to take necessary action to rescind and cancel a previously approved merger agreement and demand damages. The company took the position that the proposal would require the company to unilaterally rescind the merger in violation of the terms of the agreement and state law. The Commission agreed and permitted omission.[43] The staff also applied the exclusion to a proposal that required the breach of an existing option agreement.[44]

Section 3.02 Shareholder Authority

The Commission has consistently allowed for the omission of proposals that interfered with the authority delegated to shareholders. In *Boeing Company*,[45] the shareholder submitted a proposal that sought to impose new qualifications for membership on certain board committees. The company took the position that such requirements would require the election of new directors, something within the exclusive domain of shareholders. The Commission agreed, "[I]t does not appear to be within the board's power to ensure the election of individuals as director who meet the specified criteria."[46]

Similarly, in *Goldman Sachs*,[47] the proposal sought to limit the position of chairmen of the board to independent directors. The company argued an inability to guarantee the election of an independent director

41. In 2001, the staff provided the shareholder a right to cure in approximately two instances, and three in 2015. The Goldfield Corporation, SEC No-Action Letter, 2001 SEC No-Act. LEXIS 452 (Mar. 28, 2001); LESCO, Inc., , SEC No-Action Letter, 2001 SEC No-Act. LEXIS 471 (April 2, 2001); Seward & Kissel LLP, SEC No-Action Letter, 2015 SEC No-Act. LEXIS 167 (Feb. 18, 2001); Clough Global Equity Fund, SEC No-Action Letter, 2015 SEC No-Act. LEXIS 321 (April 16, 2015); Liberty All-Star Equity Fund, SEC No-Action Letter, 2015 SEC No-Act. LEXIS 365 (May 6, 2015).

42. Whitman Corp., SEC No-Action Letter, 2000 SEC No-Act. LEXIS 203 (Feb. 15, 2000).

43. *Id.*

44. Perrigo Company, SEC No-Action Letter, 2016 SEC No-Act. LEXIS 270 (Mar. 17, 2016) (the Commission initially determined this proposal could not be excluded but reconsidered and determined there was some basis as it would breach existing contractual obligations).

45. The Boeing Company, SEC No-Action Letter, 1999 SEC No-Act. LEXIS 214 (Feb. 22, 1999).

46. *Id.*

47. The Goldman Sachs Group, Inc., SEC No-Action Letter, 2015 SEC No-Act. LEXIS 61 (Jan. 28, 2015).

willing to serve and willing to remain independent at all times during the term. The Commission agreed that the board lacked the authority "to ensure that its chairman retains his or her independence at all times." The Commission also noted that the proposal failed to "provide the board with an opportunity or mechanism to cure such a violation of the requested standard."[48]

Section 3.03 Violations of the Law

Proposals that violate the law remain outside the power or authority to implement.[49] When seeking to omit a proposal on these grounds, companies must also submit a "supporting opinion of counsel."[50] In *Ball Corporation*,[51] the shareholder submitted a proposal that asked the company, in compliance with applicable law, to take steps necessary to reorganize the board into a single class. The company took the position that implementation would violate state law that required a staggered board.[52] The Commission agreed the proposal could be omitted as it would violate state law.[53]

Section 3.04 Impossibility in the Specified Timeframe

The Commission has permitted the exclusion of proposals that required completion in an impossible timeframe. In *Consolidated Edison of New York*,[54] the proposal would have required the company to schedule all future stockholder meetings not later than seven days before or after any religious holiday. The company argued impossibility because "no consecutive two-week period exist[ed] in which a religious holiday [did] not fall."[55] The Commission also determined in *AT&T*,[56] that a proposal requesting the adoption of public policy principles on climate change

48. *Id.*

49. Such proposals are typically excluded pursuant to (i)(6) in conjunction with (i)(2) which is also an independent basis for exclusion.

50. Staff Legal Bulletin No. 14B (Sept. 15, 2004), https://www.sec.gov/interps/legal/cfslb14b.htm (Rule 14a-8(i)(6) "permits the company to exclude a proposal if it meets its burden of demonstrating that the company would lack the power or authority to implement the proposal." Rule 14a-8(j)(2)(iii) "requires the company to provide the Commission with a supporting opinion of counsel when the asserted reasons for exclusion are based on matters of state or foreign law. In submitting such an opinion of counsel, the company and its counsel should consider whether the law underlying the opinion of counsel is unsettled or unresolved and, whenever possible, the opinion of counsel should cite relevant legislative authority or judicial precedents regarding the opinion of counsel.").

51. Ball Corp., SEC No-Action Letter, 2009 SEC No-Act. LEXIS 813 (Jan. 25, 2009).

52. The company was incorporated in the State of Indiana. Indiana Code Sections 23-1-33-6(c), requires an Indiana corporation, with registered voting shares, to establish staggered terms of office for its board unless the board had adopted a bylaw expressly electing to not be governed by this statute. *Id*. at *5–6.

53. *Id.*

54. Consolidated Edison of New York, Inc., SEC No-Action Letter, 1992 SEC No-Act. LEXIS 439, at *1–2. (March 23, 1992).

55. *Id.*

56. AT&T, SEC No-Action Letter, 2012 SEC No-Act. LEXIS 105 (Feb. 9, 2012).

within six months of the 2011 annual meeting could be omitted because the date had already passed.[57]

Section 3.05 Right to Cure

The staff has occasionally allowed shareholders to cure proposals otherwise subject to omission under the exclusion.[58] When the staff has provided a right to cure, the proposing shareholder received seven days to cure the defect in accordance to the manner specified.

The staff has afforded proponents the right to cure where doing so would avoid the immediate implementation of the proposal. In *General Electric*,[59] for instance, a proposal seeking to modify the holding period of stock purchased pursuant to the exercise of options would, to the extent immediately applicable, have arguably required the company to breach an existing contract. The staff noted, however, if the shareholder changed the proposal to apply only to unexercised options, omission would not be permitted.[60] Similarly, in *NVR*,[61] a proposal sought to modify the compensation to certain officers. The proposal arguably required the company to breach existing agreements. If the shareholder, however, altered the proposal to limit application to future compensation agreements, omission would not be permitted.[62]

Additionally, if a proposal would violate company bylaws, the staff has allowed shareholders a right to cure by merely authorizing the board to "take the necessary steps" to implement the provision.[63] In *SBC Communications*,[64] a proposal sought to reduce the board from twenty-one members to fourteen. The company took the position that the proposal required the board to act in a timeframe outside the provisions in the bylaws.[65] Although falling within the exclusion, the staff specified that the shareholder could cure the concern by merely asking that the board take the necessary steps for implementation.[66] The Commission has taken a similar approach with proposals that seek to modify company bylaws and articles of incorporation.[67]

The Commission has also provided an option to cure to proposals that would cause a violation of state law. For example, a proposal to RTI

57. *Id.*
58. A right to cure was provided in at least one occasion in 1999, on at least three occasions in 2001, and again on at least three occasions in 2015.
59. General Electric Co., SEC No-Action Letter, 2008 SEC No-Act. LEXIS 76 (Jan. 9, 2008).
60. *Id.*
61. NVR, Inc., SEC No-Action Letter, 2009 SEC No-Act. LEXIS 132 (Feb. 17, 2009).
62. *Id.*
63. Such proposals are typically excluded pursuant to (i)(6) in conjunction with (i)(2) which is also an independent basis for exclusion.
64. SBC Communications Inc., SEC No-Action Letter, 2004 No-Act. LEXIS 92 (Jan. 11, 2004).
65. *Id.*
66. *Id.*
67. Sears, Roebuck and Co. discussed *supra*, note 33.

Biologics[68] that sought to amend the certificate of incorporation in a specific manner would cause the company to violate state law.[69] The staff has permitted shareholders to add the "necessary steps" language to other proposals to cure defects.[70]

IV. ANALYSIS

Shareholders own the corporation. Board members act as stewards on behalf of the owners. The question of whether to exclude proposals should take into account these respective roles. Accordingly, before seeking omission, board members should give fair consideration to proposals and strive to understand the underlying motivations and objectives of the shareholders that submit them.

Rule 14a-8—in particular subsection (i)(6)—should impose clear standards that permit both directors and shareholders to understand their respective rights. The current language of the exclusion, particularly given the administrative interpretation, does not provide this required degree of clarity. The interpretation of the rule has broadened throughout its history to exclude an increasing number of categories of proposals. Further, the staff grants a right to cure proposals infrequently and inconsistently.

To clarify the exclusion, the staff should more narrowly interpret the terms of the provision. One solution would be to eliminate redundancies among the subsections of the Rule. The boundaries of the exclusion overlap with other subsections of Rule 14a-8. The provision frequently applies to proposals falling within a separate subsection for those violating the law.[71] Subsection (i)(6) should not apply to these proposals.

Likewise, the staff could narrow the categories of proposals subject to the exclusion. Notably, the exclusion could be construed to omit proposals that request actions impossible to implement. A standard of objective impossibility would provide a bright-line standard for shareholders and companies to comply with and greatly increase the clarity and understanding of the exclusion.

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68. RTI Biologics, Inc. SEC No-Action Letter, 2012 SEC No-Act. LEXIS 94 (Feb. 6, 2012) (a proposal that sought to amend the certificate of incorporation in a specific manner would require the company to amend its charter without following the procedure established by its state of incorporation, thus violating state law).

69. *Id.* (The proposal is outside the power of the company to implement as it would cause the company to violate state law by amending the charter outside the procedures prescribed by the DGCL.).

70. Seward & Kissel LLP, SEC No-Action Letter, 2015 SEC No-Act. LEXIS 167 (Feb. 18, 2015). (a proposal sought for the board to consider a tender offer. The company argued this violated state law as the fund did not have any authority to liquidate, merge, or convert into an open-end or exchange-traded fund. The Commission agreed but gave the shareholders a right to cure by including the necessary steps language.).

71. Discussed *supra*, note 50.

This approach, however, may have disproportionate consequences on companies by allowing the inclusion of a burdensome amount of proposals previously excludable. On the other hand, a standard of impossibility would result in the inclusion of proposals that are difficult, but not impossible, to implement. The board, however, would have an opportunity to voice any concerns about the proposal in the proxy statement, presumably influencing the outcome of any vote by shareholders on the matter.

As a final solution to clarify the exclusion, the staff could increase the right to cure. The staff has provided this option in a handful of occasions throughout the history of the exclusion. The right, however, does not appear in the exclusion. As a result, the staff could, at any time, eliminate the ability of shareholders to correct their proposals. The right should, therefore, be added to the Rule. Moreover, the staff should provide shareholders the option to cure in every proposal that requires mere semantic changes to prevent omission. While this might also require companies to include of a greater number of proposals, companies could still rely on other subsections of the Rule to omit proposals that are unduly burdensome.

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