

WHAT'S IN A NAME: RULE 14A-8(L) AND THE IDENTIFICATION OF SHAREHOLDER PROPONENTS

I. OVERVIEW

Section 14(a) of the Securities Exchange Act of 1934 authorizes the Securities and Exchange Commission (SEC) to adopt proxy rules "necessary or appropriate in the public interest or for the protection of investors."¹ Pursuant to this authority, the SEC in 1942 promulgated Rule 14a-8 in order to give shareholders a greater voice in the corporate governance process.² Requiring the inclusion of shareholder proposals in a company's proxy statement, the rule also contains a number of procedural conditions and substantive limitations. Specifically, a shareholder may not submit more than one proposal to a single company³ and proposals cannot exceed 500 words.⁴

To the extent including the proposal, the company must either provide the name and address of, and the number of securities owned by, the proponent or agree to provide the information upon request.⁵ A review of 100 proxy statements from *Fortune's* top 150 companies demonstrates many companies do not fully adhere to the requirements of the provision.⁶ Moreover, those agreeing to identify the proponent "upon receiving an oral or written request" almost never deliver useful contact information designed to facilitate the ability of shareholders to obtain the information. Nor has the SEC ever taken action with respect to the omitted information.

This paper will review this administrative history of subsection (l) and the evolution of a standard that permitted management to omit shareholder identity from the company's proxy statement. Next, the paper will discuss the staff's interpretation of the requirement through the issuance of no action letters. Lastly, the paper will examine how today's largest companies respond to the requirement in their proxy statements, ending with an analysis of the provision's practical implications.

1. 15 U.S.C. § 78n(a) (2012).

2. The rule was formally enumerated as "x-14a-7" and subsequently renumbered. Exchange Act Release No. 3347 (Dec. 18, 1942).

3. 17 C.F.R. § 240.14a-8(c).

4. *Id.* § 240.14a-8(d).

5. *Id.* § 240.14a-8(l).

6. See *infra* Section IV Present Day Utility for an analysis of *Fortune's* top 150 companies that referenced proponent materials; See FORTUNE, *Fortune 500* (2016), <http://beta.fortune.com/fortune500> (first 150 companies).

II. SUBSECTION (L)'S EVOLUTIONARY HISTORY

Rule 14a-8 originally required the inclusion of any shareholder proposal that was “a proper subject for action by the security holders,” a standard determined under state law.⁷ In the event that management opposed the proposal, the shareholder had the right to provide a 100-word statement in support that “include[d] . . . the name and address of the security holder.”⁸

In the early 1950s, the SEC proposed several substantive and procedural amendments to the Rule, including the right to omit the shareholder's identity from the proxy statement.⁹ A company would instead have to “furnish the identity upon request.”¹⁰ The Commission reasoned the change would “discourage the use of the rule by persons who are motivated by a desire for publicity rather than the interests of the company and its security holders.”¹¹ The proposal, however, was not adopted.¹²

7. Exchange Act Release No. 3638 (Jan. 3, 1945), 11 Fed. Reg. 10,990, 10,995 (1945) (included in a section of interpretive releases “issued . . . for the guidance of the public by members of the Commission's staff”). In 1945, the Commission released an opinion of the Director of the Division of Corporation Finance stating, “(1) state law would determine what was a proper subject for stockholder action and (2) stockholder proposals were an inappropriate forum for matters of a general political, social, or economic nature.” Eric A. Welter, *The Shareholder Proposal Rule: A Change to Certainty*, 60 GEO. WASH. L. REV. 1980, 1983 (1992); see also Susan W. Liebler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425, 428 (1984).

8. Exchange Act Release No. 3347 (Dec. 18, 1942) (“[I]f the management opposes such proposal, it shall, upon the request of such security holder, include in its soliciting material the name and address of such security holder and a statement of such security holder setting forth the reasons advanced by him in support of such proposal. Provided, however, that a statement of reasons in support of a proposal shall not be longer than 100 words and provided further that such security holder and not the management shall be responsible for such statement. For the purposes of this rule notice given more than thirty days in advance of a day corresponding to the date on which proxy soliciting material was released to security holders in connection with the last annual meeting of security holders shall, prima facie, be deemed to be reasonable notice.”).

9. See generally Exchange Act Release No. 4775 (Dec. 11, 1952).

10. Exchange Act Release No. 4950 (Oct. 9, 1953) (“If the management opposes the proposal, it shall also, at the request of the security holder, include in its proxy statement the name and address of the security holder (or in lieu thereof a statement that the name and address of the security holder will be furnished upon request) and a statement of the security holder in not more than 100 words in support of the proposal”). At least one company favored elimination of the proponent's identity and favored a standard that would make disclosure discretionary. See Lewis D. Gilbert, *The Proxy Proposal Rule of the Securities and Exchange Commission*, 33 U. DET. L.J. 191, 202 (1956) (“We believe this amendment is a desirable one. Companies would, of course, be free to give the names of the proposer if they thought that the interest of the company generally would be best served doing so”).

11. Exchange Act Release No. 4950 (Oct. 9, 1953). However, in light of the overall changes and political climate, the purpose was to “prevent communication and organization in support of a proposal.” GILBERT, *supra* note 10, at 195. The right for shareholders to communicate with each other far outweighed any potential harm from those issuing proposals for the sake of publicity. Opponents did not consider the SEC's publicity argument as a legitimate reason to frustrate the right of shareholders to communicate, stating that motives are subjective in nature and anyone who is seen “to take initiative commonly are regarded by their opposition as publicity seekers.” *Id.* at 211.

12. Shareholder opposition at the December 16, 1953 hearing was effective. Addressing the significance of this in his article, *Proxy Regulation and Rule-Making Process: The 1954 Amendments*, David C. Byrne observed the following: “in view of the [present] difficulty of shareholder communication, that in both practice and principle, an important feature has been preserved.” 40 VA. L. REV. 387, 430 (1956). However, exclusions for proposals relating to ordinary business operations

The Commission eventually reversed course.¹³ In 1966, the SEC revisited the requirement of shareholder identity as part of an initiative to allow the staff more time to respond to requests.¹⁴ The Commission amended Rule 14a-8 to allow for exclusion of a proponent's identity.¹⁵ Although "[t]he amendment [was] intended to discourage the use of the rule by persons who may be motivated by a desire for publicity," the Commission acknowledged the need for interested parties to have the ability to communicate with the proponent.¹⁶ The amendment, therefore, required the inclusion of a sentence in the proxy statement promising that the identity would "be furnished by the issuer or by the Commission to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor".¹⁷

At least some shareholders tried to sidestep the requirement by adding their identity into the supporting statement.¹⁸ Management argued that the approach bypassed "what shall be required to be included in the Company's proxy statement concerning stockholder proposals" and sought exclusion.¹⁹ The Commission did not permit exclusion of the entire proposal but did permit deletion of the shareholder's identity.²⁰

and repeated proposals that fail to attract a minimum favorable vote in previous years were codified. Exchange Act Release No. 4979 (Jan. 6, 1954).

13. For most of the 50s and 60s, the proposals tended to focus on proper corporate governance rather than social issues. However, the political and social climate quickly transformed in response to civil unrest, Presidential candidacy uncertainty, and the Vietnam War. See SEC HISTORICAL SOCIETY TIMELINE (2016), <http://www.sechistorical.org/museum/timeline/1960-timeline.php> (follow "1960s" hyperlink). Correspondingly, the number of proposals relating to social causes and personal grievances significantly rose. Social reform advocates who focused their discontent at corporations for the social condition tried to use corporations as the vehicle to advance their social agenda. See Donald E. Schwartz, *The Public Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 425 (1971). These proposals highlighted Rule 14a-8's ambiguous nature and forced the Commission to reevaluate regulation. The staff experienced difficulty responding to no-action letters for proposals advancing these areas with the rule's "for the purpose of" language because it required an inquiry into the proponent's state of mind to determine whether the proposal is properly excluded. See DIV. CORP. FIN., SECS. & EXCH. COMM'N, S. COMM. ON BANKING, HOUSE, AND URBAN AFFAIRS, STAFF REPORT ON CORPORATE ACCOUNTABILITY, 96th Cong., 2d Sess. B17 (Sept. 4, 1980) (hereinafter 1980 STAFF REPORT).

14. Exchange Act Release No. 4673 (Dec. 5, 1966) ("Paragraph (b) of the rule requires that the management must include in its proxy material the name and address of a security holder who has submitted a proposal which is included in such material. It is proposed to amend this paragraph to permit the issuer to exclude the name and address of the proponent provided a statement is contained in the proxy material to the effect that the name and address of the proponent will be promptly furnished to any person upon receipt of any oral or written request therefor by the issuer or the Commission. The rule would also be amended to require management to inform the Commission at the time of filing of preliminary soliciting material of the name and address of any proponent where such information has been excluded").

15. See *id.*

16. *Id.*; See also 1980 STAFF REPORT, *supra* note 13, at B17.

17. Exchange Act Release No. 5200 (Dec. 14, 1967).

18. See *infra* note 20.

19. See Ideal Basic Industries, Inc., SEC No-Action Letter, 1973 WL 9161 (Mar. 15, 1973) ("That rule does not prohibit the inclusion in a company's proxy material of the names and addresses of security holders whose proposals are included therein. The inclusion of such information is optional (and therefore not forbidden) under the rule and, accordingly, we do not believe the management may rely on Rule 14a-8(b) for the omission of the proposal."); see also Standard Oil Company

Over time, the staff revisited the decision to permit the exclusion of a proponent's identity. A report issued in 1980 determined the Rule should require inclusion of the proponent's name and address.²¹ The Commission reasoned that proponents motivated by a desire for publicity had "not been dissuaded by the omission of their identity . . . [Rather] enabling shareholders to contact the proponent for additional information or clarification would promote consideration of the proposal on an informed basis."²² In addition to shareholder name and address, the report favored inclusion of "the number of shares held by the proponent."²³

The SEC ultimately proposed but did not adopt a requirement that the proponent's identity be disclosed in the proxy statement.²⁴ Amendments adopted in 1983 did, however, require companies disclosing identity to include the number of shares owned in the company.²⁵ For companies not including the identity, the amendments eliminated the obligation of the Commission to provide the information,²⁶ alleviating an administrative burden on the staff.²⁷

of California, SEC No-Action Letter, 1973 WL 9127 (February 9, 1973) ("This Division does not agree with your opinion that Rule 14a-8(b) would prohibit the company from taking the action that would be required if the proposal no. 3 were adopted, since that actions (viz., the inclusions of the name and the address of the shareholder-proponents in the company's proxy statement) is optional (and therefore not forbidden) under the Commission's proxy rules. Accordingly, we do not believe the management may rely on the reason stated as a basis for omitting this proposal. We will not recommend enforcement for omitting if there is a statement."). The SEC received 47 total no-action letters with a reference to subsection (l) (previously, 14a-8(b)(2)) from 1973-1993. None of the requests asked for proposal exclusion based on this provision, rather the requests simply ask that the Commission do not seek enforcement action if the issuer excludes the information. *See* DIVISION OF CORPORATE FINANCE, SECURITIES AND EXCHANGE COMMISSION, NO-ACTION, INTERPRETIVE, AND EXEMPTIVE LETTERS (current through Feb. 2, 2017) www.sec.gov/divisions/corpfin/cf-noaction.shtml.

20. *See* Colgate-Palmolive Co., SEC No-Action Letter, 1979 WL 13834 (Jan. 31, 1979) ("You are also of the opinion that it is improper, pursuant to Rule 14a-8(b), for the proponent to include his mailing address in his 'Basis for Motion.' There seems to be some basis for your opinion that the inclusion of the proponent's address in the proposals is contrary to Rule 14a-8(b). Accordingly, this Division will not raise any objection if the Company deletes the proponent's address").

21. This conclusion followed an examination of managements' concern about shareholder abuse in the proposal process and shareholders' concern about communication among proponents. *See* 1980 STAFF REPORT at B15.

22. *See id.* at B35-B36.

23. The report observed, "Information about the number of shares would permit shareholders to appraise their proponent's objectives and votes committed to the proposal." *Id.*; *see also* Exchange Act Release No. 17517 (Feb. 5, 1981).

24. Exchange Act Release No. 20091 (Aug. 16, 1983).

25. *Id.* ("The proxy statement shall also include either the name and address of the proponent and the number of shares of the voting security held by the proponent or a statement that such information will be furnished by the issuer to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor").

26. *See id.*

27. A memo from Bill Morley and Mark Kargula, Counsel for the Commission to the Officers of the Division of Corporate Finance, claimed uncontested proposals slowed response time to shareholder information requests. *See* Memorandum from Bill Morley and Mark Kargula to the Officers of the Division of Corporate Finance, SEC (Mar. 18, 1982) (on file with SEC Historical Society) ("Often the proxy material containing the uncontested proposals has not been reviewed and all of the materials have been sent to the files before the request arrives...[and] getting the files and names has proved difficult. With current staff levels this is a minor problem which can be eliminated").

Amendments adopted in 1998 rewrote the language of the Rule into plain English, using a question and answer format.²⁸ The changes did not substantively alter the requirement with respect to a proponent's identity, with companies retaining the discretion to include the information or provide it upon request.²⁹

III. STAFF INTERPRETATION

Under subsection (1), the decision to disclose the identity of the proponent or provide the information upon request rests exclusively with the issuer.³⁰ A shareholder can ask to have the information excluded but the ultimate decision belongs to the company.³¹ Moreover, shareholders may not circumvent the requirement by including the information in the supporting statement.³² The staff has allowed issuers to exclude a shareholder's identity,³³ ownership,³⁴ and email address³⁵ to the extent appearing

28. Exchange Act Release No. 23200 (May 8, 1998).

29. 17 C.F.R. § 240.14a-8(l) ("Question 12: If the company includes my shareholder proposal in its proxy materials, what information about me must it include along with the proposal itself? (1) The company's proxy statement must include your name and address, as well as the number of the company's voting securities that you hold. However, instead of providing that information, the company may instead include a statement that it will provide the information to shareholders promptly upon receiving an oral or written request. (2) The company is not responsible for the contents of your proposal or supporting statement").

30. Staff Legal Bulletin No. 14, Release No. SLB-14 (Jul. 13, 2001).

31. *Id.* (noting that shareholder can request nondisclosure but that "the company has the discretion not to honor the request"). Ironically, when this issue has arisen, companies have sometimes included the information over the objection of the shareholder because of the perceived importance of the information. *See, e.g.*, Minnesota Power, SEC No-Action Letter, 1993 WL 54311 (Feb. 25, 1993) (responding to proponent, "You also indicated that you do not authorize the use of your name in printing of any ballots or other shareholder communications regarding these proposals. . . . We believe that shareholders will benefit in their consideration of any proposal from knowing the identity of the proponent and his ownership interest in the Company").

32. *See supra* notes 16–18 and accompanying text.

33. *See e.g.*, The Boeing Co., SEC No-Action Letter, 1998 WL 75818 (Feb. 18, 1998) ("[T]he proponent's name and address may be excluded from the revised proposal and supporting statement under rule 14a-8(b)(1)"); *see also* TRW, SEC No-Action Letter, 1999 WL 64618 (Feb. 11, 1999) ("TRW may exclude the proponent's name and address as well as the number of TRW securities the proponent holds from the revised proposal and supporting statement under rule 14a-8(l)"); *see also* PACCAR, SEC No-Action Letter, 1999 WL 98612 (Feb. 22, 1999) ("PACCAR may exclude the proponent's name and address as well as the number of PACCAR securities the proponent holds from the proposals and the supporting statement under rule 14a-8(l)"); *see also* First Bell Bancorp, SEC No-Action Letter, 2000 WL 248573 (Mar. 3, 2000) ("First Bell Bancorp may exclude the proponent's name from the supporting statement under rule 14a-8(l)"); *see also* Corning Inc., SEC No-Action Letter, 2005 WL 120256 (Jan. 17, 2005) ("provided by rule 14a-8(l)(1), Corning need not identify the proponents in its proxy material"); *see also* Exxon Mobil Corp., SEC No-Action Letter, 2016 WL 343257 (Mar. 22, 2016) ("Under [Rule 14a-8(l)], a company is not required to disclose a shareholder proponent's name and address in its proxy statement. Accordingly, ExxonMobil would not be required to include the shareholder proponents' name or contact information in its proxy statement. . . . Rather, ExxonMobil can indicate that it will provide the proponents' name and contact information to shareholders promptly upon receiving an oral or written request.").

34. *See e.g.*, Keystone Financial, Inc., SEC No-Action Letter, 1999 WL 141055 (March 15, 1999) ("There appears to be some basis for your view that Keystone may exclude the proponent's name and address as well as the number of Keystone securities the proponent holds from the supporting statement under rule 14a-8(l).").

35. *See e.g.*, The Swiss Helvetica Fund, Inc. SEC No-Action Letter, 2000 WL 294892 (Feb. 25, 2000) ("[T]he fund may exclude the proponent's name, e-mail address and telephone number from the revised proposal and supporting statement under Rule 14a-8(l). Under that rule, the fund

in the supporting statement or proposal.³⁶ In one case, the staff permitted the substitution of the word “proponent” in place of the shareholder’s identity.³⁷

To the extent choosing to include any shareholder information, the company must provide complete disclosure, including the name, address, and number of shares.³⁸ Disclosure also must include co-sponsors.³⁹ The provision, however, imposes limits on what a company can disclose. In one instance, the staff disagreed with the company’s decision to reveal the identity of the person acting as a proxy for the proponent.⁴⁰

To the extent not including the proponent’s identity in the proxy materials, the company must agree to provide the information “prompt-

may include a statement that it will provide the information to shareholders promptly upon request. Indeed, we note that you undertake to provide the proponent’s name, e-mail address and telephone number upon oral or written request . . . the fund may omit this information from the revised proposal and supporting statement in reliance upon Rule 14a-8(1).”; *see also* Strategic Global Income Fund, Inc., SEC No-Action Letter, 2000 WL 430675 (Mar. 24, 2000) (“[Y]ou may omit the Proponent’s name, e-mail address and telephone number from the supporting statement in reliance on Rule 14a-8(1)(1). This position assumes that the Fund will include in its proxy materials a statement that the name and address will be furnished by the Fund to any person, promptly upon request. Accordingly, the staff would not recommend enforcement action against the Fund if it omits the first clause of the first sentence of the supporting statement, and the last sentence of the supporting statement in reliance upon Rule 14a-8(1)(1), provided that it provides the Proponent’s name and address (which includes his e-mail address and telephone number) to shareholders who request it.”); *see also infra* note 40.

36. *See e.g.*, Wyeth, SEC No-Action Letter, 2004 WL 257690 (Feb. 4, 2004) (“Wyeth may exclude the sentence that begins ‘This Stockholder Proposal is submitted by . . .’ and ends ‘. . . 501 Front Street, Norfolk, Virginia’ under rule 14a-8(1). . . . Wyeth may omit this sentence from the supporting statement under rule 14a-8(1).”; *see also* General Electric Co., SEC No-Action Letter, 2005 WL 130007 (Jan. 11, 2005) (“GE may exclude the sentence that begins ‘This proposal . . .’ and ends ‘. . . of Animals’ under rule 14a-8(1) GE may omit this sentence from the proposal under rule 14a-8(1).”; *see also* The Dow Chemical Co., SEC No-Action Letter, 2005 WL 180977 (Jan. 21, 2005) (“Dow Chemical may exclude the sentence that begins ‘This proposal . . .’ and ends ‘Pyle’ under rule 14a-8(1) Dow Chemical may omit this sentence from the proposal under rule 14a-8(1).”).

37. *See e.g.*, First Bell Bancorp, Inc., SEC No-Action Letter, 2000 WL 248573 (March 3, 2000).

38. *See* Staff Legal Bulletin No. 14, Release No. SLB -14 (Jul. 13, 2001). In one instance, the shareholder provided identifying information in the supporting statement but did not include the number of shares. The staff allowed the issuer to provide the additional information. Maytag Corp., SEC No-Action Letter, 2004 WL 385752 (Feb. 19, 2004) (“Maytag may include the number of Maytag’s voting securities held by the proponent under rule 14a-8(1)(1).”).

39. *See e.g.*, Lockheed Corp., SEC No-Action Letter, 1980 WL 17894 (Feb. 15, 1980) (“Mr. Olson’s co-sponsors may [not] be omitted from the Company’s proxy material pursuant to Rule 14a-8(a)(2).”; *see also* Tyco Intl., Ltd., SEC No-Action Letter, 2002 WL 31741520 (Dec. 5, 2002) (“It appears to us that the Sisters of Mercy, Burlingame have indicated their intention to co-sponsor the proposal.”); *see also* ConocoPhillips, SEC No-Action Letter, 2006 WL 475442 (Feb. 22, 2006) (“It appears to us that the School Sisters of Notre Dame, the Church Pension Fund and Bon Secours Health System, Inc., have indicated their intention to co-sponsor the proposal submitted by the Domestic Foreign Missionary Society of the Episcopal Church.”) *see also* Texaco, Inc. SEC No-Action Letter, 2001 WL 47256 (Jan. 16, 2001) (“In light of the fact that the Minnesota State Board of Investment did not indicate its intent to co-sponsor the proposal with the Sisters of Charity of New York or the Adrian Dominican Sisters, we will not recommend enforcement action to the Commission if Baker Hughes omits the Minnesota State Board of Investment proposal from its proxy materials . . .”).

40. *See e.g.*, Maytag Corp., *supra* note 39 (“We are unable to concur in your view that Maytag may identify the representative of the proponent in reliance on rule 14a-8(1)(1).”).

ly” upon an oral or written request.⁴¹ Subsection (l) does not, however, require that the company disclose the relevant contact information needed to obtain the proponent’s identity.

IV. PRESENT DAY UTILITY

An empirical analysis of the 2015 proxy statements filed by the 150 largest public companies in the Fortune 500 index was conducted to assess the practice with respect to the requirements of subsection (l).⁴² A number of the companies did not include shareholders proposals and therefore had no obligation to address the issue. Of those that did, all of them met at least some of the requirements of the Rule. Seventy-two companies affirmatively disclosed the proponent’s identity while thirty-three agreed to do so upon request.⁴³

Of those affirmatively disclosing the information, all of them included the proponent’s name.⁴⁴ Six companies, however, omitted the address;⁴⁵ six omitted the number of securities;⁴⁶ and seven omitted the

41. See *supra* note 27.

42. See *supra* note 6 and accompanying text.

43. 150 proxy statements were reviewed. Of these, fifty indicated they were unaware of additional matters and did not include proposals. The data represents proxy statements with both the shareholder’s identity and a statement to provide information on request. *Id.*

44. See *supra* note 6 and accompanying text.

45. See *e.g.*, Abbvie, Inc., Proxy Statement (Form DEF14A) (Mar. 21, 2016) (“The address of each of the proponents is available upon request”); see also American Express Co., Proxy Statement (Form DEF14A) (Mar. 21, 2016) (“Addresses for each of the proponents will be supplied promptly upon oral or written request to our Secretary”); see also McDonald’s Corp., Proxy Statement (Form DEF14A) (Apr. 15, 2016) (“The address of each proponent, and the name and share ownership of any co-filer, are available upon request by calling 1-630-623-2553 or by sending a request to McDonald’s Corporation, Shareholder Services, Department 720, One McDonald’s Plaza, Oak Brook, IL 60523”); see also Merck & Co., Proxy Statement (Form DEF14A) (Apr. 11, 2016) (“The address of each of the proponents will be provided promptly upon request. Requests may be sent in writing to the Office of the Secretary, Merck & Co., Inc., 2000 Galloping Hill Road, K1-3049, Kenilworth, NJ 07033 U.S.A., or by calling 908-740-4000”); see also Southwest Airlines, Proxy Statement (Form DEF14A) (Apr. 8, 2016) (“The Company will provide to any Shareholder, promptly upon receipt of the Shareholder’s written or oral request, the name and address of the proponent of this proposal and the number of shares of the Company’s common stock held by the proponent of this proposal”); see also Starbucks Corp., Proxy Statement (Form DEF14A) (Jan. 25, 2016) (“We will provide the address of the individual submitting this proposal promptly upon a shareholder’s oral or written request”); see also Verizon Communications Inc., Proxy Statement (Form DEF14A) (May 5, 2016) (“The addresses of the proponents, as well as the names and addresses of any co-sponsors, are available upon written request to the Assistant Corporate Secretary at the address specified under “Contacting Verizon”).

46. Only Occidental Petroleum Corporation included a statement to provide the ownership value upon request. Occidental Petroleum Corp., Proxy Statement (Form DEF14A) (May 17, 2016) (“Upon oral or written request to Occidental’s Corporate Secretary, 5 Greenway Plaza, Suite 110, Houston, Texas 77046, Occidental will provide information about the sponsors’ stockholdings, as well as the name, address and stockholdings of any co-sponsors”); see also Bank of America Corp., Proxy Statement (Form DEF14A) (Mar. 17, 2016) (“Stockholders will vote on the following proposal, if properly presented at our annual meeting. The proposal may contain assertions about our company that we believe are incorrect. We have not attempted to refute any inaccuracies. Shareholdings of the stockholder proponent will be supplied promptly upon oral or written request to our Corporate Secretary”); see also Bristol-Myers Squibb Co., Proxy Statement (Form DEF14A) (Mar. 23, 2016) (“We expect the following stockholder proposal (Item 6) to be presented at the 2015 Annual Meeting. The Board of Directors has recommended a vote against this proposal for the

address and the number of securities.⁴⁷ With respect to share ownership, seven companies failed to offer specific information about the number of shares.⁴⁸ Some merely provided an estimate of the number of shares (i.e. “owner of no fewer than 100 shares”) or the value (i.e. “owns at least \$2,000 in market value of stock”).⁴⁹ No company provided an email or a phone number for the shareholder.

Thirty-three companies chose to include a statement of the availability of the information about the proponent’s identity.⁵⁰ Most companies provided specific contact information, including a physical address,⁵¹ phone number,⁵² and in two cases an email address.⁵³ For instance, Walmart’s proxy statement informed shareholders:

policy reasons as set forth following the proposal. The stock holdings of a proponent will be provided upon request to the Corporate Secretary of Bristol-Myers Squibb”); *See also* Citigroup Inc., Proxy Statement (Form DEF14A) (Mar. 16, 2016) (“Any stockholder wishing to communicate with management, the Board or an individual Director should send a request to the Corporate Secretary as described on page 24 in this Proxy Statement”); *see also* Celgene Corp., Proxy Statement (Form DEF14A) (Apr. 28, 2016); *See also* Microsoft Corp., Proxy Statement (Form DEF14A) (Oct. 18, 2016) (“...a purported owner of shares of our Common Stock having a minimum value as set forth in Rule 14a-8 of the Exchange Act allowing submission of proposals by stockholders meeting certain requirements”); *See also* Oracle Corp., Proxy Statement (Form DEF14A) (Sept. 23, 2016) (“represented that it has beneficially owned the requisite amount of Oracle common stock for more than one year”).

47. All but Berkshire Hath included a statement to provide addresses and number of shares upon request. Berkshire Hath Hld B, Proxy Statement (Form DEF14A) (Mar. 11, 2016) (“The Nebraska Peace Foundation owns one share of Class A Common Stock and has given notice that a representative of the Nebraska Peace Foundation intends to present for action at the meeting the following proposal”); *see also* Community Health Systems, Proxy Statement (Form DEF14A) (Apr. 7, 2016) (“Share holdings and the address of the stockholder proponent will be supplied promptly upon oral or written request to the Corporate Secretary”); *see also* Walt Disney Co., Proxy Statement (Form DEF14A) (Jan. 15, 2016) (“The address and stock ownership of the proponents will be furnished by the Company’s Secretary to any person, orally or in writing as requested, promptly upon receipt of any oral or written request”); *see also* General Electric Co., Proxy Statement (Form DEF14A) (Apr. 14, 2016), (“To obtain the addresses of any of the shareowner proponents or their GE stock holdings, email shareowner.proposals@ge.com or write to Alex Dimitrief, Secretary, GE, at the applicable address listed on the inside front cover of this proxy statement, and you will receive this information promptly”); *see also* Philip Morris Intl. Inc., Proxy Statement (Form DEF14A) (Apr. 24, 2016) (“The address and shareholdings of the proponent will be furnished upon request made to the Corporate Secretary”); *see also* Southwest Airlines, *supra* note 46.

48. Twenty-eight companies did not provide the approximate number of shares owned. *See supra* note 6 and accompanying text.

49. These values also represent instances where companies included both approximate number of shares and an estimate number or value. Only thirty-two companies provided approximate number of shares. *See supra* note 6 and accompanying text.

50. Fifteen companies provided both the identity of the shareholder and a commitment to provide additional information upon request. *See e.g.*, Exxon Mobile Corp., *supra* note 55; *see also supra* notes 6, 46–48, and accompanying text.

51. *See e.g.*, Allergan, PLC., Proxy Statement (Form DEF14A) (Mar. 25, 2016) (“The Company will promptly provide to any shareholder the name, address and number of the Company’s voting securities held by the person submitting this proposal upon receiving an oral or written request made to the Company’s Investor Relations department by telephone at +1-862-261-7488, by email at investor.relations@allergan.com or by writing to our administrative address: Investor Relations, Allergan plc, Morris Corporate Center III, 400 Interpace Parkway, Parsippany, NJ 07054”); *see also* AT&T, *supra* at 52; *see also* Dow Chemical Co., Proxy Statement (Form DEF14A) (Apr. 1, 2016) (“The Company will promptly provide the name and address of the stockholder and the number of shares owned upon request directed to the Corporate Secretary. Office of the Corporate Secretary, The Dow Chemical Company, 2030 Dow Center, Midland, MI 48674, 989-636-1792

Our company will provide the names, addresses, and shareholdings (to our company's knowledge) of the proponents of any shareholder proposal upon oral or written request made to Wal-Mart Stores, Inc., c/o Gordon Y. Allison, Vice President and General Counsel, Corporate Division, 702 Southwest 8th Street, Bentonville, Arkansas 72716-0215, (479) 273-4000.⁵⁴

Three permitted only written—not oral—requests to procure the information.⁵⁵ Eleven companies chose not to provide any specific contact information, including an office where the request could be made.⁵⁶ For

(telephone), 989-638- 1740 (fax)"); *see also* Express Scripts, Proxy Statement (Form DEF14A) (Mar. 21, 2016) ("We will furnish, orally or in writing as requested, the names, addresses and claimed stock ownership positions of the proponents of each proposal promptly upon written or oral request directed to our Corporate Secretary, Express Scripts Holding Company, at One Express Way, St. Louis, Missouri 63121"); *see also* Exxon Mobile Corp., Proxy Statement (Form DEF14A) (Apr. 13, 2016) ("Upon oral or written request to the Secretary at the address listed under Contact Information on page 4, we will provide information about the sponsors' shareholdings, as well as the names, addresses, and shareholdings of any co-sponsors"); *see also* Facebook, *supra* note 52; *see also* General Electric Co., *supra* note 47; *see also* Merck & Co, *supra* note 46; *see also* McDonalds, *supra* note 46; *see also* Tyson Foods, Proxy Statement (Form DEF14A) (Dec. 22, 2016) ("The Company will provide the names, addresses and shareholdings (to the Company's knowledge) of the proponents of any shareholder proposal upon request made to the Company's corporate secretary by mail at 2200 West Don Tyson Parkway, Mail Stop CP004, Springdale, Arkansas 72762-6999, or by calling (479) 290-4524"); *see also* Occidental Petroleum Corp., *supra* note 52; *see also* Verizon, *supra* note 46.

52. *See e.g.*, Allergan, PLC., *supra* note 55; *see also* Dow Chemical Co., *supra* note 55; *see also* Exxon Mobile Corp., *supra* note 55; *see also* McDonalds, *supra* note 46; *see also* Merck & Co, *supra* note 46; *see also* Tyson Foods, *supra* note 55; *see also* Verizon, *supra* note 46; *see also infra* note 58.

53. *See e.g.*, Allergan, PLC., *supra* note 55; *see also* General Electric Co., *supra* note 47.

54. *See e.g.*, Walmart, Proxy Statement (Form DEF14A) (Apr. 20, 2016).

55. *See e.g.*, AT&T, Proxy Statement (Form DEF14A) (Mar. 11, 2016) ("the names and addresses of, and the number of shares owned by, each such stockholder will be provided upon request to the Senior Vice President and Secretary of AT&T. (at 208 S. Akard Street, Suite 3241, Dallas, Texas 75202. Pg 75)"); *see also* Facebook, Proxy Statement (Form DEF14A) (Jun. 2, 2016) ("We will promptly provide you with the name, address, and, to our knowledge, the number of voting securities held by the proponents of the Stockholder Proposals, upon receiving a written or oral request directed to: Facebook, Inc., 1601 Willow Road, Menlo Park, California 94025, Attention: Secretary"); *see also* Occidental Petroleum Corp., *supra* note 48.

56. *See e.g.*, ABBVIE, *supra* note 46; *see also* Chevron, Proxy Statement (Form DEF14A) (Apr. 12, 2016) ("We will provide the name, address, and share ownership of the stockholders who submitted a Rule 14a-8 stockholder proposal upon a stockholder's request"); *see also* Conocophillips, *supra* note 40 ("We will provide the name, address and share ownership of the stockholders submitting these proposals, along with the information for any co-filers, promptly upon a stockholder's request"); *see also* Google, Proxy Statement (Form DEF14A) (Apr. 29, 2016) ("We will promptly provide you with the address, and, to our knowledge, the number of voting securities held by the proponents of the stockholder proposals, upon receiving a written or oral request"); *see also* Kroger, Proxy Statement (Form DEF14A) (May 12, 2016) ("We have been notified by nine shareholders, the names and shareholdings of which will be furnished promptly to any shareholder upon written or oral request to Kroger's Secretary at our executive offices, that they intend to propose the following resolution at the annual meeting"); *see also* Monsanto, Corp., Proxy Statement (Form DEF14A) (Dec. 15, 2016) ("We will furnish, orally or in writing as requested, the address of the co-proponents of this shareowner proposal promptly upon written or oral request directed to the company's Secretary"); *see also* Southern Co., Proxy Statement (Form DEF14A) (Apr. 8, 2016) ("The names, addresses, and beneficial ownership of such stockholder and co-filers are available upon request"); *see also* Starbucks Corp., *supra* note 46; *see also* Tesoro, Proxy Statement (Form DEF14A) (Mar. 22, 2016) ("The following stockholder proposal will be voted on at the 2016 Annual Meeting only if properly presented by or on behalf of the stockholder proponent. The name, address

instance, one company promised only to “provide to stockholders the names and addresses of the proponents and the number of shares of [the Company’s] stock held by them promptly upon receiving an oral or written request therefor.”⁵⁷

This study reveals that a number of companies do not fully comply with subsection (1)’s requirements. The most common example of non-compliance involved the failure to provide a shareholder’s address and ownership interest when providing the shareholder’s name.⁵⁸ In addition, some companies merely approximated the number of shares. Moreover, while presumably not a violation of the Rule, several companies reduced the operational value of the commitment to disclose the proponent’s identity by failing to provide any meaningful corporate contact information. Likewise, no company sought to facilitate shareholder communications by including the proponent’s phone number or email address.

V. ANALYSIS

The current approach to providing proponent information under Rule 14a-8 does not work. Companies divulging the identity of the proponent routinely fail to provide all the required disclosure. Those that include a statement about the availability of the information routinely do not provide adequate contact information within the company. While not explicitly required by the Rule, the absence of such information significantly impedes the ability of shareholders to obtain the information.

The administrative interpretation of Rule 14a-8(1) likewise raises significant questions. The staff has consistently allowed issuers to exclude contact information, including email addresses, from the supporting statement. The position is based on the view that shareholders should not be allowed to circumvent issuer discretion with respect to the disclosure of proponent information. Yet the Rule does not require, and issuers do not provide, the email address of the shareholder. As a result, the staff’s interpretation is tantamount to a rule of mandatory exclusion of this information from the proxy statement.

The most straightforward solution to these issues would be the mandatory disclosure of the shareholder’s identity, holdings, and contact information in the proxy statement. The Commission traditionally justified nondisclosure as necessary to avoid the use of Rule 14a-8 solely to generate publicity. The assertion has never been empirically established and the staff raised concerns over the justification back in 1980. Moreover, in an era of Internet disclosure and electronic communications,

and shareholdings of the stockholder proponent will be supplied promptly upon oral or written request”); *see also infra* note 55.

57. Emerson Electric Company, Proxy Statement (Form DEF14A) (Dec. 15, 2016).

58. *See supra* notes 38, 45–49, and accompanying text.

shareholders wanting publicity can easily achieve the result. Finally, most companies disclose proponent information, with no apparent harm.

At the same time, shareholders benefit from the disclosure. The identity and address can facilitate shareholder communication.⁵⁹ Including the number of shares can provide insight into the proponent's stake in a proposal. Finally, disclosure eliminates the administrative step of having to communicate with the issuer to obtain the information.

Even with mandatory disclosure, however, other changes should be made to the subsection through shifts in the staff's administrative interpretation. The Commission could interpret the Rule to prohibit vague disclosure concerning the proponent's ownership interest. Disclosure that the proponent owns "at least 100 shares" or "more than \$2000 worth of stock" affirmatively obscures the actual ownership interest.⁶⁰ As a result, shareholders do not have a sufficient ownership context for evaluating the proponent's intentions and voting power.

Similarly, the staff should clarify that companies providing the information upon request should include specific contact information, including an office, address (particularly an email address), and phone number.

Finally, the staff should cease to permit exclusion of identifying information in the supporting statement, particularly a proponent's email address. Nothing in the Rule explicitly bars a shareholder from using some of the 500 words to reveal the information. More importantly, the exclusion of an email address does not circumvent to issuer's discretion with respect to identity disclosure, at least where the address does not include the name of the proponent. Moreover, by not allowing an email address in the supporting statement, the Commission has essentially enacted a prohibition on the disclosure of this information.

The era of nondisclosure of a proponent's identity has passed. Changing the current requirement would require an amendment to the Rule, a laborious and slow process. On the other hand, the staff could take immediate steps to change the administrative interpretation of the Rule in a manner designed to make the provision more functional and facilitate shareholder communication.

*ERIN STUTZ**

59. See *supra* Section II for subsection (l)'s administrative history, including subsection (l)'s evolution from 14a-8(b) (current procedural requirements for proposals) to 14a-8(l).

60. See *supra* note 49 and accompanying text.

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