LIMITING THE LIMITED NUMBER OF SHAREHOLDER PROPOSALS UNDER RULE 14A-8

I. INTRODUCTION

Rule 14a-8 (the Rule) provides shareholders with the opportunity to advise corporate action through inclusion of proposals in a company's proxy statement.[1] The Securities and Exchange Commission (SEC or Commission) qualified the availability of the provision through a number of procedural thresholds for submission as well as substantive grounds for exclusion. These include a limit to a single submission per shareholder to each company.[2]

When originally adopted, the Rule contained no restrictions on the number of proposals. In 1976, however, the SEC responded to purported abuse by limiting shareholders to two proposals for each annual meeting. The allegations of abuse apparently arose from a small number of individual investors submitting a large number of proposals to specific issuers.[3] The SEC claimed that the practice threatened the underlying intent of the Rule and effective communication between shareholders and issuers.[4] Seven years later, the Commission reduced this limitation to a single proposal per shareholder per issuer[5] as part of a set of amendments designed to restrict utilization of the Rule.[6]

The restriction presented problems in implementation. Companies often asserted that submissions containing multiple issues constituted more than one proposal, circumventing the limitation. The Staff sometimes permitted exclusion on this basis but did so inconsistently. In addi-

1. 17 CFR § 240.14a-8(c) (2016).

2. *Id.*

3. Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, Exchange Act Release No. 12,599, 9 SEC Docket 1040 (Jul. 7, 1976) (citing Sec. and Exch. Comm'n., Fortieth Annual Report, 33 (1974)). Per the SEC Annual Reports for 1973 through 1975, approximately 370 to 400 proposals have been submitted to the Commission annually, whereas only 68 were submitted in 1949. SEC. EXCH. COMM'N., *Annual Report*, 42 (1950); SEC. EXCH. COMM'N, *Annual Report for Fiscal Year Ended June 30, 1975*, 51 (1975); SEC. EXCH. COMM'N, *Fortieth Annual Report*, 33 (1974); SEC. EXCH. COMM'N, *Thirty-Ninth Annual Report*, 37 (1973).

4. Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders (S7-643), Exchange Act Release No. 12,598, 9 SEC Docket 1030, 1032 (Jul. 7, 1976) ("The Commission is concerned about such practices not only because they appear to be an unreasonable exercise of the right to submit proposals, but also because they tend to obscure other material matters . . . thereby reducing the effectiveness of such documents.").

5. Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 34-19,135 (Oct. 14, 1982); Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No 34-20,091 (Aug. 16, 1983).

6. The Program "is the first comprehensive and coordinated review of the entire system of proxy regulation." Securities Exchange Commission, Federal Securities Law Reports No. 1046, Proxy Communications and Management Disclosure, SEC Proxy Review Program 1983, 11 (1983).

tion, issuers also contended that proposals submitted by third parties should be attributed to the proponent under a theory of control and alter ego.

This article will examine the history of restrictions on the number of proposals contained in Rule 14a-8. Part II focuses on the administrative history of the procedural requirement, from implementation to current amendment. Part III examines the modern interpretations of the requirement and its role in how shareholders communicate with corporate management. Part VI contains an analysis of the procedural requirement, the current impact, and suggestions on possible reforms.

II. ADMINISTRATIVE HISTORY

Section 2.01 Development of the Procedural Requirement

The Commission adopted the shareholder proposal rule in 1942.[7] The Rule did not initially include a limit on the number of proposals that a shareholder could submit to a single company or to multiple companies.[8] Although calls for a limit on the number of proposals occasionally surfaced,[9] no such restriction appeared until 1976.[10]

The 1970s saw widespread activity by "corporate gadflies" and social activists.[11] Groups such as the Medical Community for Human Rights[12] submitted proposals on public policy matters.[13] Their proposals addressed topics ranging from employment issues[14] to perceived human

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7. 17 CFR § 240.14a-8.

8. Rule X-14a-7, Duty of Management to Set Forth Stockholders' Proposals, adopted on Dec. 18, 1942, required only that shareholders provide an issuer with "reasonable notice" of intent to present a proposal "which is a proper subject for action by the security holders." No other limitations were placed in the original Rule beyond a 100-word limit for supporting statements. Exchange Act Release No. 3347, 1942 WL 34864 at *10 (Dec. 18, 2942).

9. *See* Memorandum from The Division of Corporate Finance to The Commission (Nov. 5, 1971), http://3197d6d14b5f19f2f4405e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1970/1971_1105_SECShareholder.pdf.

10. Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934, Relating to Proposals by Security Holders (S7-643), Exchange Act Release No. 12,598 (Jul. 7, 1976), 9 SEC Docket 1030.

11. *See* J. Robert Brown, Jr., *The Evolving Role of Rule 14a-8 in the Corporate Governance Process*, 93 DENV. L. REV. ONLINE 151, 157 (2016). Proposals submissions increased from 221 in 1969 to 602 in 1971.

12. In the late 1960's the Medical Community for Human Rights submitted a proposal to Dow Chemical Company recommending the company discontinue the manufacture of napalm. The SEC Staff permitted the exclusion of the proposal, prompting the Medical Community to bring suit against the SEC. The U.S. court of appeals determined the SEC provided no explanation of support for allowing Dow to exclude the proposal; and, interpreting the initial purpose of the Rule as a democratic process granting shareholders a means of addressing concerns, remanded the case to the SEC for review utilizing a proper limit on its discretionary authority. (Daniel E. Lazaroff, *Promoting Corporate Democracy and Social Responsibility: The Need to Reform the Federal Proxy Rules on Shareholder Proposals*, 50 RUTGERS L. REV. 33, 53-55).

13. *Id.* at 52-53. While individual "Gadflies" are noted as being active post World-War II, many groups sprang up in the Vietnam War era.

14. *E.g.*, Continental Airlines, Inc., SEC No-Action Letter, 1975 WL 9898 (Mar. 14, 1975).

rights violations in countries such as South Korea and South Africa.[15] During this period, a small number of shareholders submitted proposals to multiple issuers, accounting for a large percentage of the total.[16] As a result, the number of proposals increased significantly,[17] generating issuer complaints about additional costs.[18]

To some degree the Staff addressed concerns over the submission of multiple proposals through the creation of a "good faith" standard in Rule 14a-8.[19] The SEC utilized the approach in response to a practice of shareholders submitting proposals to many issuers then failing to attend the annual meetings.[20] One particular proponent, according to the Staff, submitted 189 proposals in a single year to twenty-nine companies,[21] but failed to attend most of the meetings.[22] In noting a lack of "good faith" in the practice,[23] the Commission warned that proponents engaging in similar behavior risked disqualification for future submissions.[24]

Shareholders submitting multiple proposals to a single rather than multiple issuers were not subject to the "good faith" standard. In at least one case, a shareholder submitted as many as fourteen proposals to the same company, a pattern that repeated over a number of years.[25] The

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15. *E.g.*, Motorola Inc., SEC No-Action Letter, 1976 WL 11032 (Mar. 18, 1976); Ford Motor Co., SEC No-Action Letter, 1977 WL 462582 (Mar. 14, 1977).

16. *See* Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425, 438 n. 86 (1984). A single proponent submitted 148 proposals in 1975, 21.26% of proposals for that year.

17. Donald E. Schwartz, *An Assessment of the Shareholder Proposal Rule*, 65 GEO. L. J. 635, 637 (citing 32 SEC Ann. Rep. 52 (1966) and 41 SEC Ann. Rep. 51 (1975)).

18. The SEC has provided little data on the actual costs to issuers. One issuer provided a breakdown of costs to include and exclude proposals in 1976. *See infra* note 55. Susan Liebeler estimated the total cost to issuers in the 1975-1976 season to be $7 million. Liebeler, *supra* note 17, at 454.

19. *See* Memorandum from The Division of Corporate Finance to The Commission (Nov 5, 1971), *supra* note 10; Commission Chairman Casey, *Remarks on New Proxy Rules*, address at the Corporate Law Conference, Washington, D.C. (Sep. 21, 1972), cited in The Ingersoll-Rand Co., SEC No-Action Letter, 1978 WL 13152 at *8 (Feb. 22, 1978).

20. *See* Memorandum from The Division of Corporate Finance to The Commission (Nov 5, 1971), *supra* note 10.

21. *Id.*

22. *See* Ingersoll-Rand Co., SEC No-Action Letter, 1978 WL 13152 at *8 (Feb. 22, 1978). In that letter, the Staff permitted exclusion of proposals from the same shareholder the following year, noting the lack of a *serious effort* to attend meetings as the justification. Staff claimed this action "conserved [Commission] resources and made it easier for companies to protect themselves from unnecessary cost and trouble." Letter from N. McCoy, Chief Counsel, Div. of Corp. Fin., to J. Grady, Secretary, IBR Corp. (Dec. 30, 1971) cited in The Ingersoll-Rand Company, SEC No-Action Letter, 1978 WL 13152 at *8 (February 22, 1978).

23. "Where a security holder submits proposals and then does not appear at the meetings . . . regards this practice as an abuse of the rule." Proposed Proxy Rules, Exchange Act Release No. 34-9432, 1971 WL 126135 at *1 (Dec. 22, 1971).

24. "It should be noted that under paragraph (c)(3) of the rule a security holder who submits proposals to a company and then, without good cause, does not appear at the meeting in person . . . is disqualified from submitting proposals to the company the following year". *Id.*

25. GE, in a statement to the SEC, claimed Mr. Brusati submitted the same nine proposals over a five-year period prior to 1973. General Electric Co., SEC No-Action Letter, 1973 WL 20874 (Jan. 31, 1973). In the 1974 NAL request, GE claims Mr. Brusati is using the proxy materials as a means of publicizing his "campaign against the Company's stock option plans dating back to 1953."

repeat proposals were often, apparently, identical.[26] In one case, the Staff permitted omission of the resubmitted proposals through application of the exclusion for personal grievances.[27] Nonetheless, the Rule provided no clear mechanism for addressing these concerns on a systemic basis.

The Commission sought to address the issue of multiple submissions to the same company in 1976 by, for the first time, imposing limits on the number of proposals that a shareholder could submit to an issuer.[28] The SEC asserted several proponents "exceeded the bounds of reasonableness . . . by submitting excessive numbers of proposals to issuers", something that constituted "an unreasonable exercise of the right to submit proposals".[29]

Proposing a limitation on the number of proposals to two, the SEC viewed the change as "not adversely affect[ing] the vast majority of proponents".[30] The restriction represented a "reasonable restraint" on shareholder rights.[31] Comments on the procedural amendment focused on concerns with use of the Rule by shareholder activists and corporate gadflies.[32] Issuers claimed that the majority of stockholders were indifferent to the special interest proposals and frustrated with the unnecessary expenditure of time and resources.[33]

General Electric Co., SEC No-Action Letter, 1974 WL 8843 at *2 (Feb. 6, 1974). It should be noted that Mr. Brusati complied with the procedural limitation after its implementation in 1976. *See infra* note 39.

26. General Electric Co., SEC No-Action Letter, 1973 WL 20874 (Jan. 31, 1973)

27. Mr. Brusati is noted as submitting multiple complaints and proposals against GE's stock options plan. The Staff recognized his "campaign against the Company's stock options plan dating back to 1953" as a personal clam or redress of personal grievance and permitted exclusion of the proposals for this reason. General Electric Company, WL 8843 at *2-3 (Feb. 6, 1974).

28. Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934, Relating to Proposals by Security Holders (S7-643), Exchange Act Release No. 12,598 (Jul. 7, 1976), 9 SEC Docket 1030.

29. *Id*. at 1032.

30. The SEC claimed data collected from 1973 to 1976 (uncited) indicated 83% of proponents submitted one to two proposals to an issuer annually; Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934, Relating to Proposals by Security Holders (S7-643), Exchange Act Release No. 12,598 (Jul. 7, 1976), 9 SEC Docket 1030, 1032.

31. *Id.*

32. Union Carbide, commenting on the 1976 Rule amendments stated: "[W]e would like to express at the outset our disappointment that the Commission has not dealt in the proposed amendments with a problem that is of growing concern to most *stockholders*. This is the increasingly common practice of individuals or groups having special interests . . . obtaining an unfair share of the attention of management and shareholders . . . . Most such proposals are supported by the votes of only a tiny percentage of stockholders at the meeting, which not only dismays disinterested stockholders but more importantly, restricts the time available to deal with topics that are of major concern to the majority." Letter from John F. Shanklin, Vice-President and Secretary, Union Carbide Corp., to George F. Fitzsimmons, Secretary SEC (Sep. 7, 1976) (SEC File No. S7-643) (emphasis added), *cited in* Timothy L. Feagans, *SEC Rule 14a-8: New Restrictions on Corporate Democracy?*, 33 BUFF. L. REV. 225, 221 n.16.

33. *Id.*

The Commission adopted the requirement.[34] Shareholders could submit only two proposals per issuer in any one year.[35] The release noted that shareholders inadvertently failing to adhere to the requirement would have ten business days to correct any violation.[36] The SEC also recognized the possibility that shareholders would employ tactics designed to evade the requirement.[37]

Section 2.02 Revision of Procedural Limitation

Issues quickly arose in connection with the limitation. In some cases, shareholders submitted more than two proposals to the same company. To the extent the excess submissions were not withdrawn following notification, the Staff permitted exclusion of all the proposals.[38] In other cases, however, companies asserted that shareholders included multiple issues within the same proposal, effectively circumventing the limitation.

The issue arose in *Newmont Mining Corp.*[39] The shareholder submitted a proposal concerning the board of directors. The proposal sought to require a detailed history on candidates for the board and the right to vote for nominees individually rather than as a group. Newmont Mining argued that each matter constituted a separate and distinct proposal. The Staff disagreed. The proposal involved a single issue, board elections. Only where a submission contained "separate and distinct" business items would they constitute separate proposals. [40]

The limit could also be exceeded where proposals submitted by third-parties were attributed to the proponent. Attribution would occur for any submissions arising from jointly owned shares.[41] For example, in

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34. Adoption of Amendments Relating to Proposals by Security Holders, Securities Exchange Release No. 12,999, 10 SEC Docket 1006 (Nov. 22, 1976).

35. *Id.* A shareholder may submit to multiple issuers (no more than two per issuer) in a given year. The adopted limitation also provided a caveat, that any shareholder in violation of this requirement was provided ten days to resubmit the proposal(s) that was within compliance of the Rule.

36. *Id.*

37. "[T]he Commission is aware of the possibility that some proponents may attempt to evade the new limitations through various maneuvers, such as having other persons whose securities they control submit two proposals each in their own names." *Id.* at 1009.

38. Mr. J.J. Fitzpatrick submitted nine proposals for inclusion in Merchants Petroleum Company's 1979 proxy materials. Merchants Petroleum Co., SEC No-Action Letter, 1978 WL 13173 at *2 (Oct. 17, 1978). Of note, Mr. Brusati submitted more than two proposals to General Electric in 1979 and 1981, but reduced to two after receiving notification of this violation by the company. General Electric Company, SEC No-Action Letter, 1979 WL 13795 (Jan. 17, 1979); General Electric Company, SEC No-Action Letter, 1981 WL 24697 (Jan. 29, 1981).

39. The proposal under question was the second of two submitted by the proponent. Newmont Mining Corp., SEC No-Action Letter, 1979 WL 13385 (Feb. 23, 1979).

40. "Management has asserted that the second proposal…is actually three separate and distinct proposals. However, it is the Division's view that the second proposal in fact constitutes only a single proposal concerning the procedures to be followed by the Company in elections of directors." *Id.* at *2.

41. "These limitations will apply collectively to all persons having an interest in the same securities (e.g., the record owner and the beneficial owner, and joint tenants)." SEC Release 12,999, *supra* note 35, at 1009; *see also*, Texas Instruments Inc., SEC No-Action Letter, 1982 WL 28691 (Jan. 19, 1982).

TransWorld Airlines, the Staff permitted exclusion of four proposals submitted by two joint owners of the shares.[42] In addition, attribution could also occur where the third party acted "on behalf of, under the control of, or as the alter ego" of the proponent.[43]

For instance, in *TransWorld Corporation*,[44] the company received proposals submitted by four shareholders, all directly related and residing together,[45] and an institution founded and chaired by one of the proponents.[46] The issuer provided evidence that two of the proponents purchased qualifying stock within months of submission and the proposals had a unifying theme.[47] Additionally, the issuer asserted a continuous history of similar proposals submitted by the institution's founder. The Staff found the evidence sufficient to support an alter-ego claim.[48]

The Staff generally viewed the limitation of two proposals as effective.[49] Nonetheless, the Commission remained concerned with the number of proposals submitted annually. Data indicated that 991 proposals were submitted to 376 companies in 1981, and 850 submitted to 300

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42. *See* TransWorld Airlines, Inc., SEC No-Action Letter, 1977 WL 13835 (Feb. 15, 1977); "[I]t is the view of the Commission that the limitation upon the number of proposals which may be submitted by a proponent applies collectively to all persons having an interest in some securities (e.g., joint tenants)." *Id.* at *2.

43. *See* BankAmerica Corp., SEC No-Action Letter, 1996 WL 54566 (Feb. 8, 1996); "There appears to be some basis for your view that the proposals may be omitted from the Company's proxy materials under rule 14a–8(a)(4) because the nominal proponents are acting on behalf of, under the control of, or as the alter ego of Aviad Visoly." *Id.* at *1.

44. TransWorld Corp., SEC No-Action Letter, 1982 WL 28756 (Feb. 8, 1982).

45. The four proponents included a husband, wife and their two children. The qualifying stock used for the submission by the wife and one of the children were purchased shortly prior to submission of the proposals.

46. The TWA (TransWorld Airlines) Shareholder Project, Inc. was founded by Fred Catalano, who remained the Chairman at the time of these proposal submissions. TransWorld claimed the Project was a "dissident" group opposing the company's current management, and received a consent injunction preventing the Project's dissemination of proxy materials or materials soliciting funding for the project. TransWorld Corp., *supra* note 45.

47. The proposals, all concerning corporate governance, included: reporting on commissions paid and large purchase transactions; cumulative voting for board members; and inclusion of employees to board positions. Per TransWorld each of these proposals is similar to previous proposals submitted by the proponent and Project. TransWorld Corp., *supra* note 45. "[The proponent] and the Project have a long, unbroken history of collaboration in opposing the management both of Trans Wordl Airlines, Inc. ('TWA') and . . . Trans World itself. [The proponent], a former purser whom TWA discharged in 1974, is the founder and moving force behind the Project." *Id.* at *5.

48. Similarly, in *Brunswick*, a qualified shareholder was notified that his submission violated the limited number requirement. He voluntarily retracted two of the four proposal. The issuer then received the two proposals, with identical wording, from the proponent's son-in-law. The issuer provided the shareholder's own statement that the withdrawn proposals would be resubmitted by the son-in-law in support of an alter-ego claim. The Staff, citing its own recognition of evasion maneuvers, agreed with the issuers' claim. Brunswick Corp., SEC No-Action Letter, 1983 WL 30726 (Jan. 31, 1983).

49. Memorandum from Bill Morley and Mike Kargula to Lee B. Spencer, Jr., John Huber and Linda Quinn (Mar. 18, 1982), http://3197d6d14b5f19f2f4405e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1982_0318_MorleyKargula.pdf.

companies in 1982.[50] Seven proponents submitted slightly more than fifty percent of all proposals both years.[51]

In an effort to further restrict use of the Rule, the Commission in 1982 proposed a broad set of additional limitations, including a reduction in the number of proposals on a per company basis from two to one.[52] In doing so, the Commission provided no specific examples of abuse by shareholders involving the submission of multiple proposals to the same company. The amendments more generally focused on the costs associated with the number of proposals.[53] As one issuer reported, the cost of including each proposal in proxy statements was $22,450 while the cost of exclusion was $3,740.[54]

The Staff initially did not support the reduction, noting that the change would result in a minimal decrease in the number of proposals[55] and negatively impact the quality of submissions.[56] Ultimately, that changed, though the shift in position lacked "a great deal of conviction."[57] Nonetheless, the Commission adopted the amendment.[58] Submission of only a single proposal would decrease issuer costs and allow for more efficient and effective communication between shareholders and corporate management while maintaining proponents' access to proxy

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50. Of the 991 proposals submitted in 1981, 387 were contested by issuers and 211 were excluded from proxy statements. Out of the 211 proposals, none were excluded in regards to the limited number exclusion. In 1982, out of the 850 proposals submitted, 156 were excluded. It was found that one shareholder submitted 14 proposals, in contravention of the limited number requirement. Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, SEC Release No. 34-19,135, 26 SEC Docket 494 (Oct. 14, 1982).

51. The seven proponents submitted 537 proposals out of 991 (54.19%) in 1981 and 510 out of 973 (52.42%) in 1982. Liebeler, *supra* note 17, at 466 app. table 2. Of note, the total proposals by the SEC in 1982 (850, *supra* note 51) differs from the total reported by Liebeler.

52. The Commission, referring to comments similar to that of J.F. Shanklin (*supra* note 33), claimed the proposed changes were in response to shareholder abuse related to proponents utilizing the Rule as "a publicity mechanism to further personal interest" and increased "pressure placed upon the existing mechanism by the large number of proposals submitted each year and the increasing complexity of the issues involved. SEC Release No. 34-19,135, *supra* at *3.

53. *Id.*

54. *Id.*; Cost data was provided by American Telephone & Telegraph Company ("AT&T"), which provided the following calculations: (costs based on approximately 2, 903, 000 shareholders to be supplied with statements) Included Proposal – $13, 800 Postage + $60, 000 Printing + $38, 450 Employee remuneration + $0 Counsel = $112, 250/5 Proposals = $22, 450 Estimated average cost per proposal. Excluded Proposal - $ 0 Postage + $0 Printing + $38, 450 Employee remuneration + $2, 700 Counsel = $41, 150/11 Proposals = $3, 740 Estimated average cost per proposal.

55. Memorandum from Morely and Kargula, *supra* at 9.

56. The Staff expressed concern that proponents attempting to condense multiple points into a single proposal would increase confusion and complexity of proposal review. Memorandum from Linda Quinn, Bill Morley and John Gorman to Lee Spencer and John Hubner (Jun. 7, 1983), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1983_0607_Revision14a8.pdf.

57. Memorandum from The Division of Corporate Finance, *supra* at 11.

58. Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No 34-20,091, 28 SEC Docket 798 (Aug. 16, 1983).

statements.[59] In 1998 the Commission rewrote the Rule in plain English, making no substantive changes to the limitation on the number of proposals.[60]

III. STAFF INTERPRETATION

The limitation to a single proposal continues to raise a number of issues. Under the interpretation first set out in *Newmont Mining*,[61] a proposal can count as more than a single submission to the extent it includes multiple distinct and separate business items.[62] The Staff has also continued to permit exclusion where issuers relied upon attribution under a theory of control or alter ego. The burden of proof, however, has remained with the issuer.

Section 3.01 Alter Ego and Control

Issuers have continued to seek exclusion of proposals from multiple shareholders under an alter ego theory.[63] This theory depends upon a showing of direct influence over the shares or the person submitting the proposal.[64] The issue typically arises where the issuer has alleged joint activity by a number of proponents all under common control. In general, a finding of control or alter ego will result in the exclusion of proposals submitted by the entire group.[65]

The Staff applied the alter ego approach in *Staten Island*.[66] A proponent submitted five proposals on corporate governance issues but withdrew four of them following notice of a violation of the one proposal limitation. Thereafter, family and neighbors of the same shareholder submitted proposals to the same issuer. The issuer claimed the proponent's agenda, evidenced by submissions over previous years, persisted in each of the submissions. Moreover, the proposals were identical to those that had been withdrawn. The Staff found the combined evidence sufficient proof of the proponent's control of others with the intent to "circumvent the proxy rules." In contrast, the Staff has not found mini-

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59. Per the SEC, in fact "the proposed reduction…is one way to reduce issuer costs and to improve the readability of proxy statements without substantially limiting the ability of proponents to bring important issues to the shareholder body at large." *Id*. at 990.

60. Amendments to Rules on Shareholder Proposals, Release No. 34-40,018, 67 SEC Docket 373, 1998 WL 254809 (May 21, 1998).

61. *See supra* notes 40-42.

62. *E.g.*, Pacific Enterprises, SEC No-Action Letter, 1998 WL 75864 (Feb. 19, 1998); Occidental Petroleum Corp., SEC No-Action Letter, 1998 WL 88063 (Feb. 23, 1998).

63. Of the 81 NALs claiming alter-ego or control tactics between 1998 and 2016, the Staff agreed with issuer claims in 11.

64. *E.g.*, Storage Technology Corp., SEC No-Action Letter, 1998 WL 111144 (Mar. 11, 1998); Alaska Air Group, Inc., SEC No-Action Letter, 2009 WL 829060 (Mar. 5, 2009).

65. In the exception, *MOD-PAC*, the issuer received permission to omit only the proposal submitted via share control. The proposal submitted by the proponent utilizing his qualifying shares remained in the proxy materials. MOD-PAC Corp., SEC No-Action Letter, 2004 WL 495653 (Mar. 8, 2004).

66. Staten Island Bancorp, Inc., SEC No-Action Letter, 2002 WL 32166624 (Feb. 27, 2002).

mal statements of personal or institutional relationships and the use of common addresses as sufficient evidence of control or alter ego.[67]

Issuers have also sought to apply the alter ego theory in connection with proposals submitted by persons affiliated with unions, though without much success. In *Crown Central Petroleum Corp*., proponents, members of the same workers' union, submitted proposals with respect to their own stock holdings.[68] At the time of submission, the company was involved in a "protracted labor dispute." The issuer, citing their connection to the union, argued that the proponents were participating in an "orchestrated campaign" promoted by the union.[69] The shareholders, however, asserted that the company had not produced "direct evidence" of control. The Staff agreed with the shareholders and did not permit exclusion.

The issue has also arisen in connection with a shareholder's designation of another individual as a proxy to submit a proposal. In *Boeing*, a proxy submitted six separate proposals to an issuer in the same year, each for a different eligible shareholder.[70] The company claimed that proxies utilized the "tactic to inundate" issuers with proposals in a "clear and egregious abuse" of the Rule.[71] The Staff, however, denied omission. Only where a proxy provided inadequate proof of authorized status did the Staff permit exclusion.[72]

Section 3.02 Substantially Distinct Issues

A proposal containing substantially distinct and separate issues can constitute more than a single submission, though the Staff has provided minimal insight into the matter.[73] For proposals addressing multiple matters, the Staff generally does not permit exclusion where they relate to a unifying concept. For instance, the Staff also declined to permit the ex-

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67. *E.g.*, The Charles Schwab Corp., SEC No-Action Letter, 2014 WL 69538 (Feb. 8, 2014); North Bancshares, Inc., SEC No-Action Letter, 1998 WL 40249 (Jan. 29, 1998).

68. Crown Central Petroleum Corp., SEC No-Action Letter, 1998 WL 111130 (Mar. 10, 1998).

69. The Company alleged a number of connections between the union and the individually submitted proposals. *See Id*. "The union mark is all over the three Proposals. The format of each proposal is substantially the same. The Gilchrest and McDowell Proposals attached hereto bear the fax transmittal notation "FROM OCAW LOCAL 4-227." The transmittal letters from all three Proponents refer to a single attorney, Matthew Haiken, who also represented Alvin Freeman, another locked out OCAW member, whose shareholder proposal last year was excluded by Crown from its 1997 proxy, with the concurrence of the staff of the Division". *Id* at *4.

70. The Boeing Co., SEC No-Action Letter, 2001 WL 122000 (Feb. 7, 2001).

71. *See id.* at 3; *see also*, Southwest Airlines Co., SEC No-Action Letter, 2002 WL 833590 (Mar. 25, 2002); Northrop Grumman Corp., SEC No-Action Letter, 2002 WL 730716 (Mar. 22, 2002). The SEC denied omission under the limited number procedural requirement.

72. The proponent submitted one proposal for himself and a second for joint-owners. The letter provided by the proponent declaring authorization to submit on behalf of the joint-owners was not signed, presumably indicating he was attempting to control the shares without authorization. MOD-PAC, *supra* note 66.

73. The Staff has not clarified their interpretation of substantially distinct and separate issues in any Bulletins or releases. Any understanding of this distinction is derived from analysis of NALs.

clusion of a request for the adoption of equal employment principles containing eight actionable processes.[74]

Application of the unifying concept, however, has varied. Governance submissions, for example, often involve a unifying theme.[75] In some cases, the unifying concept prevents exclusion. A submission requesting an elimination of the supermajority vote coupled with the adoption of a simple majority vote constituted a single proposal.[76] The Staff found that a request to require a majority of independent directors, who would meet separately and elect an independent Chairman, and the creation of a nominating committee constituted a single proposal.[77] So did a submission requesting a retroactive and prospective application of a two-thirds vote for changes to the bylaws.[78] The Staff viewed a proposal that combined a request for annual elections of board members and term limits[79], and a proposal calling for annual election of the board and the requirement that nominees maintain a certain amount of stock[80] as single proposals.

In other instances involving corporate governance, however, the Staff has permitted exclusion. A proposal sought to implement shareholder access. In addition, the proposal also provided that the election of a majority of the board "under these provisions shall be considered to not be a change in control by the Company, its board and officers." The staff treated the change of control as a "separate and distinct" matter and permitted exclusion.[81] So did a proposal requesting an increase of the number of directors combined with a mechanism for filling any vacancies.[82]

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74. The staff disagreed that a proposal providing for a shareholder vote on a poison pill and the right of directors "to set the earliest election date" contained multiple business items. Intel Corp., SEC No-Action Letter, 2015 WL 186749 (Fe. 11, 2015); *see also* PACCAR Inc., SEC No-Action Letter, 2004 WL 224507 (Jan. 5, 2004).

75. The Staff's application of a unifying theme also applies in the context of public policy related proposals. A submission requesting a review or amendment of standards for international operations and a summary report of this review, as well as an account of four specific human rights topics, constituted a single proposal. R.R. Donnelley & Sons Co., SEC No-Action Letter, 1999 WL 15951 (Jan. 14, 1999). So did a request for the adoption of human rights principles, consisting of eight guidelines. Yahoo! Inc., SEC No-Action Letter, 2011 WL 494129 (Apr. 5, 2011). The Staff, however, found a submission requiring a larger number of nominees than board seats and that the nominees come from a diverse background constituted multiple proposals. Exxon Mobile Corp., SEC No-Action Letter, 2002 WL 597371 (Mar. 19, 2002).

76. Britton & Koontz Capital Corp., SEC No Action Letter, 2006 WL 475444 (Feb. 22, 2006).

77. Quality Systems, Inc., SEC No Action Letter, 1999 WL 376097 (Jun. 9, 1999).

78. Global Entertainment Holdings/Equities, Inc., SEC No Action Letter, 2003 WL 22204506 (Jul. 10, 2003).

79. The Boeing Co., SEC No-Action Letter, 1999 WL 105014 (Feb. 23, 1999).

80. Washington Mutual Inc., SEC No-Action Letter, 2004 WL 5228554 (Feb. 20, 2004).

81. Bank of America Corp., SEC No Action Letter, 2012 WL 91383 (Mar. 7, 2012) ("In arriving at this position, we note that paragraphs one through five and seven of the submission contain a proposal relating to the inclusion of shareholder nominations for director in Bank of America's proxy materials and paragraph six of the submission contains a proposal relating to events that would not be considered a change in control. We concur with your view that paragraph six contains a proposal that constitutes a separate and distinct matter from the proposal relating to the inclusion of shareholder nominations for director in Bank of America's proxy materials.").

82. HealthSouth Corp., SEC No Action Letter, 2006 WL 845605 (Mar. 28, 2006).

Likewise, the Staff determined that a proposal involving independent directors and the number of directors lacked a unifying theme. [83]

The Staff has continued to apply the "unifying theme" concept but continued to do so in an unclear fashion. Some proposals that appear to involve such a theme have been excluded. The Staff considered a submission seeking multiple edits to the proxy materials as containing separate and distinct issues.[84] A submission regarding "restructuring" of the company with seven actions, including the separation of subsidiaries, also comprised multiple proposals.[85]

Section 3.03 Revisions and Subsequent Submissions

The limit on the number of proposals applies to submissions, irrespective of the timing. Where, for example, a shareholder submits a second proposal after omission of the first from the proxy materials, the Staff will permit exclusion. For example, in *Citigroup* a proponent submitted a proposal and the company obtained no-action release permitting exclusion.[86] The shareholder then submitted a second proposal on an unrelated topic. The Staff permitted exclusion, noting "the proponent previously submitted a proposal for inclusion in Citigroup's proxy materials with respect to the same meeting."[87]

Different versions of the same proposal submitted prior to expiration of required deadlines, however, did not violate the limitation. Instead, the Staff treats the proposal as a revision rather than as a second submission. At one time, the Staff concluded that the issuer did not have

83. Streamline Health Solutions, Inc., SEC No Action Letter, 2010 WL 302777 (Mar. 23, 2010) ("In arriving at this position, we particularly note that the proposal relating to director independence involves a separate and distinct matter from the proposals relating to the number of directors, the conditions for changing the number of directors, and the voting threshold for the election of directors at the upcoming annual meeting.").

84. The proposal requested edits to the proxy materials, including changing the word "except" to "against" in the Vote for Directors column and removing the statement that all signed but unvoted proxies would be voted at Management's discretion. The issuer argued the elements were not sufficiently related to comprise a single proposal. General Motors Corp., SEC No Action Letter, 2002 WL 417370 (Feb. 23, 2002).

85. General Motors Corp., SEC No Action Letter, 2007 WL 1125500 (Apr. 9, 2007).

86. Citigroup Inc., SEC No-Action Letter, 2002 WL 523424 (Mar. 7, 2002).

87. *Id.* at *1.

to accept the revisions.[88] That, however, changed.[89] Issuers now must accept revisions provided prior to the company's deadline.[90]

IV. ANALYSIS

The staff's interpretation of the one proposal requirement has resulted in uncertainty and an unnecessary waste of resources. By looking to whether a proposal contains "distinct issues," the test implicates most proposals. In part, this occurs because proposals must address both the substance of the matter and the process for implementation.[91] In other instances, the proposal would not function adequately without consideration of multiple issues. Separation of chair of the Board and CEO is one goal but shareholders typically also want to ensure that only independent directors occupy the position. Requiring the exclusion of one of these issues would result in an ineffective proposal. As a result, issuers regularly challenge proposals under this provision, requiring the expenditure of corporate, shareholder, and staff time to resolve.[92]

A broader interpretation of the unifying theme would address some of these resource issues by providing greater certainty and reducing the number of needless no-action requests. Proposals containing a unifying concept, such as board elections, with multiple actionable items should comprise a single business item. Access proposals would generate the same result, even when addressing the consequences of the use of the provision in connection with a change of control. Under a broader concept, a previously omitted submission requiring board member disclosure of conflicts and preexisting corporate interests, and tying compensation to company success interest equates a single proposal under director accountability.[93] Similarly, requests concerning shareholder voting[94] or

88. Staff Bulletin 14, section E, question 2: "If a company has received a timely proposal and the shareholder makes revisions to the proposal before the company submits its no-action request, must the company accept those revisions? No, but it *may* accept the shareholder's revisions. If the changes are such that the revised proposal is actually a different proposal from the original, the revised proposal could be subject to exclusion under . . . rule 14a-8(c)." SEC Staff Legal Bulletin No. 14 (CF), 2001 WL 34886112 (Jul. 13, 2001).

89. The deadline requires proposals to be received at the company within 120 calendar days of the date proxy materials were distributed the prior year. 17 CFR § 240.14a-8(ii)(C)(e)(2) (2016).

90. *Id.* Of note, the proponent is not required to label the second submission as a revision. However, if the second submission is affirmatively noted as an additional proposal for inclusion, this will be considered a second proposal in violation of the number limitation procedure.

91. The failure to specify any action designed for implementation may not qualify as a proposal. *See* Long Drug Stores Corp., 2008 WL 224026 (Jan. 23, 2008) ("There appears to be some basis for your view that Longs may exclude the submission under rule 14a-8(a) because it does not recommend or require that Longs or its board of directors take any action.").

92. Of the 109 NALs between 1998 and 2016 where issuers claimed a proposal contained multiple separate and distinct items, the Staff permitted omission in 40 responses. Of these 40, the entire proposal was omitted.

93. Duke Energy Corp., SEC No-Action Letter, 2009 WL 851487 (Feb. 27, 2009).

94. The proposal requested two changes to proxy materials addressing the manner of shareholder voting for directors. The actions were unified under the broader 'director elections' concept. Ford Motor Co., SEC No-Action Letter, 2002 WL 32075803 (Feb. 26, 2002).

board composition[95] with multiple actions related to the broad concept should constitute a single submission.

This approach would reduce uncertainty and needless requests with minimal effort by the Commission. At the same time, with shareholders having less concern over omission, the approach would potentially result in proposals that more fully addressed issues raised in any submission. Moreover, the existing administrative interpretation and the provisions of the Rule would minimize the risk of proposals containing truly unrelated topics. First, the proposal would still have to have a unifying theme. Second, shareholders have a limit of 500 words, minimizing the number of topics that can be fully explored. Third, proposals with too many topics would likely generate shareholder concern and reduce support. At the same time, however, shareholders, rather than the Staff of the Commission would remain the final arbiter of the proposal.

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95. HealthSouth Corp., *supra* note 83.

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