

THE UNTIMELY PROBLEM OF THE TIMELY SUBMISSION OF SHAREHOLDER PROPOSALS

I. INTRODUCTION

Rule 14a-8 requires companies to include properly submitted shareholder proposals in their proxy materials.¹ The Rule, however, imposes a number of substantive and procedural requirements. Subsection (e)(2) provides that, in most cases, shareholders must submit a proposal no later than 120 days before the date the company distributed the proxy statement to shareholders the prior year.² Failure to do so can result in exclusion.³

The Securities and Exchange Commission (SEC or Commission) strictly enforces the time limit. The deadline applies even when falling on a weekend or federal holiday.⁴ Oftentimes, submission to an inactive e-mail address or incorrect facsimile number can result in exclusion.⁵ A proposal's late submission by two days may preclude its inclusion into the proxy materials, even if postmarked before the deadline.⁶

This paper will begin by tracing the administrative history of 14a-8(e)(2), including the impact of amendments to the provision. The next section will analyze the Commission staff's recent interpretations of subsection 14a-8(e)(2). Finally, this paper will analyze the Commission staff's current role in enforcing the timeliness requirement and will suggest possible changes.

II. ADMINISTRATIVE HISTORY

The Commission enacted Rule 14a-8 in 1942.⁷ The Rule required a qualified shareholder to give "reasonable notice" of a proposal to the issuer's "management."⁸ The Commission defined "reasonable" as any "notice given more than thirty days in advance of a day corresponding to

1. 17 C.F.R. § 240.14a-8(e)(2) (2016).

2. *Id.*

3. § 240.14a-8(e)(3) (2016). Different deadline standards apply if the company did not hold an annual meeting in the prior year. If the date has been changed by more than 30 days, then the 14a-8(e)(3) "reasonable time" standard applies. *Id.*

4. SEC Staff Legal Bulletin No. 14 (July 13, 2001).

5. *See infra* p. 8 and notes 53-57.

6. *See* United National Bancorp, SEC No-Action Letter, 2000 WL 217932 (Feb. 7, 2000) (reasoning that exclusion was warranted because the mail room log indicated that the proposal arrived two days after the deadline). *See also* Dresser Industries Inc., SEC No-Action Letter, 1990 WL 285779 (Jan. 4, 1990) (illustrating that the company was allowed to omit the proposal when the submission, though postmarked prior to deadline, was received at the issuer's office after the deadline).

7. *See* Solicitation of Proxies under the Securities Exchange Act of 1934, 7 Fed. Reg. 10655 (Dec. 22, 1942).

8. *Id.*

the date on which proxy soliciting material was released to security holders in connection with the last annual meeting of security holders.”⁹

The Commission amended the submission requirements in 1954.¹⁰ Shareholders were required to provide an eligible proposal to “management of the issuer a reasonable time before the solicitation.”¹¹ For annual meetings, a sixty-day time period from the date of the prior year’s distribution of proxy materials was deemed reasonable.¹² The change provided issuers with “more time” to consider proposals.¹³ Eventually, the Rule would make the time period mandatory.¹⁴

In the early 1970s, application of the Rule became increasingly complex. The GM Campaign motivated shareholders to use the proposal process to debate the company’s social policies. Efforts to keep these types of proposals out of the proxy statement resulted in litigation.¹⁵ In *Medical Committee for Human Rights v. SEC*,¹⁶ the Medical Committee sought an amendment to DOW Chemical’s charter regarding the manufacture of napalm.¹⁷ The court’s ruling in that case more firmly established procedural and substantive rights of shareholders wanting a greater voice in corporate governance issues.¹⁸

With the shareholder concern growing over public interest matters, the volume of submissions increased and required companies and the Commission to devote greater resources in addressing proposals.¹⁹ In part as a result, the Commission sought more time to do so. The time-period for submitting a proposal to the principal office of the company increased to seventy days in 1976²⁰ and to ninety days four years later.²¹

9. *Id.* (“In the event that a qualified security holder of the issuer has given the management reasonable notice that such security holder intends to present for action at a meeting of security holders of the issuer a proposal which is a proper subject for action by the security holders, the management shall set forth the proposal and provide means by which security holders can make a specification as provided in Rule X-14A-2.”) *See also* Sec. & Exch. Comm’n v. Transamerica Corp., 163 F.2d 511, 514 n.4 (3d Cir. 1947) (explaining that notice provided 30 days in advance of the corresponding date on which proxy material was released for the last annual meeting “shall, prima facie, be deemed” as sufficient notice within a reasonable time).

10. *See* Adoption of Amendments to Proxy Rules, Exchange Act Release No. 4,979, 1954 WL 5772, at *1 (Jan. 6, 1954) (“The rule is amended to extend this period from 30 days to 60 days, so as to give more time for the consideration of security holder proposals.”).

11. *Id.* at *3.

12. *Id.*

13. *Id.* at *1.

14. *See* Adoption of Amendments to Proxy Rules and Information Rules, Exchange Act Release No. 5,200, 1967 WL 88215, at *2 (Dec. 14, 1967) (confirming 60 days as mandatory).

15. Sean Patrick O’Brien, *The 1983 Amendments to SEC Rule 14A-8: Upsetting a Precarious Balance*, 19 VAL. U. L. REV. 221, 234–35 (1984).

16. 432 F.2d 659 (D.C. Cir. 1970).

17. *Id.* at 661–62. *See also* O’Brien, *supra* note 16, at 234–36.

18. O’Brien, *supra* note 16, at 236, 239.

19. O’Brien, *supra* note 16, at 236 (“The Commission soon became concerned that given the increased requests for no-action letters by issuers, some shareholder proponents would . . . attempt to appeal staff no-action determinations.”).

20. *See* Solicitation of Proxies, Exchange Act Release No. 9,784, 1972 WL 125400, at *2 (Sept. 22, 1972).

For non-annual meetings and annual meetings where the date changed by thirty days or more from the prior year, proposals were to be submitted a “reasonable” time before the meeting.²²

The Commission staff provided guidance on the calculation of the time-period. In *Union Oil*,²³ the staff noted that the period began the “day preceding the [prior year’s] mailing date.”²⁴ Proposals submitted even one day after the deadline constituted a late submission resulting in exclusion.²⁵

Concerns continued to arise over the adequacy of the time period.²⁶ With the high volume of proposals and the longer “lead times” needed to print proxy materials, issuers had little time—as few as ten days—to file for no action relief.²⁷ Similarly, the high volume of requests caused the Commission staff to have “a more difficult time in meeting its deadlines for responses.”²⁸ As a result, the Commission amended Rule 14a-8 in 1983 to require the filing of a proposal at least 120 days from the date of the prior year’s distribution of the proxy materials.²⁹

21. See Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12999, 1976 WL 160347, at *3, *17 (Nov. 22, 1976) (“Under the revised rule, the timeliness deadline for annual meetings will be extended from 70 to 90 days. . . . [A] proposal to be presented at an annual meeting shall be received by the management at the issuer’s principal executive offices not less than 90 days in advance of a date corresponding to the date set forth on the management’s proxy statement released to security holders in connection with the previous year’s annual meeting of security holders . . .”).

22. *Id.* at *3 (“[T]he provision relating to a change in the annual meeting date due to a change in the fiscal year has been deleted and replaced by a provision that will be applicable to all changes in annual meeting dates of 30 days or more. The timeliness requirement for meetings . . . has not been changed.”).

23. Union Oil Co. of Cal., SEC No-Action Letter, 1974 WL 8865 (Feb. 27, 1974).

24. *Id.* (“Counting backward from the date that proxy soliciting materials were first mailed to shareholders of a company in connection with the annual meeting of shareholders for the preceding year, the day preceding the mailing date is considered as day No. 1. So long as the Company receives a shareholder proposal at any time on or before day No. 70, that proposal will have been timely received.”).

25. *Id.* at *1. See also Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, Exchange Act Release No. 16,356, 1979 WL 173198, at *11 (Nov. 21, 1979) (explaining that the purpose of the published deadline for submitting shareholder proposals was to “increase the certainty of meeting the filing requirements under rule 14a-8 and minimize inadvertent timing errors in the submission of proposals”).

26. See Memorandum from Bill Morley & Mike Kargula, on the Proposed Revision of Rule 14a-8 to Lee B. Spencer, Jr., John Huber & Linda Quinn 6–7 (1982), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1982_0318_MorleyKargula.pdf (“The reason for the change is that with the increased number of proposals being submitted and the longer lead times necessary for printing proxy materials many companies have as little as 10 days between the last date for submission of proposals and the filing date required . . .”).

27. *Id.*

28. *Id.* at 7. See also John C. Cook & Commissioner Daniel M. Gallagher, *Shareholder Proposals: An Exit Strategy for the SEC*, WASH. LEGAL FOUND., Sept. 2015, at 26 (discussing the historical problems from the 1980s, arguing that “[t]he lack of guidance and the Commission’s hands-off approach over the past decades has left the staff to be the ‘fall guy’ when it comes to the fair and timely administration of the shareholder proposal rule”).

29. See Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 20,091, 1983 WL 33272, at *4 (Aug. 16, 1983).

The Commission rewrote Rule 14a-8 into layman's terms in 1998 using a question-answer format.³⁰ The time periods for filing submissions, however, did not change.³¹

III. STAFF INTERPRETATION

Proposals must be submitted at least 120 days prior to the distribution of the prior year's proxy statement unless the company changes the date of the annual meeting by more than thirty days from the prior year.³² Shareholders must actually submit the proposal; notice of an intent to provide a proposal will not suffice.³³ The time period begins the "approximate date on which the proxy statement and form of proxy were first sent or given to shareholders,"³⁴ with the date typically appearing in the proxy statement.³⁵ Shareholders can rely on the provided date even when miscalculated by the company.³⁶ While the proposal must arrive within the specified time period, other types of documentation can be submitted afterwards.³⁷

The Commission staff strictly enforces the 120-day deadline.³⁸ The deadline applies even if the relevant date "falls on a Saturday, Sunday or

30. See Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 23,200, 1998 WL 254809, at *6 (May 21, 1998) (explaining that certain proposals "were viewed as especially controversial, and generated strong comments in favor, as well as heavy opposition").

31. *Id.* ("The deadline is calculated in the following manner if the proposal is submitted for a regularly scheduled annual meeting. The proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting.")

32. See SEC Staff Legal Bulletin No. 14F (Oct. 18, 2011) (explaining that, to the extent proposals are submitted on a timely basis, the company must also accept revisions that are provided before the expiration of the deadline).

33. See Procter & Gamble Co., SEC No-Action Letter, 2016 WL 3453940 (July 19, 2016) (explaining that, where the company's emphasis was on the proposal arriving at the issuer's "principal executive office").

34. SEC STAFF LEGAL BULLETIN NO. 14, *supra* note 30, ("If a company is planning to have a regularly scheduled annual meeting in May of 2003 and the company disclosed that the release date for its 2002 proxy statement was April 14, 2002", the issuer was instructed to calculate the 2003 submission date as follows:

"The release date disclosed in the company's 2002 proxy statement was April 14, 2002.

Increasing the year by one, the day to begin the calculation is April 14, 2003.

'Day one' for purposes of the calculation is April 13, 2003.

'Day 120' is December 15, 2002.

The 120-day deadline for the 2003 annual meeting is December 15, 2002.

A rule 14a-8 proposal received after December 15, 2002 would be untimely."

35. See SEC Staff Legal Bulletin No. 14 (July 13, 2001) ("Both the release date and the deadline for receiving rule 14a-8 proposals for the next annual meeting should be identified in that proxy statement.")

36. See Optelecom, Inc., SEC No-Action Letter, 1999 WL 193442 (Apr. 6, 1999) (illustrating a company arguing that a "reasonable" investor would not have relied on the misstated date in the proxy statement). See also Smith & Wesson Holding Corp., SEC No-Action Letter, 2014 WL 3569246 (Aug. 7, 2014) (explaining that the issuer is granted no action relief if a company's proxy statement's "poor or misleading draftsmanship" of a deadline causes the shareholder to submit her proponent late).

37. See JPMorgan Chase & Co., SEC No-Action Letter, 2014 WL 217732 (Mar. 11, 2014).

38. See IBM Corp., SEC, No-Action Letter, 2016 WL 521266 (Feb. 19, 2016) (illustrating the Commission's explicit adherence to the deadline "on the basis that those proposals were received at the company's principal executive offices after the deadline for submitting shareholder proposals").

federal holiday.³⁹ Exclusion applies to a proposal submitted merely one day after the 120-day deadline.⁴⁰ This includes proposals postmarked before expiration but received after the deadline.⁴¹ At the same time, however, proposals qualify as timely to the extent submitted anytime on the final day of period. In *Marathon Oil Corp.*,⁴² the Commission staff declined to permit exclusion of a proposal submitted thirteen minutes past a company's close of regular business operations.⁴³

3.01 Changes to the Annual Meeting Date

The 120-day period does not apply when the date of the annual meeting changes by more than thirty days from the prior year.⁴⁴ Instead, proponents must submit the proposal a “reasonable time” before “the company begins to print and send its proxy materials.”⁴⁵ Reasonableness requires sufficient time for the issuer “to consider a proposal without causing excessive delay in the distribution of the proxy materials” to stockholders.⁴⁶

Reasonableness does not require submission at least 120 days before the meeting. In *U.S. Liquids Inc.*,⁴⁷ the company announced a change to its annual meeting from May to June—over thirty days. The proponent's submission arrived on March 11, 2002. The company argued the Rule “clearly implie[d]” that 120 days before proxy materials were to be printed constituted a “reasonable time” and, as a result, the proposal was not timely. The Staff, however, declined to concur with the reasoning.⁴⁸

39. See SEC Staff Legal Bulletin No. 14 (July 13, 2001). See also Westinghouse Electric Corp., SEC No-Action Letter, 1995 WL 33578 (Jan. 27, 1995) (explaining that the Commission found the company could “omit [the] proposal received after the deadline due to the Veterans Day holiday weekend which delayed delivery”).

40. *Id.*

41. See General Electric Co., SEC No-Action Letter, 2012 WL 6625350 (Jan. 24, 2013) (“To be timely, a proposal must be received at companies' principal executive offices before the deadline, not just mailed by that date.”). See also Equity LifeStyle Properties, Inc., SEC No-Action Letter, 2012 WL 71852 (Feb. 10, 2012) (“[T]he Proposal, while dated December 6, 2011 and mailed on December 7, 2011, was not received until December 14, 2011” three days after the deadline.); Verizon Communications Inc., SEC No-Action Letter, 2008 WL 308213 (Jan. 8, 2008) (“[T]he UPS shipping label filled out by the Proponent, and which directed the delivery of the Proposal, was addressed to the Incorrect Address. . . . [It was] received at the company's principal executive office . . . twenty days after the deadline.”).

42. Marathon Oil Corp., SEC No-Action Letter, 2004 WL 7207853 (Jan. 12, 2004).

43. *Id.* (describing an instance where a proposal arrived on the day's deadline, but thirteen minutes after 5:00PM, at the close of business).

44. See Adam Gordon Brimer, *Getting Wired at the SEC: Reforming the Proxy Process to Account for New Technologies*, 58 ALA. L. REV. 179, 186 (2006) (presenting the notion that this requirement limits the number of proposals an issuer must include).

45. 17 C.F.R. § 240.14a-8(e)(2) (2016).

46. Great Basin Scientific Inc., SEC No-Action Letter, 2016 WL 343247 (Feb. 25, 2016).

47. U.S. Liquids, Inc., SEC No-Action Letter, 2002 WL 975924 (Apr. 3, 2002) (illustrating that 32 days was considered reasonable time to consider the proposal).

48. *Id.*

3.02 Subsequent Submissions

Issues can arise where shareholders submit multiple versions of the same proposal. In general, the Staff will not permit exclusion where at least one arrives during the 120-day period.⁴⁹ In *Sara Lee, Corp.*, the first and second submissions arrived on October 25, 2004 and May 16, 2005, “well in advance of the May 25, 2005 deadline.”⁵⁰ The proponent withdrew the second proposal on May 31, 2005, six days after the proxy deadline. Sara Lee asserted that the “Withdrawal Notice” constituted the submission date for the second proposal.⁵¹ The Commission staff, however, did not permit exclusion.

3.03 Proposals Submitted to an Incorrect Address

Proposals must arrive at the company’s principal executive offices.⁵² Submissions sent to the wrong email or facsimile address,⁵³ even in good faith,⁵⁴ may not, therefore, meet this requirement.⁵⁵ Where however, the company declined to accept delivery, the Commission staff did not permit exclusion.⁵⁶

Exclusion has not been allowed where the company provided an incorrect address, email box, or facsimile number. In *Fifth Third Bancorp.*,⁵⁷ the proxy statement provided a submission deadline of November 6, 2008. The proponent submitted the proposal on November 6, 2008 via facsimile, but to the incorrect number. Fifth Third Bancorp only found the proposal the next day after thoroughly searching in a department located “on a different floor from the Company’s principal executive offices” and sought exclusion of the submission as untimely.⁵⁸ Proponent,

49. *Sara Lee Corp.*, SEC No-Action Letter, 2005 WL 1676892 (Jul. 15, 2005).

50. *Id.*

51. *Id.* The Corporation argued that the date the shareholder went from two to one was effectively the submission date. *Id.* By withdrawing the first proposal, however, the proponent submitted *only one* proposal. *Id.*

52. SEC Staff Legal Bulletin No. 14 (July 13, 2001).

53. See SEC Staff Legal Bulletin No. 14C (June 28, 2005). The staff advised the shareholders to contact the company to obtain the correct fax number because, if “the facsimile number is incorrect, the shareholder proponent’s proposal may be subject to exclusion on the basis that the shareholder proponent failed to submit the proposal or response in a timely manner.” *Id.*

54. See *Coca Cola Co.*, SEC No-Action Letter, 2001 WL 43656 (Jan. 11, 2001). Here, the Staff found a proposal submitted in good faith did not excuse an untimely proposal. *Id.* Though the “proponent e-mailed it to the company’s transfer agent’s address listed on Coca-Cola’s website, even when transmission routed to the company after the deadline”—this did not constitute the proposal arriving at the correct address in a timely manner.” *Id.*

55. See *Illumina, Inc.*, SEC No-Action Letter, 2015 WL 186741 (Feb. 17, 2015).

56. *Halliburton, Co.*, SEC No-Action Letter, 2010 WL 673797 (Feb. 12, 2010) (illustrating that the proposal was not subject to exclusion where the shareholder attempted to deliver proposal by Federal Express and attempted delivery was recorded two separate dates before the deadline).

57. See *Fifth Third BanCorp*, SEC No-Action Letter, 2009 WL 154916 (Jan. 2, 2009) (illustrating that the Commission could not concur, in particular due to “the proponent’s representation that it sent the proposal to a facsimile number that the company had confirmed”).

58. *Id.* (“The letter received by the Proponent on November 7, 2008 was dated November 6, 2008 and included language that suggested the letter was delivered via overnight mail and by fac-

however, represented that “it sent the proposal to a facsimile number *that the company had confirmed*.”⁵⁹ The Commission staff declined to permit exclusion.⁶⁰

3.04 Delays Involving Overseas Issuers

Proponents submitting proposals to overseas offices need not use the fastest method. In *Perrigo*,⁶¹ the company disclosed on January 20 that proposals needed to be submitted by February 16, 2016. The proponent’s proposal arrived by letter at Perrigo, Co.’s principal executive offices in Dublin, Ireland after that date. According to the company, the shareholder “transmitted the letter by overseas postal mail, rather than using an electronic or other, faster means of transmission.”⁶² As a result, Perrigo received the letter “nine-days after the deadline, and just five business days before the Company filed its preliminary proxy statement.”⁶³ The Commission declined to permit exclusion.

IV. ANALYSIS AND CONCLUSION

Under the current deadline, shareholder proposals must arrive 120 days—four months—from the distribution date for the proxy materials. Proposals, therefore, must be drafted and sent to the company approximately *six months* before the meeting.⁶⁴ The justification of the early deadline has been the need for extra time by companies to consider filing with the Commission and the staff to process the requests.

The early deadline can impose a significant burden on small shareholders, particularly those unfamiliar with the intricacies of Rule 14a-8. Moreover, the deadline requires investors to identify issues for inclusion in a proposal long before the annual meeting. Thus, important topics that develop shortly before the meeting will not be captured in a shareholder proposal.

The need for the company and the Commission to have six months before the meeting appears excessive. The Commission should therefore reexamine the justification for the 120-day submission requirement. Much has changed since the implementation of the requirement in 1983. Modern technology, particularly electronic communication, permits shareholders to instantly notify companies of a proposal. Once received,

simile to fax number . . . Upon investigation, the Company’s Investor Relations Department traced fax number” to a department “on a different floor from the Company’s principal executive offices.”).

59. *Id.* (emphasis added).

60. *Id.*

61. Perrigo Co. plc, SEC No-Action Letter, 2016 WL 1254390 (Mar. 16, 2016).

62. *Id.*

63. *Id.*

64. Craig McGuire, *What is a Shareholder Proposal?*, [THESHAREHOLDERACTIVIST.COM](http://theshareholderactivist.com/shareholder-activism-spotlight/what-is-a-shareholder-proposal), <http://theshareholderactivist.com/shareholder-activism-spotlight/what-is-a-shareholder-proposal> (last visited Mar. 10, 2017) (“[T]he submission deadline . . . is generally six months prior to the actual meeting.”).

the company must notify shareholders within two weeks of any deficiency. Thereafter, no action request can be filed at any time. Yet, the filing deadline allows a company to wait several months before doing so.

Likewise, electronic dissemination of proxy materials have reduced the time pressure on issuers. The Commission has encouraged the use of electronic dissemination of proxy materials.⁶⁵ Companies needing only to print enough versions to meet the needs of requesting shareholders, the number of hard copies has declined.⁶⁶

The Commission should, therefore, consider a reduction in the time-period needed for submission. That, however, would require an amendment to the Rule. In the meantime, the staff could apply a less rigid administrative interpretation of the requirement. For example, the staff could treat as timely proposals that, while not received by the deadline, were “postmarked” or otherwise sent to the company prior to the expiration of the period.

Finally, as to the issuer receiving the proposal at the company’s principal offices, the Commission should consider requiring better disclosure about the submission of proposals. Rather than simply requiring delivery to the “principal executive offices,” the Commission staff should mandate disclosure in the proxy materials of an electronic address for submission. Doing so will facilitate submission and eliminate any uncertainty over the receipt of the proposal.

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65. See Shareholder Choice Regarding Proxy Materials, Exchange Act Release 2007 WL 2140169 (Jul. 26, 2007) (“[I]ssuers and other soliciting persons will be required to post their proxy materials on an Internet Web site and provide shareholders with a notice of the Internet availability of the materials.”).

66. See 17 C.F.R. § 240.14a-16 (2016). See also Press Release, Money 20/20 Conference PRNewswire, *The Broadridge Communications CloudSM Accelerates Digital Adoption, Enables Brands and Consumers to Interact in New Ways*, BROADRIDGE (Oct. 25, 2016), <http://www.broadridge.com/news-events/press-releases/The-Broadridge-Communications-CloudSM-Accelerates-Digital-Adoption-Enables-Brands-and-Consumers-to-Interact-in-New-Ways.html?show=2016+Press+Release> (noting significant decline in issuers printing physical proxy materials).

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