

“GOOD CAUSE” FOR NONATTENDANCE AT THE SHAREHOLDER MEETING UNDER RULE 14A-8(H)

I. INTRODUCTION

Rule 14a-8 grants shareholders of a publicly traded company the right to include their proposals in the annual proxy statements.¹ The Rule, however, also imposes a number of procedural requirements on proponents.² Specifically, subsection (h)(1) requires that either the proponent or a “representative who is qualified under state law” attend the meeting and present the proposal.³ A violation without “good cause” allows the company “to exclude all of [the shareholder’s] proposals from its proxy materials for any meetings held in the following two calendar years.”⁴

The attendance requirement did not appear in the initial version of Rule 14a-8. The Rule assumed that shareholders would attend meetings and personally present their proposals. Eventually, the Commission amended the Rule to require attendance but permitted waiver upon a showing of good cause. In addition, shareholders could appoint a “qualified representative” to present proposals.⁵ Administrative interpretations have, however, effectively repealed the good cause exception. Consequently, the failure to present has become a per se ground for exclusion of a shareholder’s proposal in the following two years.

This article will review the administrative history of subsection (h) and the evolution of a procedural requirement that permitted management to omit shareholder proposals for two years following a violation. Next, this article will examine the SEC Staff’s (Staff or Division) interpretation of the requirement through no-action letters (NAL). Finally, the article will analyze the Staff’s interpretation of subsection (h) and explain how the appearance requirement and good cause excuse may be modified to benefit both shareholders and companies.

II. ADMINISTRATIVE HISTORY

When adopting the Rule in 1942,⁶ the Commission assumed shareholders would personally attend the meeting and present their proposals.⁷

1. 17 C.F.R. § 240.14a-8 (2012).

2. *Id.*

3. § 240.14a-8(h).

4. *Id.*

5. *Id.*

6. The shareholder proposal rule was originally titled “Rule X-14A.” Exchange Act Release No. 3347 (Dec. 18, 1942).

7. *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

Six years later the SEC made the assumption explicit. The amended Rule permitted exclusion of the proposal where the shareholder had, in the two prior years, “failed without good cause to attend the meeting in person or by proxy or to present the proposal for action at the meeting.”⁸ Amendments in 1954 left the penalty provision unchanged but clarified that a shareholder had to provide, at the time of submission of the proposal, notice of intent to personally appear and present.⁹

This requirement generally went uncontested until the early 1970s when shareholders began using shareholder proposals to take a more active role in the corporate governance process.¹⁰ Concerns arose over shareholders who submitted proposals but did not subsequently attend the meeting. A 1971 release¹¹ emphasized that when “a security holder submits proposals and then does not appear at the meetings of the companies involved, all security holders have been put to considerable expense to [sic] no purpose”¹²

Amendments adopted in 1976 retained the requirement that proponents provide notice of intent to personally appear for action at the meeting but allowed a representative to present proposals on behalf of the

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.”) (emphasis added). In promulgating the Rule, the Commission intended “to place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation; that is, such matters relating to the affairs of the company concerned as are proper subjects for stockholders’ action under the laws of the state under which it was organized.” Exchange Act Release No. 3638 (Jan. 3, 1945).

8. Exchange Act Release No. 4185 (Nov. 5, 1948).

9. Exchange Act Release No. 4979 (Jan. 6, 1954).

10. Between 1951 and 1953, shareholders submitted 203 proposals. Clarence H. Adams, Comm’r, U.S. Sec. & Exch. Comm’n, Comments on the Proxy Rules at the Annual Meeting of the American Society of Corporate Secretaries, Inc., in Hot Springs, Va. (June 1, 1953), <https://www.sec.gov/news/speech/speecharchive/1953speech.shtml>. Shareholders submitted 602 proposals in 1971 and 645 proposals in 1972. J. Robert Brown, Jr., *The Evolving Rule of Rule 14a-8 in the Corporate Governance Process*, 93 DENV. ONLINE L. REV. 151, 157 (2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2767712.

11. Exchange Act Release No. 9432 (Dec. 22, 1971) (“Sometimes a security holder in submitting a proposal to the management of the issuer will include a preamble or series of ‘whereases’ which are in effect arguments in support of the proposal. These arguments are in addition to the permitted 100-word statement and appear to be an attempt to circumvent the 100-word limit. In view of the proposed increase in supporting statements from 100 words to 200 words, it is proposed to add a note to the rule to make clear that any statements in the text of the proposed resolution which are in effect arguments in support of the proposal are to be considered a part of the supporting statement and subject to the 200-word limitation.”).

12. *Id.* (“The Commission regards this practice as an abuse of the rule and intends to monitor the practice in the future. If it continues, the Commission will consider whether further amendment of the rule is necessary. 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 or by proxy to present them is disqualified from submitting proposals to the company the following year.”). The SEC also affirmed the two-year penalty for non-attendance. *Id.* (“[I]n the event the proponent or his proxy fails without good cause to present the proponent’s proposal at the meeting the management need not include any proposals submitted by the proponent in its proxy materials for any meeting held in the following two calendar years.”).

shareholder.¹³ The proposing release justified the attendance requirement as necessary to ensure that someone knowledgeable enough to discuss the matter and answer questions appeared at the meeting,¹⁴ a point subsequently reiterated by the Commission.¹⁵ Commentators, however, viewed the requirement as unnecessary.¹⁶ Security holders for the most part learned about proposals through the proxy materials, not at the meeting.¹⁷

The Staff interpreted the authority to appoint a representative broadly. Despite the explicit language of the exclusion, proponents could appoint a representative who did not own shares in the issuer.¹⁸ In *Will Maslow*,¹⁹ the Division determined that a proponent could designate “any person qualified under the applicable state law” to present a proposal.²⁰

In contrast, the Staff construed the good cause provision narrowly.²¹ In *CBS Inc.*,²² the shareholder asserted she did not attend the 1976 meeting because the company provided assurance that someone would present the proposal regardless of her presence.²³ Proponent’s counsel asserted that she had been “defrauded and doubleincreased [sic] by CBS and COULD [sic] have a legal case.”²⁴ The company did not deny the allega-

13. Exchange Act Release No. 12999 (Nov. 22, 1976) (“If the proponent, after furnishing in good faith the notice required by this provision, subsequently determines that he will be unable to appear personally at the meeting, he shall arrange to have another security holder of the issuer present his proposal on his behalf at the meeting.”). The Commission noted that the “revision is in accord with existing practice and is intended, again, to provide some assurance that a proponent’s proposal will indeed be presented for action at the meeting.” *Id.*

14. Exchange Act Release No. 9343 (July 7, 1976) (noting “the overall purpose of the notice requirement, which is to avoid putting the issuer and its security holders to considerable expense for no valid purpose”).

15. See Division of Corporation Finance, Securities and Exchange Commission, Staff Report on Corporate Accountability (Comm. Print September 4, 1980) (Sen. Committee on Banking, Housing and Urban Affairs, 96th Cong., 2nd Sess.) (emphasizing the need for “an informed, interested individual [to]be present to introduce the proposal and to participate in any ensuing debate.”).

16. Exchange Act Release No. 12999 (Nov. 22, 1976).

17. *Id.*

18. Will Maslow, SEC No-Action Letter, 1976 WL 11265 (Dec. 21, 1976).

19. *Id.*

20. *Id.* (“It is the Division’s view that, for purposes of Rule 14a-8(a)(2), a proponent who is unable to appear personally at the meeting may have his proposal presented by any person qualified under the applicable state law to represent him at the meeting.”). At the time the Maslow Letter was issued, “Alan Levenson, who had become Director of the Division in 1970, took a personal interest in these responses because he believed the Division had been too strict in its interpretations of Rule 14a-8 in the past.” Statement of Peter J. Romeo, SEC Official from 1969-84, SEC Historical Society (Feb. 20, 2014).

21. See *CBS Inc.*, SEC No-Action Letter 1977 WL 13691 (Jan. 31, 1977).

22. *Id.*

23. *Id.* (“Prior to our annual meeting of 1976 I had telephoned Mr. Meads (Vice President Public Relations), and he assured me by phone that I would have ‘nothing to worry about’ and ‘that there would be no need for me to attend our CBS annual meeting in person, since he would see to it that the resolution would be properly presented’ and that ‘everything would be taken care of WITHOUT my having to be there in person.’”).

24. The proponent alleged that counsel advised her of the possible legal claim, but did not provide a letter from the attorney. See *id.* (“Counsel has advised me that I have in THAT case been defrauded and doubleincreased by CBS and COULD have a legal case.”).

tions.²⁵ The Staff, however, determined that “assurances from management” did not constitute good cause for the absence.²⁶

In some cases, the Staff found an absence of good cause only to subsequently take the opposite view. In *Alexander's Inc.*,²⁷ the Staff initially determined that good cause did not include the need to attend a conflicting meeting.²⁸ But in *Atlas Corporation*,²⁹ the Division asserted that “attendance at another shareholders’ meeting was good cause for failure to present a proposal.”³⁰ The approach presumably reflected the reality that annual meetings for most large numbers of companies occurred over a two-month period, increasing the risk of conflicts.³¹ Less than two years later, however, the Staff reversed the position.³² Accordingly, a conflicting meeting constituted “a foreseeable and likely event” the shareholder could have addressed by appointing “a proxy or another security holder” to attend.³³ Only in rare cases did the Staff find excuses for nonattendance sufficient to show good cause.³⁴

The SEC amended the Rule in 1983.³⁵ The revision allowed the shareholder “to arrange, from the outset, to have any person who is permitted under applicable state law, present the proposal for action at the

25. *Id.* (“As I read your letter you are quoting me as saying more than I actually said. You called me prior to the 1976 Annual Meeting and inquired whether your proxy proposition would be put to a vote at the meeting if you were unable to attend in person. I said to you, in effect, ‘don’t worry [sic], if you can’t be there, as a courtesy to you a member of CBS management will put your resolution to a vote, but we won’t [sic] defend it and we will oppose it for the reasons set out in the proxy.’ This is what I promised you and this is precisely what we did, as you will note from the enclosed excerpt from the transcript of the Meeting.”).

26. *Id.* (“This Division does not believe that assurances from management that a proposal which has been noticed in the proxy statement will be presented for a vote at the annual meeting constitutes [sic] ‘good cause’ for not appearing, at least by proxy, to present one’s proposal.”).

27. *Alexander's, Inc.*, SEC No-Action Letter, 1973 WL 7028 (Nov. 4, 1973).

28. *Id.*; see also *American Express Company*, SEC No-Action Letter, 1976 WL 10936 (Feb. 9, 1976) (“This Division does not believe is [sic] a conflict with another meeting constitutes ‘good cause’ for not appearing, at least by proxy, to present one’s proposal.”).

29. *Atlas Corporation*, SEC No-Action Letter, 1978 WL 13004 (July 25, 1978).

30. *Id.* (“In this Division’s view, attendance at another annual meeting taking place at a conflicting date and time is ‘good cause’ for the proponent’s failure to attend the Company’s meeting to introduce her proposal.”).

31. Because annual shareholder meetings for most “public companies are bunched together over a short period of time” and often overlap, there is greater risk that proponents will have multiple proposals considered on the same day. See J. Robert Brown, Jr., *The Proxy Rules and Restrictions on Shareholder Voting Rights*, 47 SETON HALL L. REV. 45, 68–69 (2016) (“In 2013, almost seventy percent of the companies in the Fortune 500 and Russell 3000 held their meetings in April and June.”).

32. *Transamerica Corp.*, SEC No-Action Letter 1980 WL 15221 (Jan. 11, 1980).

33. *Id.* (“The proponent has offered as her reason for not attending the 1979 annual meeting the fact that she attended an annual meeting of another corporation and that she could not catch a taxi, as she had planned, in order to present her proposal at the Company’s annual meeting. The proponent further states that she made ‘every effort to attend’ the 1979 annual meeting. This Division does not believe that the proponent’s reason constitutes ‘good cause’ as contemplated under [the] Rule.”).

34. See *IC Indus., Inc.*, SEC No-Action Letter 1982 WL 29392 (Aug. 10, 1982), *affirmed* 1982 WL 29555 (Oct. 28, 1982) (determining that good cause existed where the absence was due to illness and the proponent unsuccessfully attempted to contact management).

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

meeting.”³⁶ Consistent with the 1976 *Maslow* letter,³⁷ therefore, the agent did not have to also own stock in the company.³⁸ The Commission believed share ownership did “little to assure that the person presenting the proposal will be well informed” and was arguably counterproductive to the purpose of the provision.³⁹ Permitting the shareholder to designate any qualified representative under state law, the SEC noted, fulfilled the objective of the attendance requirement.⁴⁰

Having broadened the authority to select a representative, the Staff rarely found grounds for nonattendance sufficient. “An extremely slow commute” did not excuse attendance because delays in traffic are “reasonably foreseeable.”⁴¹ Nor did postal delays that prevented a representative from receiving materials for use at the meeting.⁴² The Staff also noted that neither the inconvenience of physical travel⁴³ nor being “retired and older”⁴⁴ constituted good cause for nonattendance.⁴⁵

The Commission rewrote the Rule into plain English in 1998, utilizing a question and answer format.⁴⁶ The SEC renumbered the subsection but did not further clarify the meaning of good cause.⁴⁷ The Commission

36. Exchange Act Release No. 19135 (Oct. 14, 1982) (“It is the Commission's view that such change should provide greater assurance that the proposal will be presented at the meeting and that the proposal will be presented by a well-informed person. It must be emphasized, however, that it would continue to be the proponent's responsibility, not his representative's, to insure that the proposal is presented. In the event that the proponent or his representative fails, without good cause, to present the proposal for action at the meeting, the rule would continue to permit the issuer to exclude proposals submitted by the proponent from its proxy soliciting materials relating to any meeting held in the following two years.”).

37. See *supra* notes 18–20 and accompanying text.

38. The change brought the Rule into greater alignment with state law. Memo to Lee Spencer and John Huber with outline for revisions of Rule 14a-8, SEC Historical Society (June 7, 1983) (“The major point raised by those persons who were opposed was that the annual meeting is a shareholders meeting and that any representative selected to present the proposal should be a shareholder. We believe, however, that if state law permits a person other than a shareholder to act as proxy for a shareholder then such person should be permitted to present the shareholder proposal.”).

39. Exchange Act Release No. 17517 (Feb. 5, 1981) (“Permitting the proponent to select any person qualified under state law will give him greater opportunity to secure an interested and informed replacement. The Commission also notes that under the proposed change the shareholder proponent still will be required to notify the issuer at the time he submits a proposal of his good faith intention to attend the meeting. Only if he subsequently discovers that he will be unable to attend will he be able to designate a qualified representative. The Commission believes that retention of this good faith notice and attendance requirement will continue to minimize the submission of frivolous proposals.”).

40. *Id.*

41. Transamerica Corp., SEC No-Action Letter 1989 WL 246605 (Dec. 27, 1989).

42. Allied Signal, Inc. SEC No-Action Letter 1992 WL 32297 (Feb. 12, 1992).

43. Allied Gen. Motors Corp., SEC No-Action Letter 1992 WL 51720 (Mar. 12, 1992).

44. Allied Harnischfeger Indus., Inc., SEC No-Action Letter 1992 WL 372149 (Dec. 15, 1992).

45. Civil disturbance, however, did provide sufficient excuse. Chevron Corp., SEC No-Action Letter 1993 WL 52196 (Feb. 25, 1993) (finding good cause where absence was due to “[t]he civil disturbance in Los Angeles which commenced on Wednesday afternoon, April 29, 1992”).

46. Exchange Act Release No. 40018 (May 21, 1998). The 1998 Amendments relabeled section 14a-8(a)(2) as 14a-8(h). Compare Exchange Act Release No. 20091 (Aug. 16, 1983), with Exchange Act Release No. 40018 (May 21, 1998).

47. 17 C.F.R. § 240.14a-8(h) (2012) (“Question 8: Must I appear personally at the shareholders' meeting to present the proposal? (1) Either you, or your representative who is qualified under

did, without commenting in either the proposal or amendment, add language that allowed shareholders or their representatives to present via electronic media rather than traveling to appear in person.⁴⁸ Without explaining the purpose behind the provision, the amendment granted companies authority to decide whether shareholders could present via electronic media.⁴⁹

III. STAFF INTERPRETATION OF RULE 14A-8(H) AFTER 1998

Until recently, the Staff provided little guidance on the requirements for designating a “qualified representative.”⁵⁰ The Division has, however, taken a strong stance on what constitutes good cause—not a single proponent has satisfied this requirement since 1993.⁵¹ The Staff also routinely allowed for the exclusion of a proposal where shareholders acknowledged the ability to attend and the company had not yet included the submission in the proxy statement.⁵²

Nor did the Staff allow the shareholder to pass the responsibility to the issuer. Exclusion could occur even where a company representative or an unrelated attendee placed the proposal before the meeting for a vote.⁵³ Likewise, a shareholder did not satisfy the attendance requirement by asking the issuer to designate someone at the meeting to present the

state law to present the proposal on your behalf, must attend the meeting to present the proposal. Whether you attend the meeting yourself or send a qualified representative to the meeting in your place, you should make sure that you, or your representative, follow the proper state law procedures for attending the meeting and/or presenting your proposal. (2) If the company holds its shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person. (3) If you or your qualified representative fail to appear and present the proposal, without good cause, the company will be permitted to exclude all of your proposals from its proxy materials for any meetings held in the following two calendar years.”)

48. Exchange Act Release No. 40018 (May 21, 1998).

49. *Id.* (“If the company holds its shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person.”).

50. Besides reiterating the Rule’s explicit language that a proponent’s proxy must be qualified under state law to present a proposal. *See, e.g.,* Kohl’s Corp., SEC No-Action Letter, 1999 WL 152440 (Mar. 12, 1999); Paccar Inc., SEC No-Action Letter 2000 WL 223669 (Feb. 11, 2000); Procter & Gamble Co., SEC No-Action Letter 2008 WL 3909486 (July 24, 2008).

51. *See* Spreadsheet of No Action Letters Addressing Proposals under Rule 14a-8(h) from 1973 through February 2017 [hereinafter SPREADSHEET]. Following the 1983 amendments, the Staff changed its approach in no-action letters. The Staff declined to give detailed explanation on its opinions; instead, responses were limited to concurring with or disagreeing with the issuers’ grounds for omission.

52. Staff Legal Bulletin No. 14, Release No. SLB-14 (Jul. 13, 2001) (“Rule 14a-8(i)(3) allows companies to exclude proposals that are contrary to the proxy rules, including rule 14a-8(h)(1). If a shareholder voluntarily provides a written statement evidencing his or her intent to act contrary to rule 14a-8(h)(1), rule 14a-8(i)(3) may serve as a basis for the company to exclude the proposal.”)

53. Raytheon Co., SEC No-Action Letter 2003 WL 231017 (Jan. 22, 2003); Eastman Chem. Co., SEC No-Action Letter 2001 WL 223401 (Feb. 27, 2001); Lucent Technologies Inc. (Sept. 21, 1999); Excalibur Techs. Corp., SEC No-Action Letter 1999 WL 269921 (May 4, 1999); Kohl’s Corp., SEC No-Action Letter, 1999 WL 152440 (Mar. 12, 1999).

proposal even if the company accommodated the request.⁵⁴ Finally, a decision by the issuer to report the results of a proposal despite nonattendance did not preclude application of the two-year penalty.⁵⁵

A. Qualified Representative

The proponent alone carries the burden of ensuring satisfaction of the qualified representative requirement.⁵⁶ A proponent may designate a representative “qualified under state law” to attend the meeting and present the proposal.⁵⁷ The proponent may also designate a representative to submit a proposal and attend the meeting,⁵⁸ although doing so requires additional documentation.⁵⁹

The Staff has generally set a low bar for what a representative must do at the meeting. Representatives must do more than attend; they must actually make⁶⁰ or speak about⁶¹ the proposal. The company, however, has no obligation to provide instructions or otherwise assist in the process. In *Paccar, Inc.*,⁶² a company agent at the annual meeting informed

54. Procter & Gamble Co., SEC No-Action Letter 2008 WL 3909486 (July 24, 2008) (company stating that “[a]fter specifically informing [Proponent] that the Company reserved the right to exclude future proposals by Proponent, the Company agreed to allow the 2007 Proposal to be presented.”).

55. McDonald’s Corp., SEC No-Action Letter 2015 WL 296056 (Mar. 3, 2015); E. I. Du Pont De Nemours & Co., SEC No-Action Letter 2009 WL 498726 (Jan. 16, 2009).

56. Paccar Inc., SEC No-Action Letter 2000 WL 223669 (Feb. 11, 2000).

57. 17 C.F.R. § 240.14a-8(h) (2012).

58. Staff Legal Bulletin No. 14I, Release No. SLB-14I (Nov. 1, 2017). The latest staff bulletin addressed the appointment of a proxy to submit a proposal. While the Division affirmed that “a shareholder’s submission by proxy is consistent with Rule 14a-8,” the bulletin also explained, “going forward, the staff will look to whether the shareholders who submit a proposal by proxy provide documentation describing the shareholder’s delegation of authority to the proxy.” *Id.* There is legislation afoot that may repeal the right to appoint a proxy under the Rule. The Financial CHOICE Act of 2017 in its current form precludes proxy materials containing “a shareholder proposal submitted by a person in such person’s capacity as a proxy, representative, agent, or person otherwise acting on behalf of a shareholder.” *See* Financial Choice Act of 2017, H.R. 10, 115th Cong. § 844(j) (2017). The plain language of the bill indicates that only the submission of proposals is at issue. *See id.* (“An issuer may not include in its proxy materials a shareholder proposal *submitted* by a person in such person’s capacity as a proxy, representative, agent, or person otherwise acting on behalf of a shareholder.”) (emphasis added). Nor does the legislative history indicate such. *See* H.R. REP. 115-163, H.R. Rep. No. 163, 115TH Cong., 1ST Sess. 2017, 2017 WL 2454264 (Leg. Hist.). This is consistent with the fact that most of the debate concerning proxy representatives has generally concerned who can submit a proposal on behalf of the shareholder, not who can attend the meeting on the proponent’s behalf. *See* N. Peter Rasmussen, Financial Regulation Bill Could Threaten Shareholder Proposal Process, BNA Corporate Transactions Blog (Apr. 16, 2017), <https://www.bna.com/financial-regulation-bill-b57982086738/> (“Issuers have often complained about the practice of proposals by proxies. Companies have unsuccessfully argued to the SEC that Rule 14a-8(h)(1) only allows shareholders to nominate representatives to attend the annual meeting on their behalf, and not to stand in for the shareholder at any earlier stage in the process.”).

59. The documentation must include “identify the shareholder-proponent and the person or entity selected as proxy”, the company that will receive the proposal, and identify the relevant shareholder meeting. The shareholder appointing the representative must sign and date the document. Staff Legal Bulletin No. 14I, Release No. SLB-14I (Nov. 1, 2017).

60. Marriott Int’l, Inc., SEC No-Action Letter 2016 WL 7210008 (Jan. 10, 2017); Sprint Nextel Corp, SEC No-Action Letter 2013 WL 170418 (Mar. 18, 2013).

61. Paccar Inc., SEC No-Action Letter 2000 WL 223669 (Feb. 11, 2000).

62. *Id.*

the proponent's representative that she "may have to speak."⁶³ The proponent asserted that the company's statement misdirected the representative who attended the meeting because the language implied an optional presentation.⁶⁴ The Staff rejected the contention and determined that the issuer had no responsibility to present shareholder proposals or instruct proxy representatives on how to carry out the task.⁶⁵

In *Marriot Int'l, Inc.*,⁶⁶ the Staff did not permit exclusion where the representative allegedly "not only failed to refer to the substance of the 2016 Proposal but also failed to make any statement that reasonably can be interpreted as presenting the 2016 Proposal." The representative, according to the company, "presented an entirely different proposal and not the 2016 Proposal."⁶⁷ Nor did the Staff do so in *Sprint Nextel Corp.*,⁶⁸ where the representative "did not state that he represented the [p]roponent, [did not] read a statement in support of the proposal or say what the proposal was about, [and] merely stated that another shareholder (which had submitted the previous proposal) supported this one."⁶⁹

The Staff also did not permit exclusion where the company limited a shareholder's right to make proposals at the meeting.⁷⁰ In *Sonoco Prod. Co.*,⁷¹ the company's bylaws provided that only a director or shareholder of record could *propose* a resolution at a shareholder meeting.⁷² The company identified the proponent as a beneficial holder and argued for omission because neither he nor the representative constituted a shareholder of record.⁷³ The company also asserted that, under South Carolina Law, only a shareholder of record, not a beneficial owner, could appoint a proxy to act on her behalf at the meeting.⁷⁴ Because the proponent "did not meet these requirements, neither he nor anyone he purported to appoint was qualified under state law to present the 2015 proposal."⁷⁵

63. *Id.*

64. *Id.*

65. *Id.*

66. Marriott Int'l, Inc., SEC No-Action Letter 2016 WL 7210008 (Jan. 10, 2017).

67. *Id.*

68. Sprint Nextel Corp, SEC No-Action Letter 2013 WL 170418 (Mar. 18, 2013).

69. *Id.*

70. Sonoco Prod. Co., SEC No-Action Letter 2015 WL 7755506 (Jan. 13, 2016).

71. *Id.*

72. *Id.*

73. *Id.* ("As confirmed by his broker, the Proponent was a beneficial holder of the Company's shares on the date of submission of his shareholder proposal to the Company. However, because his shares were held in a brokerage account, Proponent was not a shareholder of record, on the date of submission of his shareholder proposal to the Company or on the record date for the meeting. Further, the Proponent did not represent, and his broker did not assert, that Proponent held a proxy from any such record holder.").

74. *Id.* ("Section 33-2-106(b) of the South Carolina Business Corporation Act of 1988, as amended, provides: 'The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation.'").

75. *Id.* ("[T]he Proponent was a beneficial holder of the Company's shares on the date of submission of his shareholder proposal to the Company. However, because his shares were held in a

The proponent objected, asserting that Sonoco “ask[ed] SEC staff to create new regulations, by way of an unprecedented no-action letter, to potentially disenfranchise all who are not shareholders of record, limiting rights protected under federal law to only shareholders holding shares through direct registration.”⁷⁶ And the Staff did not permit exclusion.⁷⁷

B. Good Cause

At least since the 1990s,⁷⁸ the Staff has not identified a single instance of good cause that precluded application of the two-year penalty provision.⁷⁹ The approach caused at least one issuer to assert that the Division “has placed the burden on the proponent of a shareholder proposal to demonstrate that he or she had ‘good cause’ for failing to present his or her proposal at a meeting of security holders.”⁸⁰ The ability to appoint a representative has effectively eliminated almost any excuse for nonattendance.

Lack of knowledge regarding the attendance requirement or the failure of the company to specify a proponent’s obligations did not constitute good cause.⁸¹ Neither a shareholder’s inability to secure a quali-

brokerage account, Proponent was not a shareholder of record, on the date of submission of his shareholder proposal to the Company or on the record date for the meeting. Further, the Proponent did not represent, and his broker did not assert, that Proponent held a proxy from any such record holder. Accordingly, the Proponent did not meet the requirements of the Company’s Bylaws to present his 2015 Proposal at the 2015 Annual Meeting and have it voted upon.”).

76. *Id.*

77. *Id.* Two key facts complicate and potentially narrow the *Sonoco* letter. *See Shareholder Proposal Developments During the 2016 Proxy Season*, Gibson Dunn (June 28, 2016), <http://www.gibsondunn.com/publications/Documents/Shareholder-Proposal-Developments-2016-Proxy-Season.pdf> (“Sonoco appears limited to the specific facts and, given the arguments asserted and the absence of any explanation in the Staff’s response, does not definitively resolve issues around the proper presentation of shareholder proposals or the interaction of Rule 14a-8 and state law. State law continues to govern the requirements for admission to a shareholder meeting.”). First, the company permitted the proponent’s representative to present a proposal the previous year as a courtesy, albeit informing the representative “she was not properly qualified under the Company’s Bylaws or South Carolina Law.” Second, the specific bylaw Sonoco relied on addressed who could “propose” matters for consideration at a meeting, and not what qualified a representative to present a proposal. Although the Staff did not provide any explanation, the decision illustrates that the proponent did not have to satisfy the company’s additional requirements because “he had already met the SEC’s conditions for eligibility to submit a proposal and to have the proposal included in the proxy statement.” *See Sonoco Prod. Co.*, SEC No-Action Letter 2015 WL 7755506 (Jan. 13, 2016) (“We are unable to concur in your view that Sonoco may exclude the proposal under rule 14a-8(h)(3). Accordingly, we do not believe that Sonoco may omit the proposal from its proxy materials in reliance on rule 14a-8(h)(3).”).

78. *See supra* note 45 and accompanying text (finding shareholder’s absence due to Rodney King post-verdict riots constituted good cause where riots started on Wed. April 29 and meeting was scheduled on Tues. May 5).

79. SPREADSHEET, *supra* note 51.

80. Noted by a party arguing for omission. Citigroup Inc., SEC No-Action Letter 2008 WL 116426 (Jan. 9, 2008).

81. Ameron Int’l Corp. SEC No-Action Letter 2011 WL 5088768 (Jan. 12, 2011) (“I did not attend the 2010 shareholder meeting. However, Ameron’s internal corporate counsel at the time, Stephen E. Johnson, told me by telephone prior to the meeting that I had satisfied ‘all’ requirements with respect to the proposal I had submitted for the 2010 shareholder meeting, and he did not state that I was required to attend the meeting, or, alternatively, to send a representative. Had I known this, I would have asked my mom or my dad, who live in Los Angeles, and who also are Ameron

fied representative nor a company's decision to deny a proponent's representative who lacked identification required by policy provided grounds for good cause.⁸² The Staff has also indicated that scheduling conflicts and personal inconveniences;⁸³ costs of travel;⁸⁴ traffic delays and parking issues;⁸⁵ and missed airline flights⁸⁶ did not constitute good cause. A foreseeable absence caused by medical difficulties also did not preclude application of the two-year sanction.⁸⁷

Even a medical issue that arises the morning of the meeting may not constitute good cause, depending on the severity of the matter.⁸⁸ In *Safeway, Inc.*,⁸⁹ the company alleged that the proponent provided no explanation for nonattendance.⁹⁰ The company had notified the proponent "that no Company employee would act as her agent at the meeting, and she had more than a month to make other arrangements to attend the meeting or designate a representative or proxy to present the 2001 Proposal."⁹¹ The Staff permitted exclusion.⁹² In another instance, the shareholder asserted that a doctor's order for testing, two to three days before the meet-

shareholders, to attend the meeting on my behalf. In addition, at no time did Ameron seek to inform me that failing to attend the meeting would jeopardize my ability to exercise my rights as a shareholder to submit proposals in subsequent years.").

82. CCBT ConocoPhillips, SEC No-Action Letter 2007 WL 724408 (March 5, 2007).

83. CCBT Fin. Companies, Inc., SEC No-Action Letter 2000 WL 217920 (Feb. 15, 2000).

84. Idacorp, Inc, SEC No-Action Letter 2004 WL 2389238 (Oct. 21, 2004); Occidental Petroleum Corp., SEC No-Action Letter 2001 WL 47264 (Jan. 16, 2001).

85. Aetna Inc., SEC No-Action Letter 2017 WL 193081 (Feb. 1, 2017); Cmty. Health Sys., Inc., SEC No-Action Letter 2006 WL 213496 (Jan. 25, 2006).

86. Sw. Airlines, SEC No-Action Letter 2001 WL 283030 (Mar. 12, 2001) (finding basis for exclusion where another airline's negligence allegedly caused the missed flight).

87. E. I. Du Pont De Nemours & Co., SEC No-Action Letter 2010 WL 4922458 (Feb. 16, 2010) (determining that spouse's medical surgery and accelerated timeline was not good cause for failure to present); J.C. Penny Co., SEC No-Action Letter 2004 WL 315212 (Feb. 13, 2004) (finding spinal, cervical and neurological issues that prevent safe travel and lack of assistance not good causes for non-presentation); Masco Corp., SEC No-Action Letter 2001 WL 306192 (Mar. 20, 2001); The Detroit Edison Co., SEC No-Action Letter 1998 WL 92650 (Feb. 24, 1998) (noting that Staff did not find good cause where shareholder contacted the company several days prior to the meeting and indicated she would not be in attendance due to ill health).

88. Providence & Worcester R.R. Co., SEC No-Action Letter 2013 WL 1717742 (Jan. 17, 2013) (finding the proponent failed to demonstrate good cause where he suffered from "severe diarrhea" the morning of the meeting).

89. Safeway Inc., SEC No-Action Letter 2002 WL 523361 (Mar. 7, 2002), *reconsideration denied* 2002 WL 664045 (Mar. 27, 2002).

90. *Id.*

91. *Id.* ("Before the 2001 Annual Meeting, proponent requested that a Safeway individual read the 2001 Proposal at the meeting if she or a representative did not attend the meeting to present the proposal personally. By letter to the proponent dated April 6, 2001 (more than a month prior to the 2001 Annual Meeting), Steven A. Burd, the Chairman, President and Chief Executive Officer of the Company, responded to proponent. A copy of the letter is attached hereto as Exhibit C. The letter stated that "[i]n the event that you do not attend the meeting, I or another Safeway individual will read the text of your proposal aloud at the appropriate time during the meeting. Please note, however, that this will not create any implication that I or another Safeway individual will be acting at the meeting or presenting your proposal on your behalf or as your designated representative.").

92. *Id.*

ing, prevented her from securing a representative to act on her behalf.⁹³ The Staff disagreed and found no basis for reconsideration.⁹⁴

Regardless of whether the proponent had good cause for not personally attending the event, she must take adequate steps to ensure a representative presents the proposal on her behalf.⁹⁵ In *Fleetboston Fin.*,⁹⁶ the Staff indicated that attending a funeral on the day of the shareholder meeting could excuse personal absence but did not constitute good cause for a proponent's failure to secure a qualified representative to present the proposal.⁹⁷

IV. ANALYSIS

A. A Requirement Without Purpose

The justified rationale for the attendance requirement and two-year penalty does not withstand scrutiny for several reasons. First, few shareholders have any need for a discussion at the meeting. Most make their decision as part of the proxy process.⁹⁸ Only a small fraction of the voters attend and hear the presentation. Moreover, even if the requirement worked as expected and attendance resulted in some sort of additional clarification or explanation, the result would result in unequal disclosure. Only the small number of investors attending the meeting, rather than those voting through the proxy process, would benefit from the additional insight.

Nor will shareholders necessarily have their questions answered as a result of physical presence. A proponent may not know the answer. Moreover, the qualifications for a personal representative do not include expertise or knowledge about the proposal. Indeed, insight from the representative may or may not coincide with what the proponent intended.

Second, mandatory attendance imposes costs on shareholders that limit the ability to submit proposals. Proponents must incur the expenses associated with the requirement, a particular hardship for small investors. Further, in some cases, physical attendance will be impossible. Annual shareholder meetings for most “public companies are bunched together over a short period of time.”⁹⁹ As a result, proponents must designate a

93. Safeway Inc., SEC No-Action Letter 2002 WL 664045 (Mar. 27, 2002).

94. *Id.*

95. Coll. Ret. Equities Fund, SEC No-Action Letter 2000 WL 1280909 (Sept. 7, 2000) (“While the Proponent, in his letter to the staff dated July 21, 2000, provides information intended to suggest that he had a “good cause” for his failure to appear personally [because of his wife’s medical surgery], there is no information to indicate that the Proponent took steps to have a representative present the proposal at the meeting on his behalf.”).

96. Fleetboston Fin., SEC No-Action Letter 2002 WL 126578 (Jan. 3, 2002).

97. *Id.*

98. See *supra* note 30, at 68–69 (explaining that most shareholders vote through execution of a proxy card submitted before the meeting occurs because of the costs associated with attendance).

99. See *id.* (“In 2013, almost seventy percent of the companies in the Fortune 500 and Russell 3000 held their meetings in April, May, and June.”).

personal representative, a step that at least in some cases results in additional costs.¹⁰⁰

Third, while having few benefits, the requirement does have the potential to reduce the number of proposals submitted by shareholders. With respect to an individual company, shareholders can submit only a single proposal.¹⁰¹ The Rule does not, however, restrict the overall number of companies that can receive proposals. Mandatory attendance and the costs associated with meeting the requirement have the potential to act as a limitation.¹⁰²

Fourth, the Staff has administratively rewritten the rule by repealing the good cause exception and transforming nonattendance into a strict liability offense. Indeed, the Staff has not applied the good cause exception since the 1990s.¹⁰³ Good cause is essentially a double obligation—the proponent must have good cause both not to appear and not to appoint a representative. Even here, however, the Staff has declined to apply good cause where the proponent, because of unexpected circumstances, had little time to designate a representative.¹⁰⁴

B. The Rise of Electronic Meetings

At the same time, technological innovation has further reduced the value of the requirement. Companies may now hold virtual shareholder meetings. In those instances, shareholders attend, vote, and ask questions entirely online. Other companies permit “hybrid” meetings where shareholders can choose either to attend physically or online. Although relatively new, virtual meetings have become more common,¹⁰⁵ despite opposition from some shareholders.¹⁰⁶

100. *Id.*

101. 17 C.F.R. 240.14a-8(c); see also Renee Himes, *Limiting the Limited Number of Shareholder Proposals Under Rule 14a-8*, 94 DENV. L. REV. ONLINE 63, 360 (2017) (“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. The SEC claimed that the practice threatened the underlying intent of the Rule and effective communication between shareholders and issuers. Seven years later, the Commission reduced this limitation to a single proposal per shareholder per issuer as part of a set of amendments designed to restrict utilization of the Rule.”).

102. To the extent shareholders solicit a large number of issuers, they will incur greater difficulty satisfying the requirement. Shareholders will confront logistical problems associated with attending multiple meetings on the same day or in close approximation. They can avoid the requirement by incurring the expense of appointing a personal representative. Moreover, the process will likely become more expensive.

103. See *supra* note 45 and accompanying text.

104. See *supra* notes 86–95 and accompanying text.

105. “Last year, 187 companies used the services of Broadridge Financial Solutions Inc., the main provider of virtual shareholder meeting technology, to hold virtual shareholder meetings. This is up from 28 companies in 2010.” Tatyana Shumsky, *SEC Backs “Virtual-Only” Annual Meeting Option*, WALL ST. J. (Jan. 12, 2017), <https://blogs.wsj.com/cfo/2017/01/12/sec-backs-virtual-only-annual-meeting-option/>. Proponents of virtual shareholder meetings believe that the expense and time associated with in-person meetings outweigh the benefits. *Making the Switch: A company’s*

Rule 14a-8(h)(2) addresses electronic attendance in a confusing fashion. The Rule indicates shareholders can present a proposal through electronic media to the extent “the company permits.”¹⁰⁷ Implemented before the advent of virtual meetings, the language suggests that companies can decide how proposals must be presented.¹⁰⁸ With hybrid meetings where shareholders can attend physically or electronically, companies could presumably mandate physical attendance for proponents or their representatives.¹⁰⁹

Guide to Virtual-Only Shareholder Meetings, Hunton & Williams (Nov. 2017), <https://information.hunton.com/34/2143/uploads/companys-guide-virtual-only-shareholder-meetings.pdf>. Supporters of electronic meetings believe that both shareholders and companies would cut costs associated with the physical meeting, such as travel expenses. Virtual meetings also increase shareholder participation by allowing proponents that are unable to attend due to physical or financial reasons access to the corporate governance process. *Id.* Additionally, a virtual forum would reduce the negative environmental impact associated with physically traveling to the meeting—that is “lower[ing] the carbon footprint of annual meetings by reducing travel by management, the board, and shareholders.” The Best Practices Working Group for Online Shareholder Participation in Annual Meetings, *Guidelines for Protecting and Enhancing Shareholder Participation in Annual Meetings* (June 2012), http://www.shareholderforum.com/e-mtg/Library/20120614_Broadridge-report.pdf.

106. The Staff “has allowed at least two corporations to exclude from their proxy materials a shareholder proposal that the corporation hold in-person rather than virtual-only annual meetings. In each case, the corporation was permitted to exclude the proposal under Rule 14a-8(i)(7) as relating to the corporation’s ordinary business operations.” *Making the Switch: A company’s Guide to Virtual-Only Shareholder Meetings*, Hunton & Williams (Nov. 2017), <https://information.hunton.com/34/2143/uploads/companys-guide-virtual-only-shareholder-meetings.pdf>. While virtual meetings are arguably more efficient and convenient, they are also controversial. *See* Alaska Air Group, Inc., SEC No-Action Letter 2017 WL 57207 (Jan. 25, 2017); HP Inc., SEC No-Action Letter 2016 WL 6819133 (Dec. 28, 2016). Opponents argue that online-only participation represents a harmful slipper-slope that insulates management from shareholder interaction. Alaska Air Group, Inc., SEC No-Action Letter 2017 WL 57207 (Jan. 25, 2017). And substituting a virtual meeting allows companies to cherry pick favorable questions and ignore negative questions or investor frustration. *Id.*; *Making the Switch: A company’s Guide to Virtual-Only Shareholder Meetings*, Hunton & Williams (Nov. 2017), <https://information.hunton.com/34/2143/uploads/companys-guide-virtual-only-shareholder-meetings.pdf>. Critics also argue that companies adopt online-only meetings “to avoid looking shareowners in the eye—they’re treating face-to-face interaction as a nuisance instead of a duty . . . in some cases, companies are clearly using virtual-only meetings to avoid criticism.” Press Release, New York City Comptroller, *Comptroller Stringer: Virtual Only Meetings Deprive Shareowners of Important Rights, Stifle Criticism* (Apr. 2, 2017), available at <https://comptroller.nyc.gov/newsroom/comptroller-stringer-virtual-only-meetings-deprive-shareowners-of-important-rights-stifle-criticism/>. While shareholders are concerned with meetings that are exclusively virtual, they favor meetings that are both physical and virtual. *See Making the Switch: A company’s Guide to Virtual-Only Shareholder Meetings*, Hunton & Williams (Nov. 2017), <https://information.hunton.com/34/2143/uploads/companys-guide-virtual-only-shareholder-meetings.pdf>.

107. This approach would make 14a-8(h)(2) a mandatory requirement for the issuer. *See* 17 C.F.R. § 240.14a-8(h)(2) (2012) (“If the company holds its shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person.”).

108. Broadridge reported that only 17% of 2016 meetings with a virtual component were hybrid, while 83% were virtual-only. *Virtual Shareholder Meetings: Recent Facts and Figures*, Broadridge Financial Solutions, Inc. (2017), <http://media.broadridge.com/documents/MKT-1956-17-VSM-Article4.pdf>.

109. Doing so might create an issue under state law to the extent that the company discriminated among shareholders of the same class of securities. *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 957–58 (Del. 1985) (finding selective stock repurchases by a board of directors with

For the most part, proponents participating in a virtual or hybrid meeting have not been required to physically attend. Issuers have, however, singled out proponents for unique treatment. Rather than having the choice with respect to attendance, proponents generally must access the meeting via the telephone. In 2016, companies typically used an operator-assisted phone line for representatives to present proposals.¹¹⁰

In contrast, most companies allow shareholders to submit questions electronically.¹¹¹ At both the Intel and ConocoPhillips virtual-only meetings, all comments and questions were reserved for a short time period after the representatives presented proposals.¹¹² While Conoco accommodated comments and questions by phone,¹¹³ Intel did not provide a dial-in option and required investors to type in questions through an online portal.¹¹⁴ HP and Microsoft, among other major companies, permitted the pre-submission of shareholder questions, which were read at the meeting and posted on the companies' websites afterwards.¹¹⁵

With respect to these meetings, therefore, proponents did not have to physically attend a meeting but did have to use a phone line while other investors could establish their presence electronically. Moreover, the company controlled the dialogue. The risk existed that companies would fail to read all of the questions posed to proponents. And, while some companies allowed for pre-submission of questions, only those shareholders attending the meeting heard the answers.

C. Possible Reforms

The area suggests the need for several possible reforms that would reduce the difficulties and costs associated with the attendance require-

corporate funds in order to remove a threat to corporate policy is not discriminatory even though it precludes a raider from sharing in a benefit available to all other shareholders).

110. *Virtual Shareholder Meetings: Recent Facts and Figures*, Broadridge Financial Solutions, Inc. (2017), <http://media.broadridge.com/documents/MKT-1956-17-VSM-Article4.pdf>.

111. "In 2016, Broadridge reported that 99% of corporations holding virtual meetings permitted live questions via text. Only 5% allowed live questions via telephone, and 15% accepted pre-submitted questions in addition to live

text questions." *Making the Switch: A company's Guide to Virtual-Only Shareholder Meetings*, Hunton & Williams (Nov. 2017), <https://information.hunton.com/34/2143/uploads/companys-guide-virtual-only-shareholder-meetings.pdf>.

112. *2017 Annual Stockholder's Meeting*, Intel, Corp. (May 18, 2017), <https://www.intc.com/investor-relations/events-and-presentations/events-calendar/event-details/2017/Annual-Stockholders-Meeting-2017/default.aspx>; *2017 Annual Meeting of Stockholders*, ConocoPhillips (May 16, 2017), <https://east.virtualshareholdermeeting.com/vsm/web?pvskey=COP>.

113. *2017 Annual Meeting of Stockholders*, ConocoPhillips (May 16, 2017), <https://east.virtualshareholdermeeting.com/vsm/web?pvskey=COP>.

114. *2017 Annual Stockholder's Meeting*, Intel, Corp. (May 18, 2017), <https://www.intc.com/investor-relations/events-and-presentations/events-calendar/event-details/2017/Annual-Stockholders-Meeting-2017/default.aspx>.

115. *Certain Considerations Relating to Virtual Shareholder Meetings*, White & Case (Mar. 28, 2017), <https://www.whitecase.com/publications/alert/certain-considerations-relating-virtual-shareholder-meetings>.

ment. The Commission could rewrite the Rule to remove the unnecessary attendance requirement altogether. In the absence of such a reform, the Staff could take a number of steps designed to minimize the impact of the requirement on shareholders.

First, the Staff should make clear that in virtual or hybrid meetings, proponents must have the same rights as other shareholders to attend the meeting electronically. Companies cannot, in those circumstances, require physical attendance. Nor should they only require that proponents attend by telephone. To the extent that other shareholders can submit questions electronically and have corporate officials read them, proponents should have the same right with respect to any proposal. While effectively requiring involvement by the issuer in the presentation of the proposal, this approach necessarily follows from the decision to hold a virtual or hybrid meeting.

Second, given the rote nature of the presentation in most cases, the Staff should permit companies to agree to present the proposal at both physical and virtual meetings, excusing attendance. This could occur where both the company and the proponent agreed. The approach could result in the unavailability of the proponent to answer questions. But the Rule already contemplates that this can occur. A representative appointed by the proponent need not have the ability to answer questions from shareholders.

Third, the Staff could, at the very least, change its position as it has done in the past and reinvigorate good cause by removing the double obligation that has developed. If the proponent has good cause for not appearing personally, that should be sufficient to excuse nonattendance. The Staff's implicit abrogation of good cause reflects an inconsistency in treatment. While shareholders are automatically penalized if they fail to attend, companies are often granted leeway for procedural deficiencies.¹¹⁶

The mandatory attendance requirement has provided few benefits and resulted in some potential harm. As technology evolves and virtual meetings become increasingly employed by issuers, the requirement has become even less meaningful and deserves reexamination by the Commission.

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116. See, e.g., Mark G. Proust, *The Evolution of Rule 14a-8(j): The Good Cause to Clarify Good Cause*, 93 DENV. L. REV. ONLINE 289, 296–98 (2016) (finding that the Staff does not enforce the filing deadline imposed on issuers seeking no action requests).

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