

# LIMITS ON THE WORD LIMIT UNDER RULE 14A-8

## I. INTRODUCTION

The Securities Exchange Act (Exchange Act or Act) granted the Securities and Exchange Commission (SEC or Commission) the authority to regulate the proxy process.<sup>1</sup> In exercising that authority, the Commission adopted Rule 14a-8 (Rule). The Rule requires public companies to include shareholder proposals in their proxy materials.<sup>2</sup>

The original version of the rule imposed a word limitation on supporting statements but not the actual proposal.<sup>3</sup> As a result, shareholders sometimes submitted excessively long proposals. Eventually, the Commission imposed a cap of 500-words on the entire submission.<sup>4</sup> To enforce the requirement, the SEC developed a number of counting rules that addressed the use of numbers, web site addresses, symbols, and hyphenated words. The counting limit also included words and numbers contained in images and charts.

This article will first review the administrative history of the word limit. The Commission has amended the word limit on a number of occasions, at least in some instances as a result of issuer complaints. This article will next analyze the staff's interpretation of the limit, with a particular focus on the period after 1998. Finally, the piece will discuss the need for changes to better serve the interests of issuers and investors.

## II. EVOLUTION OF RULE 14A-8(D)

Originally adopted in 1942, the shareholder proposal rule required corporate management to include stockholder proposals in their annual proxy materials.<sup>5</sup> No limit existed on the length of a proposal.<sup>6</sup> The rule allowed shareholders to include a supporting statement anytime management opposed a proposal. The supporting statement, however, could consist of no more than 100-words. No comparable limits applied to management's statement of opposition.<sup>7</sup>

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1. Section 14(a), 15 USC 78n(a).

2. 17 CFR 240.14a-8.

3. Exchange Act Release No. 9784 (Sep. 22, 1972)

4. 17 CFR 240.14a-8(d)

5. Exchange Act Release No. 417 (Dec. 18, 1942); The rule was originally cited as Rule X-14A-7. The citation was changed to Rule X-14A-8 in 1952. See Exchange Act Release No. 4775 (Dec. 11, 1952).

6. Exchange Act Release No. 417 (Dec. 18, 1942), Daniel M. Friedman, *Expenses of Corporate Proxy Contests*, 51 Colum. L. Rev. 951 (1951).

7. *Dyer v. Securities and Exchange Commission*, 266 F.2d 33, 44 (8th Cir. 1959); ("The regulations, however, impose no similar limitation upon the number of words which management may insert in its own proxy material in opposition.") Shareholders brought an action against the SEC

The cap imposed significant limitations on a shareholder's ability to explain a proposal. To circumvent the restriction, proponents sometimes submitted lengthy proposals<sup>8</sup> that included extensive "whereas" clauses or preambles.<sup>9</sup> In 1972, the Commission increased the word limit on supporting statements to 200-words, thereby allowing the shareholders to "more fully present the reasons for submitting" a proposal.<sup>10</sup> Additionally, the staff added a paragraph to the rule providing that "whereas clauses" inserted into proposals that amounted to "arguments in support"<sup>11</sup> would count against the word limitation for the supporting statement.<sup>12</sup>

The approach allowed companies to argue that language in one part of the submission belonged in the other.<sup>13</sup> In addressing the issue, the staff focused on whether the challenged statements contained argumentative language.<sup>14</sup> To the extent clauses consisted only of actual information, they did not qualify as language that counted against the word limit for the supporting statement.<sup>15</sup>

The staff also declined to include in the supporting statement language that allegedly gave rise to argumentative inferences. In *Colorado National Bankshares*,<sup>16</sup> a shareholder proposed the formation of a new

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in 1959, objecting to the lack of a word limit on companies, arguing they must also comply with the 100-word restriction. The Eighth Circuit Court of Appeals rejected this contention, accepting the counter stance that different policy considerations applied to shareholders than management in the company's solicitation material.).

8. Exchange Act Release No. 9784 (Sep. 22, 1972) (shareholders often attempted to "evade the word limitation on supporting statements by submitting lengthy proposals which contain supporting argumentation within the text of the proposals themselves.").

9. *Id.*

10. *Id.* ("This provision has been amended to increase the 100-word limit to 200-words so that a security holder may more fully present the reasons for submitting his proposal to security holders.").

11. Exchange Act Release No. 9784 (Sep. 22, 1972) ("...the Commission has further amended paragraph (b) to provide that any statements in the text of a proposal, such as a preamble or 'whereas' clause, which are in effect arguments in support of the proposal, shall be considered part of the supporting statement and subject to the 200-word limitation thereon.").

12. Exchange Act Release No. 9784 (Sep. 22, 1972) (Changed citation to Rule 14a-8(b). "The purpose of the change is to curtail the growing tendency of security holders to evade the word limitation on supporting statements by submitting lengthy proposals which contain supporting argumentation within the text of the proposals themselves.").

13. Continental Airlines, Incorporated, 1975 WL 9898 (Mar. 14, 1975); Stauffer Chemical Company, 1974 WL 6884 (Mar. 1, 1974) (Whereas clauses in each proposal contained three factual statements, the companies argued that whereas clause in effect arguments in support of the proposal.).

14. See Continental Airlines, Incorporated, 1975 WL 9898 (Mar. 14, 1975)

15. Continental Airlines, Incorporated, 1975 WL 9898 (Mar. 14, 1975) (Proposal contained two 'whereas' clauses which the company took issue to: "WHEREAS management has expressed to the shareholders its adherence to equal employment opportunities without regard to race, sex, or national origin; WHEREAS Continental Airlines has regularly filed with the federal government through its EEO-1 form, data indicating the representation of minorities and women in its workforce", the staff responded: "It is our view that the 'whereas' clauses in the proposal constitute factual statements rather than statements in support of the proposal, and, accordingly, should not be deemed part of the supporting statement.").

16. Colorado National Bankshares, Incorporated, 1974 WL 8872 (Mar. 4, 1974) (Shareholder purported to define the scope and duties of a board committee and Colorado National Bankshares

board committee and included a description of the anticipated duties. The company argued that language in the proposal created inferences about the quality of the board (i.e. the current board was not doing a proper job) and should therefore count as part of the supporting statement. The staff, however, did not agree but did allow for exclusion of the supporting statement for exceeding the 200-word limitation on other grounds.<sup>17</sup>

With no word limit on the length of proposals, issuers sometimes confronted submissions that exceeded 3,000 words.<sup>18</sup> The Commission viewed such lengthy submissions as “obscure[ing] other material matters in the proxy statements . . . , thereby reducing the effectiveness of such documents.”<sup>19</sup> As a result, amendments imposed a 300-word limit on proposals.<sup>20</sup> The 200-word limit on supporting statements remained in place.<sup>21</sup>

With two separate thresholds, companies continued to argue that language in one section should count against the other. In one instance, a proposal submitted to multiple companies contained a section titled, “Basis for Motion.” A number of companies asserted that the entire section should count against the 200-word limitation on supporting statements.<sup>22</sup> The staff, however, disagreed, finding that the sections constituted part of the proposal.<sup>23</sup>

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stated this was an argument for the proposal because it inferred that such duties were not being properly handled by management.).

17. *Id.* (The staff stated the following language of the proposal: “The shareholders of Colorado National Bankshares, Inc...now request that the Board of Directors take such steps...to establish the...Committee for Corporate Responsibility.”, did not constitute argumentative language. The proposal, however, was still excluded under 14a-8(b) because the supporting statement totaled 242 words.).

18. Exchange Act Release No. 9343 (Jul. 7, 1976) (The Commission specifically noted two No-Action letters that exceeded 3,000 words.)

19. *Id.*

20. Data collected by the Commission showed that 86% of the proposals at issue were 300-words or less in length. *Id.*

21. The Commission did delete a note in the rule concerning the use of whereas clauses in the proposal that contained argumentative language. *See* Exchange Act Release No. 12999 (Nov. 22, 1976) (“Since the Commission has now placed a limit on the length of proposals that would encompass any introductory preambles or ‘whereas’ clauses it does not believe a need exists to police the length of supporting statements in the manner envisioned...”).

22. Colgate-Palmolive Company, 1979 WL 13834 (Jan. 31, 1979) (“You opine that the statements labeled ‘Basis for Motion’ in each of the proposals constitute additional supporting statements.”); Central Fidelity Banks, Incorporated, 1982 WL 28866 (Feb. 18, 1982) (“...it is apparently your view that the Proponent exceeded the 200-word limitation...by setting forth additional information under the captions ‘Summary’ and ‘Basis for Motion.’”).

23. Colgate-Palmolive Company, 1979 WL 13834 (Jan. 31, 1979) (“...we do not believe management may rely on [the rule] as a basis for omitting the two ‘Basis for Motion’ or the supporting statements.”); First & Merchants Corporation, 1981 WL 26537 (Feb. 11, 1981) (“This Division is unable to conclude that the ‘Basis for Motion’ is not part of the proposal itself...”); Central Fidelity Banks, Incorporated, 1982 WL 28866 (Feb. 18, 1982) (“It is apparently [the company’s] view that the Proponent exceeded the 200-word limitation on supporting statements by setting forth additional information under the captions ‘Summary’ and ‘Basis for Motion’. This Division is of the view that the additional information under these two captions are a part of the proposal itself, and therefore, includable in the 300-word limitation...”); First Union Bancorporation, 1980 WL 15623 (Feb. 7, 1980) (“It should be noted that the purpose of the word limitations is not to dictate the style or con-

Companies also argued that a title to the supporting statement should count against the word limit. In *Occidental*,<sup>24</sup> the shareholder labeled the submission as a “Statement in Support of Proposals to Appear in the Proxy Statement.” The company asserted that the heading counted against the 200-word restriction.<sup>25</sup> Disagreeing,<sup>26</sup> the staff found that “[a]s long as the title of the supporting statement makes no argument in support of the proposal the words contained in the title need not be counted” against the word limit.<sup>27</sup>

Commission hearings held in the late 1970s uncovered a number of investor concerns with the word limits. Calls arose to increase the threshold, eliminate the restriction entirely, or impose a similar limit on opposition statements by management.<sup>28</sup> Some observers recommended aggregating the separate word limits for both proposals and supporting statements.<sup>29</sup>

In 1983, the Commission ultimately adopted the single word limit for both the proposal and the supporting statement. The amendment provided that submissions could not exceed “an aggregate of 500 words,” with the particular allocation left to “the discretion of the proponent.”<sup>30</sup> The amendments also dropped from the rule the provision that allowed shareholders to include a supporting statement only when management opposed the proposal.<sup>31</sup>

The amendments provided proponents more flexibility in their presentation while lessening the financial burden on issuers.<sup>32</sup> At the same time, the single word limit approach also potentially reduced administrative involvement. With just one threshold, issuers no longer had

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tent of the items submitted by the proponent, buy only to restrict their length in order to prevent other matters in the proxy statement from being obscured.”)

24. *Occidental Petroleum Corporation*, 1979 WL 13517 (Mar. 19, 1979); *Signal Companies, Incorporated*, 1978 WL 13049 (Jan. 25, 1978)

25. *Occidental Petroleum Corporation*, 1979 WL 13517 (Mar. 19, 1979)

26. *Occidental Petroleum Corporation*, 1979 WL 13517 (Mar. 19, 1979) (“It appears to us, however, that the supporting statement does not exceed the 200-word limitation since...the heading to such statement...would [not] be counted.”); *Signal Companies, Incorporated*, 1978 WL 13049 (Jan. 25, 1978) (The staff did not concur with *Signal Companies’* argument, determining the heading of the supporting statement did not count against the 200-word limitation.)

27. *Signal Companies, Incorporated*, 1978 WL 13049 (Jan. 25, 1978)

28. Exchange Act Release No. 17517 (Feb. 5, 1981) (“Commentators at the corporate governance hearings generally favored either eliminating the word limitation entirely, increasing the limit, or placing a similar limitation on management’s opposing statement.”)

29. *Id.* (Proposed amendment to Rule 14a-8: “A proposal and its supporting statement, in the aggregate, shall not exceed 500-words.”)

30. Exchange Act Release No. 19135 (Oct. 14, 1982)

31. *Id.*, Exchange Act Release No. 20091 (Aug. 16, 1983) (Commission adopted all the proposed amendments to the Rule in 1983.)

32. *Id.*, Exchange Act Release No. 17517 (Feb. 5, 1981) (“The Commission believes that the suggestion of the commentators to establish a combined word limit is a positive one. Such a change will afford proponents more flexibility in allocating discussion between the proposal and the supporting statement, and, because the proposed combined word limit is no greater than the total of the two current individual limits, the proposed change should not increase the burden on issuers.”)

an incentive to seek relief by arguing that language in one part of the proposal counted against the other part.

The Commission rewrote the shareholder proposal rule into a Question & Answer format in 1998.<sup>33</sup> The word limitation did not change. In addition to reaffirming the requirement that companies notify shareholders of any violation of the threshold, the amendment provided a grace period of fourteen calendar days, rather than ten business days.<sup>34</sup>

### III. RECENT STAFF INTERPRETATION

The adoption of an aggregate word limit for shareholder proposals simplified the analysis. The allocation between the proposal and the supporting statement ceased to matter. Nonetheless, issues continued to arise with respect to the 500-word limit. In response, the staff developed counting rules that addressed the use of headers, hyphens, numbers and, eventually, pictures, graphs, and web site addresses.

#### A. Headings

The staff's position regarding the inclusion of headings in shareholder proposals has not changed.<sup>35</sup> Titles or headings that include arguments in support of the proposal count toward the word limit;<sup>36</sup> others, such as "Director Election Majority Vote Standard Proposal" and "Political Contribution & Participation Report Proposal" do not.<sup>37</sup>

#### B. Numbers

The limit in the rule applies to "words."<sup>38</sup> As a result, shareholders at one time argued that numbers included in tables did not count against the total.<sup>39</sup> In *Aetna Life and Casualty Company*,<sup>40</sup> however, the staff rejected that position.<sup>41</sup> This interpretation has held consistent since *Aet-*

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33. Exchange Act Release No. 39093 (Sep. 18, 1997) (This amendment made no substantive changes to the 500-word limit; however, the citation was changed to Rule 14a-8(d) Question 4.)

34. *Id.*

35. Staff Legal Bulletin No. 14 (CF) (Jul. 13, 2001) ("Any statements that are, in effect, arguments in support of the proposal constitute part of the supporting statement. Therefore, any "title" or "heading" that meets this test may be counted toward the 500-word limitation.") Also see footnote 27

36. *Id.*

37. Safeway Inc., 2004 WL 393756 (Mar. 1, 2004); Abercrombie & Fitch Co., 2008 WL 670169 (Mar. 10, 2008)

38. American Electric Power Company, 1979 WL 14594 (Feb. 17, 1979) (American Electric Power Company counted every numeric figure as a single word and concluded the supporting statement totaled 314 words. This was the first No-Action letter in which an issuer used such a strategy, however, the staff did not respond to this topic. Exclusion of the proposal was granted under 14a-8(i)(3) because it contained misleading statements.)

39. Aetna Life and Casualty Company, 1995 WL 18740 (Jan. 18, 1995); American Express Company, 1995 WL 18745 (Jan. 18, 1995); New England Electric System, 1996 WL 53817 (1996 WL 53817)

40. Aetna Life and Casualty Company, 1995 WL 18740 (Jan. 18, 1995)

41. *Id.* (As the company argued: "It is the Company's view that, at a minimum, each numeric entry should be counted as a word for purposes of applying the 500-word limitation of Rule 14a-

na.<sup>42</sup> The size of a table has not, however, affected the count.<sup>43</sup> Furthermore, dates expressed in numbers count as three separate words.<sup>44</sup>

### C. Graphs and Images

The language of the rule does not address the inclusion in proposals of pictures, graphs, or other images. The staff has nonetheless regulated their use by counting all words and numbers included in such images. In *Ferrofluidics Corporation*,<sup>45</sup> the shareholder submitted a proposal that included a line graph comparing changes in the company's stock price to the annual pay of the president.<sup>46</sup> The company noted that the graph took up the space of over 100-words and argued that the size of the graph should count against the word limit.<sup>47</sup> The staff rejected this argument but did agree to count the words and numbers used in the graph.<sup>48</sup>

More recently, General Electric challenged the staff interpretation in *Ferrofluidics*. The company received proposals containing color images<sup>49</sup> which included graphs, charts, and emojis.<sup>50</sup> General Electric sought exclusion, arguing that the Rule did not specifically allow the use of images or graphs and that “other than *Ferrofluidics*, [the company] was not aware of any shareowner proposal that contains a graphic or image and has not been properly excluded pursuant to Rule 14a-8.”<sup>51</sup>

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8(a)(4). The basis for this position is that the use of numbers is simply a substitute for the use of words.”).

42. Danaher Corporation, 2010 WL 4922429 (Jan. 19, 2010); Intel Corporation, 2010 WL 197269 (Mar. 8, 2010); (Danaher Corporation and Intel Corporation cited *Aetna Life and Casualty Company* as precedent for counting each number as a single word. The staff concurred with both companies and allowed the omission of each proposal under 14a-8(d).)

43. Aetna Life and Casualty Company, 1995 WL 18740 (Jan. 18, 1995) (“The Company does not contend that the tables used by the Proponent take up space that would otherwise be used by words. Rather, it is the Company’s position that the Proponent’s tables use numeric entries in place of words.”).

44. Union Electric Company, 1986 WL 66600 (Feb. 19, 1986) (“We are unclear why the Company believes that the proposal exceeds 500 words. Our count is only 495 words (including...dates (e.g. December 21, 1984) as three words).”; General Electric Company, 2016 WL 865230 (Mar. 3, 2016), (“We have counted each date that references a day, a month and a year as three words. For example, we have counter “9/11/01” as three words.”).

45. *Ferrofluidics Corporation*, 1992 WL 235093 (Sep. 18, 1992)

46. *Id.*

47. *Id.*

48. *Id.* (In reaching this position, the staff notes that 14a-8(b)(1) only imposed a limitation on the number of words and provides no basis for equating graphic presentations under the rule.)

49. General Electric Company, 2016 WL 7370136 (Jan. 12, 2017) (“The Company received several shareowner proposals last year that included images, one of which consisted of a color photograph of a burning building.”)

50. General Electric Company, 2015 WL 9002923 (Feb. 23, 2016) (Proposal included four graphs and emojis.). General Electric Company, 2016 WL 7370136 (Jan. 12, 2017) (Proposal included an image that took up approximately half a page.); General Electric Company, 2016 WL 7370133 (Feb. 3, 2017) (Proposal included a full page of graphs, charts, equations, and other images.); General Electric Company, 2017 WL 821664 (Feb. 23, 2017) (Proposal included an image that took up a full page.).

51. *Id.* (“Rule 14a-8 is an authorizing provision; absent its express terms, shareowners have no right to include any disclosure in the Company’s proxy statement. Therefore, we respectfully believe that the proper inquiry should not be whether Rule 14a-8 imposes a limitation on a share-

The staff rejected arguments based upon the size of the image, reaffirming *Ferrofluidics*. Moreover, even counting the words and numbers in the chart, the total did not exceed 500. The staff did, however, permit exclusion of the chart as irrelevant under the exclusion for false and misleading disclosure.<sup>52</sup> A Staff Bulletin issued in 2017 reiterated that “the Division is of the view that Rule 14a-8(d) does not preclude shareholders from using graphics to convey information about their proposals.”<sup>53</sup>

#### *D. Hyphenated Words, Dates, and Symbols*

Companies attempted to exclude proposals for exceeding the limit by arguing that hyphenated words or those separated by a slash mark counted twice. The staff initially took the position that words with such symbols only counted once.<sup>54</sup> The position eventually changed. In *Minnesota Mining and Manufacturing*,<sup>55</sup> the company argued the use of hyphenated words or those separated by a slash, (i.e. publicly-owned, and/or, so-called, and democratically-elected) counted as multiple words.<sup>56</sup> The staff agreed.<sup>57</sup>

The staff expanded this interpretation to include dollar signs (\$), percent symbols (%), and others. In *Intel Corporation*,<sup>58</sup> the staff indicated that “we have counted each percent symbol and dollar sign as a separate word.”<sup>59</sup> In 2014, General Electric argued for the inclusion of equal signs (=), at signs (@), and percentage symbols (%).<sup>60</sup> Although not speaking specifically to permissibility of the additional symbols, the staff permitted exclusion of the challenged proposal.<sup>61</sup>

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owner’s ability to include an image in a company’s proxy statement; it should instead have focused on whether Rule 14a-8 authorizes a shareowner proponent to include an image in a company’s proxy statement. The text of Rule 14a-8 and its extensive regulatory history contains no such authorization.”)

52. General Electric Company, 2017 WL 821664 (Feb. 23, 2017) (Relevance Exclusion: Rule 14(a)-8(i)(5)).

53. Staff Legal Bulletin No. 14I (CF) (Nov. 1, 2017)

54. Long Island Lighting Company, 1983 WL 30773 (Feb. 10, 1983) (Long Island Lighting attempted to exclude a proposal for violating the rule. The staff counted each hyphenated word as one against the limit); Union Electric Company, 1986 WL 66600 (Feb. 19, 1986) (“Hyphenated words are not counted as two words for the purposes of the 500-word limitation.”).

55. Minnesota Mining and Manufacturing, 2000 WL 233143 (Feb. 27, 2000)

56. *Id.* (Minnesota Mining and Manufacturing argued the proponent has failed to comply with the Commissions counting rules by counting hyphenated words and words separated by a “/” as single words.)

<sup>56</sup> *Id.*

57. *Id.* (i.e. counting a hyphenated word as two separate words.)

58. Intel Corporation, 2010 WL 197269 (Mar. 8, 2010)

59. *Id.*

60. General Electric Company, 2014 WL 7507324 (Dec. 30, 2014)

61. *Id.*; General Electric Company, 2016 WL 865230 (Mar. 3, 2016) (Additionally, GE stated it had counted each emoji used in the proposal as a single word. The staff, however, did not address this issue and permitted exclusion because the submission deadline had expired under 14a-8(e)(2)).

### E. Web Site Addresses

The staff has also addressed the application of the word limit to URLs and the content posted on the Internet. In *Templeton Dragon*,<sup>62</sup> the proponent included a reference to an Internet site in the supporting statement.<sup>63</sup> The company argued the proposal must also include the content of the web site, thereby causing the submission to exceed the word limit.<sup>64</sup> The staff instead permitted exclusion of the Internet site.<sup>65</sup>

The staff altered this position in *Electronic Data Systems*.<sup>66</sup> There, the proponent refused to omit a web site address from the proposal. As a result, Electronic Data Systems sought exclusion of the entire proposal.<sup>67</sup> The proponent, however, argued that the “intent of the 500-word limit is to keep costs reasonable and to keep from obscuring other important matters” and that “including the address of an Internet site . . . will not raise the cost or obscure other important matters . . . .”<sup>68</sup> The staff accepted the argument and allowed the proponent to retain the web site address.<sup>69</sup>

Web site addresses count as single words.<sup>70</sup> The staff does not include the content of the web site as part of the proposal.<sup>71</sup> The staff has only allowed for the exclusion of a web site address that refers to materially false or misleading information.<sup>72</sup> Proposals routinely include a web site address as a tool for providing additional information beyond the supporting statement

## IV. ANALYSIS

Rule 14a-8 has become an important mechanism in the corporate governance process. Shareholders routinely submit proposals on topics ranging from environmental concerns to corporate governance issues.<sup>73</sup> The word limitation, however, imposes a significant restriction on pro-

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62. Templeton Dragon Fund, Inc., 1988 WL 337469 (Jun. 15, 1998)

63. *Id.*

64. *Id.* (Templeton Dragon argued that allowing the inclusion of web site addresses subverts the proxy process because the content of the site may be altered at will.)

65. *Id.*; The Emerging Germany Fund, Inc., 1998 WL 890121 (Dec. 22, 1998) (Company argued that inclusion of web site “subvert[ed] the intent of the 500-word limit.”).

66. Electronic Data Systems Corporation, 2000 WL 354383 (Mar. 24, 2000) (The web site address included by the shareholder was not a web site managed by Electronic Data Systems.)

67. *Id.* (Company cited *The Emerging Germany Fund, Inc.* and *Templeton Dragon Fund* No-action letters in its response to the SEC.)

68. *Id.*

69. *Id.*

70. *Id.* (“Because we count a web site address as one word for purposes of the 500-word limitation, we do not believe that a web site address raises the concern that rule 14a-8(d) is intended to address.”).

71. Staff Legal Bulletin No. 14 (Jul. 13, 2001)

72. *Id.*

73. J. Robert Brown, Jr., *Corporate Governance, Shareholder Proposals, and Engagement Between Managers and Owners* (The CLS Blue Sky Blog, May 15, 2017), <http://clsbluesky.law.columbia.edu/author/j-robert-brown-jr/>



ponents, potentially interfering with communications between management and shareholders.

The current Rule can also prevent shareholders from actually including drafts of the relevant bylaws. Because of the length of some bylaws, a proposal including an actual draft of the provision with the actual language of a bylaw would, in at least some instances, exceed the word limit or eliminate the ability to include a supporting statement.<sup>74</sup> In those circumstances, shareholders will have the ability only to include a broad summary of the intended changes.

In *Windstream*,<sup>75</sup> for example, a shareholder submitted a proposal seeking the adoption of a bylaw that would allow shareholders to call a special meeting. Given the limit on shareholder proposals, the submission only contained a summary of the bylaw amendment.<sup>76</sup> In the proxy statement, the company included the actual text of a similar provision, along with a supporting statement. The company's version took up 3,056 words, or more than six times the word limit imposed on proponents.<sup>77</sup>

The inability to include an actual version of the bylaw disadvantages shareholders. Even when receiving majority support, a proposal containing only a summary will leave significant drafting discretion to management.<sup>78</sup> Management could potentially add provisions to the bylaw that the proponent would not have supported.

At the same time, some limit on length remains important to the proper functioning of Rule 14a-8. Without a limit, companies would incur the high costs of shareholder proposals that take up excessive space. While many proponents stay within a reasonable word count even absent a limit, the history of Rule 14a-8(d) suggests that not all will do so.<sup>79</sup>

One possible compromise that would address concerns from both issuers and shareholders would entail a change in the Commission's interpretation of the use of web sites. A shareholder unable to include the exact language of a bylaw because of the word limit could be allowed to do so using a URL and include a link in the proposal. The result would not result in extra length to the proxy materials but would provide the

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74. See Sullivan & Cromwell, LLP, *Proxy Access Bylaw Developments and Trends* (Aug. 18, 2015), [https://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_Proxy\\_Access\\_Bylaw\\_Developments\\_and\\_Trends.pdf](https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Proxy_Access_Bylaw_Developments_and_Trends.pdf). (Annex B contains an example of a proxy access bylaw that would allow eligible shareholders to nominate others for election to the board of directors. This example exceeds 3,900 words in total.)

75. *Windstream Holdings, Inc.*, 2015 WL 66518 (Mar. 5, 2015)

76. *Id.*

77. *Id.*

78. Most proposals request rather than require management to act. Including the actual language of the bylaw in those types of proposals would not bind the company. Nonetheless, they would provide influential guidance when management considered the actual text of the bylaw.

79. Exchange Act Release No. 9343 (Jul. 7, 1976) "There have been two occasions in which proposals exceeding 3,000 words in length have been submitted."

actual language for use by management in adopting a bylaw. The staff would need to provide, however, that such language was part of the proposal and therefore approved by shareholders.<sup>80</sup> To permit this approach, the SEC would have to overturn the current position and deem language of a web site a part of the proposal that did not count against the word limitation.

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80. Staff Legal Bulletin No. 14 (Jul. 13, 2001)

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