

THE STATE OF THE STATE LAW EXCLUSION UNDER RULE 14A-8(I)(1)

I. INTRODUCTION

Rule 14a-8 of the Securities Exchange Act of 1934 (Rule) requires public companies to include stockholder proposals in its proxy statements. The Rule, however, contains thirteen substantive grounds for exclusion.¹ Subsection (i)(1) permits exclusion if “the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company’s organization.”²

Regarding the first exclusion inserted into the Rule, the Securities and Exchange Commission (SEC or Commission) originally sought to ensure that the rights of stockholders coincided with state law.³ State law, therefore, determined the eligibility of a proposal.⁴ Commonly omitted proposals included those mandating the compensation of officers and directors,⁵ infringing on shareholder rights to approve amendments to the articles,⁶ and mandating the board take the steps necessary to achieve a sale or merger.⁷ In at least some cases, however, the Commission declined to apply the exclusion to proposals that contained precatory rather than mandatory language.

This article will first examine the administrative history of Rule 14a-8(i)(1). The next section will focus on staff interpretations through no action letters, particularly those addressing the conflict between mandatory and precatory language in shareholder proposals. The last section will critique the state law exclusion and suggest possible reforms in the SEC staff’s interpretation of the provision.

1. 17 C.F.R. § 240.14a-8 (2012); Exchange Act Release No. 4185, 1948 WL 28695 (Nov. 5, 1948); Exchange Act Release No. 40018, 1998 WL 254809 (May 21, 1998).

2. 17 C.F.R. § 240.14a-8(i)(1) (2012).

3. David C. Bayne, *The Basic Rationale of Proper Subject*, 34 U. DET. L. J. 575, 575-614 (1956-1957).

4. Exchange Act Release No. 4979, 1954 WL 5772 (Jan. 6, 1954).

5. See *Richford Industries, Inc.*, SEC No-Action Letter, 1973 WL 8244, at *4 (Apr. 16, 1973); see *infra* 45-46 and accompanying text.

6. See *Columbia Broadcasting Systems, Inc.*, SEC No-Action Letter, 1974 WL 8433, at *6 (Feb. 18, 1974); see *infra* notes 45, 70-71.

7. See *First United Financial, Corp.*, SEC No-Action Letter, 1975 WL 9255, at *11 (Mar. 31, 1975); see also *Harnischfeger Corp.*, SEC No-Action Letter, 1981 WL 25532, at *1 (Dec. 15, 1981); see *infra* note 58.

II. ADMINISTRATIVE HISTORY

As originally adopted, Rule 14a-8 permitted the exclusion of proposals considered an improper subject for shareholder action.⁸ To resolve uncertainty in the meaning of the language, the staff specified that the exclusion applied only to matters not permitted under state law.⁹ Owners could submit proposals to address “such matters relating to the affairs of the company . . . as are proper subjects for stockholders’ action under the laws of the state under which it is organized.”¹⁰

Companies could not, however, rely on state law to impose procedural limitations on the availability of the Rule. In *SEC v. Transamerica Corp.*,¹¹ the bylaws of the company authorized management to draft the notice of the meeting. Shareholders could only vote on matters included in the notice. To the extent a proposal did not appear in the notice, the matter could “never come before the stockholders’ meeting with complete correctness.”¹² Management sought to exclude any shareholder proposal not included in the notice.

The SEC challenged the practice.¹³ In upholding the Rule, the court found that the SEC could override state law in carrying out the congressional policy embodied in the Securities Exchange Act of 1934.¹⁴ As a result, companies could not use the articles or bylaws to prevent the inclusion in the proxy statement of proposals that otherwise addressed “subjects in respect to which stockholders have the right to act under state law”¹⁵

8. Exchange Act Release No. 3347, 1942 WL 34864 (Dec. 19, 1942) (adopting Rule X-14a-7). In 1957, the exclusion was renumbered to X-14a-8(a) and read, “If a qualified security holder of the issuer has given management reasonable notice of his intention to present for action at a meeting of security holders of the issuers a proposal which is a proper subject for action by the security holders...” *Id.* See Exchange Act Release No. 3998, 1947 WL 25504 (Oct. 10, 1947); see also Exchange Act Release No. 4979, 1954 WL 5772 (Jan. 6, 1954). In 1954, the exclusion was renumbered to 14a-8(c)(1) and rewritten. The language was changed to, “[management may omit the proposal from its proxy statement] [i]f the proposal as submitted is, under the laws of the issuer’s domicile, not a proper subject for action by security holders.” *Id.*

9. OPINION OF BALDWIN B. BANE, Director of its Corporation Finance Division, Exchange Act Release No. 3638, 1945 WL 27415 (Jan. 3, 1945).

10. OPINION OF BALDWIN B. BANE, Director of its Corporation Finance Division, Exchange Act Release No. 3638, 1945 WL 27415 (Jan. 3, 1945); see also *SEC v. Transamerica Corporation et al.*, 163 F. 2d 511, 513 (3d Cir. 1947), cert denied, 332 U.S. 847 (1948) (“Speaking broadly, it is the position of the Commission that ‘a proper subject’ for stockholder action is one in which the stockholders may properly be interested under the law of Delaware”); see also Frank D. Emerson and Franklin C. Latham, *The Corporate Gadfly*, 19 CHI L. REV. 807, n.4 (1952).

11. *SEC v. Transamerica Corporation et al.*, 163 F. 2d 511, 513 (3d Cir. 1947), cert denied, 332 U.S. 847 (1948).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Supra* note 12. The court found the shareholder’s proposals for the selection of auditors, locations for annual shareholder meetings, and post-meeting reports were proper subjects for action under Delaware Corporate law.

Although companies could not impose procedural mechanisms to preclude use of the Rule, state law continued to control the substantive content of proposals.¹⁶ Shareholder proposals sometimes contained subject matter that arguably conflicted with state law but merely advised rather than mandated board action.¹⁷ Because state law permitted advisory matters, the staff often denied exclusion of these proposals.¹⁸ Recommendations made by shareholders included proposals calling for the presence of an auditor at security holder meetings,¹⁹ requesting that directors give consideration to reducing salaries of officers and members of the board,²⁰ and asking that the company include reports to security holders.²¹

The SEC ultimately amended the provision to explicitly add the connection to state law. Through its amendment, the SEC sought to permit the exclusion where the pursued actions could not be “taken at the meeting” under the laws of the issuer’s domicile.²² Some commenters saw the effort as an attempt to overturn *Transamerica* and allow management to use bylaws to prevent the introduction of proposals.²³ The SEC adopted the amendment and specifically provided that the standard remained consistent with the court’s interpretation in *Transamerica*.²⁴ The adopting release further clarified that management had the burden of showing a proposal violated the laws of an issuer’s domicile.²⁵

16. David C. Bayne, Mortimer M. Caplin, Frank D. Emerson, and Franklin C. Latham, *Proxy regulation and the Rule-Making Process: The 1954 Amendments*, 40 VA L. REV. 387, 401 n.4 (1954).

17. State law authorized advisory proposals. See *Miller v. Vanderlip*, 633 N.E.2d 51, 54 (N.Y. 1941) (While the directors owe a duty to all of the stockholders to act only according to their best judgment, there is no reason why any stockholder . . . may not urge upon the board considerations in favor of or opposed to a proposed course of action in the interest of the company . . . To listen to the arguments advanced by others is not to abandon discretion or judgment in the premises, but merely to weigh as many factors as possible”); see also *Continental Securities Co. v. Belmont*, 206 N.Y. 7, 16, 99 N.E. 138, 141 (1912).

18. Frank D. Emerson and Franklin C. Latham, *The Corporate Gadfly*, 19 CHI L. REV. 807, 811 n.4 (1952).

19. *Id.* at 814.

20. *Id.* at 819.

21. *Id.* at 826.

22. Exchange Act Release No. 4979, 1954 WL 5772 (Jan. 6, 1954) (“The present Rule provides for submission of proposals which are proper subjects for action by security holders but does not specifically provide that state law is the standard for determining what is a proper subject for such action. In a prior release, however, the Commission has so stated. . . . To clarify this point, the amended Rule specifically provides that a security holder’s proposal may be omitted from the management proxy material if it is one which, under the laws of the issuer’s domicile, is not a proper subject for action by security holders”).

23. Exchange Act Release No. 4979, 1954 WL 5772 (Jan. 6, 1954).

24. Exchange Act Release No. 4979, 1954 WL 5772 (Jan. 6, 1954) (“The Commission wishes to make it clear that it considers [the state law] standard consistent with the decision of the Court of Appeals in the case of *S.E.C. v. Transamerica Corporation*”).

25. Exchange Act Release No. 4979, 1954 WL 5772 (Jan. 6, 1954). The Commission amended the Rule to provide a security holder’s proposal is determined proper “under the laws of the issuer’s domicile.” Another amendment required that management seeking to omit a proposal, had to submit an opinion of counsel. The opinions required a “citation to controlling authority” which in at least one case, counsel failed to include. See also Thomas M. Clusserath, *Amended Stockholder*

The exclusion left the Commission with the need to interpret state law,²⁶ something often complicated by the presence of competing opinions from proponents and issuers.²⁷ In one instance, a company's counsel "vigorously attacked"²⁸ a proposal which sought the adoption of a bylaw mandating cumulative voting²⁹, asserting that the certificate of incorporation did not allow the practice and, as a result, the proposal would have no legal effect.³⁰ The Commission, however, found that, while bylaws generally could not contradict provisions in the charter, the attorney general of the state had concluded that companies could not bar cumulative voting in their certificates of incorporation.³¹

In other instances, management provided only "perfunctory conclusions" and instead relied on the SEC's diligence.³² The Commission continued to conduct independent analyses of relevant state law issues. As the Chairman of the SEC noted, "[the] proxy rules would quickly fall into hopeless confusion if [the SEC] relied solely upon the arguments and opinions of counsel."³³ The Commission's approach generated risks, however. Companies not providing thorough analysis would sometimes fail to sustain the burden of proof and obtain exclusion of the proposal.³⁴

The form of a proposal occasionally impacted the staff's analysis. The staff continued the practice of declining to exclude non-binding, advisory proposals. In *Rogers Brothers Company*,³⁵ the shareholder requested that the board consider an amendment to the certificate of incor-

Proposal Rule: A Decade Later, 40 Notre Dame L. Rev. 13, 32-3 (1964) (citing Div. Let., August 9, 1955).

26. *Hearings on Problems in Enforcing the Securities Laws Before a Subcommittee of the Senate Committee on Banking and Currency*, 85th Cong., 1st Sess. 117-118 (1957) ("In the absence of a state statute establishing that a proposal is a proper subject for stockholder action the Commission will rely on the common law if this can be ascertained. It will also consider other sources such as the corporate laws of other states, particularly of the leading commercial states, as well as the decisions of the Federal courts, textbooks, law journals and other similar material where the question may be discussed").

27. Thomas M. Clusserath, *Amended Stockholder Proposal Rule: A Decade Later*, 40 NOTRE DAME L. REV. 13, 33 (1964) ("more frequently than not, counsel is unable to furnish us with a citation to controlling authority . . . the administration of this aspect of our proxy rules would quickly fall into hopeless confusion if we relied solely upon the arguments and opinions of counsel").

28. Thomas M. Clusserath, *Amended Stockholder Proposal Rule: A Decade Later*, 40 NOTRE DAME L. REV. 13, 33 (1964); see COM. MIN., March 30, 1959; DIV. MEMO. of March 27, 1959, and LET. of March 31, 1959.

29. Cumulative voting is a system of election in which a shareholder may multiple her shares by the number of candidates, and vote those shares for one candidate or varying shares to multiple candidates.

30. Thomas M. Clusserath, *Amended Stockholder Proposal Rule: A Decade Later*, 40 NOTRE DAME L. REV. 13, 33 (1964) (citing 191 COM. AND FINANCIAL CHRONICLE 1825 (1960)).

31. See *supra* note 30.

32. *Proxy Rule 14a-8: Omission of Shareholder Proposals*, 84 HARV. L. REV. 700, 717 (1971).

33. See *supra* note 30.

34. Thomas M. Clusserath, *Amended Stockholder Proposal Rule: A Decade Later*, 40 NOTRE DAME L. REV. 13, 33 (1964); see UU, COM. MINUTES, March 1, 3, and 4, 1960.

35. *Rogers Brothers Co.*, SEC No-Action Letter, 1973 WL 8272, at *6 (Oct. 10, 1973).

³⁵ *Id.* at 6-7.

poration to provide for cumulative voting. The company argued that the proposal did not provide for the requisite director action necessary to amend the certificate of incorporation and therefore violated state law.³⁶ The staff declined to permit exclusion where the proposal merely requested, rather than commanded, an amendment to the certificate.³⁷

Moreover, shareholders sometimes prevented omission by revising a proposal.³⁸ On numerous occasions, the Commission declined to allow reliance on the exclusion after a shareholder agreed to alter a proposal.³⁹ For example, in *CBS, Inc.*, a proposal sought to require the company to establish a committee to supervise operations.⁴⁰ The company took the position that the proposal intruded on the discretionary authority granted to the board.⁴¹ The stockholder revised the form to be construed as a recommendation rather than a mandate.⁴² As a result, the staff declined to apply the exclusion.⁴³

The staff, however, did not always permit revisions. Revisions were not allowed where a proposal would still be subject to omission under other exclusions.⁴⁴ Nor did the staff permit revisions that addressed matters within the "exclusive responsibility of the Board of Directors."⁴⁵ Additionally, revision could not cure matters that violated a fundamental principle of state law.⁴⁶ In one instance, the staff permitted a company to

36. *Id.*

37. *Id.*

38. The staff has long permitted revisions under the exclusion. See Frank D. Emerson and Franklin C. Latcham, *The Corporate Gadfly*, 19 CHIL. REV. 807, 811 n.4 (1952).

39. *Marathon Oil Co.*, SEC No-Action Letter, 1974 WL 8858, at *5 (Mar. 18, 1974); *CBS Inc.*, SEC No-Action Letter, 1975 WL 9873, at *4-5 (Feb. 21, 1975); *American Fletcher Corp.*, SEC No-Action Letter, 1976 WL 11007, at *9 (Mar. 8, 1976).

40. *CBS Inc.*, SEC No-Action Letter, 1975 WL 9873, at *4 (Feb. 21, 1975).

41. *Id.*

42. *Id.*

43. *Id.* The staff acknowledged they generally would have agreed with the company's view if not for the shareholder's revision

44. See *St. Louis-San Francisco Railway Co.*, SEC No-Action Letter, 1975 WL 9438, at *7 (Mar. 3, 1975); *Levitz Furniture Corp.*, SEC No-Action Letter, 1975 WL 9899, at *7 (Mar. 13, 1975); *General Motors Corp.*, SEC No-Action Letter, 1975 WL 9254, at *12 (Mar. 25, 1975); *Richford Industries, Inc.*, SEC No-Action Letter, 1975 WL 9916, at *7 (Apr. 2, 1975); The addition of the ordinary business exclusion eliminated an entire area of advisory proposals without a clear standard as to what constituted "ordinary business" of a company. see Exchange Act Release No. 4979, 1954 WL 5772 (Jan. 6, 1954). Rule 14a-8(c)(5) states that a proposal may be omitted if the proposal deals with a matter relating to the company's ordinary business operations. see 17 CFR 240.14a-8(c)(5).

45. *Rogers Brothers Co.*, SEC No-Action Letter, 1973 WL 8272, at *4 (Oct. 10, 1973) The proposal required an amendment to the company's certificate of incorporation, which the Board had to initiate. Additionally, the amendment dealt with the nature of stock splits and dividends, an area the Commission noted as the exclusive responsibility of the board.

46. *Exxon Corp.*, SEC No-Action Letter, 1976 WL 10931, at *25 (Feb. 4, 1976) ("[Adoption of the proposal] would be contrary to the spirit and intent of certain provisions of the [state] business Corporation Act").

exclude a proposal, without revision, which disenfranchised certain institutional stock holders by retroactively limiting their voting rights.⁴⁷

The Commission ultimately revised the Rule to clarify the right of shareholders to modify proposals under the exclusion. The exclusion would no longer apply to proposals “as submitted” and did not, therefore, bind the proponent to “the original text.”⁴⁸ Instead, revisions could occur “in those instances in which a non-substantive change [would] bring it into compliance with the applicable state law.”⁴⁹ The Commission also added a note clarifying that a proposal “may be improper under the applicable state law when framed as a mandate or directive” but “proper when framed as a recommendation or request.”⁵⁰

Although expressly allowing for revision, the staff continued to permit exclusion without an opportunity to cure to the extent that a proposal conflicted with fundamental provisions of state law, regardless of the form.⁵¹ Moreover, critics of the note argued that the approach focused more on form rather than substance.⁵² The Commission agreed that the Note gave a “misleading impression”⁵³ and revised the language in 1983.⁵⁴ The amended language specified that the form only affected the

47. See *Exxon Corp.*, SEC No-Action Letter, 1976 WL 10931, at *25 (Feb. 4, 1976) (“[The proposal] would require the Company to disenfranchise certain institutional shareholders by retroactively limiting their voting rights. As [the company’s] counsel points out. . . this would be contrary to the spirit and intent of certain provisions of the [state law]”).

48. *Id.*

49. Exchange Act Release No. 12598, 1976 WL 160410 (July 7, 1976).

50. Exchange Act Release No. 12598, 1976 WL 160410 (July 7, 1976) (In adding the Note to the exclusion, the Commission aimed to clarify that “the board may be considered to have exclusive discretion in corporate matters absent a specific provision to the contrary in the [state] statute itself, or the corporation’s charter or by-laws. Accordingly, proposals by security holders that mandate or direct the board to take certain action may constitute an unlawful intrusion on the board’s discretionary authority under the typical [state] statute . . . however, proposals that merely recommend or request that the board take certain action would not appear to be contrary to the typical state statute, since such proposals are merely advisory in nature and would not be binding on the board even if adopted by a majority of the security holders”); see *supra* note 12 (“It was the intent of Congress to require fair opportunity for the operation of corporate suffrage”).

51. *First Empire State Corp.*, SEC No-Action Letter, 1978 WL 13055, at *7 (Jan. 26, 1978). The staff found a proposal which required security holders to specifically mark their proxies for or against a matter in order to count their vote, would, if implemented, unlawfully limit security holders’ ability to give a discretionary proxy, thereby violating state law.

52. Exchange Act Release No. 20091, 1983 WL 33272 (Aug. 16, 1983). After the 1976 amendments to the Rule, the staff often allowed for the revision of proposals that mandated board action.

53. SEC Historical Society, Outline for the Revision of Rule 14a-8, (June 7, 1983), available at http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cfl.rackcdn.com/collection/papers/1980/1983_0607_Revision14a8.pdf. (“While we continue to believe that this interpretive position is correct, we would concur in the commenters suggestion to remove the Note. Our position in this regard is based upon a conclusion that the language of the Note gives the misleading impression that our interpretation is based solely on the form of the proposal as opposed to a legal analysis of the proper application of the state statute involved.”)

54. The amended Note recognized that “[u]nder certain states’ laws, a proposal that mandates certain action by the issuer’s board of directors may not be a proper subject matter for shareholder action, while a proposal recommending or requesting such action of the board may be proper under such state laws;” see Exchange Act Release No. 20091, 1983 WL 33272 (Aug. 16, 1983).

validity of a proposal under state law and not the Commission's application of the exclusion.⁵⁵

By the 1980s, the subsection had largely fallen into disuse.⁵⁶ The staff permitted exclusion in a few instances, including proposals which called for a change to the process of electing directors⁵⁷ or that mandated the establishment of a shareholder representative committee to review the activities of the board.⁵⁸ The staff continued to permit shareholders to change mandatory proposals to advisory proposals.⁵⁹

The Commission rewrote the Rule in plain English in 1998, employing a question and answer format.⁶⁰ With respect to the exclusion, the Commission rephrased "the state of the company's incorporation"⁶¹ to "the laws of the jurisdiction of the company's organization," thereby expressly including unincorporated entities.⁶² Otherwise, the amendments did not substantively change the provision.⁶³

55. Exchange Act Release No. 20091, 1983 WL 33272 (Aug. 16, 1983).

56. SEC Historical Society, Shareholder Proposal Memorandum, (Nov. 16, 1983) available at http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1983_1116_StatisticalShareholder.pdf.

In 1983, out of the total excluded proposals, only 1.06% were excluded as improper under state law. In 1958, 15.68% of proposals were excluded as improper under state law. See Securities and Exchange Commission, 24th Annual Report of the Securities and Exchange Commission, (Jan. 5, 1959) available at https://www.sec.gov/about/annual_report/1958.pdf; A few years later, the number of proposals excluded rose to 36.36%. See Securities and Exchange Commission, 24th Annual Report of the Securities and Exchange Commission, (Jan. 10, 1962) available at https://www.sec.gov/about/annual_report/1961.pdf.

57. *Xerox Corp.*, SEC No-Action Letter, 1993 WL 93596, at *1 (Mar. 26, 1993). The staff noted that the proposal was improper under the laws of the issuer's domicile because it called for elections other than an annual basis and did not comply with New York law which required two or three-year terms. Counsel for Xerox also argued the proposal required the board of directors to abdicate its fiduciary duty to choose the best qualified candidates for nominees as directors.

58. *Pennzoil Corp.*, SEC No-Action Letter, 1993 WL 87871, at *4-5 (Mar. 22, 1993). The committee required the expenditure of corporate funds without the consent of the board, and the staff deemed the proposed bylaw inconsistent with Delaware law.

59. See *Barnett Banks, Inc.*, SEC No-Action Letter, 1993 WL 530070, at *1 (Dec. 22, 1993); *Bernard Chaus, Inc.*, SEC No-Action Letter, 1994 WL 483882, at *10 (Sep. 6, 1994); *Goldfield Corp.*, SEC No-Action Letter, 1995 WL 87937, at *1 (Mar. 2, 1995); *Templeton Global Income Fund*, SEC No-Action Letter, 1996 WL 800579, at *1-2 (Dec. 19, 1996); *Union Electric Co.*, SEC No-Action Letter, 1997 WL 33776, at *1 (Jan. 22, 1997).

60. Exchange Act Release No. 40018, 1998 WL 254809 (May 21, 1998).

61. Exchange Act Release No. 39093, 1997 WL 578696 (Sept. 18, 1997) ("In current paragraph (c)(1) . . . the reference to the 'laws of the issuer's domicile' would be replaced by a reference to 'the laws of the state of the company's incorporation,' which we have applied to have the same meaning").

62. The Commission broadly implies that the scope of the rule included unincorporated entities before the revision. See Exchange Act Release No. 40018, 1998 WL 254809 (May 21, 1998) ("...commenters stated, and we agree, that the reference to 'the state of the company's incorporation' may appear narrower than the actual scope of the rule...").

63. The state law exclusion was renumbered as 14a-8(i)(1).

III. STAFF INTERPRETATIONS AFTER 1998 TO PRESENT DAY

Since the 1998 amendments, the Commission has rarely employed the exclusion. In an eighteen-year span, the staff addressed (i)(1) approximately four-hundred times.⁶⁴ The SEC allowed the exclusion with the option to revise in eighty-five instances.⁶⁵

Only a limited number of proposals have been excluded without the right to revise.⁶⁶ The staff noted that companies often provided comprehensive opinions of counsel about those proposals which were excluded.⁶⁷ Types of proposals omitted without revision involved shareholder approval of an advisory contract in violation of Section 15 of the Investment Company Act of 1940,⁶⁸ the restoration of the voting rights of a shareholder,⁶⁹ and the delegation of authority to shareholders over a rights plan.⁷⁰

The most frequent basis for exclusion of proposals without the right to revise involves calling for a special meeting or for the addition of items to the agenda of a special meeting.⁷¹ State law requires that the notice of a special meeting include the meeting's purpose.⁷² Only matters

64. Using search terms “(14A-8(i)(1) /20 “appears to be some basis”) & DA(aft 12-31-1998) and (14A-8(i)(1) /20 “unable to concur”) & DA(aft 12-31-1998).

65. See *No Action Letter Spreadsheet*.

66. From 1973 to 2017, only thirty proposals were excluded without the right to revise with the majority of proposals excluded before the 1980's. Since the 1998 amendments, the staff permitted exclusion without the right to revise for eight. See *Omitted Proposals Spreadsheet*.

67. See *infra* notes 64-65; see also *Fleet Financial Group*, SEC No-Action Letter, 1999 WL 231186, at *2 (Apr. 20, 1999); *AlliedSignal Inc.*, SEC No-Action Letter, 1999 WL 528851, *1-2 (July 22, 1999); *J.P. Morgan and Co. Inc.*, SEC No-Action Letter, 2000 WL 1877573, at *2 (Dec. 22, 2000); *Clayton Homes Inc.*, SEC No-Action Letter, 2003 WL 21362245, at *3 (June 6, 2003).

68. *Ellsworth Convertible Growth and Income Fund*, SEC No-Action Letter, 2000 WL 34027283, at *1 (Sep. 1, 2000) (In [the Commission's] view, the proposal may divest the board of directors of its ability to approve the continuance of the advisory contract. That is, if the board of directors has approved the continuance of an advisory contract, but shareholders do not approve the continuance, as required by the bylaw, then the continuance of the contract would not be approved, and the board's approval would be nullified”).

69. *Badger Paper Mills Inc.*, SEC No-Action Letter, 2000 WL 348371, at *7 (Mar. 15, 2000). The staff noted the opinion of counsel in their decision. Counsel argued “in order to restore voting rights under [state law] to shares of Company common stock owned by another shareholder . . . such a resolution must be submitted by the holder of the shares whose full voting power is proposed to be restored.” *Id.*

70. *Novell Inc.*, SEC No-Action Letter, 2000 WL 223715, at *1-6 (Feb. 14, 2000). The staff noted the opinion of counsel in their decision. Counsel urged the proposal violated state law because the board had exclusive authority to manage the company; the adoption, use, or redemption of a rights plan was in the exclusive province of the board; and the proposal required the expenditure of corporate funds.

71. *AlliedSignal Inc.*, SEC No-Action Letter, 1999 WL 528851, *1-2 (July 22, 1999) The inclusion of the shareholder proposal at a special meeting is an improper subject for action under Delaware General Corporation Law §§ 211 and 222(a).

72. *Fleet Financial Group*, SEC No-Action Letter, 1999 WL 231186, at *2 (Apr. 20, 1999); *AlliedSignal Inc.*, SEC No-Action Letter, 1999 WL 528851, *1-2 (July 22, 1999); *J.P. Morgan and Co. Inc.*, SEC No-Action Letter, 2000 WL 1877573, at *2 (Dec. 22, 2000); *Clayton Homes Inc.*, SEC No-Action Letter, 2003 WL 21362245, at *3 (June 6, 2003); *XTO Energy Inc.*, SEC No-Action Letter, 2010 WL 810290, at *1 (Mar. 4, 2010); MBCA §8.22. NOTICE OF MEETINGS.

appearing in the notice can generally be considered at the meeting.⁷³ The staff, therefore, apparently agreed with issuer arguments that state law prevented the introduction of shareholder proposals unrelated to the subject of the special meeting.⁷⁴

Following the 1998 amendments, the staff continued to permit revisions, though in declining numbers. In 2003, eleven shareholders had the opportunity to revise. By 2010, the number fell to five shareholders. In both 2016 and 2017, the SEC permitted the right to revise in only one instance.⁷⁵ The right applied primarily to proposals revised to a recommendation or request. Proposals subject to revision included those which required the board to take the necessary steps to achieve a sale or merger,⁷⁶ dictated employee and non-employee compensation,⁷⁷ directed the election or nomination process of board members,⁷⁸ called for an amendment to the articles of incorporation,⁷⁹ required the board to establish a committee,⁸⁰ or limited the ways in which the board uses corporate funds.⁸¹

The staff has sometimes refused to make a decision in cases where each party's counsel took opposing positions on the meaning of state

73. *AlliedSignal Inc.*, SEC No-Action Letter, 1999 WL 528851, *1-2 (July 22, 1999); MBCA §8.22. NOTICE OF MEETINGS.

74. *Fleet Financial Group*, SEC No-Action Letter, 1999 WL 231186, at *2 (Apr. 20, 1999); *AlliedSignal Inc.*, SEC No-Action Letter, 1999 WL 528851, *1-2 (July 22, 1999); *J.P. Morgan and Co. Inc.*, SEC No-Action Letter, 2000 WL 1877573, at *2 (Dec. 22, 2000); *Clayton Homes Inc.*, SEC No-Action Letter, 2003 WL 21362245, at *3 (June 6, 2003); *XTO Energy Inc.*, SEC No-Action Letter, 2010 WL 810290, at *1 (Mar. 4, 2010).

75. See *NextEra Energy, Inc.*, SEC No-Action Letter, 2016 WL 751722, at *1 (Feb. 24, 2016); see also *PG&E Corp.*, SEC No-Action Letter, 2017 WL 410345, at *1 (Mar. 17, 2017).

76. See *First Bell Bancorp, Inc.*, SEC No-Action Letter, 1999 WL 38286, at *1 (Jan. 28, 1999); *Keystone Financial, Inc.*, SEC No-Action Letter, 1999 WL 141055, at *1 (Mar. 15, 1999). In mandating a sale or merger, the shareholders are infringing in an area where state law commits the to the discretion of the board.

77. See *El Paso Energy Corp.*, 2001 WL 253624, at *5 (Mar. 8, 2001); *PBS Holdings, Inc.*, 2002 WL 201870, at *1 (Jan. 23, 2002); *The Allstate Corp.*, SEC No-Action Letter, 2017 WL 6509014, at *1 (Jan. 17, 2018). The proposals limit the ability of the board to exercise their business judgment as it pertains to matters of employee and director compensation.

78. See *Wachovia Corp.*, SEC No-Action Letter, 2007 WL 465540, at *1 (Feb. 7, 2007). The proposal's requirement that director nominees satisfy certain stock ownership and membership criteria wrongly infringes upon the board's authority.

79. See *The First Bancorp, Inc.*, SEC No-Action Letter, 2010 WL 835407, at *1 (Feb. 25, 2010). Proposal violates state law which states the articles of incorporation may be amended only if the proposed amendment is first adopted by the Company's board of directors and then approved by the requisite vote of the Company's shareholders.

80. See *Goldman Sachs Group Inc.*, SEC No-Action Letter, 2012 WL 6723106, at *1 (Feb. 7, 2012). The proposal mandates the board to establish a committee to enhance the company's corporate policy and practice on human rights in violation of state law which states that the board shall manage the business affairs of the company.

81. See *Archer-Daniels-Midland Co.*, SEC No-Action Letter, 2010 WL 3314702, at *1 (Aug. 18, 2010); *IEC Electronics Corp.*, SEC No-Action Letter, 2012 WL 4341085, at *1 (Oct. 31, 2012); *Target Corp.*, SEC No-Action Letter, 2014 WL 556449, at *1 (Mar. 21, 2014); *NextEra Energy, Inc.*, SEC No-Action Letter, 2016 WL 751722, at *1 (Feb. 24, 2016); *PG&E Corp.*, SEC No-Action Letter, 2017 WL 410345, at *1 (Mar. 17, 2017). Proposal regarding the expenditure of corporate funds falls within the board's responsibility for the management of a corporation's business and affairs.

law.⁸² The staff instead concluded that “neither counsel for [the company] nor the proponent has opined as to any compelling state law precedent.”⁸³ Rather than resolving the dispute, the staff decided not to express a view.⁸⁴ The SEC’s lack of action resulted in issuers sometimes omitting the proposal and proponents seeking court intervention to compel inclusion.⁸⁵

IV. ANALYSIS

Rule 14a-8 permits the exclusion of a proposal that is not a “proper subject for action” under the laws of the jurisdiction of the company’s organization. Although it was the first exclusion to the Rule, this provision has largely been supplanted by others.⁸⁶ Section (i)(2) permits the exclusion of proposals that “violate any state, federal, or foreign law.”⁸⁷ Subsection (i)(7) permits the exclusion of proposals that excessively interfere with the supervisory function of the board of directors.⁸⁸ To the extent it permits exclusion, the staff typically relies on subsections (i)(2) and (i)(7) rather than (i)(1).⁸⁹

The staff’s approach represents an appropriate evolution in the use of the exclusion. Rather than agreeing with an opinion of counsel on state law, which may ultimately be narrowed or overturned, or performing the extensive research into matters not typically within the expertise of the Commission, the staff has in most instances declined to allow for omission under the exclusion.⁹⁰ Nor, given the predominance of advisory

82. *Union Carbide Corp.*, SEC No-Action Letter, 1999 WL 58519, at *1 (Feb. 5, 1999).

83. *Id.*

84. *Id.*

85. *Brief of Petitioner-Appellant, Lucian Bebchuk v. Electronic Arts, Inc.*, 2009 WL 8144050, at *3 (Feb. 25, 2009);

See General Data Comm. Ind., SEC No-Action Letter, 1998 WL 883796, at *1 (Dec. 9, 1998); *Union Carbide Corp.*, SEC No-Action Letter, 1999 WL 58519, at *1 (Feb. 5, 1999); *Community Bancshares, Inc.*, SEC No-Action Letter, 1999 WL 166982, at *1 (Mar. 15, 1999).

86. *See* Megan Livingston, *The “Unordinary Business” Exclusion and Changes to Board Structure*, 93 DENV. L. REV. ONLINE 263 (2016) (“‘Ordinary business’ ultimately came to encompass almost any matter effecting directly or indirectly the business activities of the company whether advisory or mandatory”); *See also* Jason Haubenreiser, *Rule 14a-8 and the Exclusion of Proposals that Violate the Law*, 93 DENV. L. REV. ONLINE 213 (2016) (“Proposals that resulted in violations of articles of incorporation or bylaws also continued to be subject to (i)(2)”).

87. *See* Jason Haubenreiser, *Rule 14a-8 and the Exclusion of Proposals that Violate the Law*, 93 DENV. L. REV. ONLINE 213 (2016) (“Proposals that resulted in violations of articles of incorporation or bylaws also continued to be subject to (i)(2)”).

88. Megan Livingston, *The “Unordinary Business” Exclusion and Changes to Board Structure*, 93 DENV. L. REV. ONLINE 263 (2016) (“‘Ordinary business’ ultimately came to encompass almost any matter effecting directly or indirectly the business activities of the company whether advisory or mandatory”).

89. *See Advanced Photonix, Inc.*, SEC No-Action Letter, 2014 WL 1411041, at *4 (May 14, 2014); *United Technologies Corp.*, SEC No-Action Letter, 2015 WL 9460210, at *8–12 (Jan. 19, 2016); *Empire State Realty Trust, Inc.*, SEC No-Action Letter, 2017 WL 3053641, at *4–6 (Sep. 14, 2017); *Luby’s, Inc.*, SEC No-Action Letter, 2017 WL 4457764, at *1, 4 (Oct. 2, 2017); *3M Company*, SEC No-Action Letter, 2018 WL 348053, at *3–13 (Jan. 8, 2018).

90. *See ITT Corp.*, SEC No-Action Letter, 2015 WL 9319125, at *1 (Jan. 12, 2016); *Caterpillar Inc.*, SEC No-Action Letter, 2017 WL 446952, at *1 (Mar. 28, 2017). When the staff does ad-

proposals, does the staff usually need to permit the right to revise.⁹¹ By providing only advice, precatory proposals do not have to address the requirements of state law with the same level of precision.

Given the lack of its use, the Commission should consider repealing subsection (i)(1). The traditional scope of the provision significantly overlaps with other exclusions in the Rule.⁹² The “ordinary business” exclusion overlaps with (i)(1) to the extent that the exclusion applies to proposals addressing the board of directors’ involvement in the business affairs of the corporation.⁹³ Subsection (i)(1) also overlaps with (i)(2), which applies to proposals violating the law.⁹⁴ Thus, the staff has applied (i)(2) to “proposals that resulted in violations of articles of incorporation or bylaws,”⁹⁵ an area commonly regarded as falling within the scope of (i)(1).

Alternatively, the SEC could explicitly adopt a narrow and objective standard for applying the exclusion. Rather than spend time trying to resolve competing opinions in the absence of controlling statutory or case law,⁹⁶ the Commission could take the position that the exclusion did not apply in the case of legal uncertainty, particularly if phrased as a recommendation.⁹⁷ This approach recognizes, as others have noted, that the staff may not have the expertise required to resolve such disputes.⁹⁸

dress (i)(1), the Commission is often unable to concur that the company may exclude the proposal under the provision.

91. The use of these types of proposals has been criticized. See Paul S. Atkins, Comm’r, U.S. Sec. Exch. Comm’n, *Shareholder Rights, the 2008 Proxy Season, and the Impact of Shareholder Activism*, (Jul. 22, 2008) available at <https://www.sec.gov/news/speech/2008/spch072208psa.htm> (“Many shareholder proposals are characterized as ‘advisory,’ ‘precatory,’ or ‘non-binding’ so as to not run afoul of state corporate laws that generally leave the tactical decisions of running a corporation to its management as overseen by its board of directors. These sorts of proposals often consume a significant amount of management time and attention”).

92. See *supra* notes 61-63.

93. Megan Livingston, *The “Unordinary Business” Exclusion and Changes to Board Structure*, 93 DENV. L. REV. ONLINE 263 (2016) (“The broad interpretation of ‘ordinary business’ has effectively altered the structure of Rule 14a-8. Subsection (i)(1) prohibits proposals that would be improper under state law. Interference in the ‘ordinary business’ can also violate state law. By relying on the ‘ordinary business’ exclusion rather than the ‘improper’ exclusion, however, companies avoid the need for an opinion of counsel and need not make the case that the content of the proposal actually violates state law”).

94. See *supra* note 86.

95. Jason Haubenreiser, *Rule 14a-8 and the Exclusion of Proposals that Violate the Law*, 93 DENV. L. REV. ONLINE 213 (2016).

96. See *supra* note 81 and corresponding discussion; see also Robert J. Brown, *Bring it On: The Delaware Courts Speak on Precatory Proposals under Rule 14a-8*, THE RACE TO THE BOTTOM (May 24, 2007, 6:15 AM), <http://www.theracetothetbottom.org/preemption-of-delaware-law/bring-it-on-the-delaware-courts-speak-on-precatory-proposals-under-rule-14a-8.html#comments>.

97. *Roundtable Discussions Regarding the Federal Proxy Rules and State Corporation Law*, U.S. Securities and Exchange Commission (May 7, 2007), <https://www.sec.gov/spotlight/proxyprocess/proxy-transcript050707.pdf>.

98. Exchange Act Release No. 19,135, 1982 WL 600869, at *19 (Oct. 14, 1982) (“The applicability of [paragraph (i)(1)] . . . to a particular proposal is a matter entirely based on the state, federal or foreign law cited by counsel for the issuer or the proponent in connection with the proposal. It has been suggested that because the Commission’s staff may have no particular expertise with respect to the statutory provisions cited by counsel, it is the courts, and not the staff, that are the

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appropriate forum for resolving disputes as to the legality under state, federal [other than securities laws] and foreign law of an action that is the subject of a security holder Proposal”).

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