Amy C. Seidel
Partner
amy.seidel@FaegreBD.com
Direct **+1 612 766 7769**

Faegre Baker Daniels LLP
2200 Wells Fargo Center ▪ 90 South Seventh Street
Minneapolis ▪ Minnesota 55402-3901
Phone **+1 612 766 7000**
Fax **+1 612 766 1600**

March 6, 2015

Securities and Exchange Commission
Division of Corporation Finance
100 F Street, NE
Washington, DC 20549

Via Email: i9review@sec.gov

Re: Staff Review of Conflicting Shareholder Proposals

Ladies and Gentlemen:

We greatly appreciate the opportunity to offer our comments on recent developments related to the interpretation of Rule 14a-8(i)(9). In particular, we are grateful for Director Higgins's openness to considering the thoughts and concerns of those affected by this issue, as expressed in his February 10, 2015, "Rule 14a-8: Conflicting Proposals, Conflicting Views" speech at the Practising Law Institute Program on Corporate Governance.

We, and many of our clients, have given this matter considerable thought. Attached as Exhibit A to this letter is a blog post on Broc Romanek's thecorporatecounsel.net website that was authored by an in-house lawyer at one of our clients who has more than 20 years of experience dealing with Rule 14a-8.

With the analysis set forth in that blog posting as background, we propose the following points for the Commission's consideration:

1. ***The goal of any interpretation of Rule 14a-8(i)(9) must be to provide certainty as to its application to companies, shareholders, and federal courts.***

   In 2007, the Commission faced a strikingly similar situation with respect to the interpretation of Rule 14a-8(i)(8), which permitted the exclusion of certain shareholder proposals related to the election of directors. Because of a recent decision by the U.S. Court of Appeals for the Second Circuit that did not defer to the Commission's long-standing interpretation, the Commission expressed concern that an "escalating state of confusion" existed that would require shareholders and companies "… to go to court to determine the meaning of the Commission's proxy rules, and it could take years before the U.S. Supreme Court resolved any resulting conflicts between the circuits. Inaction by the Commission would thus promote further uncertainty and leave both shareholders and companies in a position of 'every litigant for himself.' This would benefit neither shareholders nor companies." Release No. 34-56914 (December 6, 2007) at p. 12. *See also*, proposing Release No. 34-56161 (July 27, 2007), especially the Cost-Benefit Analysis at pp. 24-25, expressing the Commission's view that without a clarification of the scope of the exclusion in Rule 14a-8(i)(8), shareholders and companies would incur needless costs, including litigation expenses, with respect to

proposals that were properly excludable. This is now the experience of many companies, including Whole Foods Market, Inc., which determined that it was necessary to postpone its 2015 annual meeting of shareholders until the board determines the appropriate response to the situation.

Notably, in the adopting release the Commission acknowledged that it has "...a fundamental responsibility to make sure that the rules and regulations it adopts have clear meaning so that the regulated community can conform its conduct accordingly. ...It is our intention that this [amendment] will enable shareholders and companies to know *with certainty* whether a proposal may or may not be excluded...It also will facilitate the efforts of the staff in reviewing no-action requests and in interpreting Rule 14a-8 *with certainty* in responding to requests for no-action letters during the 2008 proxy season." (emphasis added throughout) Release No. 34-56914 at p. 12.

The Commission identified three elements that were crucial in adopting an amendment to Rule 14a-8(i)(8) that would provide the certainty it owed to shareholders and companies. That is, the amendment was: clear; concise; and a codification of the Commission's long-standing interpretation of Rule 14a-8(i)(8). Release No. 34-56914 at p. 12. Our comments below are intended to assist the Commission in adopting a clear and concise amendment of Rule 14a-8(i)(9) that both codifies its long-standing interpretation of that rule and provides much needed certainty to the regulated community.

2. ***The first step toward certainty is an answer to this question: "Does a shareholder proposal that directly conflicts with a management proposal and is included in the company's proxy materials constitute a solicitation in opposition for purposes of Regulation 14A?"***

We believe that the answer to this question is "Yes," which explains why the many questions about the potential confusion regarding voting results in such a situation should never occur in the first place. The purpose of Rule 14a-8 is not to facilitate a solicitation in opposition to a management proposal at the expense of other shareholders and without compliance with the proxy solicitation rules. Rather, the purpose of the rule is to allow qualifying shareholders to bring certain subjects to a vote of shareholders *assuming that management does not plan to do so.* The blog post addresses this point and it is a likely explanation for why the SEC amended Rule 14a-8 in 1967 to exclude counter proposals from the scope of the rule with no explanation; that is, it was so well understood that the rule was never intended to allow a shareholder to circumvent the proxy solicitation requirements through the 14a-8 process that the Commission did not believe it merited a request for comment.

Once the Commission has resolved this threshold issue, many of the conflicting opinions and novel questions about the proper interpretation of Rule 14a-8(i)(9) can be disregarded, thereby allowing the Commission's long-standing interpretation of the rule to come into clearer focus for many of those involved in this debate.

3. ***The Commission's interpretation of Rule 14a-8(i)(9) is well established and there is nothing unique to proxy access shareholder proposals that requires a change to that interpretation.***

As Director Higgins pointed out in his February 10, 2015, speech, the Division of Corporation Finance has a "long-standing interpretation permitting omission of a shareholder proposal if the company demonstrates that its *subject matter* directly conflicts with all or part of one of management's proposals." (emphasis in the original). Director Higgins also said that the word "directly" was "not intended to imply that the proposals must be identical in scope or focus for the exclusion to be available." This very practical and straightforward interpretation has not caused any controversy or confusion for nearly half a century. It is certainly not clear why the fact that the subject matter of certain shareholder proposals submitted for the 2015 proxy season involves proxy

access has now subjected so many companies to unfair surprise and uncertainty when citing Rule 14a-8(i)(9) as a basis for exclusion, *regardless of the subject matter of the shareholder proposals.*

It may be useful to note that, as Director Higgins stated in his February 10, 2015, remarks, "The staff has generally agreed that a shareholder proposal conflicts with a management proposal where the inclusion of both proposals in the proxy materials could 'present alternative and conflicting decisions for shareholders and that submitting both proposals to a vote could provide inconsistent and ambiguous results,'" citing EMC Corp. (February 24, 2009). EMC Corp. is worth reading because it illustrates the analytical drift that has carried the away from the core principle underlying the Rule 14a-8(i)(9) exclusion- that a shareholder proposal is excludable if it concerns *the same subject matter* as a management proposal to be included in the proxy statement.

In EMC Corp., the company's legal analysis explains how certain terms and conditions of the shareholder proposal conflict with those in the company's proposal, which is noted in the staff's response. The company's legal analysis cites a string of no-action letters that similarly note the differences in the terms and conditions between shareholder and company proposals as a basis for exclusion under Rule 14a-8(i)(9). This analysis was responsive to the following note added to Rule 14a-8(i)(9) in the 1998 adopting release: "A company's submission to the Commission under this section should specify the points of conflict with the company's proposal." Release No. 34-40018 (May 21, 1998).

In proposing Release No. 34-39093 (September 18, 1997), however, the Commission explained that: "We propose to revise current paragraph (c)(9) to reflect the [Corporation Finance] Division's long-standing interpretation permitting omission of a shareholder proposal *if the company demonstrates that its subject matter directly conflicts with all or part of one of management's proposals*." (emphasis added). The existing wording of Rule 14a-8(c)(9), the predecessor of today's Rule 14a-8(i)(9), at that time actually gave a better sense of the rule's scope, permitting exclusion "If the proposal is counter to a proposal to be submitted by the issuer at the meeting." This language was derived from the 1967 amendment to Rule 14a-8(a) that provided that Rule 14a-8 does not apply "...to counter proposals to any matter to be submitted by the management." Release No. 8206 (December 14, 1967). This history shows that the exclusion was intended to apply to a shareholder proposal that would be an alternative to a proposal to be submitted by management at the same meeting and that concerned the same subject matter.

Certainly, including a shareholder proposal and a company proposal on the same subject matter in the same proxy statement, whether the subject matter is proxy access, board declassification, majority voting for directors, or corporate political spending, would "present alternative and conflicting decisions for shareholders and...submitting both proposals to a vote could provide inconsistent and ambiguous results." EMC Corp. (February 24, 2009). This is true regardless of the number or materiality of conflicting terms and conditions in the proposals.

Accordingly, there is no need for any staff analysis of the terms and conditions of each proposal and whether they "directly conflict." All that a company should have to demonstrate as a basis for exclusion under Rule 14a-8(i)(9) is that the shareholder proposal concerns the same subject matter (*e.g.,* the adoption of a proxy access process) of a company proposal to be submitted to shareholders for a vote at the next annual meeting.

4. ***The Commission should avoid imposing any conditions on the availability of the exclusion under Rule 14a-8(i)(9) that would impair the regulated community's certainty as to the Rule's application.***

To respond to other points raised by Director Higgins in his February 10, 2015 speech, whether a management proposal is mandatory and a shareholder proposal is precatory should not determine whether the proposals directly conflict. The only criterion that should be applied is whether the proposals concern the same subject matter. Putting a mandatory management proposal and a precatory shareholder proposal on the same subject matter in the same proxy statement will only compound the confusion of shareholders being asked to vote on the proposals. As the Commission aims is to avoid presenting alternative and conflicting decisions for shareholders where submitting both proposals to a vote could provide inconsistent and ambiguous results, submitting both mandatory and precatory proposals to a vote will have exactly the opposite effect.

Next, we believe that the argument from Director Higgins's speech that a management proposal made only "in response to" one from a shareholder should not operate to exclude the shareholder proposal is completely without merit. First, determining the reason why a management proposal was put forward would involve the staff in exactly the type of factual determination that results in delays during the no-action process and reduces the regulatory certainty the Commission has promised to companies and shareholders.

Consider this hypothetical situation: A board of directors has monitored developments in the proxy access debate for the last ten years. Seven years ago, it considered adopting a proxy access by-law, which would not have required a vote of shareholders, but decided to await developments. In October 2014, the board's nominating and governance committee placed on its December meeting agenda the question of whether to submit a proxy access proposal to shareholders at its 2015 annual meeting. A shareholder proxy access proposal is received by the November 25 deadline. At its December meeting, the board votes to submit its proxy access by-law proposal to shareholders at its 2015 annual meeting. Was the board's action "in response to" the shareholder proposal? Does the staff want spend hours upon hours of its limited time to make that determination only to have that determination litigated in federal district court? Why does it matter?

We also urge the Commission to avoid requiring companies to include additional disclosure concerning its proposals in cases where a shareholder proposal on the same subject matter was excluded. It is difficult to see how this information would be material to a shareholder's voting decision. How much disclosure would be necessary to avoid a claim by the shareholder proponent that the company's disclosure is false or misleading? Disclosure topics could include, for example: the exact terms and conditions of the shareholder proposal; the substance of any discussions between the company and the shareholder; when and why the company decided to include its proposal; and why the company believes its proposal is preferable to that submitted by the shareholder. This type of unnecessary disclosure will only confuse shareholders and increase the length of proxy statements that are already too long.

For decades, companies have agreed to submit a proposal to shareholders as a result of negotiations with a shareholder proponent, in exchange for the shareholder's withdrawal of its proposal. To our knowledge, no one has *ever* claimed that this fact is material to a shareholder's voting decision or that the omission of this fact from the company's proxy statement is false or misleading. Why is the exclusion of a shareholder proposal pursuant to Rule 14a-8(i)(9) different?

In any event, none of these issues reflects long-standing Commission interpretations of Rule 14a-8(i)(9). Without publishing a rule proposal soliciting public comment in compliance with the

Administrative Procedure Act, any Commission interpretation that does not reflect long-standing Commission no-action policy risks creating the type of unfair surprise that may cause uncertainty about the legal validity of the Commission's actions. *See,* Release No. 34-56914 at pp. 8-13.

5. ***Shareholder proponents will suffer no harm if the Commission adopts the interpretation of Rule 14a-8(i)(9) suggested below.***

As explained in the blog post, a shareholder proponent whose proposal is excluded under this rule may simply wait until the next proxy season to submit another proposal that challenges or seeks to amend the actions approved at the preceding annual meeting by a shareholder vote on a management proposal. The concern that management will repeatedly submit a proposal on the same subject matter for the sole purpose of excluding shareholder proposals on the same subject matter can best be described as fanciful. To our knowledge, no company has ever done this, for very good reasons.

First, even though such proposals are commonly referred to as "management proposals", their inclusion the proxy statement has to be approved by the company's board directors, which in almost all cases has a majority of independent directors. It is inconceivable that management would suggest to a board that a proposal on a particular subject be submitted to shareholders at each annual meeting solely for the purpose of asserting the exclusion under Rule 14a-8(i)(9). Quite apart from the waste of shareholder money and directors' time this would involve, the board would be justifiably concerned about the Commission or shareholders viewing this as an abuse of the Rule 14a-8 process.

Second, it's hard to imagine what the supporting statement in the proxy statement would say for a proposal that appears in the annual meeting proxy statement for several consecutive years for this purpose. It doesn't seem likely that a sentence such as this would ever appear: "We continue to submit a proposal on this subject to our shareholders for a vote at each annual meeting solely in order to exclude shareholder proposals on the same subject from our proxy statement, as permitted under the rules of the Securities and Exchange Commission." Of course, if in fact that *is* the reason for the proposal's inclusion in the proxy statement, the omission of that sentence may make the proxy statement false or misleading, in violation of Rule 14a-9.

Third, such an action would most likely result in proxy advisory firms such as ISS and Glass Lewis recommending that their clients vote against or withhold votes from the company's directors at that annual meeting. In fact, ISS is well aware of the Rule 14a-8(i)(9) issue, as reflected in its *2015 Benchmark U.S. Proxy Voting Policies* (published February 19, 2015) at pp.4-5.

In view of this, there is no need for an amendment to Rule 14a-8(i)(9) so that the exclusion is not available to a company two years in a row for the same shareholder proposal or another shareholder proposal on the same subject matter, a question Director Higgins raised in his February 10, 2015, speech. This is especially true in view of the current resubmission thresholds for shareholder proposals in Rule 14a-8(i)(12), which enable a shareholder to submit the same proposal for years as long as it has received at least 10% of the vote.

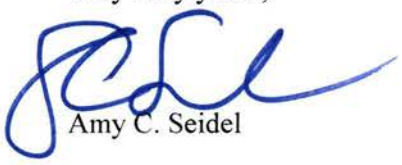
RECOMMENDATION

Whether the Commission decides to adopt an interpretation of Rule 14a-8(i)(9) informally or by means of an amendment to the rule pursuant to the Administrative Procedure Act, we respectfully propose that the interpretation have the following effect, with a new Note substituted for the current one:

> (9) *Conflicts with company's proposal*: If the proposal concerns the same subject matter as one of the company's own proposals to be submitted to shareholders at the same meeting;
>
> *Note to paragraph (i)(9):* A company's submission to the Commission under the section should confirm that its proposal concerns the same subject matter as the shareholder proposal and that the company's proposal will be submitted to shareholders at its next annual meeting. The company need not specify the points of conflict between its proposal and the shareholder proposal.

We greatly appreciate the Commission's consideration of our comments and suggestions. Thank you.

Very truly yours,



Amy C. Seidel

Exhibit A

January 26, 2015

Member Musings on the SEC's Proxy Season Punt

- by **Broc Romanek**

Here's something that I received from an anonymous member in reaction to my recent blog about the decision by the SEC to take a proxy season off to consider how to apply Rule 14a-8(i)(9) going forward:

Thanks for your very helpful post on the SEC's statement on January 16 not to issue no-action letters when the basis for exclusion is Rule 14a-8(i)(9). I, like many others, was surprised by this and I agree with you that it is a much bigger deal than many persons would think. My mind goes to Eddie Gaedel, rather than Tiny Courtney Lee, but I'm of that age.

Apart from remembering Mr. Gaedel's short-lived baseball career with the old St. Louis Browns, I also remember the SEC's 1982 Proposing Release on amendments to Rule 14a-8, Release No. 34-19135 (October 26, 1982). It's well worth revisiting for anyone contemplating the sometimes fraught relationship that issuers currently have with the Corp Fin Staff when dealing with shareholder proposals.

First, in that Release the SEC floated the idea (denoted as Proposal II) of exiting the no-action letter business in favor of private ordering, recognizing that "...an issuer's security holders at large have a role to play in the defining the scope of [a shareholder proponent's] access [to the issuer's proxy statement] and the costs that they are willing to have the issuer bear to provide individual security holders the opportunity to communicate with security holders at large." Nearly 33 years ago, the SEC acknowledged the unavoidable shortcomings and interpretive challenges of the no-action process and suggested that the procedures governing access to the issuer's proxy statement, subject to certain minimum standards prescribed by the Commission, could be left to issuers and their shareholders, and ultimately the courts. Ironically, that's the direction many companies are headed now.

It's also worth noting that the 1982 Release categorizes the exclusion for a proposal that is "counter to a proposal submitted by the issuer at the meeting" (the text at that time) as a type of proposal "...that constitute[s] an abuse of the security holder proposal process." at n. 27 Other proposals falling into the "abuse" category include proposals that: are contrary to the Commission's proxy rules; relate to a personal claim or grievance; relate to an election to office; has been rendered moot; or is substantially duplicative of a proposal previously submitted by another security holder for the same meeting.

Why would a shareholder proposal that is counter to a management proposal constitute an abuse of Rule 14a-8, as opposed to a proposal that should be excluded for policy reasons, such as avoidance of shareholder confusion or unclear voting results? Unfortunately, there's not much to be learned from the SEC's releases amending Rule 14a-8 over the last 65 years or so.

Until 1967, Rule 14a-8(a) included the following sentence: "This rule does not apply, however, to elections to office." In Proposing Release No. 34-8000 (December 5, 1966), the SEC proposed various amendments to Rule 14a-8, none of which amended this sentence. When the final rules were issued in Release No. 34-8206 (December 14, 1967), however, the SEC simply noted that, "Paragraph (a) provides that the rule does not apply to elections to office. It has been further amended to provide also that the rule does not apply to counter proposals to any matter to be submitted by the management."

That was a simpler time in terms of the length of and detailed analysis contained in Commission rule proposals and the preamble to the 1966 Proposing Release indicates a Commission practice of proposing rule amendments "...derived from instructions issued to the staff from time to time and thus reflect existing administrative policy." In any event, there is no supporting rationale for the added reference to counter proposals as being outside the scope of Rule 14a-8.

We can therefore only speculate as to the reason why the SEC has long believed that counter proposals should not be included in the issuer's proxy statement. One fundamental reason comes to mind. In such a situation the shareholder- proponent would be filing soliciting material with the SEC (in the issuer's proxy materials and at the issuer's expense) opposing a proposal supported by management, which allows the proponent to avoid the application of the proxy filing and disclosure rules. In other words, the proponent would be conducting a solicitation in opposition without an exemption from the proxy filing or disclosure rules. (The 1982 Release also requested comment on requiring the proponent "*...like any other person filing solicitation material with the Commission* [emphasis added], pay a fee to the Commission for processing the proposal." That's an idea worth revisiting.)

Moreover, if the issuer comments upon or refers to the solicitation in opposition in its own proxy materials (hard to avoid), it is arguable that the exclusion from filing preliminary proxy materials afforded by Rule 14a-6 would no longer apply, meaning that the issuer would be forced to file preliminary proxy materials when it would otherwise not have to. See, Note 3 to Rule 14a-6(a). Of course, an issuer can include a statement in opposition to a shareholder proposal included in the proxy statement pursuant to Rule 14a-8 and need not file a preliminary proxy statement simply because it contains a shareholder proposal submitted pursuant to Rule 14a-8, *but the application of Rule 14a-8(i)(9) in its intended manner would prevent the inclusion of a solicitation in opposition in the issuer's proxy statement in the first place.*

When viewed in this light, the exclusion for a proposal that directly conflicts with a management proposal makes perfect sense as a way to maintain the integrity of the proxy filing, disclosure, and solicitation process. When the SEC proposed changing the language of the counter proposal exclusion in 1997, it said that, "We propose to revise current paragraph (c)(9) *to reflect the Division's long-standing interpretation permitting omission of a shareholder proposal if the company demonstrates that its subject matter directly conflicts with all or part of one of management's proposals.*" (emphasis added) Release No. 34-39093 (September 19, 1997). This language was subsequently adopted as proposed in Release No. 34-40018 (May 21, 1998).

Note the reference to the "subject matter" of the proposal conflicting with a management proposal, rather than "terms and conditions" or "details." Although the Staff has gotten away from this concept, it would obviously make the Staff's interpretive job much easier. If management is including a proposal to declassify the board, adopt majority voting, approve an equity compensation plan, or permit proxy access to nominate directors, any shareholder proposal dealing with the same subject matter should be excluded.

As far back as 1945, the SEC stated that by providing shareholders with the right to have appropriately submitted proposals included in the issuer's proxy statement, it 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." Release No. 34-3638 (January 3, 1945).

If management does not intend to bring a matter such as proxy access, for example, before the shareholders at the annual meeting, a qualifying shareholder is free to do so. If, however, management is going to include a proposal to adopt a proxy access by-law *regardless of whether the details of the*

proposal may be acceptable to a particular shareholder seeking to submit a proposal on the same subject, the fundamental purpose of Rule 14a-8 has been satisfied; that is, the matter of proxy access will be brought before all shareholders.

If management's proposal is adopted, the shareholder may then submit a proposal the next year to revise the proxy access by-law as adopted, but there is no basis to include a management proposal and shareholder proposal in opposition to management on the same subject matter in the same proxy statement. The shareholder is of course free to conduct a solicitation in opposition in separate proxy materials, without expecting fellow shareholders to help bear the expense, or to conduct an exempt solicitation. Although a shareholder's ability to submit a proposal for inclusion in an issuer's proxy statement pursuant to Rule 14a-8 is frequently referred to as a "right", the SEC has often previously referred to it as a "privilege" that should not be abused and that's worth keeping in mind.

I have enormous respect for the Corp Fin Staff and a great appreciation for the challenges it faces in dealing with a flood of shareholder proposals each proxy season. It's a difficult and thankless job that the Staff takes very seriously and it should be commended for its efforts.

That said, I tend to agree with you that the SEC's action will cause companies to revisit the usefulness of the no-action process with a critical eye and accelerate the trend of companies going to federal district court to resolve shareholder proposal issues. At least that would eventually create a body of law with precedential value and analysis that would help issuers and shareholder-proponents alike. In the long run, that's not a bad thing for issuers, shareholders, and even the Staff.

Posted by Broc Romanek

Permalink: http://www.thecorporatecounsel.net/member/blogs/proxy/2015/01/member-musings-on-the-secs-proxy-season-punt.html