June 10, 2015

Application of Rule 14a-8(i)(9)
to Conflicting Shareholder Proposals

On January 16, 2015, the Securities and Exchange Commission ("SEC" or "Commission") announced that Chair Mary Jo White had directed the staff of the SEC's Division of Corporation Finance (the "Staff") to review Rule 14a-8(i)(9) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and report to the Commission on its review due to questions that have arisen about the proper scope and application of Rule 14a-8(i)(9). Concurrently with this announcement, the Division of Corporation Finance announced that it would no longer express a view with respect to the application of Rule 14a-8(i)(9) to shareholder proposals submitted to companies during the 2015 proxy season. This letter provides the views of the undersigned firms with regard to these matters and, in particular, the views of our firms regarding the proper interpretation of Rule 14a-8(i)(9) for the Staff's consideration as it engages in its review of the rule.[1]

THE ORIGIN AND PURPOSE OF RULE 14A-8(I)(9)

Rule 14a-8(i)(9) allows a company to exclude from its proxy materials any shareholder proposal that directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting. In interpreting the rule prior to the 2015 proxy season, the Staff struck a careful balance between reinforcing the right of shareholders to include appropriate shareholder proposals in company proxy materials and preventing the shareholder proposal rule from being used to, in effect, create proxy contests within company proxy materials through the inclusion of conflicting proposals.

The predecessor to Rule 14a-8(i)(9) was first adopted in 1967 when the SEC added a phrase to the final sentence of Rule 14a-8(a) that made clear that companies could exclude from their proxy materials shareholder proposals that were "counter proposals to matters to be submitted by the management."[2] Although the SEC provided little explanation when it first adopted the exclusion, the fact that it was added to the same sentence as the exclusion for proposals relating to elections of directors suggests that the two exclusions were adopted for similar purposes – to prevent shareholders from using Rule 14a-8 to mount proxy contests without complying with the rules relating to proxy contests.[3] The similarity of purpose between the election exclusion (now codified as Rule 14a-8(i)(8)) and Rule 14a-8(i)(9) has not been lost on practitioners – in some cases companies have even requested no-action relief by citing to both Rule 14a-8(i)(9) and Rule 14a-8(i)(8).[4]

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[1] Members of the undersigned firms regularly submit requests to the Staff of the SEC for no-action relief under Rule 14a-8 on behalf of our clients.

[2] SEC Release No. 8206 (Dec. 14, 1967).

[3] *See generally* SEC Release No. 12598 (July 7, 1976).

[4] *See, e.g.*, Bank of America Corporation, SEC No-Action Letter (Jan. 12, 2007) (allowing exclusion under Rules 14a-8(i)(8) and 14a-8(i)(9) of a proposal requesting that the board amend the company's governance documents to establish that the board consists of nine members); Competitive Technologies, Inc., SEC No-Action Letter (Oct. 7,

Since 1967, the SEC has neither made any substantive changes to the exclusion nor provided much in the way of substantive interpretive guidance. One of the few interpretive statements made by the SEC regarding the rule was made in 1982, when the SEC explained that the rule was intended to permit the exclusion of proposals "that constitute an abuse of the security holder proposal process."[5] In 1998, the SEC added the "directly conflicts" language, which was intended 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."[6] In explaining these changes, the SEC noted that a proposal need not be "identical in scope or focus" for exclusion to be available.[7]

THE STAFF'S HISTORICAL APPLICATION OF RULE 14A-8(I)(9)

In no-action letters that it has issued since the adoption of the exclusion in 1967, the Staff consistently has allowed companies to rely on Rule 14a-8(i)(9) to exclude shareholder proposals where inclusion of a company proposal and a shareholder proposal in the same proxy statement could "present alternative and conflicting decisions for shareholders and … submitting both proposals to a vote could provide inconsistent and ambiguous results."[8] The Staff has taken this approach where the company proposal at issue sought to address the same issue as the

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1998) (allowing exclusion under Rules 14a-8(i)(8) and 14a-8(i)(9) of a shareholder proposal requesting that the company impose an election condition that would require that any management nominee for the board own a certain amount of company stock where such proposal would have disqualified current nominees to the board).

[5] SEC Release No. 34-19135 n.29 (Oct. 14, 1982). Other proposals categorized under the "abuse" category include proposals contrary to the SEC's proxy rules, related to a personal claim or grievance, related to an election to office, rendered moot, or substantially duplicative of a proposal submitted by another shareholder. *Id.*

[6] SEC Release No. 34-39093 (Sept. 19, 1997); SEC Release No. 34-40018 (May 21, 1998).

[7] SEC Release No. 34-40018 (May 21, 1998) (internal citations omitted) (citing SBC Communications, SEC No-Action Letter (Feb. 2, 1996) (shareholder proposal on calculation of non-cash compensation directly conflicted with company's proposal on a stock and incentive plan)).

[8] *See, e.g.*, Stericycle, Inc., SEC No-Action Letter (Mar. 7, 2014) (shareholder proposal seeking the right for holders of 15% of the company's common stock to be able to call a special meeting conflicted with a company-sponsored proposal that would have permitted holders of 25% of the company's common stock to call a special meeting); Verisign, Inc., SEC No-Action Letter (February 24, 2014) (shareholder proposal seeking the right for holders of 15% of the company's common stock to be able to call a special meeting conflicted with a company-sponsored proposal that would have permitted holders of 35% of the company's common stock to call a special meeting); Cummins Inc., SEC No-Action Letter (Jan. 24, 2012) (allowing exclusion under Rule 14a-8(i)(9) of a proposal requesting an amendment to the bylaws and each appropriate governing document to give holders of 10% of the company's outstanding common stock the power to call a special shareholder meeting, which conflicted with a proposal to be included in the same proxy that gave holders of 25% of the company's outstanding common stock that power); Baker Hughes Incorporated, SEC No-Action Letter (Dec. 8, 2009) (same); Goodrich Corporation, SEC No-Action Letter (Jan. 27, 2004) (allowing exclusion under Rule 14a-8(i)(9) of a proposal requesting that the company utilize performance- and time-based restricted share programs in lieu of stock options for future senior executive equity compensation, which conflicted with a proposal to amend the company's stock option plan by increasing the securities available for issuance under the plan); BankBoston Corporation, SEC No-Action Letter (June 7, 1999) (allowing exclusion under Rule 14a-8(i)(9) of a proposal requesting a report on the effect of a merger on a company's employees and the communities where it does business, which conflicted with a merger proposal to be included in the same proxy materials); INTERLINQ Software Company, SEC No-Action Letter (Apr. 20, 1999) (allowing exclusion under Rule 14a-8(i)(9) of a proposal for the company to conduct a self-tender offer, which conflicted with a merger proposal to be included in the same proxy materials).

shareholder proposal but through different terms,[9] and where the company proposal sought to do the exact opposite as the shareholder proposal.[10]

Consistent with its longstanding approach to Rule 14a-8 matters, the Staff has taken this position without regard to the issues that a shareholder proposal is seeking to address. For example, the Staff has taken this position with respect to proposals concerning compensation matters,[11] as well as with respect to a variety of corporate governance matters.[12] Due to the consistency of Staff no-action letters interpreting and applying this exclusion, shareholders and companies alike have come to understand and rely on the Staff's extensive body of no-action letters involving Rule 14a-8(i)(9).[13]

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[9] *See, e.g.*, United Natural Foods, Inc., SEC No-Action Letter (Sept. 10, 2014) (allowing exclusion under Rule 14a-8(i)(9) of a shareholder proposal seeking to allow holders of 10% of a company's stock to call special meetings, where the conflicting company proposal would have limited such a right to a shareholder that owned 25% of the company's stock); *see also*, Harris Corp., SEC No-Action Letter (June 26, 2012), Cummins Inc., SEC No-Action Letter (Jan. 24, 2012); Waste Management, Inc., SEC No-Action Letter (Feb. 16, 2011); Altera Corp., SEC No-Action Letter (Jan. 14, 2011, recon. denied Jan. 24, 2011); EMC Corp., SEC No-Action Letter (Feb. 24, 2009) (each of the foregoing proposals allowed the exclusion of a shareholder proposal requesting that the board to take the steps necessary to amend the bylaws and each appropriate governing document to give holders of a specified percentage of the company's outstanding common stock the power to call special shareowner meetings, where the company planned to ask its shareholders to approve a bylaw amendment to permit holders of a higher percentage of the outstanding common stock to call a special shareholder meeting).

[10] *See, e.g.*, Alliance World Dollar Government Fund, Inc., SEC No-Action Letter (Oct. 19, 2006) (allowing exclusion under Rule 14a-8(i)(9) of a shareholder proposal seeking to have the fund merge with another specified fund, which conflicted with the company's plans to solicit approval of a merger agreement with a fund that was different than the fund specified by the shareholder proposal); Pacific First Financial Corporation, SEC No-Action Letter (Sept. 25, 1989) (allowing exclusion under Rule 14a-8(c)(9) of a shareholder proposal that requested that the company "take all lawful and necessary steps to cancel the Agreement and Plan of Merger providing for the acquisition of the Company," which conflicted with the company's plans to solicit approval of a merger agreement).

[11] *See, e.g.*, The Boeing Company, SEC No-Action Letter (Feb. 25, 2014) (allowing exclusion under Rule 14a-8(i)(9) of a shareholder proposal seeking to have the company make certain amendments to its clawback policy, which conflicted with a proposal sponsored by Boeing to amend and restate Boeing's 2003 Stock Incentive Plan); Phillips-Van Heusen Corp., SEC No-Action Letter (Apr. 21, 2000) (allowing exclusion under Rule 14a-8(i)(9) of a shareholder proposal requesting that the board discontinue all bonuses, options, rights, SARs, etc., after termination of any existing programs for top management, which conflicted with a company proposal seeking shareholder approval of a performance incentive bonus plan, a long-term incentive plan, and a stock option plan).

[12] *See, e.g.*, Cognizant Technology Solutions Corporation, SEC No-Action Letter (Mar. 25, 2011) (allowing exclusion under Rule 14a-8(i)(9) of a shareholder proposal requesting the company change the shareholder voting requirement to a simple majority of the votes cast for and against the item in question, which conflicted with the company's plans to submit a proposal to revise the supermajority provisions to a different supermajority standard); Herley Industries, Inc., SEC No-Action Letter (Nov. 20, 2007) (allowing exclusion under Rule 14a-8(i)(9) of a shareholder proposal seeking to impose a majority voting standard for the election of directors, which directly conflicted with a company proposal that would have left the company's plurality voting standard for directors in place but required that directors who were elected by less than a majority to submit a resignation letter to the board of directors).

[13] Based on a Lexis search on February 28, 2015, we identified 367 no-action letters involving Rule 14a-8(i)(9); the Staff granted no-action relief in 263 of these letters, denied relief in 58 of these letters, and expressed no view in 46 of these letters, 43 of which were issued during this proxy season.

THE WHOLE FOODS NO-ACTION LETTER WAS CONSISTENT WITH THE SEC'S HISTORICAL ADMINISTRATION OF RULE 14A-8(I)(9)

On December 1, 2014, the Staff issued a no-action letter to Whole Foods Market, Inc., consistent with its longstanding application of Rule 14a-8(i)(9).[14] In that letter, the Staff agreed with Whole Foods that it could exclude a proxy access proposal from its proxy materials on the basis that Whole Foods planned to submit its own proxy access proposal at its 2015 annual meeting of shareholders. The shareholder proposal that was the subject of that letter sought a proxy access bylaw that would have allowed a shareholder or group of shareholders that collectively held at least 3% of the company's shares continuously for three years to include in the company's proxy materials nominees representing up to 20% of the company's board and have such nominees listed with the board's nominees in the company's proxy statement. In contrast, the proxy access bylaw to be proposed by Whole Foods would have allowed a shareholder (but not a group of shareholders) that owned 9% or more of the company's stock for five years to include one nominee or up to 10% of the board in the company's proxy materials. Based on these differences, Whole Foods took the position, with the Staff's concurrence, that Whole Foods could exclude the proposal from its proxy materials in reliance on Rule 14a-8(i)(9).

As was the case in the hundreds of letters issued since the adoption of Rule 14a-8(i)(9), Whole Foods' proposal and the shareholder proposal differed in material ways, including with respect to the minimum ownership threshold proposed by the proposals (3% vs. 9%), the minimum ownership period (three years vs. five years) and the number of nominees contemplated by the proposals (20% of the board vs. 10% of the board). Any of these differences would have provided a basis for exclusion under the language and historical application of Rule 14a-8(i)(9).

Notwithstanding the fact that the Staff's response to Whole Foods was consistent with longstanding no-action letter precedent, on January 16, 2015, the Staff reconsidered its position in light of the review directed to be undertaken by Chair White. Based on media reports, it appears that this reversal was due, at least in part, to concerns expressed by certain investor groups regarding the Whole Foods no-action letter and its implications for other proxy access shareholder proposals submitted to companies for the 2015 proxy season.[15] We believe that these concerns are unwarranted and do not justify a change in the way proposals are analyzed for excludability under Rule 14a-8(i)(9).

The Whole Foods letter was consistent with the Staff's response to numerous Rule 14a-8(i)(9) no-action requests concerning corporate governance issues of equal significance as proxy access. For example, the Staff has concurred with the exclusion of shareholder proposals concerning issues such as the right of shareholders to call special meetings, the right of shareholders to act by written consent, modification of supermajority provisions in a company's

[14] *See* Whole Foods Market, Inc., SEC No-Action Letter (Dec. 1, 2014).

[15] *See, e.g.*, Kaja Whitehouse, "Shareholders threaten boards over 'proxy access,'" USA Today, Jan. 27, 2015 ("The SEC initially agreed to Whole Foods' request to block the shareholder proposal but backed off this position following a letter-writing campaign by shareholders angry about the move."), *available at* http://www.usatoday.com/story/money/business/2015/01/27/proxyaccess-investors-businessroundtable-wholefoods/22234271/.

governing documents and a host of other governance topics.[16] While we recognize that the topic of proxy access is particularly significant to certain investor groups, we do not believe there is a principled reason to view proxy access shareholder proposals as having raised new or unique considerations from any other proposal topics that have been considered under Rule 14a-8(i)(9) or to alter the Staff's application of Rule 14a-8(i)(9) on this basis.

THE SEC SHOULD NOT ADOPT A NEW POSITION UNDER WHICH A COMPANY CANNOT RELY ON RULE 14A-8(I)(9) IF IT INTRODUCES A COMPANY PROPOSAL IN RESPONSE TO A SHAREHOLDER PROPOSAL

One of the criticisms of the Whole Foods no-action letter and similar no-action letters under Rule 14a-8(i)(9) has been that such position allows companies that may not otherwise have intended to bring a matter to a shareholder vote to avoid including controversial shareholder proposals in the company's proxy materials. We believe that this concern is misplaced. The underlying policy behind Rule 14a-8 is "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."[17] Whether a company submits its own proposal for shareholder approval or allows a shareholder proposal to be included in its proxy materials, shareholders will be provided the opportunity to consider and vote on the subject matter of the proposal. Even in the context of a company proposal that would implement the opposite of what a shareholder proposal addresses, shareholder support of a company proposal concerning a particular topic would send the message that shareholders support the company's approach to a topic, while shareholder disapproval of such a proposal would send the message to the company that its approach is not supported by shareholders. In either case, shareholders would have the opportunity to consider matters of concern to shareholders.

We understand some have expressed concern that the Staff's historical application of Rule 14a-8(i)(9) gives shareholders the opportunity to express their views on only the company's proposal, without a similar opportunity to express their view on the alternative approach presented by the shareholder proponent, thereby "blunt[ing] the communicative value of the vote shareholders do have."[18] We believe this concern conflates the question of the proper application of the Rule 14a-8(i)(9) exclusion with the far larger question of whether the federal

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[16] *See, e.g.*, Verisign, Inc. (Feb. 24, 2014) (shareholder proposal seeking the right for holders of 15% of the company's common stock to be able to call a special meeting conflicted with a company-sponsored proposal that would have permitted holders of 35% of the company's common stock to call a special meeting); Equinix, Inc., SEC No-Action Letter (Mar. 7, 2013) (shareholder proposal seeking the ability of shareholders to act by written consent conflicted with a company proposal seeking a charter amendment to allow action by written consent pursuant to procedures that differed significantly from the shareholder proposal); SUPERVALU Inc., SEC No-Action Letter (Apr. 20, 2012) (shareholder proposal to adopt a simple majority voting standard conflicted with a company proposal to lower a 75% voting standard to 66-2/3% voting standard).

[17] SEC Release No. 34-3638 (Jan. 3, 1945).

[18] *See* letter from Council of Institutional Investors to Keith F. Higgins, Director, Division of Corporation Finance, dated Jan. 9, 2015, *available at* http://www.cii.org/files/issues_and_advocacy/correspondence/2015/01_09_15_CII_to_SEC_re_Whole_foods.pdf; *see also* letter from CalPERS and CalSTRS to Keith F. Higgins, Director, Division of Corporation Finance, dated May 21, 2015, *available at* http://www.calpers-governance.org/docs-sof/resources/14a-8i9-comment-letter-joint-letter-from-calpers-and-calstrs.pdf.

proxy rules currently allow for the type of communications between shareholders and management that some groups desire. Requiring companies to present multiple proposals on the same topic and limiting shareholders to voting for, voting against, or abstaining will create confusion not only for the company's board, which must then decipher the meaning of these multiple votes, but also for shareholders, who are asked to express their views on an issue but are limited in how they can communicate their views.

Contrary to the view expressed by some, this confusion exists even if the company presents a binding proposal while the shareholder presents a non-binding proposal. It is important to note that there are many material aspects of a proposal. For example, a proxy access proposal generally specifies not only the securities ownership threshold that a nominating shareholder must satisfy, but other material requirements, such as:

- the minimum period for holding the requisite securities;
- the ability of nominating shareholders to aggregate their securities holdings to meet the eligibility requirement, if any;
- the number of director nominees that the nominating shareholder(s) can submit; and
- the ability of shareholders to use the proxy access procedure for a change in control transaction, if any.

The appropriate parameters for each of these requirements were heavily debated during the Commission's own rulemaking process for Exchange Act Rule 14a-11, with commenters highlighting the importance of each of these requirements for any proxy access procedure. If, for example, shareholders approve both the company's proxy access proposal and the shareholder proponent's proxy access proposal, it will be difficult to discern with certainty the meaning of these votes. Some may assume that these votes signify that shareholders want the company to implement some form of proxy access procedure immediately but prefer the shareholder proposal's formulation. It is equally possible, however, that the votes signify that shareholders actually support some of the requirements of the company's version of a proxy access proposal (*e.g.*, the holding period) but also prefer some of the requirements of the shareholder proponent's version of proxy access (*e.g.*, the ownership threshold). Further confusion can ensue if both proposals are approved or are not approved, but with differing levels of support.[19] For example, what would be the message if the company's proposal was approved by holders of 76% of the shares entitled to vote and the shareholder proposal was approved by holders of 65% of the shares entitled to vote? Would the company be expected to adopt the shareholder proponent's

[19] *See, e.g.*, management and shareholder proxy access proposals voted on at the 2015 annual meeting of Chipotle Mexican Grill, Inc., in the proxy access proposal submitted by the New York City Employees' Retirement System (3% minimum ownership threshold/ 3 year minimum ownership period/25% of the board) received 49.9% of the votes cast, and a binding management proposal (5% minimum ownership threshold/ 3 year minimum ownership period/20% of the board) received 34.4% of the votes cast. Along similar lines, Borg-Warner included a management proposal and a shareholder proposal that would each give shareholders the right to call special meetings. The management proposal was a proposed amendment to the company's certificate of incorporation; it received 76% of the company's outstanding shares, just short of the 80% required for it to take effect. In contrast, the shareholder proposal received 52% of the votes cast, which only represented 43% of the company's outstanding shares. Notwithstanding the fact that the management proposal received significantly more votes than the shareholder proposal, it did not pass under applicable state law, while the shareholder proposal would be considered to have "passed" under the policies of certain proxy advisory firms.

formulation of proxy access, which, while approved, received less support than the company's proposal? Companies can only speculate, with little definitive guidance as to how to react to the results.

Rule 14a-8(i)(9) appropriately recognizes and accommodates a board's fiduciary duty to consider a matter and, if it believes it to be in the best interests of the corporation, to introduce a proposal that either addresses the same issue as the shareholder proposal but through different terms, or that proposes to do the exact opposite as requested in the shareholder proposal. We note for example that this process occurred when shareholders commenced introducing proposals seeking to allow shareholders to call special meetings. There, initial proposals would have allowed *any* shareholder to call a special meeting, but over the years were revised to request that shareholders owning 10% of a company's shares be able to call special meetings. At a number of companies (but not all companies), boards viewed the 10% standard as too low and proposed instead binding proposals that implemented a higher threshold for shareholders to call special meetings. In some cases, after implementing one standard, a company proposed a different standard based on further engagement with and feedback from its shareholders. Through this process, companies have achieved a wide variety of special meeting standards that each are appropriately tailored for, and have been supported by majority votes of shareholders at, the particular companies. We believe that a similar process would have occurred with respect to proxy access proposals, where there continues to be differing views and differing approaches on whether proxy access should be available at particular companies, and the key terms of any proxy access provision.

In this regard, we note that the same shareholder who submitted the proxy access proposal to Whole Foods had previously submitted proxy access proposals with very different ownership thresholds than were contained in the proposal he submitted this year to Whole Foods (which proposals typically received low support from institutional and other shareholders) and that this year some institutional shareholders, including The Vanguard Group, Inc., are indicating a preference for proxy access at a 5%/3 year ownership level for 20% of the seats, while other institutional shareholders are not supporting proxy access shareholder proposals. In this context, we believe that the concerns regarding shareholder confusion over the effects of "competing" proposals remain, and that the Commission's administration of Rule 14a-8(i)(9) should continue to allow deference to a board's determination on putting forth a proposal for consideration by shareholders.

Moreover, as a practical matter, we believe it would be unworkable for the Commission and Staff to seek to draw a distinction between company proposals that are independent of, versus responsive to, a shareholder proposal. This would be a fact-intensive determination, and one that would be virtually impossible for the Staff to administer in an objective or predictable manner. In this regard, the timeframes that exist under Rule 14a-8 do not impose an outside limit on how far in advance a proposal can be submitted to a company,[20] but operate so that proposals are submitted sufficiently in advance of when a board typically establishes the annual meeting agenda to allow the board to consider whether to implement, include or seek to exclude a shareholder proposal. In addition, it is important to note that the timing of a company's determination to introduce a proposal is not necessarily indicative of the company's intention, as it is common for boards to monitor and discuss emerging corporate governance proposals over a

[20] *See, e.g.*, General Electric Co. (avail. Jan 23, 2014) (proposal for April 2014 annual meeting initially submitted in January 2013, fifteen months in advance).

period of many months or years.[21] Determining whether a company proposal was adopted in response to a shareholder proposal would require a review of the evidentiary record to see when the board decided to take action with respect to a particular matter. If the SEC were to take this approach, what level of board consideration would suffice? For example, would the board have to have already adopted the proposal at issue? Would it have to have decided on a particular course of action? What if the board considered an action, but did not decide to move forward with that action until it received a shareholder proposal on the topic? In many cases boards deliberate on issues over the course of months or years before taking action. In all events, how would the SEC obtain and evaluate this information? Conditioning the availability of Rule 14a-8(i)(9) exclusion on board approval of the company's proposal prior to either the receipt of the shareholder proposal or the submission of the no-action request would force companies to significantly change their current deliberative process and schedule for considering the matters that would be presented for shareholder votes at the annual meeting, thereby imposing new costs and burdens.

Further, we believe that denying relief under Rule 14a-8(i)(9) on the basis that the company's proposal may have been a response to a shareholder proposal could have the unintended consequences of discouraging companies from engaging with their shareholders. Many companies regularly engage with their shareholders to solicit their thoughts and concerns, but may be disinclined to continue to do so if such dialogue could impact their ability to formulate their own proposals on a particular issue. Moreover, it is not uncommon for a well-publicized debate over a particular topic to attract the attention of both a company and a shareholder proponent, leading each to formulate independently a proposed approach for addressing the topic. Conditioning the availability of the Rule 14a-8(i)(9) exclusion on the absence of an earlier-submitted proposal from a shareholder or allowing shareholder proponents to effectively preempt companies' own proposals would discourage companies from taking a proactive approach towards addressing corporate governance concerns.

RULE 14A-8(I)(9) SERVES AN IMPORTANT PURPOSE AND SHOULD NOT BE ALTERED; HOWEVER, SHOULD THE COMMISSION DISAGREE, ANY MEANINGFUL CHANGE COULD BE ACCOMPLISHED ONLY THROUGH FORMAL RULEMAKING

While we believe it is important that the Commission and its Staff regularly review the rules the Commission administers, as well as the application of these rules, we believe the existing rule and the Staff's pre-2015 administration and application of the rule are entirely appropriate and should be reaffirmed and reinstated. Indeed, Rule 14a-8(i)(9) plays a critical role in ensuring the integrity of the proxy process. As set out by the Staff in many years of no-action letters, the rule is intended to ensure that shareholders are not presented with "alternative and conflicting decisions" and that the inclusion of a shareholder proposal will not result in "inconsistent and ambiguous results."[22]

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[21] For example, a shareholder proposal might be submitted early in the season, before the board has had a chance to take action on the issue, even if the board is already considering doing so, or if the company is already planning to raise the issue for board consideration. For example, if a 10% special meeting proposal gets a significant vote in year 1 and the board therefore decides to consider implementing a 15% special meeting bylaw during the following year, the company might receive another 10% special meeting proposal shortly after the year 1 meeting, but before the board has had a chance to act.

[22] *Supra* note 7.

Both the plain language of Rule 14a-8(i)(9) and the policies underlying the rule dictate that the rule be administered in a manner that avoids these outcomes regardless of the topic of the proposals. Indeed, the more important a topic, the more critical it is to address in a manner that prevents shareholder confusion and the potential resulting shareholder disenfranchisement. As discussed above, this is the case regardless of the circumstances underlying a company's decision to put forth a proposal on a topic that a shareholder proposal also seeks to address.

Notwithstanding our view that Rule 14a-8(i)(9) as traditionally administered by the Staff requires no alteration, should the Commission disagree, we believe any changes to the way in which Rule 14a-8(i)(9) has been consistently administered can and should be made only through notice and comment rulemaking pursuant to the requirements under the Administrative Procedures Act ("APA"), and not through purportedly interpretive guidance.[23]

The APA was adopted to create a procedural mechanism for the adoption of federal regulatory standards that affords all interested parties fair notice, and an opportunity to participate in the formulation, of such standards. Specifically, the APA's requirements "are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[24] Generally speaking, a "rule"—which is defined as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"[25]— can only be adopted pursuant to "notice and comment" requirements.[26] Among other things, the APA mandates publication of a notice of proposed rulemaking in the Federal Register, an explanation of the terms or substance of the proposed rule, and allowing interested persons an opportunity to comment.[27] Rules that are merely interpretive, as distinguished from so-called legislative or "substantive" rules, are excluded from these requirements.[28]

The "inquiry in distinguishing legislative rules from interpretive rules is whether the new rule effects a substantive regulatory change to the statutory or regulatory regime."[29] An agency statement constitutes a legislative rule if "affected private parties are reasonably led to believe that failure to conform will bring adverse consequences."[30] An interpretive rule, by contrast, merely "derives a proposition from an existing document whose meaning compels or logically

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[23] We acknowledge that there may be some actions the Commission could take administratively in response to its study of Rule 14a-8(i)(9) that would not alter the way the exemption has been administered and therefore that would not require formal rulemaking, such as restoring the Staff's longstanding application of Rule 14a-8(i)(9) but advising issuers that their proxy statement disclosures regarding a company-sponsored proposal should disclose that a conflicting shareholder proposal had been omitted and excluded.

[24] *Int'l Union, United Mine Workers of Am. v. Mine Saf. & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

[25] 5 U.S.C. § 551(4).

[26] *See* 5 U.S.C. § 553.

[27] *See id.*

[28] *See id.* § 553(b)(3)(A); *White v. Shalala*, 7 F.3d 296, 303 (2d. Cir. 1993).

[29] *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Circ. 2014) (quoting *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6-7 (D.C. Cir. 2011)).

[30] *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002).

justifies" its requirements.[31]

Here, any Staff recommendations to change the longstanding manner in which Rule 14a-8(i)(9) has been administered would require a notice and comment rulemaking, for at least two reasons.

First, Rule 14a-8(i)(9) makes no exception for proposals that deal with certain subject matter, such as proxy access. Rather, it broadly provides that a shareholder proposal may be excluded from a company's proxy materials "[i]f the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting."[32] The fact that the Staff has long interpreted the rule, consistent with its plain terms, to apply regardless of the issues addressed in a particular shareholder proposal reinforces the point. Thus, any categorical exclusion from the scope of Rule 14a-8(i)(9) for proposals that deal with proxy access (or any other particular type of subject matter) would constitute a substantive amendment of the plain terms of the rule itself. Moreover, any such recommendation by the Staff would presumably be intended "to be binding."[33] Similarly, the timing of a company proposal—*e.g.*, whether it was submitted in response to a shareholder proposal—is not a consideration encompassed by the text of the rule. The agency's own practice likewise supports this view: as repeatedly explained, the "directly conflicts" test asks whether the presentation of a shareholder proposal together with a company proposal would "present alternative and conflicting *decisions*," and that analysis goes to the substance of the shareholder and company proposals, not the company's timing or motivation.[34] Accordingly, any effort to limit the scope of the exception in Rule 14a-8(i)(9) based on either of these theories must be accomplished by amending the rule itself in a notice and comment rulemaking.

Second, such changes cannot reasonably be characterized as mere interpretations of the "directly conflicts" phrase in Rule 14a-8(i)(9). These changes would not "merely track" any preexisting requirements—whether established on the face of the rule or by the Staff's practice—or "explain something the statute already required."[35] Rather, they could create new, categorical limitations for the exclusion established by Rule 14a-8(i)(9) that have never before been explained anywhere, much less in Section 14(a) of the Exchange Act or Rule 14a-8 itself.[36]

In sum, because any significant change in how the SEC and its Staff administer Rule 14a-8(i)(9) would effectively constitute a substantive amendment of Rule 14a-8(i)(9), a proper rulemaking is required under the APA. Even if a rulemaking were not mandatory, it would nonetheless be the prudent administrative course under the circumstances, given the range of

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[31] *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010) (internal quotations omitted).

[32] 17 C.F.R. § 240.14a-8(i)(9).

[33] *Gen. Elec.*, 290 F.3d at 382; *see also Community Nutrition Institute v. Young*, 818 F.2d 943, 950-52 (D.C. Cir. 1987) (Starr, J., dissenting) ("If the [agency] pronouncement has the force of law in future proceedings, it is a legislative rule."). Although the Staff states that a no-action letter is not binding on a company or a court, the 2015 proxy season and past litigation under Rule 14a-8 has demonstrated that absent a court ruling, most companies do not exclude shareholder proposals unless they have obtained a no-action letter supporting such exclusion.

[34] SEC Release No. 12598 at 2.

[35] *Mendoza*, 754 F.3d at 1021 (quoting *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 236-37 (D.C. Cir. 1992)).

[36] *See generally Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (agencies must provide "fair warning of the conduct a regulation prohibits or requires").

issues that Rule 14a-8(i)(9) implicates, the long history of reliance on past no-action letters and the need for regulatory certainty by companies and shareholders alike. The interests of clarity, fairness, the receipt of accurate information, and consistency will be advanced by use of the rulemaking process.

CONCLUSION

Rule 14a-8(i)(9) serves an important purpose, and any reconsideration of this purpose or the means of accomplishing it should not be undertaken lightly. Companies and shareholders alike have come to understand this exclusion and the Staff's historical administration of it. Consequently, any deviation from the Staff's historical approach to Rule 14a-8(i)(9) has the potential to cause confusion for companies and shareholders alike. Further, to the extent that the Staff intends to meaningfully deviate from the decades of guidance that have been provided regarding Rule 14a-8(i)(9), the SEC will be required by the APA to propose the new approach as a rule amendment and give affected parties the opportunity to comment on the proposed approach. Finally, we ask that the Staff complete its review and publicly announce its results sufficiently in advance of the upcoming proxy season so that both shareholders and companies have adequate time to plan and prepare.

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