Business Roundtable℠

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June 10, 2015

Mr. Keith F. Higgins
Director, Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Mr. Higgins:

Re: Review of Rule 14a-8(i)(9)

This letter is submitted on behalf of Business Roundtable, an association of the chief executive officers of leading U.S. companies. Our member companies produce $7.2 trillion in annual revenues and employ more than 16 million employees worldwide. Business Roundtable companies comprise more than a quarter of the total value of the U.S. stock market, annually pay more than $230 billion in dividends to shareholders, generate more than $470 billion in sales for small and medium-sized businesses, and invest $190 billion in research and development—equal to 70 percent of U.S. private research and development spending. Our members also give more than $3 billion a year in combined charitable contributions.

We appreciate the opportunity to offer our views in connection with the review of Rule 14a-8(i)(9) under the Securities Exchange Act of 1934 as amended by the staff of the Division of Corporation Finance (Staff) of the U.S. Securities and Exchange Commission (SEC). As you know, this review was prompted by what Chair White characterized as "questions that have arisen about the proper scope and application of" the rule, which 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.[1]

These questions emerged from recent events involving proxy access shareholder proposals. However, we do not believe that these proposals present novel issues under Rule 14a-8(i)(9) or that they should call into

[1] Statement from Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Proxy Proposals (Jan. 16, 2015).

question the propriety of the SEC's longstanding approach to Rule 14a-8(i)(9). Instead, we believe that the rule and the Staff's longstanding interpretation of it remain appropriate in light of: (a) the purpose of the rule; (b) the role of the board in corporate governance; and (c) the current proxy system. Therefore, we believe it is unnecessary and would be inappropriate to amend Rule 14a-8(i)(9) or change the Staff's historical and consistent approach to the rule.

A. The SEC's Longstanding Approach to Rule 14a-8(i)(9) Remains Appropriate in Light of the History and Purpose of the Rule.

Business Roundtable believes that the SEC's longstanding, balanced approach to Rule 14a-8(i)(9) should be maintained in light of the history and purpose of the rule. The SEC's shareholder proposal rule balances: (1) the interests of shareholders—some of whom own only a small amount of company stock—who wish to present appropriate matters to their fellow shareholders for consideration; and (2) the interests—and indeed, the responsibility—of companies and their boards of directors to conduct annual meetings in an effective and efficient manner for the benefit of all shareholders. Rule 14a-8(i)(9) promotes this balance by permitting the exclusion of a shareholder proposal that "directly conflicts" with a proposal that the company will submit for shareholder approval at the same shareholder meeting. The Staff has recognized that "directly conflicts" does not mean that two "proposals must be identical in scope or focus."[2] However, as stated repeatedly in Staff no-action letter precedent, historically the Staff has limited the application of Rule 14a-8(i)(9) to situations where a company can show that including a shareholder proposal in the company's proxy materials along with a company proposal would "present alternative and conflicting decisions for shareholders and that submitting both proposals to a vote could provide inconsistent and ambiguous results."[3]

A key purpose of Rule 14a-8(i)(9) is to minimize the potential for confusion that could occur—both among the shareholders who are voting and the company's board in deciding how to respond to voting results—when shareholders are asked to vote simultaneously on two conflicting proposals. Indeed this occurred as a result of the Staff's decision to express no views on the application of Rule 14a-8(i)(9) during the 2015 proxy season. For example, at the 2015 annual meeting of one company, approximately 77 percent more shares voted for an amendment to the company's certificate of incorporation to permit 25 percent of outstanding shares to call a special meeting than voted for a non-binding shareholder proposal with a 20 percent threshold. However, due to different voting standards, the shareholder proposal passed but the certificate amendment did not. Moreover, at several companies conflicting company and shareholder proposals each received significant votes at the same meeting, resulting in no clear guidance from shareholders. Finally, confusion can result even at companies where one proposal receives greater support than a

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[2] SEC Release No. 34-40018 (May 21, 1998).

[3] *E.g.*, *Becton, Dickinson and Co.* (avail. Nov. 12, 2009); *Crown Holdings, Inc.* (avail. Feb. 4, 2004); *Goodrich Corp.* (avail. Jan. 27, 2004); *Osteotech, Inc.* (avail. Apr. 24, 2000).

conflicting proposal, since some expect boards to respond to proposals that receive significantly less than majority support.[4]

Importantly, the current interpretation of Rule 14a-8(i)(9) reflects what the SEC described in 1997 as a "long-standing interpretation" of the rule.[5] At that time, the SEC acknowledged that the rule "permit[s] 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] The history of Rule 14a-8(i)(9) makes clear that the SEC intended the exclusion to be available regardless of whether the subject matter of the proposal is a popular topic of shareholder proposals, regardless of whether the proposals are binding or precatory, and regardless of whether a company decides to include a proposal in the proxy statement on its own initiative or following receipt of a shareholder proposal.[7] There have been no developments that support abandoning or changing the way that Rule 14a-8(i)(9) has long been administered and, as discussed below, in this age of heightened shareholder engagement, the SEC's long-standing application of the rule is more appropriate than ever.

B. The SEC's Longstanding Approach to Rule 14a-8(i)(9) Remains Appropriate in Light of the Role of the Board of Directors in Corporate Governance.

Rule 14a-8(i)(9) and the Staff's longstanding interpretation of it rationalize the ability of shareholders to present their views through shareholder proposals with a fundamental tenet of corporate governance—that boards of directors oversee corporations on behalf of all shareholders. In this regard, changes to Rule 14a-8(i)(9) are unnecessary given the ongoing widespread emphasis by boards on responsiveness to and engagement with shareholders and in light of directors' fiduciary duties.

Business Roundtable has long been at the forefront of efforts to improve corporate governance. We have been issuing "best practices" statements in this area for over three decades, including most recently, *Principles of Corporate Governance* (2012).[8] On the subject of shareholder engagement, our *Principles of Corporate Governance* reflect our belief that "it is the responsibility of the corporation to engage with long-term shareholders

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[4] For example, the proxy advisory firm Glass, Lewis & Co. states in its 2015 proxy voting guidelines that boards "should . . . demonstrate some level of responsiveness" any time 25 percent or more of shareholders vote contrary to the company's recommendation, whether on a company-sponsored proposal or a shareholder proposal. Glass, Lewis & Co., Proxy Paper Guidelines: 2015 Proxy Season (2015), *available at* http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_United_States.pdf.

[5] SEC Release No. 34-39093 (Sept. 19, 1997).

[6] *Id*. (emphasis added).

[7] We also believe that the current interpretation of Rule 14a-8(i)(9) is necessary given the narrow application of Rule 14a-8(i)(10), which provides a basis for a company to exclude a shareholder proposal that has been substantially implemented.

[8] *Available at* http://businessroundtable.org/sites/default/files/BRT_Principles_of_Corporate_Governance_-2012_Formatted_Final.pdf.

in a meaningful way on issues and concerns that are of widespread interest to long-term shareholders, with appropriate involvement from the board of directors and management." Our member companies take shareholder engagement seriously, and we believe that the responsibility to communicate effectively with shareholders is critical to the functioning of the modern public company and the public markets. As a result, our member companies understand the importance of listening to their shareholders, and they engage in dialogue with shareholders on an ongoing basis and consider governance issues (and shareholder views on those issues) throughout the year. Thus, suggestions that Rule 14a-8(i)(9) should be limited to instances where a board has already agreed to propose conflicting action fail to recognize the realities of shareholder engagement.

In addition, the current interpretation of Rule 14a-8(i)(9) is consistent with state corporate law principles setting forth the fiduciary duties of boards of directors. Under state corporate law, directors are expected—and indeed, have a legal obligation—to exercise informed, independent judgment to make decisions that are in the best interests of the corporation and its shareholders. As a result, when deciding the appropriate response to a shareholder proposal, a board must take into account *all* factors that the board deems relevant—including, but not limited to, the views of shareholders—in order to reach a decision that is in the best interests of shareholders. Shareholder proponents are not subject to the same duties. Thus, by providing a basis for excluding conflicting shareholder proposals, Rule 14a-8(i)(9) reflects an appropriate balance between the board's obligation to fulfill its fiduciary duties and the rights of shareholders who may own as little as $2,000 of company stock to submit shareholder proposals. For these reasons, the SEC should not alter that balance by changing the application of Rule 14a-8(i)(9).

C. The SEC's Longstanding Approach to Rule 14a-8(i)(9) Remains Appropriate in Light of the Proxy System.

Rule 14a-8(i)(9) and the Staff's longstanding interpretation of it have worked well over time in light of the proxy system. In our *Principles of Corporate Governance*, we emphasized that "[c]orporations should be responsive to issues and concerns that are of widespread interest to their long-term shareholders." In the *Principles*, we also encouraged boards to "seriously consider issues raised by shareholder proposals that receive substantial support and . . . communicate [their] response[s] to proposals to the shareholder-proponents and to all shareholders." The Staff's current application of Rule 14a-8(i)(9) has been one of a number of market forces that have encouraged shareholders and boards of directors to engage on shareholder proposals and work toward implementing proposals in ways that are mutually acceptable. Unfortunately shareholder proponents often choose to communicate their support for a change in a company's corporate governance or other practices for the first time by submitting a Rule 14a-8 shareholder proposal on an issue instead of engaging in dialogue with the company. In that situation, the Staff's position provides a mechanism for companies to seek a referendum on the approach that the board deems to be in the

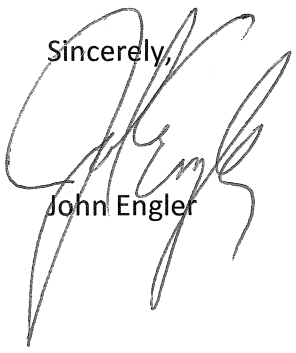
best interests of the company and its shareholders without immediately facilitating a disruptive proxy contest on the issue.

Maintaining the SEC's past interpretations and administration of Rule 14a-8(i)(9) neither disenfranchises shareholders nor eliminates debate on the subject. In response to a company's proposal, shareholders can conduct a traditional proxy contest or, more commonly, an exempt solicitation against the company's proposal. In addition, shareholders can always resubmit their proposal the following year if they disagree with the approach proposed by the company's board. This already occurs under the current interpretation of Rule 14a-8(i)(9). For example, several years ago a shareholder submitted a special meeting proposal to a company requesting a 10 percent special meeting threshold. The shareholder proposal was excluded under Rule 14a-8(i)(9) because the company sought—and obtained—at the same meeting shareholder approval of an amendment to the company's certificate of incorporation to adopt a 25 percent threshold for shareholders to call special meetings. The same shareholder resubmitted a shareholder proposal requesting a 10 percent special meeting threshold the next year, which did not pass. That proponent subsequently submitted shareholder proposals on other topics, and it appears that no shareholder has submitted a special meeting proposal to that company since then.

Finally, while a few have expressed concern about the potential for abuse of Rule 14a-8(i)(9), Business Roundtable believes that any concerns are best addressed through existing proxy and engagement processes rather than through a far-reaching change in the rule or the Staff's interpretations. Particularly in an era of increased shareholder engagement, companies that seek to apply Rule 14a-8(i)(9) in what is viewed as an unreasonable manner—whether with respect to the substance of a company proposal or the frequency with which a company relies on the rule—will hear from their shareholders in a variety of ways. As a result, intervention by the SEC or the Staff to substantially alter the current interpretation of Rule 14a-8(i)(9) is unnecessary.

Thank you for considering our views. We would be happy to discuss our concerns or any other matters that you believe would be helpful. Please contact Michael J. Ryan of the Business Roundtable at [redacted].

Sincerely,



John Engler