

Securities and Exchange Commission

17 CFR PART 240

[Release No. 34-56161; IC-27914; File No. S7-17-07]

RIN 3235-AJ95

Shareholder Proposals Relating to the Election of Directors

Agency: Securities and Exchange Commission.

Action: Proposed rule.

Summary: The Securities and Exchange Commission is publishing this interpretive and proposing release to clarify the meaning of the exclusion for shareholder proposals related to the election of directors that is contained in Rule 14a-8(i)(8) under the Securities Exchange Act of 1934. Rule 14a-8 is the Commission rule that provides shareholders with an opportunity to place a proposal in a company's proxy materials for a vote at an annual or special meeting of shareholders. The Commission is publishing its interpretation of and proposing amendments to Rule 14a-8(i)(8) to provide certainty regarding the meaning of the exclusion in that Rule.

DATES: Comments should be received by October 2, 2007.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form
(<http://www.sec.gov/rules/proposed.shtml>);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-17-07 on the subject line; or

- Use the Federal Rulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-17-07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Lillian Brown, Steven Hearne, or Tamara Brightwell, at (202) 551-3700, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3010.

SUPPLEMENTARY INFORMATION: We are publishing our interpretation of Rule 14a-8(i)(8)¹ under the Securities Exchange Act of 1934.² We also are proposing

¹ 17 CFR 240.14a-8(i)(8).

² 15 U.S.C. 78a *et seq.*

amendments to Rule 14a-8(i)(8).

I. Overview

A. Federal Regulation of the Proxy Process

Regulation of the proxy process is a core function of the Commission and is one of the original responsibilities that Congress assigned to the agency in 1934. Section 14(a) of the Exchange Act³ stemmed from a Congressional belief that “fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange.”⁴ The Congressional committees recommending passage of Section 14(a) proposed that “the solicitation and issuance of proxies be left to regulation by the Commission.”⁵ Congress intended that Section 14(a) give the Commission the “power to control the conditions under which proxies may be solicited”⁶ and that this power would be exercised “as necessary or appropriate in the public interest or for the protection of investors.”⁷ Because the Commission’s authority under Section 14(a) encompasses both disclosure and proxy mechanics,⁸ the proxy rules have long governed not only the

³ 15 U.S.C. 78n(a).

⁴ Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 (1970), quoting H. R. Rep. No. 1383, 73d Cong., 2d Sess., at 13 (1934). See also J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).

⁵ S. Rep. No. 792, 73d Cong., 2d Sess., at 12 (1934).

⁶ H.R. Rep. No. 1383, 73d Cong., 2d Sess., at 14 (1934). The same report demonstrated a congressional intent to prevent frustration of the “free exercise of the voting rights of stockholders.” Id.

⁷ 15 U.S.C. 78n(a).

⁸ See Business Roundtable v. SEC, 905 F.2d 406, 411 (D.C. Cir. 1990) (“We do not mean to be taken as saying that disclosure is necessarily the sole subject of §14”); Roosevelt v. E.I. du Pont de Nemours & Co., 958 F.2d 416, 421-22 (D.C. Cir. 1992) (Congress “did not narrowly train section 14(a) on the interest of stockholders in receiving information necessary to the intelligent exercise of their” state law rights); SEC v. Transamerica Corp., 163 F.2d 511, 518 (3d Cir. 1947) (in which the Commission’s authority to promulgate Exchange Act Rule 14a-8 was upheld), cert. denied, 332 U.S. 847 (1948). See also John C. Coffee Jr., Federalism and the SEC’s Proxy Proposals, New York Law Journal 5 (March 18, 2004) (Section 14(a) “does not focus exclusively on

information required to be disclosed to ensure that shareholders receive full disclosure of all information that is material to the exercise of their voting rights under state law and the corporation's charter, but also the procedure for soliciting proxies.⁹

B. Exchange Act Disclosure Requirements for Contested Elections

Several Commission rules, including Exchange Act Rule 14a-12,¹⁰ regulate contested proxy solicitations to assure that investors receive adequate disclosure to enable them to make informed voting decisions in elections. The requirements to provide these disclosures to shareholders from whom proxy authority is sought are grounded in Rule 14a-3,¹¹ which requires that any party conducting a proxy solicitation file with the Commission, and furnish to each person solicited, a proxy statement containing the information in Schedule 14A.¹² Items 4(b) and 5(b) of Schedule 14A require numerous specified disclosures if the solicitation is subject to Rule 14a-12(c). A solicitation is subject to Rule 14a-12(c) if it is made “for the purpose of opposing” a solicitation by any

disclosure; rather, it contemplates SEC rules regulating procedure in order to grant shareholders a ‘fair’ right of corporate suffrage”); Louis Loss & Joel Seligman, Securities Regulation 1936-37 (3d ed. 1990) (The Commission’s “power under §14(a) is not necessarily limited to ensuring full disclosure. The statutory language is considerably more general than it is under the specific disclosure philosophy of the [Securities Act of 1933].”)

⁹ E.g., Exchange Act Rule 14a-4 (17 CFR 240.14a-4), Exchange Act Rule 14a-7 (17 CFR 240.14a-7), and Exchange Act Rule 14a-8 (17 CFR 240.14a-8). Each specifies procedural requirements that companies must observe in soliciting proxies. Exchange Act Rule 14a-4(b)(2) requires that the form of proxy furnish the security holder with the means to withhold approval for the election of a director. Exchange Act Rule 14a-7 provides a procedure under which a security holder may be able to obtain a list of security holders. Exchange Rule 14a-8 provides a procedure under which a qualifying security holder can obligate the company to include certain types of proposals, along with statements in support of those proposals, in the company’s proxy statement.

¹⁰ 17 CFR 240.14a-12.

¹¹ 17 CFR 240.14a-3.

¹² Rule 14a-3 provides, in pertinent part, that “[n]o solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a publicly-filed preliminary or definitive written proxy statement containing the information specified in Schedule 14A....”

other person “with respect to the election or removal of directors...”¹³ Thus, the result of Schedule 14A’s cross-referencing of Rule 14a-12(c) is to trigger, when a solicitation with respect to the election of directors is conducted in opposition to another solicitation, a number of disclosures relevant in proxy contests, including disclosure of:¹⁴

- by whom the solicitation is made;
- the methods to be employed to solicit;
- total expenditures to date and anticipated in connection with the solicitation;
- by whom the cost of the solicitation will be borne;
- any substantial interest of each participant in the solicitation;
- the name, address, and principal occupation or principal business of each participant;
- whether any participant has been convicted in a criminal proceeding within the past 10 years;
- the amount of each class of securities of the company owned by the participant and the participant’s associates;
- information concerning purchases and sales of the company’s securities by each participant within the past two years;
- whether any part of the purchase price or market value of such securities is represented by funds borrowed;

¹³ Because numerous protections of the federal proxy rules are triggered only by the presence of a solicitation made in opposition to another solicitation, the requirements regarding disclosures and procedures in contested elections do not contemplate the presence of nominees from different vying factions in the same proxy materials.

¹⁴ See 17 CFR 240.14a-101, Items 4(b) and 5(b).

- whether a participant is a party to any contract, arrangements or understandings with any person with respect to securities of the company;
- certain related party transactions between the participant or its associates and the company;
- whether the participant or any of its associates have any arrangement or understanding with any person with respect to any future employment with the company or its affiliates, or with respect to any future transactions to which the company or its affiliates will or may be a party; and
- with respect to any person who is a party to an arrangement or understanding pursuant to which a nominee is proposed to be elected, any substantial interest that such person has in any matter to be acted upon at the meeting.¹⁵

In addition, Item 7 of Schedule 14A requires the furnishing of additional information as to nominees for director, including nominees of “persons other than the [company]” (e.g., shareholders), including:¹⁶

- any arrangement or understanding between the nominee and any other person(s) (naming such person(s)) pursuant to which the nominee was or is selected as a nominee;¹⁷

¹⁵ For purposes of Items 4 and 5, a “participant” in the solicitation includes: (i) any person who solicits proxies; (ii) any director nominee for whose election proxies are being solicited; and (iii) any committee or group, any member of a committee or group, and other persons involved in specified ways in the financing of the solicitation. See Item 4, Instruction 3. Thus, for each of the numerous disclosures required as to a “participant,” the information must be disclosed as to all of such persons.

¹⁶ See 17 CFR 240.14a-101, Item 7. See also 17 CFR 240.14a-101, Item 22(b).

¹⁷ See Item 401(a) of Regulation S-K [17 CFR 229.401(a)], which is referenced in Item 7 of Schedule 14A.

- business experience of the nominee;¹⁸
- any other directorships held by the nominee in an Exchange Act reporting company;¹⁹
- the nominee's involvement in certain legal proceedings;²⁰
- certain transactions between the nominee and the company;²¹ and
- whether the nominee complies with independence requirements.²²

Finally, and of critical importance, all of these disclosures are covered by the prohibition on the making of a solicitation containing false or misleading statements or omissions that is found in Rule 14a-9.²³

C. The Shareholder Proposal Process

Rule 14a-8 creates a procedure under which shareholders, subject to certain requirements, may present in the company's proxy materials a broad range of binding and non-binding proposals. The rule permits a shareholder owning a relatively small amount of the company's shares²⁴ to submit his or her proposal to the company, and requires the

¹⁸ See Item 401(e)(1) of Regulation S-K [17 CFR 229.401(e)(1)], which is referenced in Item 7 of Schedule 14A.

¹⁹ See Item 401(e)(2) of Regulation S-K [17 CFR 229.401(e)(2)], which is referenced in Item 7 of Schedule 14A.

²⁰ See Items 103 and 401(f) of Regulation S-K [17 CFR 229.103 and 17 CFR 229.401(f)], which are referenced in Item 7 of Schedule 14A.

²¹ See Item 404 of Regulation S-K [17 CFR 229.404], which is referenced in Item 7 of Schedule 14A.

²² See Item 407(a) of Regulation S-K [17 CFR 229.407(a)], which is referenced in Item 7 of Schedule 14A.

²³ See 17 CFR 240.14a-9.

²⁴ Exchange Act Rule 14a-8(b)(1) (17 CFR 240.14a-8(b)(1)) provides that a holder of at least \$2,000 in market value, or 1% of the company's securities entitled to be voted, may submit a shareholder proposal subject to other procedural requirements and substantive bases for exclusion under the rule.

company to include the proposal alongside management’s proposals in the company’s proxy materials. In all cases, the proposal may be excluded by the company if it fails to satisfy the rule’s procedural requirements or falls within one of the rule’s thirteen substantive categories of proposals that may be excluded.²⁵

Rule 14a-8 specifies that companies must notify the Commission when they intend to exclude a shareholder’s proposal from their proxy materials. This notice goes to the staff of the Division of Corporation Finance or the Division of Investment Management. In the notice, the company provides the staff with a discussion of the basis or bases upon which the company intends to exclude the proposal and requests that the staff not recommend enforcement action if the company excludes the proposal. A shareholder proponent may respond to the company’s notice, but is not required to do so. Generally, the staff responds to each notice with a “no-action” letter to the company, a copy of which is provided to the shareholder, in which the staff either concurs or declines to concur with the company’s view that there is a basis for excluding the proposal.²⁶

II. The Election Exclusion in Rule 14a-8(i)(8)

A. Introduction

Rule 14a-8(i)(8) sets forth one of several substantive bases upon which a company may exclude a shareholder proposal from its proxy materials. Specifically, it

²⁵ With respect to subjects and procedures for shareholder votes that are specified by the corporation’s governing documents, most state corporation laws provide that a corporation’s charter or bylaws can specify the types of proposals that are permitted to be brought before the shareholders for a vote at an annual or special meeting. Rule 14a-8(i)(1) supports these determinations by providing that a proposal that is violative of the corporation’s governing documents may be excluded from the corporation’s proxy materials.

²⁶ The staff’s response is an informal expression of its views, and does not necessarily reflect the view of the Commission. Either the shareholder proponent or the company may obtain a decision on the excludability of a challenged proposal from a federal court.

provides that a company need not include a proposal that “relates to an election for membership on the company’s board of directors or analogous governing body.” The purpose of this provision is to prevent the circumvention of other proxy rules that are carefully crafted to ensure that investors receive adequate disclosure and an opportunity to make informed voting decisions in election contests.

In administering Rule 14a-8(i)(8), the staff has applied the following explanation of the election exclusion that the Commission gave in 1976 when it proposed the exclusion:

[T]he principal purpose of [Rule 14a-8(i)(8)] is to make clear, with respect to corporate elections, that Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature, since other proxy rules, including Rule 14a-11, are applicable thereto.²⁷

In its application of the Commission’s explanation, the staff has permitted companies to exclude any shareholder proposal that may result in a contested election. For purposes of Rule 14a-8, the staff has expressed the position that a proposal may result in a contested election if it is a means either to campaign for or against a director nominee or to require a company to include shareholder-nominated candidates in the company’s proxy materials. The staff’s position is consistent with the explanation that the Commission gave in 1976, and with the Commission’s interpretation of the election exclusion.

A recent decision by the U.S. Court of Appeals for the Second Circuit in American Federation of State, County & Municipal Employees, Employees Pension Plan

²⁷ Exchange Act Release No. 34-12598 (July 7, 1976) [41 FR 29982].

v. American International Group, Inc.,²⁸ addressed the application of the election exclusion. In that decision, the Second Circuit held that AIG could not rely on Rule 14a-8(i)(8) to exclude a shareholder proposal seeking to amend a company's bylaws to establish a procedure under which a company would be required, in specified circumstances, to include shareholder nominees for director in the company's proxy materials. The Second Circuit interpreted the Commission's statement in 1976 as limiting the election exclusion "to shareholder proposals used to oppose solicitations dealing with an identified board seat in an upcoming election and reject[ing] the somewhat broader interpretation that the election exclusion applies to shareholder proposals that would institute procedures making such election contests more likely."²⁹ It is the Commission's position that the election exclusion should not be limited in this way.³⁰

We are concerned that the Second Circuit's decision has resulted in uncertainty and confusion with respect to the appropriate application of Rule 14a-8(i)(8) and may lead to contested elections for directors without adequate disclosure. In this regard, not only are shareholders and companies unable to know with certainty whether a proposal that could result in an election contest may be excluded under Rule 14a-8(i)(8), but the staff also is severely limited in their ability to interpret Rule 14a-8 in responding to

²⁸ American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group, Inc., 462 F.3d 121 (2d Cir. 2006) (AFSCME v. AIG).

²⁹ Id. at 128.

³⁰ In this regard, we note that the Second Circuit noted in its decision that "...if the SEC determines that the interpretation of the election exclusion embodied in its 1976 Statement would result in a decrease in necessary disclosures or any other undesirable outcome, it can certainly change its interpretation of the election exclusion, provided that it explains its reasons for doing so." Id. at 130.

companies' notices of intent to exclude shareholder proposals. Therefore, to eliminate any uncertainty and confusion arising from the Second Circuit's decision, we are issuing this release to confirm the Commission's position that shareholder proposals that could result in an election contest may be excluded under Rule 14a-8(i)(8). We also are soliciting comment as to whether we should adopt proposed changes to Rule 14a-8(i)(8) to further clarify the rule's application. If clarification of the text of Rule 14a-8(i)(8) would be helpful, we are seeking input as to whether the text of the proposed amendment provides adequate clarity.

B. The Purpose of the Election Exclusion

The proper functioning of the election exclusion is critical to prevent the circumvention of other proxy rules that are carefully crafted to ensure that investors receive adequate disclosure in election contests. Because the board of directors of a company most often will include its own director nominees in its proxy materials, allowing shareholders to include their nominees in company proxy materials would create what is, in fact, a contested election of directors, without the shareholders conducting a separate proxy solicitation.

The detailed and carefully crafted regulatory regime governing contested elections does not contemplate the presence of nominees from different vying factions in the same proxy materials. As explained above, numerous protections of the federal proxy rules are triggered only by the presence of a solicitation made in opposition to another solicitation. Accordingly, were the election exclusion to be applied as contemplated in the Second Circuit's decision in AFSCME v. AIG, it would be possible for a person to wage an election contest without conducting a separate proxy solicitation, and thus

without providing the disclosures required by the Commission's present rules governing such contests, and potentially without liability under Rule 14a-9 for misrepresentations made by that person in its proxy solicitations. Such a result would be inconsistent with the Commission's 1976 statement regarding Rule 14a-8(i)(8) and the staff's application of that statement in responding to Rule 14a-8 notices of companies' intent to exclude proposals.

C. Application of the Election Exclusion Since 1976

Since the Commission made its original statement regarding the intended purpose of the election exclusion in 1976, the Commission has made few statements regarding the exclusion, instead leaving application of the exclusion to the staff to implement in accordance with its stated intent at adoption. When the Commission has had occasion to comment on the exclusion or to review staff positions in applying the exclusion, however, it has done so in a manner that is consistent with its longstanding view of the exclusion's purpose.

The Division issued a series of letters in 1990 that addressed nomination proposals similar to that presented in the AFSCME v. AIG matter. In those letters, the Division set forth its framework for applying Rule 14a-8(i)(8) to nomination proposals:

There appears to be some basis for [the company's] view that the proposal may be omitted pursuant to rule 14a-8[(i)](8). That provision allows the omission of a proposal that "relates to an election to office." In this regard, the staff particularly notes that the Commission has indicated that the "principal purposes of [rule 14a-8(i)(8)] is to make clear [that] with respect to corporate elections, that [r]ule 14a-8 is not the proper means for

conducting campaigns . . . since other proxy rules, including rule [14a-12] are applicable thereto.” Securities Exchange Act Release No. 12598 (July 7, 1976). Insofar as it seeks to implement a common ballot procedure, it appears that this proposal . . . would establish a procedure that may result in contested elections to the board which is a matter more appropriately addressed under Rule 14a-12. Accordingly, this Division will not recommend enforcement action to the Commission if the Company excludes the proposal from its proxy materials.³¹

In 1992, in proposing reforms to the proxy rules, the Commission acknowledged the “difficulty experienced by shareholders in gaining a voice in determining the composition of the board of directors” but noted further that:

Proposals to require the company to include shareholder nominees in the company’s proxy statement [rather than in the dissident’s own proxy statement] would represent a substantial change in the Commission’s proxy rules. This would essentially mandate a universal ballot including both management nominees and independent candidates for board seats.³² (emphasis added).

The Division continued to include the “may result in contested elections” language in its letters regarding shareholder nomination proposals and Rule 14a-8(i)(8) for 10 years.³³ In 1998, the Division included this language in its letter to Storage

³¹ See Division letter to Amoco (Feb. 14, 1990).

³² See Exchange Act Release No. 34-31326 (Oct. 16, 1992) [57 FR 48276].

³³ In each of 1993 and 1995, the Division issued one letter that took a view that was counter to existing precedent and its own statements with regard to similar proposals. See Dravo Corp. (Feb. 21, 1995); and Pinnacle West Capital Corp. (Mar. 26, 1993) (not permitting exclusion under Rule

Technology Corporation.³⁴ In that letter, the Division agreed that there was a basis for the company's view that it could exclude, under Rule 14a-8(i)(8), a proposal that sought to amend the company's governing instruments to provide that any three shareholders who owned a combined minimum of 3,000 shares could include a director nominee in the company's proxy materials.³⁵ The shareholder sought Commission review of this Division position, but the Commission declined to review the no-action determination.³⁶

As noted above, the Division continued to include the "contested elections" language in its Rule 14a-8(i)(8) no-action letters through and beyond the Commission's 1998 letter to Storage Technology Corporation. While the Division has continued to follow this analysis in past seasons, it ceased repeating this language in its letters during the 2000 proxy season, as the analysis had been established definitively through 10 years of Division positions and the Commission's letter to Storage Technology.

In 2003, the Division agreed that there was a basis for the view of Citigroup Inc. that it could exclude, under Rule 14a-8(i)(8), a proposal that was substantially similar to the proposal that was submitted to AIG by AFSCME and that was the subject of the

14a-8(i)(8) of proposals seeking to include qualified nominees in the company's proxy statement). The staff issued these letters in error, as they clearly are inconsistent with the Commission statement in the 1976 release proposing Rule 14a-8(i)(8) and numerous Division statements before and after. Further, these letters are inconsistent with later Commission statements, as described below.

³⁴ See Division letter to Storage Technology Corporation (Mar. 11, 1998) ("There appears to be some basis for your view that the first proposal may be omitted under rule 14a-8[(i)](8). It appears that the first proposal, rather than establishing procedures for nomination or qualification generally, would establish a procedure that may result in contested elections of directors, which is a matter more appropriately addressed under Rule [14a-12]. Accordingly, the Division will not recommend enforcement action to the Commission if the Company excludes the first proposal from its proxy materials in reliance upon Rule 14a-8[(i)](8)").

³⁵ See id.

³⁶ Letter of Jonathan Katz, Secretary of the Commission, to Dr. Seymour Licht P.E. (Apr. 6, 1998).

Second Circuit's recent opinion. In its letter to Citigroup Inc. (Jan. 31, 2003), the Division agreed that there was a basis for the Citigroup's view that the company could exclude a proposal because the proposal, "rather than establishing procedures for nomination or qualification generally, would establish a procedure that may result in contested elections of directors." The shareholder proposal at issue in Citigroup was submitted by AFSCME and, similar to the proposal submitted to AIG, would have amended the company's bylaws to require the company to include the name, along with certain disclosures and statements, of any person nominated for election to the board by a 3% or greater stockholder.

The shareholder sought Commission review of the Division's position in its 2003 letter to Citigroup. The Commission declined to review the staff's determination, stating:

[t]he Commission has determined not to review the Division's no-action position under Rule 14a-8(i)(8). The Division's current no-action position is consistent with Division positions taken in recent years. Any change in the Division's current interpretation would require other significant adjustments in the system of proxy regulation under Section 14(a) of the Securities Exchange Act of 1934.³⁷

While the Commission determined not to review the staff's position, it directed the Division of Corporation Finance to review the proxy rules regarding procedures for the election of corporate directors and provide the Commission

³⁷ See letter from Jonathan Katz, Secretary of the Commission, to Gerald W. McEntee (Apr. 14, 2003). In that letter, the Commission directed the Division to review the proxy rules and regulations, as well as the Division's interpretations, regarding procedures for the election of corporate directors. This review resulted in the Commission's proposal of revisions to the proxy rules in October 2003.

with recommendations regarding possible changes to the proxy rules.

Following the Division's review of the proxy rules, in 2003 the Commission proposed a comprehensive new set of rules, based on the Division's recommendations, which would govern shareholder director nominations that are not control-related.³⁸ The Commission would not have taken such action had it believed that Rule 14a-8 provided an appropriate avenue for shareholder director nominations. In fact, in discussing alternatives considered but not chosen in proposing the rules, the Commission specifically noted the alternative of revising Rule 14a-8(i)(8) to enable shareholders to use the shareholder proposal rule to participate more fully in the director nomination process.³⁹

D. Commission Interpretation of Rule 14a-8(i)(8)

As noted previously, the Commission stated clearly when it proposed amendments to Rule 14a-8 in 1976 that "Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature, since other proxy rules, including Rule 14a-11, are applicable thereto."⁴⁰ Thus, Rule 14a-8 expressly was not intended to be a substitute, or additional, mechanism for conducting contested elections (the type of elections that would involve the "conducting [of] campaigns"), or

³⁸ Exchange Act Release No. 34-48626 (Oct. 14, 2003) [68 FR 60784].

³⁹ Id. See also AFSCME at 130, n. 8 (stating that, because of the court's determination, "there might very well be no reason for a rule based on Proposed Rule 14a-11 to co-exist with the procedure that our holding makes available to shareholders").

⁴⁰ Exchange Act Release No. 34-12598 (July 7, 1976). The Commission's reference in its 1976 statement to "other proxy rules, including Rule 14a-11," reflects the fact that, in 1976, Rule 14a-11 was the Commission proxy rule governing election contests. As part of a series of rule changes in 1999, the Commission rescinded Rule 14a-11 and moved many of the requirements of prior Rule 14a-11 to the current Rule 14a-12. [17 CFR 240.14a-12] See Securities Act Release No. 33-7760 (Oct. 22, 1999) [64 FR 61408]. Accordingly, the Commission's reference to Rule 14a-11 in 1976 was to the rules governing election contests, which now may be found generally elsewhere in the proxy rules and, in particular, in Rule 14a-12.

for effecting reforms in contested elections (elections whose “nature” involves campaigns). Based on the foregoing, it is the Commission’s view that a proposal may be excluded under Rule 14a-8(i)(8) if it would result in an immediate election contest (e.g., by making or opposing a director nomination for a particular meeting) or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders’ director nominees in the company’s proxy materials for subsequent meetings.

In the AFSCME opinion, the Second Circuit agreed with the Commission’s view that shareholder proposals can be excluded under Rule 14a-8(i)(8) if they would result in an immediate election contest. The court, however, disagreed with the view that a proposal can be excluded under Rule 14a-8(i)(8) if it “establish[es] a process for shareholders to wage a future election contest.”

We believe that the fact a proposal relates to the process for future elections rather than an immediate election is not dispositive in determining whether the election exclusion applies to the proposal. As the Commission stated in 1976, the express purpose of the election exclusion is to make clear that Rule 14a-8 is not a proper “means” to achieve election contests because “other proxy rules” are applicable to such contests. The use of Rule 14a-8 to require companies to include proposals that would require election contests to be conducted without compliance with the specific rules governing such contests would be contrary to the intent of the Commission’s 1976 statement.

For these reasons, and to avoid such circumvention, the phrase “relates to an election” in the election exclusion cannot be read so narrowly as to refer only to a proposal that “relates to the current election,” or a particular election, but rather must be

read to refer to a proposal that “relates to an election” in subsequent years as well. In this regard, if one looked only to what a proposal accomplished in the current year, and not to its effect in subsequent years, the purpose of the exclusion could be evaded easily. For example, such a reading might permit a company to exclude a shareholder proposal that nominated a candidate for election as director for the upcoming meeting of shareholders but not exclude a proposal that required the company to include the same shareholder-nominated candidate in the company’s proxy materials for the following year’s meeting.

In implementing the Commission’s intended meaning, the staff has taken care not to adopt an inappropriately broad reading of whether a proposal “relates to an election,” as such a reading would permit the exclusion of all proposals regarding the qualifications of directors, the composition of the board, shareholder voting procedures, and board nomination procedures. We agree with the staff’s application of the exclusion in this regard, as an inappropriately broad reading of the exclusion would deny shareholder access to the company proxy materials under Rule 14a-8 with respect to a vast category of election matters of importance to shareholders that would not result in an election contest between management and shareholder nominees, and that do not present significant conflicts with the Commission’s other proxy rules.⁴¹

⁴¹ In this regard, the staff has taken the position that a proposal relates to “an election for membership on the company’s board of directors or analogous governing body” and, as such, may be excluded under Rule 14a-8(i)(8) if it could have the effect of, or proposes a procedure that could have the effect of, any of the following:

- disqualifying board nominees who are standing for election;
- removing a director from office before his or her term expired;
- questioning the competence or business judgment of one or more directors; or
- requiring companies to include shareholder nominees for director in the companies’ proxy materials or otherwise resulting in a solicitation on behalf of shareholder nominees in opposition to management-chosen nominees.

Conversely, the staff has taken the position that a proposal may not be excluded under Rule 14a-8(i)(8) if it relates to any of the following:

- qualifications of directors or board structure (as long as the proposal will not remove current directors or not disqualify current nominees);

Our interpretation of the election exclusion is fully consistent with the Commission’s statement in 1976, that the rule was not intended “to cover proposals dealing with matters previously not held not excludable by the Commission, such as cumulative voting rights, general qualifications for directors...” In the AFSCME v. AIG opinion, the Second Circuit inferred from this Commission statement that the Commission “reject[ed] the somewhat broader interpretation that the election exclusion applies to shareholder proposals that would institute procedures for making election contests more likely.” Our view that Rule 14a-8(i)(8) allows companies to exclude shareholder proposals that could result in election contests without compliance with the contested election proxy rules is consistent with the Commission’s statement in 1976. As explained above, the analysis under Rule 14a-8(i)(8) does not focus on whether the proposal would make election contests more likely, but whether the resulting contests would be governed by the Commission’s proxy rules for contested elections. The Commission’s references in 1976 to proposals relating to “cumulative voting rights” and “general qualifications for directors” simply reflect the long-held belief that these proposals generally do not trigger the contested elections proxy rules and therefore are not excludable under Rule 14a-8(i)(8). Accordingly, the Commission’s 1976 statement should not be interpreted to mean that Rule 14a-8(i)(8) is inapplicable to proposals establishing procedures for elections generally.

III. Proposed Amendments to Rule 14a-8(i)(8)

In addition to the guidance provided in this release regarding our interpretation of

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- voting procedures (such as majority or cumulative voting);
 - nominating procedures; or
 - reimbursement of shareholder expenses in contested elections.

Rule 14a-8(i)(8), we are considering whether it would be appropriate to amend that rule to further clarify the meaning of its exclusion. The text of Rule 14a-8(i)(8) currently specifies only that a proposal may be excluded “[i]f the proposal relates to an election for membership on the company’s board of directors or analogous governing body.” To clarify the meaning of the exclusion, consistent with the Commission’s interpretation of that exclusion, we are proposing to revise the exclusion to read:

If the proposal relates to a nomination or an election for membership on the company’s board of directors or analogous governing body or a procedure for such nomination or election.

We believe that the added references to “nomination” and “procedure” in the rule text will reflect more appropriately the purpose of the election exclusion. Further, if adopted, we would indicate clearly that the term “procedures” referenced in the election exclusion relates to procedures that would result in a contested election, either in the year in which the proposal is submitted or in subsequent years, consistent with the Commission’s interpretation of the exclusion.

As discussed above, we are proposing amendments to Rule 14a-8 that would clarify the operation of the exclusion in Rule 14a-8(i)(8) in a manner that is consistent with the Commission’s interpretation of that exclusion. With regard to this proposed amendment, we are soliciting comment as to the following:

- Would the proposed amendments to Rule 14a-8(i)(8) provide sufficient certainty regarding the scope of the exclusion? If not, what additional amendments are necessary?
- Should the exclusion specify those procedures that the staff historically has

found to fall within the exclusion?

- What additional clarification would be helpful and/or appropriate?

For further clarity, should the proposed amendments include a specific reference to the interpretation of the exclusion with respect to procedures that could not result in a contested election? An example of such a further clarification would be:

In this regard, a proposal relates to “a nomination or an election for membership on the company’s board of directors or analogous governing body or a procedure for such nomination or election” if it could have the effect of, or proposes a procedure that could have the effect of, any of the following: (A) disqualifying board nominees who are standing for election; (B) removing a director from office before his or her term expired; (C) questioning the competence or business judgment of one or more directors; or (D) requiring companies to include shareholder nominees for director in the companies’ proxy materials or otherwise resulting in a solicitation on behalf of shareholder nominees in opposition to management-chosen nominees.

IV. General Request for Comment

We request and encourage any interested person to submit comments regarding:

- the proposed amendments that are the subject of this release;
- additional or different changes; or
- other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of companies, investors, and other market participants. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and

analysis of the issues addressed in those comments. We will consider all comments responsive to this inquiry in complying with our responsibilities under Section 23(a) of the Exchange Act.⁴²

V. Paperwork Reduction Act

A. Background

The proposed amendments affect “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995, the PRA.⁴³ The title for the affected collection of information is “Proxy Statements - Regulation 14A (Commission Rules 14a-1 through 14a-16 and Schedule 14A)” (OMB Control No. 3235-0059). This regulation was adopted pursuant to the Exchange Act and sets forth the disclosure requirements for proxy statements filed by companies to help investors make informed voting decisions.

The hours and costs associated with preparing and filing the disclosure, filing the forms and schedules and retaining records required by these regulations constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

B. Summary of Proposals

Rule 14a-8 is the Commission rule that provides shareholders with an opportunity to place a proposal in a company’s proxy materials for a vote at an annual or special meeting of shareholders. The proposed amendments to that rule are intended to clarify

⁴² 15 U.S.C. 78w(a).

⁴³ 44 U.S.C. 3501 *et seq.*

the scope of the exclusion in Rule 14a-8(i)(8), consistent with the Commission's interpretation of the exclusion. The amendments would provide certainty regarding the meaning of the exclusion in that rule.

C. Paperwork Reduction Act Burden Estimates

Adoption of the Rule 14a-8(i)(8) amendments would merely revise the text of the rule in a manner that is consistent with the Commission's interpretation of the rule. As such, the amendments proposed today would not change the information that companies are required to provide on Schedule 14A; the same information will be required if the proposed amendments are adopted.

D. Solicitation of Comments

We request comment on this Paperwork Reduction Act Analysis. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

- evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the Commission's estimate of burden of the proposed collection of information;
- determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and
- evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct

the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-17-07. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-17-07, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Assistance, Washington, DC 20549.

VI. Cost-Benefit Analysis

We propose amendments that would clarify existing rules. The opinion in American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group, Inc.⁴⁴ has created uncertainty regarding the Commission staff's longstanding administration of Rule 14a-8(i)(8), making it difficult for shareholders and companies to assess the operation of that rule. The proposed amendments to that rule are intended to clarify the scope of the exclusion in Rule 14a-8(i)(8), consistent with the Commission's interpretation of the rule. Without such clarification, shareholders and companies may be uncertain as to the range of shareholder proposals that are required to be included in company proxy materials and may be uncertain as to the proper range of proposals that shareholders may submit to companies for inclusion in those proxy materials. For example, without clarification of the exclusion in Rule 14a-8(i)(8), shareholders may incur costs in preparing and submitting proposals that a company may properly exclude from its proxy materials.

⁴⁴ 462 F.3d 121 (2d Cir. 2006) (AFSCME).

Because the proposed amendments would clarify that the scope of the exclusion in Rule 14a-8(i)(8) is consistent with the Commission's interpretation of that exclusion, shareholders and companies would not incur additional costs to determine the appropriate scope of that exclusion. Further, companies would not incur additional costs with regard to the inclusion of shareholder proposals in proxy materials.

The proposed amendments should improve the ability of shareholders to prepare and submit proposals that will be required to be included in a company's proxy materials, as those shareholders will have a clear understanding of the scope of the Rule 14a-8(i)(8) exemption. Further, without the clarification of the proper scope of the Rule 14a-8(i)(8) exclusion that would be provided by the amendments, shareholders and companies may incur substantial expense in litigating disputes regarding that exclusion.

Request for Comment

We are sensitive to the costs and benefits imposed by our rules. We have identified no costs and certain benefits related to these proposals. We request comment on all aspects of this cost-benefit analysis, including identification of any costs and additional benefits. We encourage commenters to identify and supply relevant data concerning the costs and benefits of the proposed amendments.

VII. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act⁴⁵ requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the

⁴⁵ 15 U.S.C. 78w(a)(2).

Exchange Act. Section 3(f) of the Exchange Act⁴⁶ and Section 2(c) of the Investment Company Act of 1940⁴⁷ requires us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

The AFSCME opinion has created uncertainty regarding the Commission staff's longstanding administration of Rule 14a-8(i)(8), making it difficult for companies and shareholders to assess the operation of that rule. This has resulted in uncertainty regarding whether Rule 14a-8 requires companies to include in their proxy materials shareholder proposals that would establish procedures under which shareholder nominees for director, despite the exclusion provided by Rule 14a-8(i)(8). This uncertainty has made it difficult for shareholders and companies to assess the proper operation of the shareholder proposal rule and has generated economic inefficiency by introducing potential litigation costs, and costs incurred to prepare and respond to shareholder proposals.

The proposed amendments are intended to clarify the scope of the exclusion in Rule 14a-8(i)(8), consistent with the Commission's interpretation of the rule. This should improve shareholders' and companies' ability to assess shareholder proposals with a clear understanding whether Rule 14a-8 will require inclusion of the proposal. Informed decisions in this regard generally promote market efficiency and capital formation. We believe the proposed amendments to Rule 14a-8 would not impose a burden on

⁴⁶ 15 U.S.C. 78c(f).

⁴⁷ 15 U.S.C. 80a-2(c).

competition.

We request comment on whether the proposed amendments, if adopted, would impose a burden on competition. We also request comment on whether the proposed amendments, if adopted, would promote efficiency, competition and capital formation. Finally, we request commenters to provide empirical data and other factual support for their views if possible.

VIII. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed amendments to Rule 14a-8 that would clarify the application of the exclusion provided by paragraph (i)(8) of that rule.

A. Reasons for, and Objectives of, Proposed Action

The purpose of the proposed amendments is to clarify the requirements of companies to include in their proxy materials shareholder proposals relating to procedures for the inclusion of shareholder nominees for directors in company proxy materials. The proposed amendments would clarify the scope of Rule 14a-8(i)(8), which permits companies to omit certain such proposals from their proxy materials.

The proposals, if adopted, should improve shareholders' and companies' ability to assess shareholder proposals with a clear understanding whether Rule 14a-8 will require inclusion of the proposal.

B. Legal Basis

We are proposing amendments to the rules under the authority set forth in Sections 14 and 23(a) of the Exchange Act, as amended, and Sections 20(a) and 38 of the Investment Company Act of 1940, as amended.

C. Small Entities Subject to the Proposed Rules

The Regulatory Flexibility Act defines “small entity” to mean “small business,” “small organization,” or “small governmental jurisdiction.”⁴⁸ The Commission’s rules define “small business” and “small organization” for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.⁴⁹ A “small business” and “small organization,” when used with reference to a company other than an investment company, generally means an company with total assets of \$5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 companies, other than investment companies, that may be considered reporting small entities.⁵⁰ The proposed rules may affect each of the approximately 1,315 small entities that are subject to the Exchange Act reporting requirements.

We request comment on the number of small entities that would be impacted by our proposals, including any available empirical data.

D. Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendments would impose no new reporting, recordkeeping, or compliance requirements. The impact of these proposals relates to clarifying the scope of the requirement to include shareholder proposals in company proxy materials.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that conflict with or duplicate the proposed

⁴⁸ 5 U.S.C. 601(6).

⁴⁹ Securities Act Rule 157 (17 CFR 230.157), Exchange Act Rule 0-10 (17 CFR 240.0-10) and Investment Company Act Rule 0-10 (17 CFR 270.0-10) contain the applicable definitions.

⁵⁰ The estimated number of reporting small entities is based on 2007 data, including the Commission’s EDGAR database and Thomson Financial’s Worldscope database. Approximately 215 investment companies meet this definition.

rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective of our proposals, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments and rules, we considered the following alternatives:

1. the establishment of different compliance or reporting requirements or timetables that take into account the resources available to small entities;
2. the clarification, consolidation, or simplification of the rule's compliance and reporting requirements for small entities;
3. the use of performance rather than design standards; and
4. an exemption from coverage of the proposed rules, or any part thereof, for small entities.

Regarding Alternative 1, we believe that differing compliance or reporting requirements for small entities would be inconsistent with Rule 14a-8, the Commission's intent when it adopted that rule, and the Commission's purpose of providing certainty in the application of that rule. Regarding Alternative 2, the proposals are concise and would clarify the Rule 14a-8(i)(8) exclusion for all entities, including small entities. Regarding Alternative 3, we believe that design rather than performance standards are appropriate because use of performance standards for small entities would not be consistent with the purpose of Rule 14a-8. Finally, an exemption for small entities is not appropriate because the proposals are designed to provide certainty and consistency regarding the application of the exclusion provided by Rule 14a-8.

G. Solicitation of Comment

We encourage comments with respect to any aspect of this initial regulatory flexibility analysis. In particular, we request comments regarding:

- The number of small entities that may be affected by the proposals;
- The existence or nature of the potential impact of the proposals on small entities discussed in the analysis; and
- How to quantify the impact of the proposed rules.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the final regulatory flexibility analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

IX. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,⁵¹ a rule is “major” if it has resulted, or is likely to result in:

- An annual effect on the economy of \$100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a “major rule” for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;

⁵¹ Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 50 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. §601).

- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment or innovation.

X. Statutory Basis and Text of Proposed Amendments

We are proposing amendments to rules pursuant to Sections 14, and 23(a) of the Exchange Act, as amended, and Sections 20(a) and 38 of the Investment Company Act of 1940, as amended.

List of Subjects

17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, the Securities and Exchange Commission proposes to amend Title 17, chapter II of the Code of Federal Regulations as follows:

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 24 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et. seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Amend §240.14a-8 by revising paragraph (i)(8) to read as follows:

§240.14a-8 Shareholder proposals.

* * * * *

- (i) * * *

(8) Relates to election: If the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election;

* * * * *

By the Commission.

Nancy M. Morris
Secretary

Dated: July 27, 2007