FREQUENTLY ASKED QUESTIONS ABOUT SHAREHOLDER PROPOSALS AND PROXY ACCESS

Shareholder Proposals

What are shareholder proposals?

Shareholder proposals are matters that shareholders of a public company seek to have acted on at an annual or other meeting of the company. In accordance with the requirements specified in state corporation laws and in a company's organizational documents, a shareholder could seek to have a matter voted on by raising the matter at a meeting of shareholders. Alternatively, a qualifying shareholder could seek to include the proposal in the company's proxy statement under Rule 14a-8 adopted under Section 14(a) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and thereby have the company solicit proxies with respect to the proposal that would be presented at the meeting.

Who submits shareholder proposals to companies?

Shareholder proposals come from a wide variety of shareholders, sometimes referred to as "proponents." Shareholder proponents may be individual investors who are seeking to raise a particular issue or implement a policy at a company, corporate "gadflies" who seek to bring about changes to corporate activity through the shareholder proposal process, activist investors who are seeking to bring about a change-in-control or a change in the strategy or policies of the company, and institutional investors who may be focused on particular corporate governance or social issues.

Who regulates the shareholder proposal process?

The Securities and Exchange Commission (the "SEC") has adopted Rule 14a-8 as a means to control the process whereby proponents seek to have shareholder proposals included in the proxy statements of public companies, and the staff of the SEC (the "Staff") is involved in considering the arguments of companies that seek to exclude shareholder proposals based on the operation of Rule 14a-8 through a process whereby companies typically seek a "no-action letter" from the Staff with regard to whether the company may exclude the shareholder proposal. Under Rule 14a-8, a company must include a shareholder proposal in its proxy materials unless it violates one of the rule's eligibility and procedural requirements or falls within one of the rule's thirteen substantive bases for exclusion.

The Scope of Rule 14a-8

Does Rule 14a-8 require that all shareholder proposals be included in a company's proxy statement?

Under Rule 14a-8, a company must include a shareholder proposal in its proxy materials unless it violates one of the rule's eligibility and procedural requirements, or one of the thirteen substantive bases for exclusion specified in the rule.

What are the eligibility and procedural requirements for shareholder proposals under Rule 14a-8?

Rule 14a-8 imposes several eligibility and procedural requirements on shareholders who rely on the rule. A shareholder may only submit one proposal per meeting, must own at least $2,000 or 1% of securities entitled to vote on the proposal and must limit its proposal to 500 words. A shareholder must submit the proposal at least 120 days before the date of the company's proxy statement for the previous year's annual meeting (or a reasonable time before the company begins to print and mail its proxy materials if the company did not have an annual meeting during the previous year, or if the date of the annual meeting has been changed by more than 30 days from the date of the previous year's annual meeting). A company that intends to rely on the rule to exclude a proposal must submit its "no-action" request 80 days in advance of the date that it proposes to file its definitive proxy materials.

What are the substantive requirements under Rule 14a-8?

Under paragraph (i) of Rule 14a-8, a company may exclude a shareholder proposal from its proxy materials if the proposal falls into one of thirteen specific substantive bases for exclusion. These substantive bases represent areas that the SEC has determined over the years to not be appropriate matters for consideration by shareholders through the shareholder proposal process. To exclude a proposal, a company must first notify the SEC, which is typically done through a request for a "no-action" letter. In the no-action letter request, a company may argue that the subject shareholder proposal can be excluded under more than one basis for exclusion.

How does the no-action letter process work with respect to shareholder proposals?

The central component of the Rule 14a-8 process is the no-action letter. A no-action letter is a letter from the Staff that provides the Staff's informal view regarding whether it would recommend enforcement action to the SEC if the company takes the course of action described in the no-action request. No-action letters reflect the Staff's views concerning the application of securities laws to a particular set of facts. In the context of Rule 14a-8, no-action letters often serve as a key hurdle for shareholders that hope to include a proposal in a company's proxy materials.

There is no rule that requires the submission of no-action requests, nor is there a rule that requires that the Staff respond to such requests. Companies submit requests to comply with Rule 14a-8(j), which requires that companies "file their reasons" with the SEC. The Staff responds to such requests as a convenience to both companies and shareholders, and in order to assist both companies and shareholders in complying with the proxy rules. While the Staff's no-action letters typically address whether the company has a basis to exclude the proposal, there also may be times when the Staff will say that there appears to be some basis for the company's objection, but the problem can be cured if the proponent changes the proposal in some specific way, for example, the proponent makes a mandatory proposal into a nonbinding proposal, or deletes certain words or sentences in the proposal to avoid vagueness.

Some companies have elected to submit a notice to the SEC of the company's intention to exclude the proposal, and then file suit in federal court seeking a declaratory judgment as to whether the proposal may be excluded under Rule 14a-8(i)(8).

The Eligibility and Procedural Requirements of Rule 14a-8

What are the requirements as to ownership for submitting shareholder proposals?

A shareholder proposal may be submitted under Rule 14a-8 by a proponent who has held at least $2,000 worth of the company's stock (or 1% of the shares eligible to vote, whichever figure is smaller) continuously for at least one year before the date the proposal is submitted to the company. Further, the proponent must hold the securities through the date of the annual meeting.

How does a proponent demonstrate that the ownership requirements have been satisfied?

Under Rule 14a-8(b), at the time a shareholder submits a proposal, the shareholder must prove eligibility by being a record holder of the securities that the company could verify on its own, or by submitting either:

- A written statement from the record holder of the securities (usually a broker or bank that is a Depositary Trust Company ("DTC") participant) verifying that, at the time the shareholder submits the proposal, the shareholder continuously held at least $2,000 in market value or 1% of the company's securities entitled to vote on the proposal at the meeting for at least one year by the date the shareholder submitted the proposal; or
- A copy of a Schedule 13D, Schedule 13G, Form 3, Form 4, Form 5, or amendments to those documents or updated forms, reflecting the shareholder's ownership of the shares as of or before the date on which the one-year eligibility period begins.

Rule 14a-8(b)(2)(i) provides that, in addition to the proof of ownership, "You [the shareholder proponent] must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders."

What must a proponent submit if the proponent is not the record holder of the securities?

Usually, a proponent would submit a written statement from the "record" holder of the securities (usually a broker or bank that is a DTC participant) verifying that, at the time the shareholder submits the proposal, the shareholder continuously held at least $2,000 in market value or 1% of the company's securities entitled to vote on the proposal at the meeting for at least one year by the date the shareholder submitted the proposal. In Staff Legal Bulletin No. 14F ("SLB 14F"), the Staff clarified that only DTC participants should be viewed as "record" holders of securities that are deposited with DTC. In accordance with this guidance, a shareholder that owns shares through a broker or bank that is not a DTC participant must obtain and submit two proof of ownership statements—one from the shareholder's broker or bank confirming the shareholder's ownership and one from the DTC participant through which the securities are held confirming the ownership of the shareholder's broker or bank.

A company that seeks to exclude a shareholder proposal from its proxy materials on the basis of proof of ownership now must take at least the following steps: (i) determine whether the shareholder is a registered shareholder by checking its list of registered shareholders; (ii) review the proof of ownership to see if the bank or broker providing such proof is a DTC participant by comparing such bank or broker's name against the list of DTC participants; and (iii) notify the shareholder that the person that provided proof of ownership is not a DTC participant and request that the shareholder obtain a second letter demonstrating proof of ownership from the bank or broker that is a DTC participant through which the other bank or broker holds shares.

In Staff Legal Bulletin No. 14G ("SLB 14G"), the Staff stated the view that, for purposes of Rule 14a-8(b)(2)(i), a proof of ownership letter from an affiliate of a DTC participant satisfies the requirement to provide a proof of ownership letter from a DTC participant.

Is there particular language that a proponent should have its broker or bank use when providing the proof of ownership information?

SLB 14F suggests that a shareholder proponent use the following format to have its broker or bank provide the required proof of ownership as of the date the shareholder plans to submit the proposal: "As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least one year, [number of securities] shares of [company name] [class of securities]."

How does a proponent determine the market value of the securities held for the purposes of eligibility to submit a proposal under Rule 14a-8?

The Staff noted in Staff Legal Bulletin No. 14 ("SLB 14") that, in order to determine whether the shareholder satisfies the $2,000 threshold, the Staff looks at whether, on any date within the 60 calendar days before the date the shareholder submits the proposal, the shareholder's investment is valued at $2,000 or greater, based on the average of the bid and ask prices. If bid and ask prices are not available, then the market value is determined by multiplying the number of securities the shareholder held for the one-year period by the highest selling price during the 60 calendar days before the shareholder submitted the proposal. The Staff notes that that a security's highest selling price is not necessarily the same as its highest closing price.

How many proposals may a shareholder proponent submit?

Under Rule 14a-8(c), a proponent may submit no more than one proposal for a particular shareholders' meeting.

How long can a shareholder proposal be?

Under Rule 14a-8(d), the proposal, including any accompanying supporting statement, may not exceed 500 words.

The Staff notes, in SLB 14, that any statements which are arguments "in support of the proposal" are considered to be part of the supporting statement, therefore, any title or heading in the proposal meeting that test may be counted toward the 500-word limitation. In general, the reference to a website address does not violate the 500 word limitation by virtue of indirectly including the content of the website in the proposal and supporting statement. In SLB 14, the Staff indicated that it counts a website address as one word for purposes of the 500-word limitation because the Staff does not believe that a website address raises the concern that Rule 14a-8(d) was intended to address.

What is the deadline for submitting a shareholder proposal?

Rule 14a-8(e)(2) requires that proposals for a regularly scheduled annual meeting be received at the company's principal executive offices by a date not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting. The deadline for shareholder proposals is included in the company's proxy statement, and is determined by (i) starting with the release date disclosed in the previous year's proxy statement; (ii) increasing the year by one; and (iii) counting back 120 calendar days.

Must a proponent or a proponent's designee attend the meeting to present the proposal?

Rule 14a-8(h)(1) requires that the proponent or the proponent's qualified representative attend the shareholders' meeting to present the proposal. Rule 14a-8(h)(3) provides that a company may exclude a proponent's proposals for two calendar years if the company included one of the proponent's proposals in its proxy materials for a shareholders' meeting, neither the proponent nor the proponent's qualified representative appeared and presented the proposal, and the proponent did not demonstrate "good cause" for failing to attend the meeting or present the proposal.

If a proponent voluntarily provides a written statement evidencing an intention to act contrary to Rule 14a-8(h)(1) and not attend the meeting, Rule 14a-8(i)(3) (discussed below) may serve as a basis for the company to exclude the proposal because the proponent's actions are contrary to the proxy rules.

What must a company do if it seeks to exclude a proposal based on the failure of the proponent to meet one these eligibility and procedural requirements?

If a shareholder fails to follow the eligibility or procedural requirements of Rule 14a-8, Rule 14a-8(f) provides that a company may exclude a proposal from its proxy materials due to eligibility or procedural defects if (i) within 14 calendar days of receiving the proposal, the company provides the shareholder with written notice of the defect or defects with the proposal, including the time frame for responding; and (ii) the shareholder fails to respond to this notice within 14 calendar days of receiving the notice of the defect or defects, or the shareholder timely responds but does not cure the eligibility or procedural defect(s). If the shareholder does not timely respond or remedy the defect(s) and the company intends to exclude the proposal, the company must still submit, to the Staff and the shareholder, a copy of the proposal and the reasons for excluding the proposal.

The company does not need to provide the shareholder with a notice of defect if the defect cannot be remedied; however, the company must still submit its reasons regarding exclusion of the proposal to the Staff and the shareholder. The shareholder may, but is not required to, submit a reply to the Staff with a copy sent to the company.

Under what circumstances must a company accept a revised shareholder proposal?

Under guidance provided in SLB 14F, if a shareholder proponent submits a revised proposal before the company's deadline for shareholder proposals, the company must accept the revised proposal. If a shareholder submits a revised proposal after the company's deadline, the company does not have to accept the revised proposal.

Does the Staff provide responses to no-action requests by e-mail?

The Staff indicated in SLB 14F that it now transmits Rule 14a-8 no-action responses by e-mail to companies and proponents, provided that they include e-mail addresses for recipients in their correspondence.

Can a no-action letter be withdrawn?

If a company determines that it does not want to obtain a Staff response to a pending no-action request, because, for example, the company has negotiated with the proponent to withdraw the proposal or the company has elected to include the proposal in its proxy statement, then the company should submit a letter to the Staff requesting withdrawal of the no-action request.

The Substantive Bases for Exclusion of Shareholder Proposals under Rule 14a-8

Rule 14a-8(i)(1) provides that a proposal is excludable when it is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization. Under what circumstances is this basis for exclusion applicable?

Rule 14-8(i)(1) focuses on proposals that would not be a proper subject for shareholder action. With respect to subjects and procedures for shareholder votes, 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. The SEC indicates that, depending on the subject matter, a proposal that would bind the company if approved by shareholders may not be considered proper under state law. Proposals cast as recommendations or requests that the board of directors take specified action, however, are generally considered proper under state law. As a result, the Staff will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise. The Staff will let a proponent amend a proposal to make it a "precatory" recommendation if the company objects to the mandatory nature of the proposal.

The Staff has consistently granted no-action relief to corporations under Rule 14a-8(i)(1) where a shareholder proposal mandates action that, under state law, falls within the powers of the board of directors. For example, the Staff has allowed companies to exclude proposals that would require a board to declassify a staggered board, while the Staff has permitted proposals requesting company "take the steps necessary" to declassify staggered board.

Companies must provide a supporting opinion of counsel when the reason for exclusion is based on matters of state or foreign law. Further, under a 2007 amendment to Delaware law, the SEC may request a legal interpretation from the Delaware Supreme Court. In June 2008, the SEC certified to the Supreme Court questions about the propriety under state law of a shareholder proposal submitted to CA by the AFSCME pension plan.

Rule 14a-8(i)(2) provides that a proposal is excludable when the proposal would, if implemented, cause the company to violate any state, federal or foreign law to which it is subject. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(2) focuses on situations where the implementation of the shareholder proposal would result in a violation of any state, federal or foreign law. Such a violation could include a violation of applicable corporate law, or it could include the violation of other laws applicable to the company and its operations. For example, the Staff has allowed a company to exclude a proposal that would require mandatory board retirement age, where doing so would violate a state age discrimination law. A note to Rule 14a-8(i)(2) provides that a company cannot exclude a proposal on the basis that it would violate foreign law if compliance with that law would result in violation of state or federal law. As with requests to exclude under Rule 14a-8(i)(1), the Staff will permit a proponent to amend a proposal to make it a "precatory" recommendation if the company objects to the mandatory nature of the proposal as a potential violation of state corporate law.

As with Rule 14a-8(i)(1), companies must provide a supporting opinion of counsel when the reason for exclusion is based on matters of state or foreign law. Further, under a 2007 amendment to Delaware law, the SEC may request a legal interpretation from the Delaware Supreme Court.

Rule 14a-8(i)(3) provides that a proposal is excludable when the proposal or supporting statement is contrary to any of the SEC's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. Under what circumstances is this basis for exclusion applicable?

The Staff has indicated that reliance on Rule 14a-8(i)(3) to exclude or modify a statement may be appropriate where: (i) statements directly or indirectly impugn character, integrity, or personal reputation, or directly or indirectly make charges concerning improper, illegal, or immoral conduct or association, without factual foundation; (ii) the company demonstrates objectively that a factual statement is materially false or misleading; (iii) the resolution contained in the proposal is so inherently vague or indefinite that neither the shareholders voting on the proposal, nor the company implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires — this objection also may be appropriate where the proposal and the supporting statement, when read together, have the same result; and (iv) substantial portions of the supporting statement are irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which it is being asked to vote.

By contrast, in Staff Legal Bulletin No. 14B ("SLB 14B"), the Staff indicated that it would not be appropriate for companies to exclude supporting statement language and/or an entire proposal in reliance on Rule 14a-8(i)(3) in the following circumstances: (1) the company objects to factual assertions because they are not supported; (2) the company objects to factual assertions that, while not materially false or misleading, may be disputed or countered; (3) the company objects to factual assertions because those assertions may be interpreted by shareholders in a manner that is unfavorable to the company, its directors, or its officers; and/or (4) the company objects to statements because they represent the opinion of the shareholder proponent or a referenced source, but the statements are not identified specifically as such.

Under these standards, a request to exclude a proposal *in its entirety* under Rule 14a-8(i)(3) is unlikely to be granted.

Rule 14a-8(i)(4) provides that a proposal is excludable when the proposal relates to the redress of a personal claim or grievance against the company or any other person, or is designed to result in a benefit to the shareholder, or to further a personal interest, which is not shared by the other shareholders at large. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(4) focuses on proposals involving matters that are deemed not to rise to the level that shareholders as a whole should vote on as a shareholder proposal. For example, if a proponent is involved in litigation with the company, and the proposal deals with a matter being litigated, that could serve as grounds to exclude the proposal on the theory that the proponent is pursuing its own agenda. The SEC has stated that Rule 14a-8(i)(4) is designed to "insure that the security holder proposal process [is] not abused by proponents attempting to achieve personal ends that are not necessarily in the common interest of the issuer's shareholders generally." *See* SEC Release No. 34-20091 (August 16, 1983).

In considering exclusion requests under Rule 14a-8(i)(4), the Staff often looks to the particular motives of proponent. However, a proponent's particular objectives need not be apparent from a proposal's plain language in order to be excludable under Rule 14a-8(i)(4). Rather, proposals phrased in broad terms that "might relate to matters which may be of general interest to all security holders" may be omitted from proxy materials "if it is clear from the facts ... that the proponent is using the proposal as a tactic designed to ... further a personal interest." *See* SEC Release No. 34-19135 (October 14, 1982). These types of exclusion requests often involve proposals by disgruntled former employees of a company relating to personal issues that the former employees have with the company.

Rule 14a-8(i)(5) provides that a proposal is excludable when the proposal relates to operations that account for less than 5% of the company's total assets at the end of its most recent fiscal year, and for less than 5% of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(5) is referred to as the "relevance rule." A significant focus of the Staff is on whether the proposal relates to operations that are "not otherwise significantly related to the company's business." As a practical matter, the Rule 14a-8(i)(5) exclusion has not been frequently raised successfully in recent years, because proponents have been able to frame issues in a way that adequately establishes the significance of an issue, even if the economic impact may be minimal. The SEC stated in SEC Release No. 34-19135 (October 14, 1982):

> Historically, the Commission staff has taken the position that certain proposals, while relating to only a small portion of the issuer's operations, raise policy issues of significance to the issuer's business.... For example, the proponent could provide information that indicates that while a particular corporate policy which involves an arguably economically insignificant portion of an issuer's business, the policy may have a significant impact on other segments of the issuer's business or subject the issuer to significant contingent liabilities.

The Staff has typically been relatively permissive when the Rule 14a-8(i)(5) basis for exclusion has been raised by companies, permitting proposals to be included in proxy statements when they are deemed to be of social or political "significance" and somehow related to the company's business, even in some instances where 5% asset and gross sales thresholds were not met.

Rule 14a-8(i)(6) provides that a proposal is excludable when the company would lack the power or authority to implement the proposal. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(6) focuses on proposals requesting that a board of directors do something that it lacks the power or authority to implement. For example, the Staff has allowed exclusion of a proposal that would require a company to breach existing contracts; however, the Staff has permitted revisions to such a proposal so that it applied only to future contracts. Further, the Staff has held that Rule 14a-8(i)(6) applies to a shareholder proposal that, if adopted by the company's shareholders, would cause the company to violate applicable state law. With respect to shareholder proposals that, if adopted by the company's shareholders, would cause the company to violate applicable state law, *see Noble Corporation* (January 19, 2007); *SBC Communications Inc.* (January 11, 2004); *Xerox Corp.* (February 23, 2004). As with Rule 14a-8(i)(1) and Rule 14a-8(i)(2), companies must provide a supporting opinion of counsel when the reason for exclusion is based on matters of state or foreign law. Further, under a 2007 amendment to Delaware law, the SEC may request a legal interpretation from the Delaware Supreme Court.

Rule 14a-8(i)(7) provides that a proposal is excludable when the proposal deals with a matter relating to the company's ordinary business operations. Under what circumstances is this basis for exclusion applicable?

The SEC has explained that the analysis under the "ordinary business" exclusion is based on two key considerations. First, certain tasks "are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." Examples that the SEC has cited include employee hiring, promotion and termination decisions, decisions on production quality or quantity, or the retention of suppliers. Even so, some proposals "focusing on sufficiently significant social policy issues" (such as employment discrimination policies) transcend day-to-day operational matters and raise issues "so significant" that shareholders should be afforded the opportunity to express their views. The second key consideration relates to "the degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which, shareowners, as a group, would not be in a position to make an informed judgment." Examples cited were proposals involving "intricate detail" or seeking to impose "specific timeframes or methods for implementing complex policies."

Most of the no-action letters under Rule 14a-8(i)(7) arise because the fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials. As the SEC stated in SEC Release No. 34-40018 (May 21, 1988), proposals that relate to ordinary business matters but that focus on "sufficiently significant social policy issues . . . would not be considered to be excludable because the proposals would transcend the day-to-day business matters." Among the areas considered to be significant social policy issues are: renewable energy generation; antibiotics in foods; health care reform; collateralization of derivatives; loan foreclosures; risk oversight; CEO succession planning; executive compensation; auditor rotation; environmental matters; South Africa; Myanmar; human rights; net neutrality; and predatory lending.

Rule 14a-8(i)(8) provides that a proposal is excludable when the proposal relates to an election for membership on the company's board of directors or analogous governing body. Under what circumstances is this basis for exclusion applicable?

The SEC adopted amendments to Rule 14a-8 in 2010 in connection with its "proxy access" rulemaking, discussed in more detail in these Frequently Asked Questions. Rule 14a-11, the SEC's proxy access rule, was vacated, but the amendments to Rule 14a-8(i)(8) recently became effective. Rule 14a-8(i)(8) may permit the type of "private ordering" for proxy access through the shareholder proposal process that many commenters had supported in the course of the proxy access rulemaking. Under Rule 14a-8(i)(8), as amended, a company may no longer exclude under this basis a shareholder proposal that would amend or request that the company consider amending governing documents to facilitate director nominations by shareholders or disclosures related to nominations made by shareholders, as long as such proposal does not conflict with Rule 14a-11 and is not otherwise excludable under some other procedural or substantive basis in Rule 14a-8. The SEC also codified some of the Staff's historical interpretations of Rule 14a-8(i)(8) which permitted exclusion of a shareholder proposal that would: (i) seek to disqualify a nominee standing for election; (ii) remove a director from office before the expiration of his or her term; (iii) question the competence, business judgment, or character of a nominee or director; (iv) nominate a specific individual for election to the board of directors, other than through the Rule 14a-11 process, an applicable state law provision, or an issuer's governing documents; or (v) otherwise affect the outcome of an upcoming election of directors.

Rule 14a-8(i)(9) provides that a proposal is excludable when the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting. Under what circumstances is this basis for exclusion applicable?

A company may properly exclude a proposal from its proxy materials under Rule 14a-8(i)(9) "if the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting." The SEC has stated that the subject proposals need not be "identical in scope or focus" in order for this basis for exclusion to be available. *See* SEC Release No. 34-40018 (May 21, 1998).

Consistent with the SEC's position, the Staff has consistently concurred that where a shareholder proposal and a company-sponsored proposal present alternative and conflicting decisions for shareholders ,and where submitting both proposals could provide inconsistent and ambiguous results, the shareholder proposal may be excluded under Rule 14a-8(i)(9).

Rule 14a-8(i)(10) provides that a proposal is excludable when the company has already substantially implemented the proposal. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(10) permits a company to exclude a shareholder proposal from its proxy materials if the company has "substantially implemented" the proposal.

Interpreting the predecessor to Rule 14a-8(i)(10), the SEC stated in Release No. 34-12598 (July 7, 1976) that the rule was "designed to avoid the possibility of shareholders having to consider matters which have already been favorably acted upon by the management." To be excluded, the proposal does not need to be implemented in full or exactly as presented by the proponent. Instead, the standard for exclusion is substantial implementation. *See* SEC Release No. 34-40018 (May 21, 1998, *note 30 and accompanying text*); *see also* SEC Release No. 34-20091 (August 16, 1983).

The Staff has stated that, in determining whether a shareholder proposal has been substantially implemented, it will consider whether a company's particular policies, practices, and procedures "compare favorably with the guidelines of the proposal," and not where those policies, practices, and procedures are embodied. *Texaco, Inc.* (March 28, 1991). The Staff has provided no-action relief under Rule 14a-8(i)(10) where a company has satisfied the essential objective of the proposal, even if the company (i) did not take the exact action requested by the proponent, (ii) did not implement the proposal in every detail or (iii) exercised discretion in determining how to implement the proposal. *See, e.g., Exelon Corp.* (February 26, 2010); and *Anheuser-Busch Companies, Inc.* (January 17, 2007). In these cases, the Staff concurred with the company's determination that the proposal was substantially implemented in accordance with Rule 14a-8(i)(10) when the company had taken actions that included modifications from what was directly contemplated by the proposal, including in circumstances when the company had policies and procedures in place relating to the subject matter of the proposal, or the company had otherwise implemented the essential objectives of the proposal.

Rule 14a-8(i)(11) provides that a proposal is excludable when the proposal substantially duplicates another proposal previously submitted to the company by another shareholder that will be included in the company's proxy materials for the same meeting. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(11) creates a means to ensure that only one shareholder proposal relating to substantially the same matter is included in the company's proxy statement. The shareholder proposal that is the first submitted is the one that is included (absent some other basis for exclusion). In this regard, management cannot choose among multiple proposals. Rule 14-8(i)(11) involves three elements: (i) substantially duplicative proposals; (ii) the order in which such proposals were received; and (iii) the inclusion of the first-received proposal in the proxy materials. The purpose of Rule 14a-8(i)(11) is to avoid shareholder confusion and to prevent various proponents from including in proxy materials several versions of essentially the same proposal.

Rule 14a-8(i)(12) provides that a proposal is excludable when the proposal deals with substantially the same subject matter as another proposal or proposals that previously has or have been included in the company's proxy materials within a specified time frame and did not receive a specified percentage of the vote. Under what circumstances is this basis for exclusion applicable?

Rule 14a-8(i)(12) operates as follows:

- The company should look back three calendar years to see if it previously included a proposal or proposals dealing with substantially the same subject matter. If it has not, Rule 14a-8(i)(12) is not available as a basis to exclude a proposal from this year's proxy materials.
- If it has, the company should then count the number of times that a proposal or proposals dealing with substantially the same subject matter was or were included over the preceding five calendar years.
- The company should look at the percentage of the shareholder vote that a proposal dealing with substantially the same subject matter received the last time it was included.

Only votes for and against a proposal are included in the calculation of the shareholder vote of that proposal. Abstentions and broker non-votes are not included in this calculation. This basis for exclusion is not frequently utilized because the minimum previous thresholds for support (3%, 6%, or 10%, depending on how frequently the proposal was proposed during previous five calendar years) are so low.

Rule 14a-8(i)(13) provides that a proposal is excludable when the proposal relates to specific amounts of cash or stock dividends. Under what circumstances is this basis for exclusion applicable?

The basis for exclusion in Rule 14a-8(i)(13) is viewed as a function of the board of directors, not shareholders. For example, the Staff has allowed exclusion of a shareholder proposal seeking declaration of a dividend of 75% of earnings per share. Proposals seeking that company's distribute specific amounts of cash or stock dividends have been relatively uncommon in recent years.

The SEC's "Proxy Access" Rulemaking

What is "proxy access" or "shareholder access"?

Under the SEC's proxy solicitation rules, only the company's director nominees are included in the company's proxy statement and proxy card. If shareholders want to nominate their own candidates, then, in addition to complying with applicable state corporation law and the company's charter and bylaws, a nominating shareholder must prepare its own proxy statement and proxy card and conduct its own proxy solicitation for the director candidates. This is referred to as a "proxy contest." The terms "proxy access" or "shareholder access" refers to an alternative approach whereby director nominees from qualifying shareholders must be included in the company's proxy statement and on the Company's proxy card.

Did the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") require that the SEC adopt a proxy access rule?

Section 971 of the Dodd-Frank Act provided the SEC with the authority to promulgate "proxy access" rules, allowing specified shareholders to include director nominees in a company's proxy materials. The Dodd-Frank Act did not prescribe specific standards for these rules, and the SEC had in fact proposed proxy access rules prior to enactment of the Dodd-Frank Act.

Did the SEC adopt a proxy access rule and what is the status of that rule?

The SEC issued final rules facilitating shareholder director nominations on August 25, 2010, and such rules were scheduled to become effective on November 15, 2010. However, the effectiveness of those rules was stayed due to litigation challenging the rules.

Under Rule 14a-11 as adopted by the SEC, qualifying shareholders or groups holding at least 3% of the voting power of a company's securities, who had held their shares for at least three years, would have had the right to include director nominees in proxy materials upon meeting certain other requirements. An amendment to Rule 14a-8 provided that companies may not exclude from their proxy materials shareholder proposals for less restrictive proxy access procedures.

On September 29, 2010, the Business Roundtable and Chamber of Commerce of the United States of America filed a petition with the United States Court of Appeals for the District of Columbia Circuit (the "Court") seeking judicial review of the changes to the SEC's proxy access rule, and on the same day filed with the SEC a request to stay the effective date of Rule 14a-11. On October 4, 2010, the SEC granted the request for a stay of the Rule 14a-11 and associated rules pending resolution of the petition for review by the Court. On July 22, 2011, the Court vacated Rule 14a-11. The Court held that the SEC was "arbitrary and capricious" in promulgating Rule 14a-11, based principally on the SEC's failure to adequately address the economic effects of the rule. The Court expressed significant concerns about the conclusions that the SEC reached and the agency's consideration of comments during the course of the rulemaking. The Court did not address the First Amendment challenge to the rule that had been raised by the petitioners.

On September 6, 2011, the SEC issued a statement indicating that it would not seek rehearing of the Court's decision, nor would it seek Supreme Court review of the decision; however, the Staff would continue to study the viability of a proxy access rule. The statement also indicated that the amendment to Rule 14a-8 referenced above would go into effect when the Court's mandate was finalized, which occurred on September 14, 2011. As a result, the amendments to Rule 14a-8 (along with other rules adopted in connection with Rule 14a-11) became effective on September 20, 2011, following the SEC's publication of a notice announcing the effective date of the rule changes.

What changes did the SEC make to the shareholder proposal rule and what is the status of those changes?

The amendments to Rule 14a-8 that the SEC adopted in 2010, which became effective on September 20, 2011, may serve to facilitate, under certain circumstances, the type of "private ordering" for proxy access through the shareholder proposal process that many commenters had supported in the course of the proxy access rulemaking.

Under Rule 14a-8(i)(8), as amended, a company may no longer exclude a shareholder proposal that would amend or request that the company consider amending governing documents to facilitate director nominations by shareholders or disclosures related to nominations made by shareholders, as long as such proposal does not conflict with Rule 14a-11 and is not otherwise excludable under some other procedural or substantive basis in Rule 14a-8. The SEC also codified some of the Staff's historical interpretations of Rule 14a-8(i)(8) which permitted exclusion of a shareholder proposal that would: (i) seek to disqualify a nominee standing for election; (ii) remove a director from office before the expiration of his or her term; (iii) question the competence, business judgment or character of a nominee or director; (iv) nominate a specific individual for election to the board of directors, other than through the Rule 14a-11 process, an applicable state law provision, or an issuer's governing documents; or (v) otherwise affect the outcome of an upcoming election of directors.

Are there other bases under which companies could exclude a shareholder proposal seeking to establish proxy access at a company?

While the SEC's amendments to Rule 14a-8(i)(8) eliminated one basis to exclude proxy access shareholder proposals, there may be other options for seeking to exclude proxy access shareholder proposals. An issuer could argue (i) that the proposal is contrary to the proxy rules under Rule 14a-8(i)(3), i.e., the resolution contained in the proposal is inherently vague or indefinite; (ii) that by adopting its own proxy access bylaw amendment, the shareholder's proxy access proposal has been "substantially implemented" under Rule 14a-8(i)(10); (iii) the shareholder proposal conflicts with a similar company-sponsored proposal under Rule 14a-8(i)(9); or (iv) that another basis for exclusion specified in Rule 14a-8(i) applies, based on the specific language of the proposal and the supporting statement or the particular circumstances of the company or the proponent.

Are companies adopting a proxy access bylaw as a result of the prospect of shareholder proposals seeking to establish proxy access?

Many companies are taking a "wait-and-see" approach with respect to amending their bylaws to permit proxy access in order to allow greater flexibility in responding to future shareholder proposals. Very few proxy access shareholder proposals have been submitted to companies since the above-referenced Rule 14a-8 amendments became effective.

By David Lynn, Partner, in the Corporate Department of Morrison & Foerster LLP