Denver Law Review Forum

Volume 96 Article 9

9-13-2018

The Burden of the Burden of Broof under Rule 14A-8

Elizabeth Trower

The Burden of the Burden of Broof under Rule 14A-8

THE BURDEN OF THE BURDEN OF PROOF UNDER RULE 14A-8

I. INTRODUCTION

Rule 14a-8 (the Rule) serves as vehicle for communications between companies and investors.[1] Considered a fixture of the shareholder governance movement,[2] the Rule to some degree amounts to an extension of ownership rights granted under state law.[3] The Rule affords shareholders of a publicly traded company the right to include proposals in the annual proxy materials.[4] The Rule also includes thirteen substantive grounds to omit a proposal.

The burden of establishing an exclusion generally falls on the issuer.[5] The SEC Staff (Staff), however, has provided little guidance on the level of evidence needed to meet the requirement.[6] Indeed, analysis suggests that, in fact, the Staff often does not require that issuers meet this burden by providing empirical support for factual assertions made in no action letter requests.

This Article seeks to examine the history of the company's burden of proof under Rule 14a-8. Part II of this Article traces the development of the burden from the first mention in 1954[7] to the eventual inclusion in the language of the rule.[8] Part III focuses on the modern application of the burden. Finally, Part IV argues that the Staff of the Commission has

---

1. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 39093, 1997 WL 578696 (Sept. 18, 1997) ("The shareholder proposal rule provides an avenue for communication between shareholders and companies, and among shareholders themselves."); *see also* Milton V. Freeman, *An Estimation of the Practical Consequences of the Stockholder's Proposal Rule*, 34 U. DET. L.J. 549, 555 (1957) ("In judging the value of the stockholder proposal rule, I believe it is of no consequence whether a stockholder ever prevails or whether a management ever accepts a stockholder's proposal. The value which I see in the rule is that to the extent that stockholders challenge the judgment of management, management is required to make a defense of its position.").

2. Thomas M. Clusserath, *The Amended Stockholder Proposal Rule: A Decade Later*, 40 NOTRE DAME L. REV. 13, 13 (1964) ("Those advocates of the small shareholder movement in institutions of higher learning and in the public and private practice of law and business have cited this Rule as the true bulwark of shareholder democracy."); *see also* Lewis D. Gilbert, *The Proxy Proposal Rule of the Securities Exchange Commission*, 33 U. Det. L.J. 191, 191 (1956).

3. *See* Clusserath, *supra* note 3, at 16; *see also* J. Robert Brown, Jr., *The Evolving Role of Rule 14A-8 in the Corporate Governance Process*, 93 DENV. L. REV. ONLINE 151, 151 (2016).

4. J. Robert Brown Jr., *The Politicization of Corporate Governance: Bureaucratic Discretion, the SEC, and Shareholder Ratification of Auditors*, 2 HARV. BUS. L. REV. 501, 506 (2012).

5. 17 CFR § 240.14a-8(g) ("Question 7: Who has the burden of persuading the Commission or its Staff that my proposal can be excluded? Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.").

6. *See The SEC and "No-Action" Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review*, 84 HARV. L. REV. 835, 843–44 (1971).

7. Adoption of Amendments to Proxy Rules, Exchange Act Release No. 34-4979, 1954 WL 5772 (Jan. 6, 1954) ("The rule places the burden of proof upon the management . . . .").

8. Exchange Act Release No. 39093, 1997 WL 578696 (Sept. 18, 1997).

at times required such little evidence as to effectively render the burden of proof meaningless.

I. ADMINISTRATIVE HISTORY

Congress passed the Securities Exchange Act of 1934 (Exchange Act or Act) in order to regulate the secondary markets, increase transparency, and prevent fraud.[9] The Act assigned to the Securities and Exchange Commission (SEC or Commission) authority under Section 14(a) to regulate the proxy process.[10] The initial set of proxy rules did not address shareholder proposals.[11] In an early decision, however, the SEC concluded that a company aware of a shareholder proposal scheduled for an upcoming meeting could commit fraud by omitting disclosure of the matter from the proxy statement.[12]

Three years later, the Commission adopted Rule X-14A-7 (later redesignated as Rule 14a-8)[13] in an effort to address these concerns.[14] Rather than require the company to describe the terms of a proposal, the Rule placed the burden on the proponent. The Commission required Companies to include any proposal deemed a "proper subject for action" under state law.[15]

Initially, the Rule remained silent on the application of the burden of proof. Changes made in 1948 added additional exclusions and specified the process used by issuers to omit a proposal.[16] Amendments adopted in 1954 again increased the number of exclusions. The adopting release also specified that the company had the burden of establishing that a proposal was "not a proper one for inclusion" based on case law and applicable statutes.[17]

---

9. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–pp (2012); *see also* J. Robert Brown, Jr., *Corporate Governance, the Securities and Exchange Commission, and the Limits of Disclosure*, 57 CATH. U. L. REV. 45, 49–52 (2007).

10. Clusserath, *supra* note 3.

11. *Id.* at 15 (referencing Exchange Act Release No. 378, 1935 WL 29270 (September 24, 1935), which adopted the first proxy rules including the information to be furnished).

12. *Id.*

13. *Id.* at 16.

14. *Id.* at 15; *see also* Brown, *supra* note 10 ("The provision was intended to remedy a number of abuses chronicled during the hearing process, including the use of proxies 'by unscrupulous corporate officials seeking to retain control of the management by concealing and distorting facts' and to obtain approval for 'vast bonuses out of all proportion to what legitimate management would justify.'").

15. *See* Clusserath, *supra* note 3, at 16.

16. *Id.* (citing Exchange Act Release No. 4185 (Nov. 5, 1948)) (explaining the management could omit proposals, but only where (1) the primary purpose of the proposal was enforcing a personal claim or of redressing a personal *grievance*, (2) the proposal was considered during the previous two years and the relevant shareholder failed to attend the meeting, or (3) a substantially similar proposal was included the prior year and received minimal support).

17. Exchange Act Release No. 4979, 1954 WL 5772 (Jan. 6, 1954) ("The rule places the burden of proof upon the management to show that a particular security holder's proposal is not a proper one for inclusion in management's proxy material. Where management contends that a pro-

Problems quickly arose, however, in connection with the application of the burden of proof.[18] The Commission sometimes permitted exclusion with little analysis from the company. In one case, the Staff did so on the basis of a one-paragraph letter from management that contained no citation to applicable authority.[19] A commentator opined that the Staff "should not have sanctioned the omission . . . because management, through a meaningless opinion of counsel, had failed to accomplish the first requirements of its burden of proof, i.e., 'refer to the applicable statute or case law.'"[20]

The Chairman of the Commission defended the approach.[21] Although the company retained the burden, the Commission sometimes needed to conduct "independent analyses"[22] that included consideration of a wide array of sources.[23] To do otherwise would have resulted in the administration of Rule 14a-8 "fall[ing] into hopeless confusion . . . ."[24] Doubts, however, were to be resolved in favor of the stockholder.[25]

---

posal may be omitted because it is not proper under state law, it will be incumbent upon management to refer to the applicable statute or case law and furnish a supporting opinion of counsel.").

18. Med. Comm. for Human Rights v. Secs. and Exch. Comm'n, 432 F.2d 659, 674 (D.C. Cir. 1970), *vacated*, 404 U.S. 403 (1972) (citing Clusserath, *supra* note 3, at 33 ("Specifically, the Commission has been charged with repeatedly violating its own established procedural principles, particularly those relating to management's burden of proof in justifying the omission of proposals; of allowing non-lawyers to decide complex legal problems raised in proxy disputes; and of affording inconsistent treatment to similar factual situations for no apparent reason.").

19. *See* Clusserath, *supra* note 3, at 33; *see also Med. Comm.*, 432 F.2d at 674.

20. Clusserath, *supra* note 3, at 33; *see also The SEC and "No-Action" Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review*, 84 HARV. L. REV. 835, 843–44 (1971) (criticizing the commission for allowing exclusions even where management "submit[ed] statements which [made] no attempt to explain how a proposal relate[d] to one or more of the disqualifying provisions in the rule . . . .").

21. Clusserath, *supra* note 3, at 32–33 (citing 191 COM. AND FIN. CHRON. 1825 (1960) ("In a speech given to the Society of Corporate Secretaries in June, 1960, the former Chairman of the SEC, Edward N. Gadsby said: '[I]n most of these cases [claiming the proposal to be illegal under state law] we are amply supplied with opinions as to the propriety or impropriety of the particular stockholder request, but, more frequently than not, counsel is unable to furnish us with a citation to controlling authority . . . the administration of this aspect of our proxy rules would quickly fall into hopeless confusion if we relied solely upon the arguments and opinions of counsel. We have found that, in most instances, it is necessary for the Commission to make an independent analysis of the proposal and of its probable legal effect under the appropriate state laws.'").

22. *Id.*

23. *SEC Enforcement Problems: Hearing on a Report from the Securities Exchange Commission on its Problems in Enforcing the Securities Laws Before a Subcomm. of the S. Comm. on Banking and Currency,* 85th Cong. 118 (1957) (statement of J. Sinclair Armstrong, Chairman, Securities Exchange Commission) ("In the absence of a State statute establishing that a proposal is proper for stockholder action, the Commission will rely on the common law if this can be ascertained. It will also consider other sources such as the corporate law of other States, particularly of the leading commercial States, as well as the decisions of the Federal courts, textbooks, law journals, and other similar material where the question may be discussed.").

24. Clusserath, *supra* note 3, at 33 (citing 191 COM. FIN. CHRON. 1825 (1960).

25. *SEC Enforcement Problems: Hearing on a Report from the Securities Exchange Commission on its Problems in Enforcing the Securities Laws Before a Subcomm. of the S. Comm. on Banking and Currency,* 85th Cong. 118 (1957) (statement of J. Sinclair Armstrong, Chairman, Securities Exchange Commission) ("If the management fails to establish that the proposal is not a proper subject for stockholder action or is otherwise negligible under the rule, doubts are resolved in favor of the stockholder and the management is required to include the proposal in the proxy material.").

The Commission occasionally declined to permit exclusion as a result of the failure to meet the standard of proof.[26] In some instances, the Staff specified the reasons for the failure. These included the absence of "statutory or judicial support" for the relevant conclusions,[27] the lack of "statistical support,"[28] or the inability to provide "any opinion rendered by" counsel.[29]

To some degree, application of the burden depended upon the particular exclusion at issue, particularly those involving subjective determinations.[30] In the 1970's and 1980's, the Staff often invoked the burden to address proposals allegedly arising from personal claims or grievances.[31] Application of the exclusion was "particularly difficult" because the Staff had to make "credibility" determinations on the basis of "circumstantial evidence."[32] By finding a failure to meet the burden in these cases, the Staff avoided the need to make these subjective determinations.[33]

In 1998, the Commission "recast rule 14a-8 into a more plain-English Question & Answer format."[34] The amendments also added for the first time language that explicitly imposed the burden of proof on management.[35] Neither the proposed nor the final rule contained any

---

26. Clusserath, *supra* note 3, at 32–33 (citing 191 COM. AND FIN. CHRON. 1825 (1960) ("It was sometimes found that the burden of proof of management could not reasonably be considered to have been sustained with respect to the impropriety of the proposal.").

27. Johns-Manville Corp., SEC No-Action Letter, 1976 WL 11003 (Mar. 2, 1976).

28. The Outlet Co., SEC No-Action Letter, 1975 WL 9911 (Mar. 21, 1975).

29. Madison Fund, Inc., SEC No-Action Letter, 1976 WL 10923 (Jan. 29, 1976).

30. At times these "discussions" tended to be exceptionally brief using near identical language, possibly suggesting the Staff intended keep its reasoning private as a result of the uncertainty. The Walt Disney Co., SEC No-Action Letter, 1997 WL 757145 (Nov. 25, 1997) ("In the Staff's view, the Company has not met its burden of demonstrating that the proposals were submitted to redress a personal claim or grievance of the proponents."); Panhandle E. Corp., SEC No-Action Letter, 1996 WL 4205 (Jan. 3, 1996); Consol. Freightways, Inc., SEC No-Action Letter, 1996 WL 44826 (Feb. 1, 1996); Avondale Indus., Inc., SEC No-Action Letter, 1995 WL 82754 (Feb. 28, 1995).

31. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 22828, 1997 WL 578696 (Sept. 18, 1997) (explaining proposals under rule 14a-8(c)(4) could be excluded where there was "a personal claim or grievance against the registrant or any other person, or if it is designed to result in a benefit to the proponent or to further a personal interest, which benefit or interest is not shared by the other security holders at large").

32. *Id.*; Jon Wagner, *Finding the Grievance in the Personal Grievance Exclusion*, 94 DENV. L. REV. ONLINE 394, 395 (2017).

33. Gen. Elec. Co., SEC No-Action Letter, 1980 WL 14364 (Jan. 28, 1980) (Staff denied exclusion of a proposal for the Board of Directors to "to immediately terminate the Board of Directors' General Electric 1978 Stock Option Plan." The Staff explained, "We are unable to conclude that you have adequately sustained the Company's burden of proof if asserting that the proposal constitutes a personal claim or redress of a personal grievance that the proponent has against the Company and its management.").

34. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 23200, 1998 WL 254809 (May 21, 1998).

35. *Id.* ("Question 7: Who has the burden of persuading the Commission or its Staff that my proposal can be excluded? Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.").

additional discussion or explanation of the change. The lack of discussion suggested that the change merely codified existing practice.[36]

III. STAFF INTERPRETATION

Representing perhaps the most frequently cited substantive provision of Rule 14a-8, more than 1,200 no action letters and related correspondences have referenced the burden of proof in the last twenty years.[37] The issue generally arises from assertions by the proponent that the issuer failed to meet the relevant standard.

In contrast, the Commission during the same period has mentioned Rule 14a-8(g) just once—in a 2004 Staff bulletin discussing an exclusion for false or misleading proposals.[38] The Staff has, however, used more general language to discuss the burden without explicitly referencing the Rule.[39] In addressing the burden, the Staff will "not consider any basis for exclusion that is not advanced by the company" and has reserved the right to "conduct [its] own research . . . ."[40] A few exceptions aside,[41]

---

36. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 23200, 1998 WL 254809 (May 21, 1998) (As the Commission clarified in footnote 13, "[u]nless specifically indicated otherwise, none of these revisions are intended to signal a change in our current interpretations.").

37. Per search of Westlaw (Feb. 2018) for No-Action Letters including "burden and 14a-8" and relevant variations.

38. SEC Staff Legal Bulletin No. 14B (Sept. 15, 2004) ("In this regard, rule 14a-8(i)(3) permits the company to exclude a proposal or a statement that is contrary to any of the proxy rules, including rule 14a-9, which prohibits *materially* false or misleading statements. Further, rule 14a-8(g) makes clear that the company bears the burden of demonstrating that a proposal or statement may be excluded. As such, the staff will concur in the company's reliance on rule 14a-8(i)(3) to exclude or modify a proposal or statement only where that company has demonstrated objectively that the proposal or statement is *materially* false or misleading.").

39. The Staff has not referenced rule 14a-8(g) specifically and instead used language including: "burden of proof," "burden of demonstrating," "burden on the issuer," "burden of establishing." *See e.g.* (for "burden of establishing") Verizon Commc'ns, Inc., SEC No-Action Letter 2004 WL 213377 (Feb. 2, 2004) ("We are unable to conclude that Verizon has met its burden of establishing that Verizon may exclude the proposal"); Cmty. Bancshares, Inc., SEC No-Action Letter, 1999 WL 166982 (Mar. 15, 1999) ("We are unable to conclude that Community Bancshares has met its burden of establishing that the Smith proposal would violate applicable state law."); Verizon Commc'ns, Inc., SEC No-Action Letter, 2003 WL 262455 (Jan. 24, 2003) ("We are unable to conclude that Verizon has met its burden of establishing that the proposal would violate applicable state law."); H&R Block, Inc., SEC No-Action Letter, 2016 WL 2642253 (July 21, 2016) ("We are unable to conclude that H&R Block has met its burden of establishing that it may exclude the proposal under rule 14a-8(i)(10)."); *see e.g.* (for "burden of demonstrating") Crown Cent. Petroleum Corp., SEC No-Action Letter, 1998 WL 111130 (Mar. 10, 1998) ("In the Staff's view, the Company has not met its burden of demonstrating that the proposals were submitted to redress a personal claim or grievance of the proponents.").

40. SEC Staff Legal Bulletin No. 14 (July 13, 2001) ("The company has the burden of demonstrating that it is entitled to exclude a proposal, and we will not consider any basis for exclusion that is not advanced by the company.").

(. **a)** [41] Medtronic, Inc., SEC No-Action Letter, 2012 WL 1493951 (June 28, 2012) ("We note that the opinion of your counsel includes an assumption that paragraph 5 of the proposal would cause Medtronic to violate state law by requiring the board to justify any different treatment of director nominees or directors as 'both fair and necessary.'"); *see also* Motorola, SEC No-Action Letter, 2010 WL 5279920 (January 24, 2011) (explaining the Staff concluded management failed to meet the burden under two exclusions because the company failed to explain whether the proponents

no-action letters rarely provide insight into the application of the burden.[42]

A. What Information is Sufficient to Meet the Burden of Proof

The required degree of proof needed to meet the burden has remained uncertain. Rule 14a-8(g) specifies the issuer must "demonstrate that it is *entitled* to exclude [the] proposal" (emphasis added).[43] The language presumably suggests a standard of not less than a preponderance of the evidence.[44] Shareholders, however, have sometimes argued that the standard poses a "very high hurdle"[45] or requires "clear and convincing" evidence.[46] The Staff has nonetheless failed to address these specific standards. Instead, the Staff instead has regularly permitted omission upon a showing of "some basis" for the exclusion.[47] The standard has allowed for the omission of proposals in the absence of empirical proof or in reliance on unproven assumptions.

B. Absence of Empirical Proof

The Staff has permitted the omission of shareholder proposals in which the company fails to provide factual support for what amounts to empirical assertions. In *AGL Resources*,[48] for example, shareholders requested that the board amend the bylaws to allow 25% of the owners of

---

had responded to the company request for documentary support and if there was a response, why it failed to establish the proponents satisfied ownership requirement).

42. *See* Nabors Indus. Ltd., SEC No-Action Letter, 2016 WL 1069442 (Mar. 17, 2016) ("The proposal relates to director nominations. We are unable to conclude that Nabors has met its burden of establishing that Nabors may exclude the proposal under rule 14a-8(e)(2). Accordingly, we do not believe that Nabors may omit the proposal from its proxy materials in reliance on rule 14a-8(e)(2)."); s*ee also* Sprint Nextel Corp., SEC No-Action Letter, 2013 WL 170418 (Mar. 18 2013); Target Corp., SEC No-Action Letter, 2017 WL 347829 (Feb. 10, 2017).

43. 17 CFR § 240.14a-8(g) ("Question 7: Who has the burden of persuading the Commission or its Staff that my proposal can be excluded? Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.").

44. Parties have argued "entitled" equates to a preponderance of the evidence. *See* AT&T Corp., SEC No-Action Letter, 2001 WL 314575 (Mar. 29, 2001) ("By allocating the burden of proof to companies in Rule 14a-8(g), the Commission required AT&T to prove, by at least a preponderance of the evidence, that it is 'entitled' to omit the instant Proposal under Rule 14a-8(i)(8).").

45. The TJX Cos., Inc., SEC No-Action Letter, 2011 WL 442367 (Mar. 29, 2011). ("[T]he fact that under Rule 14a-8(g) 'the burden is on the company to demonstrate that it is entitled to exclude a proposal' means that the mootness exclusion presents a very high hurdle for companies to overcome.").

46. AT&T Corp., SEC No-Action Letter, 2001 WL 314575 (Mar. 29, 2001) ("There are at least five sound reasons why 'clear and convincing evidence' should be adopted as the appropriate standard of proof in the context of no-action letters.").

47. *See e.g.,* Verizon Communications, SEC No-Action Letter, 2010 WL 973471 (Mar. 12, 2010) (The Staff stated: "There appears to be some basis for your view that Verizon may exclude the proposal." (emphasis added). Shareholder argued, however, that "[i]n contrast to "some basis," the legal standard stated in the SEC's rules is that the issuer carries a higher burden in the matter, not that there merely be some basis for its view. Rule 14a-8(g) makes it clear that 'the burden is on the company to demonstrate that it is entitled to exclude a proposal.' We are concerned that the Staff is not correctly applying the company's burden under the rule.").

48. AGL Res., SEC No-Action Letter, 2015 WL 1518056 (Mar. 5, 2015).

the company's outstanding common stock to call a special meeting.[49] The company agreed to amend the bylaws and adopt the percentage sought by shareholders.[50] The company, however, limited shareholders eligible to call special meetings to those holding shares for at least one year.[51] Management argued to the Staff that the bylaw "substantially implemented" the proposal and therefore justified exclusion under Rule 14a-8(i)(10).[52]

The proponent, however, asserted that the company failed to provide empirical evidence addressing the impact of the holding period requirement.[53] The change effectively reduced the number of eligible shares by excluding those unable to meet the holding period and making the ability to call a special meeting more difficult.[54] Although the degree of difficulty depended upon the impact of the holding period on the number of eligible shares, the issue remained unaddressed.[55] Nonetheless, the Staff found there was "some basis" for management's view that the proposal could be excluded under Rule 14a-8(i)(10).[56] The determination suggested that the burden merely required a credible albeit empirically unproven argument.

C. Reliance on Unproven Assumptions

Similarly, the Staff has allowed management to rely on Rule (i)(10) to exclude proposals on the basis of assumptions unsupported by empirical data.[57] In *Citigroup*, [58] for example, the company implemented a

---

49. *Id.* ("Resolved, Shareowners ask our board to take the steps necessary (unilaterally if possible) to amend our bylaws and each appropriate governing document to give holders in the aggregate of 25% of our outstanding common stock the power to call a special shareowner meeting."); *see also* Windstream Holdings, Inc., SEC No-Action Letter, 2015 WL 66518 (Mar. 5, 2015).

50. AGL Resources, SEC No-Action Letter, 2015 WL 1518056 (Mar. 5, 2015).

51. *Id.*

52. *Id.* ("We hereby request that the Staff concur in our view that the Proposal may be excluded from the 2015 Proxy Materials pursuant to Rule 14a-8(i)(10) because the Proposal has been substantially implemented by the Company."); *see* 17 CFR § 240.14a-8(i)(10) (A company may exclude a proposal from the proxy statement "[i]f the proposal substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting.").

53. AGL Resources, SEC No-Action Letter, 2015 WL 1518056 (Mar. 5, 2015).

54. J. Robert Brown, *Comment Letter on Rule 14-8(I)(10),* Securities & Exchange Commission (June 18, 2015) ("A holding period affecting share eligibility can, in some cases, make it actually practically impossible for shareholders to call a special meeting.").

55. *Id.*

56. AGL Resources, SEC No-Action Letter, 2015 WL 1518056 (Mar. 5, 2015) ("There appears to be some basis for your view that AGL Resources may exclude the proposal under rule 14a-8(i)(10). We note your representation that the board has approved, and will submit for a shareholder vote at the upcoming annual meeting, an amendment to the company's articles of incorporation to reduce the threshold for calling a special meeting to 25% of the company's shares of common stock outstanding and entitled to vote that have been held in a net long position continuously for at least one year. Accordingly, we will not recommend enforcement action to the Commission if AGL Resources omits the proposal from its proxy materials in reliance on rule 14a-8(i)(10)."); *see also* Windstream Holdings, Inc., SEC No-Action Letter, 2015 WL 66518 (Mar. 5, 2015); AGL Res. Inc., SEC No-Action Letter, 2015 WL 1518056 (Mar. 5, 2015).

57. Citigroup Inc., SEC No-Action Letter, 2016 WL 7423312 (Feb. 10, 2017); Target Corp., SEC No-Action Letter, 2017 WL 347829 (Feb. 10, 2017); Flowserve Corp., SEC No-Action Letter,

shareholder access bylaw that allowed shareholders owning 3% or more of the outstanding common stock to submit nominees for inclusion in the proxy statement. The bylaw, however, limited the size of any shareholder group seeking to meet the threshold to twenty.

Shareholders submitted a proposal seeking to increase the number to fifty.[59] The issuer sought exclusion, asserting that the existing threshold provided "meaningful proxy access" and therefore had "substantially implemented" the shareholder proposal.[60] In comparing the two thresholds, the company assumed that "stockholder ownership has been stable for three years" and as a result "many combinations of the Company's stockholders are able to aggregate their shares to meet the ownership threshold required" by the bylaw.[61] Shareholders, however, contested the legitimacy of the assumption and presented data suggesting that institutional investors did not necessarily hold shares for the assumed period.[62]

The Staff nonetheless concluded that the company had met the requisite burden. Evidence to support the assumption would not be required. "Based on the information you have presented, it appears that Citigroup's policies, practices and procedures compare favorably with the guidelines of the proposal."[63] The Staff employed the same approach in other no-action letters.[64]

2017 WL 261986 (Feb. 10, 2017); Fiserv, Inc., SEC No-Action Letter, 2017 WL 347828 (Feb. 10, 2017); UnitedHealth Group, Inc., SEC No-Action Letter, 2017 WL 410343 (Feb. 10, 2017); Reliance Steel & Aluminum Co., SEC No-Action Letter, 2017 WL 261988 (Feb. 10, 2017); NextEra Energy, Inc., SEC No-Action Letter, 2016 WL 7424107 (Feb. 10, 2017).

58. Citigroup Inc., SEC No-Action Letter, 2016 WL 7423312 (Feb. 10, 2017).

59. *Id.*

60. *Id.* The company provided no evidence or analysis on the impact of the increase or the significance of the three-year holding period and instead characterized the difference as a "minor refinement." The Staff determined the issuer did not meet the "burden of establishing" that the exclusion applied.

61. Citigroup Inc., SEC No-Action Letter, 2017 WL 876068 (Mar. 2, 2017).

62. *Id.* ("This management opposition statement just assumes that all the 27% of that company's stock, which is cited, has been held continuously for 3-years. There is absolutely nothing to back this up . . . Citigroup had an average of 11.52% of shares traded in or out during the last reported quarter").

63. *Id.*

64. PayPal Holdings, Inc., No-Action Letter, 2017 WL 361420 (Mar. 22, 2017) (allowing omission of the proposal despite company assumption shares would be stable over three years and despite proponent contending: "This is a totally fallacious argument, since we all know institutional ownership is *not* typically stable over any three year period."); *see also* Gen. Motors Co., SEC No-Action Letter, 2017 WL 819820 (Mar. 7, 2017); Int'l Paper Co., SEC No-Action Letter, 2017 WL 697565 (Mar. 2, 2017); Citigroup Inc., SEC No-Action Letter, 2017 WL 876068 (Mar. 2, 2017); Target Corp., SEC No-Action Letter, 2017 WL 876066 (Mar. 2, 2017); UnitedHealth Group, Inc., SEC No-Action Letter, 2017 WL 876067 (Mar. 2, 2017); Lowe's Cos., Inc., SEC No-Action Letter, 2017 WL 1132121 (Mar. 24, 2017); Flowserve Corp., SEC No-Action Letter, 2017 WL 261986 (Feb. 10, 2017); Fiserv, Inc., SEC No-Action Letter, 2017 WL 347828 (Feb. 10, 2017).

IV. ANALYSIS

Rule 14a-8(g) requires the issuer to "demonstrate that it is entitled to exclude [the] proposal."[65] Demonstrating entitlement would seem to require more than "some basis" for an exclusion.[66]

To the extent, however, that even "some basis" meets the standard contained in the rule, those arguing for an exclusion on the basis of a factual assertion or assumption would seem to have an obligation to provide sufficient empirical support for the proposition. As *AGL* and *Citigroup* indicate, this has not always been the case.

The current approach seems to undermine the purpose of Rule 14a-8. The rule sought to protect the right of shareholders to participate in the governance of the corporation.[67] Even in its most broad form, requiring management to reasonably support its effort to omit a proposal provides a significant level of protection. To remedy the current situation, the Staff should articulate the evidence necessary to meet the burden of proof and decline to permit exclusion on the basis of factual assertions or assumptions not sufficiently supported by empirical evidence.

**ELIZABETH TROWER*

65. 17 CFR § 240.14a-8(g) ("Question 7: Who has the burden of persuading the Commission or its Staff that my proposal can be excluded? Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.").

66. Med. Comm. for Human Rights v. Secs. and Exch. Comm'n, 432 F.2d 659, 674 (D.C. Cir. 1970), *vacated*, 404 U.S. 403 (1972) (citing Clusserath, *supra* note 3, at 43 ("Viewed in this light, 'discretion' can be merely another manifestation of the venerable bureaucratic technique of exclusion by attrition, of disposing of controversies through calculated non-decisions that will eventually cause eager supplicants to give up in frustration and stop 'bothering' the agency.").

67. Gilbert, *supra* note 3.

* University of Denver, Sturm College of Law, Anticipated Graduation May 2019.