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# APPEALING NO-ACTION RESPONSES UNDER RULE 14A-8: INFORMAL PROCEDURES OF THE SEC AND THE AVAILABILITY OF MEANINGFUL REVIEW

## I. INTRODUCTION

Publicly traded corporations annually receive a flood of shareholder proposals under Rule 14a-8 (the Rule).<sup>1</sup> In a significant number of cases, companies petition the staff of the Division of Corporation Finance at the Securities and Exchange Commission (SEC or Commission) to exclude proposals.<sup>2</sup> The staff often agrees.<sup>3</sup> In doing so, the staff typically issues a no action letter that provides a brief explanation—frequently a single sentence—explaining the decision.<sup>4</sup>

Parties unhappy with the outcome can request review. Most seek reconsideration by the staff. Some also ask to have the decision examined by the full Commission.<sup>5</sup> The Commission does not have a formal system in place for addressing appeals of an adverse no-action decision. Instead, SEC rules provide that the staff may “present” matters to the Commission but only if raising issues “of substantial importance” that are “novel or highly complex.”<sup>6</sup> The Commission, however, rarely intervenes. Between 2005 and 2015, the Commission altered the approach taken by the staff in only one instance.<sup>7</sup>

This paper will examine the process and standards for obtaining no-action relief and the typical process for appealing or seeking reconsidera-

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1. In 2015, shareholders submitted 943 proposals. GIBSON DUNN, *Shareholder Proposal Developments During the 2015 Proxy Season*, Gibson Dunn Publications (Jul. 15, 2015), <http://www.gibsondunn.com/publications/pages/Shareholder-Proposal-Developments-During-the-2015-Proxy-Season.aspx> [hereinafter GIBSON DUNN] (noting that there were 943 proposals submitted for meetings in 2015).

2. SEC. AND EXCHANGE COMM’N, DIV. OF CORP. FINANCE, STAFF LEGAL BULLETIN NO. 14 (2001) [hereinafter SEC. AND EXCHANGE COMM’N I] (explaining that the most common reason for exclusion is that the shareholder proposal intrudes into the ordinary business of the company, which are strictly the affairs of the management team. Other reasons include the proposal being too vague for understanding and implementation, or that the proposal largely mirrors an action the board has already slated for the proxy statement).

3. GIBSON DUNN, *supra* note 2. In 2015, the staff granted or denied no action relief in 213 cases. Of those, companies were allowed to exclude the proposal in 130 or 61% of the instances.

4. SEC. AND EXCHANGE COMM’N, *supra* note 3.

5. Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 BUS. LAW. 1019, 1037 (1987).

6. 17 C.F.R. § 201.1(d) (2011).

7. Whole Foods Market Inc., SEC No-Action Letter 2015 BL116161 (January 16, 2015). One additional reversal occurred as a result of the decision in Whole Foods. *See* BorgWarner Inc., SEC No-Action Letter 2015 BL 116173 (Feb. 6, 2015) (“The Division has reconsidered its position. On January 16, 2015, Chair White directed the Division to review the rule 14a-8(i)(9) basis for exclusion. The Division subsequently announced, on January 16, 2015, that in light of this direction the Division would not express any views under rule 14a-8(i)(9) for the current proxy season. Accordingly, we express no view concerning whether BorgWarner may exclude the proposal under rule 14a-8(i)(9).”).

tion of an adverse decision. The paper will explain the different grounds for staff or Commission reversal, emphasizing the types of arguments that have proved most effective. Finally, the paper will examine data from 2005 to 2015 in order to provide some insight into the best approach for seeking reconsideration or Commission review of an adverse no-action decision.

## II. RULE 14A-8 AND THE ROLE OF THE STAFF

### A. *The No-Action Process*

Under Rule 14a-8, shareholders meeting minimum ownership thresholds may submit proposals for inclusion into the annual proxy materials.<sup>8</sup> The proponent must have continuously held for one year, at the time of the submission, shares equal to at least \$2,000 in market value or represent one percent of the company's voting securities.<sup>9</sup> The proponent must also hold the securities through the date of, and attend, the shareholder meeting.<sup>10</sup>

Shareholders can only submit one proposal per company and the proposal, along with the accompanying statement, cannot exceed five hundred words.<sup>11</sup> Submissions must be received within 120 days before the date of the distribution of the prior year's proxy statement.<sup>12</sup> In addition to these procedural requirements, the Rule contains thirteen substantive grounds for excluding a proposal.<sup>13</sup>

Rule 14a-8 also sets out the process for obtaining no action relief in connection with the exclusion of a proposal.<sup>14</sup> The company must notify the shareholder and the SEC of the intent to exclude within eighty days of the filing of the definitive proxy statement. The request must include six "paper" copies of the proposal, the basis for exclusion, including the most recent authority,<sup>15</sup> and, where applicable, a supporting opinion of counsel.<sup>16</sup> The proponent has a right to, but need not, respond to the company's no action request.<sup>17</sup>

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8. 17 C.F.R. § 240.14a-8(b)(1) (2011).

9. Amendments to Rules on Shareholder Proposals, Release No. 22828 (Sept. 18, 1997).

10. 17 C.F.R. § 240.14a-8(b)(1) (2011). Also added in 1997; under 14a-8(h), the proponent may have a qualified representative present the proposal on behalf of the shareholder. 17 C.F.R. § 240.14a-8(h)(1) (2011).

11. 17 C.F.R. § 240.14a-8(d). (2011). Originally the word limit was a mere 100 words, later lifted to 200 and eventually 500, where it remains today.

12. The deadline for submission is usually found in the company's prior year proxy statement.

13. See 17 C.F.R. § 240.14a-8(i) (2011).

14. Exchange Act Release No. 4185 (Nov. 5, 1948).

15. 17 C.F.R. § 240.14a-8(j)(2)(ii) (2011) (stating that the explanation "should, if possible, refer to the most recent applicable authority, such as prior Division letters issued under the rule").

16. *Id.* (requiring an opinion of counsel "when such reasons are based on matters of state or foreign law").

17. See 17 C.F.R. § 240.14a-8(k).

A no action letter entails an informal assurance that the staff will not recommend enforcement action if the company omits the proposal from the proxy statement.<sup>18</sup> These determinations impose significant burdens on the staff of the SEC. The staff receives most of the requests between January and April of each year.<sup>19</sup> Because of this extensive incoming volume over a short period of time, the staff has adopted a policy of brief endorsement over detailed explanatory decisions.<sup>20</sup>

The issuance of a letter does not prevent a shareholder from bringing a private action challenging the company's decision to omit the proposal.<sup>21</sup> Nor does the failure to obtain a no action letter preclude a company from excluding the proposal. As a practical matter, however, parties to the no action process typically adhere to the staff's ruling.<sup>22</sup>

As informal guidance from the staff of the SEC, the letters are not final actions of the agency and, as a result, are generally non-reviewable by a court.<sup>23</sup> Similarly, the staff can change administrative interpretations of the Rule without notice and comment under the Administrative Procedures Act.<sup>24</sup> As a result, the staff has significant flexibility in determining and altering applicable interpretations under the Rule.

### B. The Appellate Process

Parties unhappy with the administrative outcome of a no action request may seek review of the decision. The SEC's Rules of Practice govern the right to challenge informal positions taken by the staff. Adopted in 1960, Rule 202.1(d)<sup>25</sup> provides:

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18. Lemke, *supra* note 6, at 1019.

19. This busy time is known in the industry as proxy season. Based on the chronological list of 14a-8 No-Action Letters on the SEC website, the bulk of the requests are in these months, with a substantial number also being submitted in December. In 2015, January had 72 incoming letters, February had 122 and March had 76; December was the next highest with 12 incoming letters. See generally SEC. AND EXCHANGE COMM'N, *Division of Corporation Finance 2015 No-Action Letters Issued Under Exchange Act Rule 14a-8*, [http://www.sec.gov/divisions/corpfm/cf-noaction/2015\\_14a-8.shtml#chrono](http://www.sec.gov/divisions/corpfm/cf-noaction/2015_14a-8.shtml#chrono) (Apr. 4, 2016).

20. SEC. AND EXCHANGE COMM'N I, *supra* note 3. This was not, however, always the case; older No-Action Letters tended to have more detailed explanations. See Exxon Mobil Corporation, SEC No-Action Letter 2002 WL 833402 (March 28, 2002). See also Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 Bus. Law. 1019, 1032 (Aug. 1987).

21. *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323 (3rd Cir. 2015).

22. Lemke, *supra* note 6, at 1022.

23. Lemke, *supra* note 6, at 1040.

24. *Perez v. Mortg. Bankers' Ass'n*, 135 S.Ct. 1199 (2015); see also J. Robert Brown Jr., Comment on Rule 14a-8(i)(9) (June 30, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2630319](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2630319); SEC. AND EXCHANGE COMM'N, DIV. OF CORP. FINANCE, *Staff Legal Bulletin No. 14H* (October 22, 2015), <http://www.sec.gov/interps/legal/cfs14h.htm>.

25. 17 C.F.R. § 202.1(d) (1960). Adopted in 1960, Rule 202.1(d) lays out the standard for Commission review. The procedural nature of the provision meant that the Commission did not need to rely on notice and comment. See 5 U.S.C. § 553 (2014). The effective language of paragraph (d) remains unchanged from the original 1960 adoption.

“While opinions expressed by members of the staff do not constitute an official expression of the Commission's views, they represent the views of persons who are continuously working with the provisions of the statute involved . . . In certain instances an informal statement of the views of the Commission may be obtained. The staff . . . will generally present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly complex . . . granting of a request for an informal statement by the Commission is entirely within its discretion.”<sup>26</sup>

The provision, therefore, assigns to the staff the role of gatekeeper for any appeal to the Commission. Moreover, the staff has some discretion over whether to “present” an appeal.<sup>27</sup> The staff need only do so when involving a matter of “substantial importance” and “novel or highly complex” issues. As a practical matter, most requests for Commission review are denied, with the staff providing little or no explanation for the decision.<sup>28</sup>

### III. STAFF INTERPRETATION

Significant disincentives exist to Commission review of no action letters under Rule 14a-8. First, the position reflects the views of the Division.<sup>29</sup> By allowing an appeal, the staff provides the Commission with an opportunity to reverse, a potentially embarrassing result. Second, allowing an appeal raises the risk that the matter will become a “final agency action” which is subject to legal challenge.<sup>30</sup>

Moreover, avenues exist for Commission involvement that does not necessarily require a formal appeal. The Division, in considering an appeal, can still seek the views of the Commissioners.<sup>31</sup> Presumably the staff will take these views into account when weighing a request for re-

26. 17 C.F.R. § 202.1(d) (1960).

27. The rule provides that the staff, “upon request or on its own motion will generally present questions to the Commission.”

28. In the past 10 years, the SEC received approximately 320 requests for either staff reconsideration, commission review or both, of these, only 42 resulted in reversal, with the SEC cryptically stating that the others did not merit reconsideration, or alternatively did not meet the standard of review for Commission appeal; see 14a-8 Proxy Appeal Data 2000-2015, <http://www.law.du.edu/documents/corporate-governance/empirical/14a-8-Proxy-Appeal-Data-2000-2015.xlsx>.

29. Lemke, *supra* note 6, at 1040 (citing L. LOSS, III SECURITIES REGULATION 1895 (2nd ed. 1961)).

30. Under the Administrative Procedures Act, once a petitioner has exhausted all the options within the administrative agency, they can appeal to the Federal Circuit Court. Only a few recent no action responses explain the reasoning for any denial. For example in March 2015, the staff briefly explained to a shareholder that his request for reconsideration was late and that respect for company printing requirements for annual proxy materials led them to deny his request for reconsideration. *Portela -Gonzalez v. Navy*, 109 F.3d 74 (1st Cir. 1997) (establishing the doctrine of exhaustion for administrative proceedings).

31. Statement of Chairman Mary Jo White in January 2015 about treatment of (i)(9) exclusions. See Statement from Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Proxy Proposals (Jan. 16, 2015), *available at* <http://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html>.

consideration. The approach ensures compliance with Commission goals and views while minimizing formal involvement.

The Commission, therefore, almost never hears appeals. From 2005 to 2015, shareholders and companies appealed or sought reconsideration of approximately 320 no action letters.<sup>32</sup> Most requested only staff reconsideration. A significantly smaller number, fifty-four, sought both staff reconsideration and Commission review.<sup>33</sup> Appeals only to the Commission were exceedingly rare and occurred in just twelve instances.<sup>34</sup>

In considering these requests, the staff seldom granted reconsideration. In the past ten years, there have been thirty-nine cases, approximately 1% of all no action letter requests,<sup>35</sup> where a request for reconsideration was successful.<sup>36</sup> In only one case did an appeal to the Commission succeed without the recommendation of the staff.<sup>37</sup> The majority of appeals or requests for reconsideration came from shareholders. Most successful requests, however, were granted to companies. Out of thirty-nine total reversals, shareholders succeeded on the merits in only two of them, although in two other instances the staff withdrew a previously issued no action letter. The other thirty-five reversals<sup>38</sup> resulted in the granting of no action relief to the company.

#### A. *Grounds for Reversal*

Successful reconsideration has occurred most often where the company is first denied no action relief, and then substantially implements the proposal or establishes that the proposal violates the law. Less commonly, reconsideration has been granted on procedural grounds or as a result of inconsistent simultaneous decisions.

##### 1. Substantial Implementation

The most common substantive ground for reconsideration concerns a proposal “substantially” implemented by the company under subsection (i)(10).<sup>39</sup> Following the denial of no action relief, companies sometimes

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32. See Posted Data, *supra* note 28.

33. See Posted Data, *supra* note 28.

34. See Posted Data, *supra* note 28.

35. According to a Bloomberg search from Jan 1, 2005 through June 30, 2015, over 3,912 no-action letters were submitted on 14a-8 grounds.

36. In no case during this period did the Commission fail to reverse when accepting an appeal. See Posted Data, *supra* note 28; Nonetheless, this can happen. For example, in 1975, the SEC addressed an AT&T no action request about dividends, where the Commission admittedly reviewed it, but still disagreed with the company. AT&T, SEC No-Action Letter (Feb. 5, 1975).

37. See Posted Data, *supra* note 28.

38. See Posted Data, *supra* note 28.

39. 17 C.F.R. § 240.14a-8(i)(10) (2011).

implement the proposal then seek reconsideration.<sup>40</sup> Over the past ten years, fourteen successful reversals were granted on this basis.<sup>41</sup>

In one recent case, Bank of America received a shareholder proposal pertaining to stock retention and ownership policies.<sup>42</sup> Bank of America sought exclusion by arguing that existing corporate policies and procedures effectively implemented the proposal. The staff denied the no action request. Following the decision, the board of directors officially adopted new policies regarding share retention and ownership that substantially mirrored the goals of the proposal. Bank of America sought reconsideration, explaining that the policies were actually more stringent than those sought in the proposal. The staff found this new information sufficient and issued the no action letter, reversing its initial decision.<sup>43</sup>

General Electric faced a shareholder proposal in February 2012 asking the board to re-examine the company's dividend policy and to consider special dividends as a means of returning excess cash to shareholders.<sup>44</sup> In the original decision, the staff failed to concur with the company's view that this proposal intruded into ordinary business matters. Thereafter, the board of directors re-examined the company's policy and considered special dividends as a means of handling excess cash. In light of the development, General Electric sought reconsideration subsection (i)(10). The staff concurred that the proposal had been substantially implemented and permitted exclusion.<sup>45</sup>

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40. In 2006, multiple companies obtained reversals under the substantial implementation exclusion. Electronic Data Systems, Bristol Myers Squib, Borders Group, Honeywell, Allegheny Electric and Boeing all received shareholder proposals relating to voting rights and redemption of poison pills. In each case, the staff originally decided that the companies could not exclude the proposal, but once each company submitted proof of adoption of a revised policy pertaining to poison pill voting rights, the staff reversed, concurring in the view that the goals of the proposals had been substantially implemented under 14a-8(i)(10).

41. These include no-action letters issued to Bank of America in 2013, General Electric in 2012, General Electric in 2011, United Health Group in 2008, Boeing Company in 2006, Home Depot Inc. in 2006, Electronic Data Systems in 2006, Bristol Myers Squib in 2006, Borders Group in 2006, Honeywell International Inc. in 2006, Pfizer Inc. in 2006, Allegheny Energy in 2005, Boeing Company in 2005, and Electronic Data Systems in 2005.

42. Bank of America, SEC No-Action Letter (March 14, 2013).

43. The original denial was in Bank of America, SEC No-Action Letter (February 15, 2013) reversed by the Bank of America, SEC No-Action Letter (March 14, 2013).

44. General Electric, SEC No-Action Letter (February 29, 2012); *see* Posted Data, *supra* note 28..

45. General Electric sought no action relief under (i)(10) for a different proposal in February 2011. The shareholder proposal requested that the company provide a report on General Electric's process for identifying and prioritizing legislative and regulatory advocacy activities. The staff declined to issue no action relief under the ordinary business exclusion. General Electric implemented the actions and then submitted a request for reconsideration, providing documentation detailing its recent implementation. The staff concurred that these implementation efforts met the standard for exclusion under 14a-8(i)(10) and reversed its prior decision. Similarly, in April 2008, United Health Group Inc. sought relief from a shareholder proposal urging the board to adopt principals of healthcare reform. Like the 2011 General Electric letter, the staff did not concur that this proposal could be excluded under the ordinary business exception. United Health then took action to implement the goals of the proposal and requested reconsideration detailing the implementation efforts and providing documentation of such implementation. The staff agreed that the goals of the proposal

## 2. Procedural Reversals

Five of the thirty-nine successful reversals were granted on procedural grounds.<sup>46</sup> Most involved allegations of deficiencies in proof of stock ownership or non-conformity with applicable time limits.

In February 2013, Entergy Corporation sought no-action relief from a shareholder proposal regarding safety concerns surrounding nuclear plants.<sup>47</sup> In submitting the requisite evidence of share ownership, the shareholder erroneously referred to a subsidiary rather than the parent company and the proposal was excluded. Realizing the mistake, the shareholder sought reconsideration and argued that Entergy failed to provide the required notice of deficiency in a timely manner. Entergy claimed otherwise. After evaluating the time line of events, the staff found the proponent did indeed possess the requisite shares in the correct company and reversed its initial decision.

In another ownership case, Pfizer sought exclusion of a proposal relating to corporate social responsibility and animal testing. Ignoring the substantive content, Pfizer reasoned the proponent lacked sufficient proof of share ownership.<sup>48</sup> The SEC denied the request, relying on representations in a letter dated January 6th that the proponent's broker had been instructed to provide the required documentation.

In the request for reconsideration, Pfizer asserted that the shareholder "had still failed to prove" ownership for the required holding period. Pfizer argued that proof of ownership never arrived and, even if received, the documents would have shown ownership only as of October 30th, insufficient to establish the one-year minimum holding requirement. The company further asserted that, after searching through all incoming mail and fax of the addressee identified in the response letter, no proof could be found of delivery. Based upon this clarifying information, the SEC reconsidered and granted no action relief to Pfizer.<sup>49</sup>

## 3. Improved Analysis Reversals

Companies sometimes received favorable decisions on reconsideration by introducing new facts or improved analysis. The approached ef-

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had essentially been met and allowed exclusion. *See* General Electric, SEC No-Action Letter (February 24, 2011); *see also* United Health, SEC No-Action Letter (April 15, 2008).

46. *See* Entergy Corp, SEC No-Action Letter (February 27, 2013); *see also* Pfizer Inc., SEC No-Action Letter (February 22, 2010); General Electric, SEC No-Action Letter (February 15, 2008); Crescent Real Estate, SEC No-Action Letter (March 27, 2006); Federal Agricultural Mortgage Corporation, SEC No-Action Letter (June 14, 2005).

47. Entergy Corp, SEC No-Action Letter (January 10, 2013); reversed by Entergy Corp, SEC No-Action Letter (February 27, 2013).

48. Pfizer Inc., SEC No-Action Letter (February 22, 2010).

49. *See* Posted Data, *supra* note 28.

fectively allowed parties “two bites at the apple.”<sup>50</sup> The Commission granted sixteen reversals for improved analysis.<sup>51</sup> In general, this occurs where the improved analysis establishes that the proposal may violate the law.

In Scotts Liquid Gold, for example, the shareholder submitted a proposal requesting establishment of a committee to receive and report any offers for the sale of the company.<sup>52</sup> After the staff declined to grant no action relief, Scott’s Liquid Gold sought reconsideration and included supplementary analysis, demonstrating how the proposal would cause the company to violate Colorado law. Additionally, the company gave a more detailed explanation of exactly how the proposal could cause directors to violate their fiduciary duties. In light of the new information, the staff reversed.<sup>53</sup>

In Interpublic Group of Companies, shareholders submitted a request related to executive compensation. The SEC declined to grant no action relief.<sup>54</sup> On reconsideration, the company submitted supplementary information including an opinion of counsel. In reversing and granting the no action request, the staff specifically noted the presence of this letter.<sup>55</sup> Hudson United Bancorp and Bristol Myers Squib received simi-

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50. In his oral biography, Peter Romeo, a former SEC employer who worked on 14a-8 no action letters in the 1970’s, expressed the SEC’s policy of disallowing “second bites at the apple” for shareholder proponents who failed to submit a valid proposal. *See* SEC Historical Society, Statement of Peter J. Romeo (February 20, 2014).

51. *See* Scott’s Liquid Gold, Inc., SEC No-Action Letter (May 7, 2013); *see also* Boeing Company, SEC No-Action Letter (March 2, 2011); Amazon.com, Inc., SEC No-Action Letter (April 7, 2010); Pfizer Inc., SEC No-Action Letter (February 16, 2010); Tyson Foods Inc., SEC No-Action Letter (December 15, 2009); JP Morgan Chase, SEC No-Action Letter (March 24, 2008); Kansas City Southern, SEC No-Action Letter (March 14, 2008); Bank of America, SEC No-Action Letter (February 2, 2007); Eli Lilly, SEC No-Action Letter (January 29, 2007); Loews Corp., SEC No-Action Letter (March 22, 2006); Interpublic Group of Companies, SEC No-Action Letter (April 29, 2005); Safeway Inc., SEC No-Action Letter (March 28, 2005); General Motors Corp., SEC No-Action Letter (March 28, 2005); Bank of America, SEC No-Action Letter (March 15, 2005); Hudson United Bancorp, SEC No-Action Letter (March 2, 2005); and Bristol Myers Squib, SEC No-Action Letter (March 10, 2005).

52. The language of the proposal read as follows: “That Scott’s Liquid Gold-Inc. establish a committee of its Board of Directors to receive and promptly report to the shareholders all past, present, and future proposals to the company or any of its directors involving the sale of all or apart of the company.” Scott’s Liquid Gold, Inc., SEC No-Action Letter (May 7, 2013).

53. In its request for reconsideration, the company explained how destructive and serious the nature of the proposal was, citing it as the reason for delaying its 2013 Annual Meeting until the staff had reconsidered the matter. *See* Scott’s Liquid Gold, Inc., SEC No-Action Letter (May 7, 2013). Based on this letter, as well as others in the category, it appears the staff will sometimes allow a company or shareholder “two bites at the apple.” There is no clear indication why this occurs, but it seems to be a function of more detailed analysis. Its possible that companies submit their original requests for no-action relief, confident they are being clear about the reasons for exclusion, but realize later that the staff needs further clarification of exact anticipated consequences to warrant exclusion.

54. Interpublic Group of Companies, SEC No-Action Letter (January 25, 2005). The staff declined to allow the exclusion under (i)(3), so the company then came back and argued that it should be excluded under (i)(2).

55. D. Michael Lefever, The Interpublic Grp. of Companies, Inc., SEC No-Action Letter, 2005 WL 1036248 (Apr. 29, 2005).

lar proposals and achieved favorable decisions by including opinions of counsel in their requests for reconsideration.<sup>56</sup>

Both Safeway and Bank of America received proposals in 2005 requesting that the board of directors amend the bylaws to require that at least fifty percent of the nominees have minority status. Both companies sought to exclude the proposals, arguing that they violated various laws including the Civil Rights Act. The staff declined to permit exclusion in both cases,<sup>57</sup> but upon reconsideration, reversed. Unlike the initial request, the companies provided the staff with an opinion of outside counsel on the application of 14a-8(i)(2).<sup>58</sup>

#### 4. Other Reasons for Reversal

The staff granted reconsideration in one case involving the timing of duplicative proposals. AT&T sought to exclude a shareholder proposal that requested reports on lobbying contributions and expenditures. The staff found that AT&T failed to establish that the duplicative proposal was received later in time, a requirement for the exclusion.<sup>59</sup> In the request for reconsideration, AT&T clarified the order in which the proposals were received. In response, the staff agreed to reverse and issue the requested no-action relief.<sup>60</sup>

In another case, the staff agreed to reconsider where a party identified a contemporaneous no action letter on a similar or identical issue that received different treatment. Shareholders submitted a proposal to Charles Schwab pertaining to board attendance. Charles Schwab characterized the proposal as vague and indefinite but the staff denied the request for no action relief.<sup>61</sup> In a letter issued just one day later to Goldman Sachs,<sup>62</sup> the staff found that a proposal with identical language met

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56. Hudson United Bancorp, SEC No-Action Letter (March 2, 2005); *see also* Bristol Myers Squibb, SEC No-Action Letter (March 10, 2005).

57. Safeway Inc., SEC No-Action Letter (March 28, 2005) and Bank of America, SEC No-Action Letter (March 15, 2005).

58. Similarly, in Amazon.com Inc.'s April 2010 request, the staff declined to concur that a proposal regarding ownership requirements to call special shareholder meetings was not vague and indefinite. Amazon gave in-depth analysis in its reconsideration request of particular language in the proposal that supported a finding of vague and indefinite. In this case, the term "rights" from the proposal was analyzed and determined to be so vague as to deny the company the certainty of the request needed to implement the proposal if voted on successfully. Amazon also gave recent guidance from the staff that supported their position, which was applied in a similar fashion to case law. The company cited other no-action letters granting relief in similar situations. Amazon's submission of improved analysis caused the staff to reconsider and reverse its earlier decision. Interpublic Group of Companies, Inc., Hudson United Bancorp and General Motors were other companies who obtained no-action relief on grounds of 14a-8(i)(2) in the past ten years.

59. This is significant because the SEC needed to know the order of the proposals to determine whose should be included.

60. AT&T, Inc., SEC No-Action Letter (March 1, 2012).

61. Charles Schwab, SEC No-Action Letter (March 20, 2014).

62. The Charles Schwab decision was originally issued on March 6<sup>th</sup> and the Goldman Sachs letter contradicting it came out one day later on March 7, 2014.

this standard.<sup>63</sup> When Charles Schwab highlighted this divisional inconsistency, the staff agreed to reconsider and allowed Charles Schwab to exclude the proposals.<sup>64</sup>

#### IV. APPEALS TO THE COMMISSION

Most requests for review of a no action letter determination seek reconsideration by the staff. Out of the 320 total requests for reconsideration<sup>65</sup> during the applicable period, approximately eighty also sought Commission review. Only one garnered actual Commission intervention.<sup>66</sup>

In that instance, the no action request came from Whole Foods. The company received a proposal requesting that the board adopt a bylaw providing for shareholder access.<sup>67</sup> The proposal would give shareholders or group of shareholders owning 3% of the common stock for three

63. ("[I]t appears to us that the proposal, as drafted and submitted to the company, is so vague and indefinite as to make it impossible for either the board of directors or the stockholders at large to comprehend precisely what the proposal would entail."); *The Goldman Sachs Group, Inc.* (March 7, 2014)(concurring with exclusion of similarly worded proposal that was "inconsistent with the [company's majority voting standard") – the Schwab proposal calls on the Company's Board of Directors: to amend the Company's governing documents to provide that all matters presented to shareholders shall be decided by a simple majority of the shares voted FOR and AGAINST an item (or "withheld" in the case of board elections). This policy shall apply to all matters unless shareholders have approved higher thresholds, or applicable laws or stock exchange regulations dictate otherwise. The Goldman Sachs proposal had nearly identical language. The Proposal reads as follows: *RESOLVED: Shareholders of The Goldman Sachs Group, Inc. ("Goldman" or "Company") hereby request the Board of Directors to amend the Company's governing documents to provide that all matters presented to shareholders shall be decided by a simple majority of the shares voted FOR and AGAINST an item (or, "withheld" in the case of board elections). This policy shall apply to all matters unless shareholders have approved higher thresholds, or applicable laws or stock exchange regulations dictate otherwise.*

64. Charles Schwab, SEC No-Action Letter (March 6, 2014); reversed by Charles Schwab, SEC No-Action Letter (March 20, 2014).

65. See Posted Data, *supra* note 28.

66. In one other case (separate from Whole Foods), a company filed an appeal directly to the Commission without seeking reconsideration by the staff. See *Pfizer Inc.*, SEC No-Action Letter (March 8, 2006). In 2006, Pfizer sought to exclude a proposal involving senior executive pension benefits, asserting that substantially identical policies existed. After the staff denial, Pfizer requested Commission review. Letter from Legal Division, Pfizer Inc., to Nancy Morris, Office of Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission (February 21, 2006) ("Pfizer Inc. ("Pfizer") respectfully requests that the Securities and Exchange Commission (the "Commission") review the response of the staff of the Division of Corporation Finance (the "Staff"), dated February 8, 2006 (the "Staff Response") to Pfizer's correspondence of December 16, 2005, notifying the Staff of its intention to omit, pursuant to Rule 14a-8(j), a shareholder proposal (the "Proposal") submitted by the AFL-CIO Reserve Fund (the "Proponent"). The staff responded "you have asked us to reconsider our position. The Division grants the reconsideration request, as there now appears to be some basis for your view that Pfizer may exclude the proposal under rule 14a-8(i)(10). Accordingly, we will not recommend enforcement action to the Commission if Pfizer omits the proposal from its proxy materials in reliance on rule 14a-8(i)(10). The decision was reversed. The decision did not, however, come from the Commission. Instead, the staff characterized the effort as asking for reconsideration, and agreed to reconsider and grant the no action relief. Nothing in the response indicated any role of the Commission in the decision.

67. For a discussion of the history of shareholder access under the proxy rules, see J. Robert Brown, Jr., *The SEC, Corporate Governance and Shareholder Access to the Boardroom*, UT. L. REV. (2008).

years the right to include nominees in the company's proxy statement. Whole Foods proposed an alternative, with the ownership threshold set at 9% and holding period at five years, and sought no action relief. The staff issued a no action letter, finding that the shareholder proposal directly conflicted with management's alternative under subsection (i)(9).<sup>68</sup>

Dissatisfied with the decision, the shareholder requested reconsideration by the staff and review by the Commission. Unusually, the shareholder copied the five members of the Commission on the appeal.<sup>69</sup> Assorted shareholder groups supported the effort and an article critical of the staff position appeared in the *New York Times*.<sup>70</sup> Just over a month later, the staff withdrew the no action letter at the request of the SEC Chair, Mary Jo White.<sup>71</sup> Chair White instructed the staff to study the use and effect of subsection (i)(9).<sup>72</sup>

In the aftermath of the Whole Foods decision, the staff withdrew another letter issued under subsection (i)(9). Borg Warner received a no-action letter allowing for the exclusion of a shareholder proposal concerning the right to call special meetings. The shareholder sought reconsideration in light of the policy articulated by the Chair. The staff agreed to withdraw the no action letter and take no position on the issue.<sup>73</sup>

## V. ANALYSIS

The process for reexamination of no action letters under Rule 14a-8 can take several approaches. Losing parties can petition the staff for reconsideration, request that the matter be escalated to the Commission for review, or both. The data from 2005 to 2015 shows that the staff received 320 requests for reconsideration or Commission appeals. The staff granted reconsideration in approximately 12% of the cases. The Commission publicly intervened only once.<sup>74</sup> Most of the appeals came from shareholders, although companies obtained reversal far more often. For both

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68. Whole Foods Market Inc., SEC No-Action Letter 2015 BL116161 (January 16, 2015).

69. The shareholder addressed the letter to the Office of Chief Counsel in the Division of Corporation Finance. Copies were sent, however, to the five commissioners and the Director of the Division of Corporation Finance. See <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2015/jamesmcritchiecheveddenrecon011615-14a8.pdf>

70. Gretchen Morgenson, *Whole Foods' High Hurdle for Investors*, N.Y. TIMES (January 3, 2015), <http://www.nytimes.com/2015/01/04/business/whole-foods-high-hurdle-for-investors.html>.

71. Whole Foods Market Inc., SEC No-Action Letter 2015 BL116161 (January 16, 2015). This no action process involved a letter from CIL, from the NY City Comptroller and an article in the NYT from Gretchen Morgenson; showing that the Commission acted only after tremendous public pressure.

72. The staff issued the results of the analysis in SEC. AND EXCHANGE COMM'N, DIV. OF CORP. FINANCE, STAFF LEGAL BULLETIN NO. 14H (CF) (Oct. 22, 2015).

73. BorgWarner, Inc., SEC No-Action Letter 2015 BL 116173 (February 6, 2015).

74. The Whole Foods reversal was actually an intervention by the chair, not the entire commission. Chairwoman Mary Jo White indicated that the Commission was reviewing (i)(9) generally. Therefore, the reversal in the Whole Foods letter was not an instance of Commission review of the substantive interpretation of the exclusion in that specific instance.

groups, the overall number of successful reversals has declined in recent years.<sup>75</sup>

Limited time and resources may partially explain the dearth of reconsiderations. The no action letter process puts unique demand on the staff's resources. With nearly 1,000 shareholder proposals and more than three hundred no action requests submitted each year, most arrive at the Commission in a three-month period between January and April.<sup>76</sup> Already inundated with initial decisions, the need for additional reconsiderations further strains the already limited time and resources of the SEC staff.

As a result, requests for reconsideration by the staff rarely succeed. Success has occurred on narrow grounds such as when the proposal has been substantially implemented, the proposal violates the law, or the staff has previously and recently decided otherwise on an identical issue.

Changing substantive interpretations of Rule 14a-8 would therefore seem to require Commission intervention. Nonetheless, this rarely occurs. Some appeals may not raise "novel" or "highly complex" matters and therefore do not satisfy the standard of review set forth in 202.1(d). In other cases, the staff may have an administrative incentive not to present an appeal to the Commission.

At the same time, the Commission can have legal or practical reasons to avoid an appeal. The Commission may not intervene when in agreement with the staff interpretation. Consideration of a staff determination by the Commission may result in a final administrative decision and can therefore be subject to judicial review.<sup>77</sup> To limit judicial intervention over agency decisions, the Commission may curb its acceptance of appeals.

The limited involvement of the Commission is troublesome. First, the staff typically does not reexamine substantive interpretations of Rule 14a-8. For example in 2006, The New York City Office of the Comptroller submitted proposals to Rite Aid Corporation concerning shareholder ratification of independent auditors. After the staff issued a no-action letter to Rite Aid, the Comptroller requested Commission review, citing a recent speech by the then Chairman of the SEC.<sup>78</sup> Despite the fact that the Chair expressed views that auditor independence was an important corporate governance issue, the staff determined the proposal did not

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75. Nineteen reversals occurred in 2005-2006, 6 in 2007-2008, 4 in 2009-2010, 5 in 2011-2012, 4 in 2013-2014 and only 2 in 2015. See Posted Data, *supra* note 28.

76. See SEC. AND EXCHANGE COMM'N I, *supra* note .3

77. Under the Administrative Procedures Act, agency action must be final before it is reviewable in district court.

78. Identifying the need for auditor independence among a list of the most difficult and important issues in corporate governance. Rahsan M. Boykin, Rite Aid Corporation, SEC No-Action Letter 2006 WL 1084052 (April 21, 2006).

raise issues that were substantially important and novel or highly complex.<sup>79</sup> It therefore refused to present the issue to the full Commission for review.

Another instance where the staff did not allow reconsideration on an important issue arose in 2014. Both Wells Fargo<sup>80</sup> and Bank of America<sup>81</sup> received shareholder proposals related to incentive compensation and the risk of financial material loss. The staff issued no-action relief to the companies. On reconsideration, the staff acknowledged that “incentive compensation paid by major financial institutions to personnel in a position to cause the institution to take inappropriate risks that could lead to a material financial loss to the institution” was a significant policy issue outside the “ordinary business” exception. Nonetheless, the staff determined that the matter did not raise issues that were sufficiently important or novel to warrant presentation to the Commission.<sup>82</sup>

Historical intervention by the Commission has been slight. Even the period between 2000 and 2005 saw limited involvement by the Commission itself. Greater involvement by the Commission would improve the quality of the decision-making under Rule 14a-8. Doing so would help ensure that the staff acted in a consistent manner and observed the goals of the Commission. The best way to achieve this is to have more oversight from the Commission. The Commission should direct the staff to forward them any requests for Commission review and should construe the requirements of 202.1(d) more liberally, so that it can refocus the agency and provide better guidance to industry actors.

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79. *Id.*

80. Wells Fargo, SEC No-Action Letter (May 22 2014).

81. Bank of America, SEC No-Action Letter (May 22, 2014).

82. *Id.*

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