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Jason Haubenreiser

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RULE 14A-8 AND THE EXCLUSION OF PROPOSALS THAT VIOLATE THE LAW

I. INTRODUCTION

The Securities and Exchange Commission (“SEC” or “Commission”) created Rule 14a-8 in 1942 to allow certain shareholder proposals to be included in a company’s proxy statement.¹ The Rule also included thirteen substantive grounds for excluding a proposal. Specifically, subsection (i)(2) allows for the exclusion of proposals “which, if implemented, would violate . . . state law or federal law of the United States, or any law of any foreign jurisdiction, to which the [company] is subject.”²

Originally arising from an informal staff interpretation, the Commission amended Rule 14a-8 in 1976 to add the exclusion.³ The provision applied to proposals that necessarily required the corporation to act in a manner that would conflict with law. The exclusion did not apply to proposals that could violate the law. Moreover, the SEC sometimes allowed shareholders to rewrite a proposal to avoid application of the exclusion.

This paper will lay out the administrative history of Rule 14a-8(i)(2) through the changes made in 1998. The paper will also trace the staff’s interpretation of the provision with particular emphasis on interpretations during the new millennium. Finally, the paper will analyze the exclusion and present possible changes in the staff’s interpretation.

II. ADMINISTRATIVE HISTORY OF SUBSECTION (I)(2)

A. *Evolution of the Exclusion*

When adopted in 1942, Rule 14a-8 did not include an explicit exclusion for proposals that violated the law.⁴ Nonetheless, the staff adopted an informal position that allowed for exclusion in these circumstances. In a no action letter issued to American Motors in 1972,⁵ the staff found that a

1. Because Rules are adopted pursuant to authority given to an agency under a statute, 14a-8 was adopted pursuant to authority under the Exchange Act but it did not involve or require an amendment to the Exchange Act.

2. Rule 14a-8(i)(2).

3. Prior to Rule 14a-8(i)(2) there was a rule called 14a-8(c)(2) which was given life in the Adoption of Amendments Relating to Proposals by Sec. Holders, Release No. 12999 (adopted Nov. 22, 1976). Since the law’s enactment in 1942, the staff had only informally excluded shareholder proposals from proxy materials for violations of the law, but this release prohibited the same violations of law formally and adopted only minor changes in language.

4. The Commission originally numbered the Rule x-14a-7. See Sec. & Exch. Comm’n Release Notice, Release No. 2376 (Jan. 12, 1940).

5. *Am. Motors Corp.*, SEC No-Action Letter, 1972 WL 9369, at *4 (Nov. 29, 1972). The proposal sought the right to have shareholders vote “For” or “Against” a matter on the proxy. The company argued that the proposal would have “unreasonably restrict[ed] the right of a shareholder to vote

proposal that would restrict a voter's right to delegate their proxy conflicted with the law of Maryland. Similarly, in a letter to the General Electric Company⁶ ("GE"), the staff found that a proposal calling for the company to breach legal contracts contradicted the law. The staff also permitted the exclusion of proposals that defied foreign law because this contravened state law by causing a corporation to exercise authority "in defiance of any statute in a jurisdiction where such company [was] doing business."⁷

The staff interpretation only applied when proposals necessitated a conflict with the law. In *Allis-Chalmers Co.*,⁸ management failed to sufficiently show that the proposal "necessarily required the performance of illegal acts. . . ." As a result, the staff decided not to permit exclusion from the proxy materials. In another letter issued to *Newmont Mining Co.*,⁹ the staff refused to permit the exclusion of a proposal that called for the company to solicit new laws advocating affirmative action in South Africa because the provision would "require the company to seek new laws only to the extent it [was] legally able to do so. . . ."¹⁰

The Commission proposed to add an explicit exclusion for proposals "contrary to the federal law of the United States" in 1976.¹¹ The release noted that the amendment was consistent with "a view that [the] staff has expressed informally on numerous occasions in the past."¹² Commentary on the proposal sought expansion to "allow the omission of proposals whose implementation would violate not only federal law, but also any other applicable law (including foreign law) or governmental regulation to which the corporation is subject. . . ."¹³

by proxy as authorized by statute, so [it] would be invalid and unenforceable under the laws of the State of Maryland."

6. General Electric Co., SEC No-Action Letter, CCH Intelliconnect, (Feb. 1, 1973). This proposal called for the "suspension of all military contracts relating to the military action in Southeast Asia." According to the staff, the proposal had the potential to violate the law because it "would require GE to violate federal law by breaching legal contracts, many of which [were] with the American government itself."

7. *Newmont Mining Co.*, SEC No-Action Letter, 1973 WL 9174 (March 20, 1973). In this case the Newmont Mining Corporation sought exclusion of a shareholder proposal which proposed the initiation of affirmative action programs at company facilities in South Africa despite apartheid practices prohibiting such programs.

8. *Allis-Chalmers Corp.*, SEC No-Action Letter, 1974 WL 8871, at *1 (Mar. 4, 1974). In this case, the proposal requested the Board to divest 40,000 shares of the company's common stock from a former executive. The executive acquired the shares as a part of his employment contract. Management argued the proposal would result in a breach of contract.

9. *Newmont Mining Co.*, SEC No-Action Letter, 1974 WL 6883 (March 27, 1974).

10. *Id.*

11. Proposed Amendments to Rule 14a-8 Under the Sec. Exch. Act of 1934 Relating to Proposals by Sec. Holders (S7-643), Release No. 9343 (proposed July 7, 1976)

12. Proposed Amendments to Rule 14a-8 Under the Sec. Exch. Act of 1934 Relating to Proposals by Sec. Holders (S7-643), Release No. 9343 (proposed July 7, 1976).

13. Proposed Amendments to Rule 14a-8 Under the Sec. Exch. Act of 1934 Relating to Proposals by Sec. Holders (S7-643), Release No. 9343 (proposed July 7, 1976).

The final rule permitted the exclusion of proposals that violated federal, state, and foreign law.¹⁴ However, the provision did not apply where the foreign law “would be violative of any state law or federal law of the United States.”¹⁵ Moreover, matters that depended upon interpretations of law, also required an opinion of counsel.¹⁶

B. Staff Interpretation

In construing the exclusion, the staff sometimes rejected a company’s position because of an inadequate opinion of counsel. In one case, the staff noted that the company did not “quote the provision cited nor . . . provide any citations to any decided cases which would indicate that the proposed action would be illegal under that provision”¹⁷ Most notably, in no action letters issued after the amendments, the staff increasingly allowed for redrafting to cure a shareholder proposal that potentially resulted in a of law.

1. State Law

The exclusion applied to proposals that violated state statutes. For example, in letters issued to BankAmerica Corp. and Crocker Nat’l Corp.,¹⁸ shareholders submitted proposals that sought to require disclosure of information about the identity of their large investors. Management argued in both cases that confidentiality restrictions prohibited disclosure without the express consent of the individual account owners. The staff allowed for exclusion, agreeing that California law prohibited a trust company from “disclosing any information concerning the existence, condition, management and administration of any private trust confided to it.”¹⁹

In General Motors Corp.,²⁰ the staff permitted the omission of a shareholder proposal calling for the withholding of bonuses from employees following significant recalls of vehicles. Management pointed to New York law that authorized criminal prosecution for employers who refused to pay wages, benefits, or wage supplements when required. In a letter to

14. Adoption of Amendments Relating to Proposals by Sec. Holders, Release No. 12999 (adopted Nov. 22, 1976).

15. The staff explained this language by example: “where a proposal would call for an action by the issuer to bring it into compliance with state or federal law, the fact that such action might be violative of a particular foreign law to which the issuer is also subject would not cause the proposal to be excluded under subparagraph (c)(2)”. Adoption of Amendments Relating to Proposals by Sec. Holders, Release No. 12999 (adopted Nov. 22, 1976).

16. See Rule 14a-8(d)(4) 17 CFR 240.14a-8(d)(4). See also Proposed Amendments to Rule 14a-8, Release No. 12734 (proposed Oct. 14, 1982) (noting that for exclusions under (c)(2), “the Commission staff requires an opinion of counsel”).

17. *California Real Estate Inv. Trust*, SEC No-Action Letter, 1980 WL 14299, at *1 (Mar. 27, 1980).

18. *BankAmerica Corp.*, SEC No-Action Letter, 1977 WL 13922, at *6 (Feb. 17, 1977); *Crocker Nat’l Corp.*, SEC No-Action Letter, 1977 WL 13924, at *1 (Feb. 17, 1977).

19. The Commission used the same language in both of these cases and a handful of other similar no action letters, which requested the same private information. *Id.*

20. *Gen. Motors Corp.*, SEC No-Action Letter, 1981 WL 26256, at *1 (Mar. 6, 1981).

Proctor & Gamble,²¹ a proposal potentially violated the law by calling for the board to implement cumulative voting when the board did not have unilateral authority to do so. Management pointed out that statute required specific procedures (notice requirements) that the company could not implement given the timing of the annual meeting.

The exclusion also applied to proposals that violated a company's bylaws and charter. In *Time Warner Inc.*,²² shareholders tried to amend the company's bylaws to allow for cumulative voting. Management argued, however, that cumulative voting required amendment to the articles of incorporation. The staff agreed and allowed for exclusion of the proposal. In *Avondale Industries Inc.*,²³ shareholders wanted to amend the company's bylaws to establish a Compensation Committee consisting of three independent directors. Management asserted that these changes would be inconsistent with the articles of incorporation. The staff agreed that a proposal calling for a bylaw that contravened the articles violated the state corporate law.

Likewise, companies could exclude proposals that interfered with a board's fiduciary obligations in violation of state law.²⁴ In *Bank America Corp.*, the proponents called for the formation of a shareholder committee to select replacements to fill board vacancies. Management argued that the proposal would divest them of their authority, under state law, to fill vacancies. The staff agreed that the proposal would "impermissibly" force the directors to "abdicate their responsibility to exercise best business judgement in filling future vacancies on the board by binding themselves to comply with the provisions of this proposal."²⁵

In *Lyondell Petrochemical Co.*,²⁶ a shareholder proposal specifically provided that the Union Representative for the company be chosen not by the Board in the exercise of its business judgment but by an appointment process in which the Board and the stockholders did not participate. Management argued that nominations were part of its responsibilities. The staff agreed, stating, "The Commission had previously recognized that a shareholder proposal seeking to divest a board of directors of its responsibilities regarding nominations may be excluded"²⁷

21. *The Procter & Gamble Co.*, SEC No-Action Letter, 1981 WL 25079, at *1 (July 1, 1981).

22. *Time Warner Inc.*, SEC No-Action Letter, 1990 WL 286263, at *1 (Mar. 23, 1990). The staff did provide that the proposal could not be excluded if revised by the proponent within the specified time period.

23. *Avondale Indus., Inc.*, SEC No-Action Letter, 1995 WL 82754, at *1 (Feb. 28, 1995).

24. State law generally provided that the "business and affairs of a corporation" would be "managed by or under the direction of a board of directors" Del. Code Ann. tit. 8, § 141(a).

25. *Bank Am. Corp.*, SEC No-Action Letter, 1980 WL 14334, at *2 (Mar. 10, 1980).

26. *Lyondell Petrochemical Co.*, SEC No-Action Letter, 1993 WL 47332, at *3 (Feb. 19, 1993).

27. See also *the Growth Fund of Spain*, SEC No-Action Letter, 1996 WL 272422, at *7 (Mar. 15, 1996) (exclusion of a proposal that could result in a violation of the board's fiduciary duties).

2. Federal Statutes and Rules

The staff also allowed exclusion of proposals that violated federal statutes. Shareholders in Reserve Oil and Gas Co.²⁸ submitted proposals seeking to avoid communist influence within the company by excluding people of specific national origins from the board of directors. The staff agreed with the management that discrimination of this sort was “clearly a violation of Title VII of the Civil Rights Act”²⁹ The Ford Motor Co.³⁰ shareholders sought disclosure of outstanding defense contracts with the United States Government in connection with the Reagan Administration’s “Star Wars” Strategic Defense Initiative. Management argued that the information could be used in violation of national security and secrecy statutes.³¹ The Staff agreed that the proposal was excludable but allowed amendment to provide

The staff also applied the exclusion to violations of federal rules and regulations. Shareholders in GE submitted a proposal that would prohibit the company, under certain circumstances, from sharing employee compensation information with the Internal Revenue Service or other governmental agencies. Management argued that the proposal would violate regulations issued by the Department of the Treasury.³² The staff agreed, concluding that “properly adopted administrative regulations have the force and effect of law until rescinded by the agency, superseded by Congressional action, or invalidated by a court of competent jurisdiction.”³³

3. Foreign Law

Some no action letters involved allegations of violations of foreign law. In Standard Oil Co. of California,³⁴ a shareholder proposal called for the company to stop selling petroleum products³⁵ to the police and military forces of the South African government which imported nearly all its oil. Management argued that the proposal called for a “boycott of sales of products to the military and police of South Africa and would constitute a violation of the laws of the Republic of South Africa”³⁶ The SEC Staff agreed and permitted exclusion.

Companies sometimes obtained exclusion of proposals consistent with foreign, but inconsistent with United States law. In the Fort Motor

28. See also *Signal Companies, Inc.*, SEC No-Action Letter, 1978 WL 13049, at *14 (Jan. 25, 1978); *Toledo Edison Co.*, SEC No-Action Letter, 1979 WL 13785, at *1 (Jan. 11, 1979).

29. *Reserve Oil & Gas Co.*, SEC No-Action Letter, 1977 WL 15065 (Feb. 28, 1977).

30. *Ford Motor Co.*, SEC No-Action Letter, 1985 WL 55898, at *1 (Apr. 11, 1985).

31. In this case, Section 793(d) of Title 18 of the United States Code.

32. Specifically Treasury Regulation § 31-3402(f)(2)-1(g).

33. *Gen. Elec. Co.*, SEC No-Action Letter, 1984 WL 47201, at *2 (Jan. 13, 1984).

34. *Standard Oil Co. of California*, SEC No-Action Letter, 1983 WL 30796, at *1 (Feb. 24, 1983).

35. See also *Texaco, Inc.*, SEC No-Action Letter, 1986 WL 66484, at *1 (Jan. 3, 1986).

36. *Standard Oil Co. of California*, SEC No-Action Letter, 1983 WL 30796, at *1 (Feb. 24, 1983).

Co., and Am. Brands, Inc.,³⁷ no action letters, proposals calling for the adoption of the McBride Principles in Northern Ireland³⁸ had the potential effect of requiring the imposition of quotas or preferential treatment for underrepresented groups. Companies argued that the approach amounted to reverse discrimination, thereby conflicting with American law.³⁹ The staff agreed that the requirements of United States law took precedence and therefore allowed exclusion.⁴⁰

C. Curing the Deficiency

In some cases, the staff permitted shareholders to amend a proposal to avoid the application of the exclusion. In McDonnell Douglas Corp.,⁴¹ a proposal sought to require the company's Board of Directors to nominate individuals selected by a minority group of stockholders. Management argued that this usurped their business judgement in violation of Maryland law.⁴² The staff agreed but allowed shareholders to amend the proposal to provide that the employee-nominee would not be considered to be a nominee of the Board of Directors.

In Equimark Corporation,⁴³ a proposal sought to amend the company's by-laws to change the company's executive termination policy. Management argued that the proposal was inconsistent with the company's contractual obligations and therefore violated state contract law. The staff agreed but allowed shareholders to revise the proposal to avoid violating the articles.⁴⁴

The staff has sometimes permitted revisions that rendered the proposal precatory. In Marriott International Inc.,⁴⁵ a proposal would have required the board of directors to amend the company's Articles of Incorporation.

37. *Ford Motor Co.*, SEC No-Action Letter, 1986 WL 66540, at *1 (Mar. 19, 1986); *Am. Brands, Inc.*, SEC No-Action Letter, 1985 WL 55910, at *1 (Mar. 5, 1985);

38. These consisted of nine fair employment principles which served as a corporate code of conduct for United States companies doing business in Northern Ireland. *Investment Responsibility in Northern Ireland: The MacBride Principles of Fair Employment* Neil J. Conway

39. In both cases management asserted that "such action would mean a person from another religious group would be treated less favorably than a person from an under represented religious group." The staff agreed, reasoning "[these] proposals seem to imply positive discrimination and legislation in the US and UK at the time provided for equality of opportunity and outlawed preferential treatment, including positive discrimination." *Id.*

40. See also *Fruehauf Corp.*, SEC No-Action Letter, 1986 WL 65334, at *4 (Mar. 5, 1986).

41. *McDonnell Douglas Corp.*, SEC No-Action Letter, 1993 WL 87870, at *1 (Mar. 23, 1993).

42. Specifically, section 2-401(a) of the Maryland General Corporation Law provides that "[t]he business and affairs of the corporation shall be managed under the direction of the Board."

43. *Equimark Corp.*, SEC No-Action Letter, Fed. Sec. L. Rep. P 76,108 (Feb. 13, 1992).

44. In this case, the staff said the defect could be cured if the proposal were revised to apply only to future employment contracts and to be limited to a request or recommendation that the Company's Board of Directors take the steps necessary to implement the proposal. *Id.*

45. *Marriot Int'l, Inc.*, SEC No-Action Letter, 1998 WL 97656, at *1 (Mar. 5, 1998).

poration to add a provision mandating abstention by the officers and directors from making certain decisions.⁴⁶ Management argued that this would usurp board discretion and violate the law. The staff allowed re-drafting of the proposal to be precatory in nature. In *Kmart Corp.*,⁴⁷ shareholders wanted to amend the company's Articles of Incorporation to eliminate staggered terms for directors. Management asserted that the proposal would cause the company to breach existing contractual obligations by prematurely shortening the terms of existing directors. The staff reasoned, "The defects could be cured, if the proposals were redrafted to be advisory" ⁴⁸

III. 14A-8(i)(2) AND THE NEW MILLENNIUM

The Commission rewrote Rule 14a-8 into plain English in 1998. With respect to the exclusion for conflicts with the law, the Commission adopted only minor revisions and otherwise left the regulation unchanged.⁴⁹ The provision continued to apply to proposals that would result in a violation of "any state, federal, or foreign law" and the staff still permitted modifications to proposals that would allow them to avoid application of the subsection.

A. *Claims for Violations of State Law Post 1998*

Violations of state law remained one of the most common grounds for exclusion. However, to the extent that the basis for exclusion involved a board's fiduciary obligations or the authority of shareholders, resolution was often not easy. State law had few decisions in the area. Moreover, in some cases, shareholders could obtain an opinion of counsel opposite that of management's.

In one case, the *CA, Inc.*,⁵⁰ the Commission sought to resolve the predicament by ying the Delaware Supreme Court. In this case, the proposal recommended an amendment of the bylaws to provide procedures for reimbursement of reasonable expenses incurred by shareholders in connection with the nomination of a candidate to the board.⁵¹ Management argued that the provision would, effectively vest in the stockholders, rather

46. In this case the board could not of its own accord amend the company's charter. Instead, in order for the charter to be amended, the board had to determine the advisability of the amendment then submit the matter to shareholders.

47. *Kmart Corp.*, SEC No-Action Letter, 1998 WL 97543, at *1 (Mar. 4, 1998). SEC No-Action Letter,

48. *Id.*

49. The Commission renumbered the subsection from (c)(2) to (i)(2). 17 CFR 240.14a-8(i)(2).

50. *Ca, Inc.*, SEC No-Action Letter, 2008 WL 2568454, at *5 (June 27, 2008).

51. The petition to the Court can be found here <https://www.sec.gov/rules/other/2008/ca14a8cert.pdf>.

than the board the ability to manage the business and conduct the affairs of the corporation.⁵² Shareholders, however, disagreed.⁵³

The Delaware Supreme Court granted review.⁵⁴ The court found that the proposal was a proper subject for shareholders but that there was no obligation to reimburse costs could infringe on the ability of directors “to discharge their fiduciary duties.”⁵⁵ Following the decision, the Commission permitted exclusion.

Proposals that resulted in violations of articles of incorporation or bylaws also continued to be subject to exclusion. In *Boeing Co.*⁵⁶ shareholders wanted to mandate that every corporate action requiring shareholder approval be adopted by a simple majority vote of shares. Management asserted that this would “result in violations of the company’s own bylaws” and constituted a violation of Delaware law. The staff agreed with management and allowed exclusion of the proposal.⁵⁷

B. Claims for Violation of Federal Statutes and Rules Post 1998

Some letters turned on possible violations of federal statutes and rules. In *Pfizer*,⁵⁸ a shareholder proposal sought to amend the bylaws to provide that parties must use arbitration to settle certain controversies or claims, including those arising under federal securities laws. *Pfizer* argued that the proposal would actually violate federal securities law by preventing any shareholder claim already subject to arbitration.⁵⁹ The staff agreed and permitted exclusion of the proposal.

52. *Ca, Inc.*, SEC No-Action Letter, 2008 WL 2568454, at *5 (June 27, 2008).

53. Shareholders argued that because the bylaw concerned the process of the nomination and election of directors, it was an appropriate subject matter for shareholder action under established Delaware law. “Delaware courts have long exercised a most sensitive and protective regard for the free and effective exercise of voting rights.” *Ca, Inc. v. AFSCME Employees Pension Plan*, 2008 WL 2724908 (Del. Supr.).

54. The Supreme Court of Delaware reasoned that “The Division was thus confronted with two conflicting legal opinions on Delaware law. Whether or not the Division would determine that CA may exclude the proposed Bylaw from its 2008 proxy materials would depend upon which of these conflicting views is legally correct. To obtain guidance, the SEC, at the Division’s request, certified two questions of Delaware law to this Court. Given the short timeframe for the filing of CA’s proxy materials, we concluded that there are important and urgent reasons for an immediate determination of the questions certified, and accepted those questions for review.”

55. *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 236 (Del. 2008).

56. *The Boeing Co.*, SEC No-Action Letter, 1999 WL 114380, at *1 (Mar. 4, 1999). Boeing’s bylaws required a majority vote of all outstanding shares, not merely those present.

57. See also *AT&T, Inc.*, SEC No-Action Letter, 2008 WL 485463, at *15 (Feb. 19, 2008). In that case, shareholders recommended that the company implement cumulative voting by means of a corporate bylaw or policy. The staff reasoned that Delaware General Corporation Law allowed cumulative voting only if it was authorized in the company’s certificate of incorporation. Even if the proposal were changed to request an amendment of the certificate to implement a cumulative voting scheme, AT&T could not commit to implement it because any such amendment must first be adopted and declared advisable by the Board and then submitted to the stockholders for their approval.

58. *Pfizer Inc.*, SEC No-Action Letter, 2012 WL 587597 (Feb. 22, 2012).

59. This would violate Section 29 of the Securities Exchange Act of 1934.

Conversely, in the Charles Schwab Corp.⁶⁰ no action letter, a shareholder proposal requested a comprehensive breakdown of the company's workforce by race and gender. The company stated the proposal was improper because it called for disclosure of private data in violation of federal statutes. The staff disagreed noting that the proposal only requested voluntary disclosure.

C. Curing the Proposal

Even when the staff agreed on the exclusion of a proposal, it often continued to give specific instructions on how to remedy the problem and a timeframe (usually seven days) to complete the revision. From 1998 until 2016, the staff permitted the exclusion of about 200 proposals under subsection (i)(2).⁶¹ In sixty-eight of the letters (33.33%), the staff provided advice on how to cure the deficiency.⁶²

In Anthem,⁶³ a proposal asked that the company take the steps necessary to reorganize the board into one class with each director subject to annual election. Management stated this would cause Anthem to breach existing contractual obligations. The staff agreed but advised that if the company revised the proposal within seven days to state that it would defer its implementation until it would not interfere with Anthem's existing contractual obligations, management could not exclude the matter.

In Exelon,⁶⁴ shareholders proposed that the board of directors and the compensation committee limit the compensation for each named executive officer to one hundred times the median annual total compensation paid to all employees of the company. Management argued the proposal would cause Exelon to impermissibly restrict the ability of its Board of Directors to determine the level and form of compensation for certain Exelon executive officers and to establish compensation plans in violation of the provisions of state law. The staff advised that if the proposal were recast as a recommendation or request to the board of directors, it would not necessarily require a violation of law. The staff provided that the proposal seven calendar days.

IV. ANALYSIS AND OVERALL INTERPRETATION OF STAFF DECISIONS

The exclusion for violations of the law has proved difficult to use. Companies generally must obtain an opinion of counsel demonstrating the violation. In addition, shareholders have an equal right to do so. The staff,

60. *The Charles Schwab Corp.*, SEC No-Action Letter, 2014 WL 69538, at *1 (Jan. 2, 2014).

61. Using the search terms (14a-8(i)(2)) /20 "appears to be some basis".

62. Using search terms (14a-8(i)(2)) /20 "appears to be some basis" & "could be cured".

63. *Anthem, Inc.*, SEC No-Action Letter, 2015 WL 139351, at *1 (Mar. 4, 2015).

64. *Exelon Corp.*, SEC No-Action Letter, 2013 WL 6355921, at *1 (Nov. 26, 2013).

therefore, often confronts areas difficult to interpret with conflicting opinions of counsel. Given the uncertainty, the staff has routinely allowed shareholders to revise the proposal to ensure that no violation occurs.

The statistics bear this out. From 1998 through early 2016, the staff was “unable to concur” that a company could exclude a proposal under (i)(2) in over 300 no action letters.⁶⁵ During the same period, the Staff permitted the exclusion of around 200 proposals. Approximately one-third of the excluded proposals were subject to cure.⁶⁶

Recent statistics suggest that the exclusion is used infrequently. In 2015, the staff allowed for the exclusion of only eight proposals under the subsection⁶⁷ and offered advice on how to cure the defect in four of these.⁶⁸ The staff permitted the exclusion of three proposals in 2014 with none suggesting a cure⁶⁹ and five in 2013 with one permitting a cure.⁷⁰

Even if rarely used, the exclusion remains important. Most importantly, however, the exclusion demonstrates the importance of Staff flexibility in the enforcement of Rule 14a-8. Unlike almost all other exclusions, the Staff under subsection (i)(2) routinely allows investors to “cure” a proposal. The exclusion demonstrates that many shareholders can avoid exclusion through modest revisions to a proposal. Perhaps the lesson under this subsection is the importance of allowing “cures” under other exclusions.

Jason Haubenreiser[†]

65. Using the search terms (14a-8(i)(2)) /20 “unable to concur”).

66. *See Supra* note 64

67. *See* Chart <http://www.law.du.edu/documents/corporate-governance/empirical/Rule-14a-8-i-2-Chart.pdf>.

68. *See supra* note 67

69. *See supra* note 67

70. *See supra* note 67

[†] University of Denver Sturm College of Law 2nd year J.D. student, evening division. I would like express humble and sincere gratitude to Professor Jay Brown for all the time, mentorship, and critiques without which this paper would have not been possible. I would also like to thank the Denver Law Review Staff for their edits and perspectives which added an additional dimension of thoughtfulness. The incredible spirit of scholarship and comradery fostered at the Sturm College of Law makes it a true community, not just an institution of learning.