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SEC Rule 14A-8(I)(9): The Conflict with Conflicting Proposals

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SEC RULE 14A-8(I)(9): THE CONFLICT WITH CONFLICTING PROPOSALS

I. INTRODUCTION

Rule 14a-8 enables shareholders to include proposals in a company's proxy materials.[1] Subsection (i)(9) permits the exclusion of proposals that "directly conflict" with a management proposal.[2] In recent years, the subsection has been widely used as a basis for excluding proposals, particularly with respect shareholder proposals addressing the right to call special meetings.[3]

The broad use of the subsection generated controversy. In 2015, the Chair of the Security and Exchange Commission (SEC or the Commission) temporarily halted the use of the exclusion and ordered the Division of Corporation Finance (Division) to reexamine the interpretation.[4] The Division's review took into account "among other things, Commission and Division statements and other materials, and considered approaches suggested by commentators."[5] Following the review, the Division narrowed the interpretation of the exclusion in Staff Legal Bulletin 14H (Bulletin 14H).[6] Nonetheless, Bulletin 14H left open a number of issues that would permit issuers to use the exclusion strategically to ensure the omission of competing proposals from shareholders.

This article examines the meaning of "directly conflicts" in subsection (i)(9). The paper will first examine the administrative history of the provision then consider staff interpretations, with an emphasis on those in the new millennium. Finally, the paper will offer some analysis of subsection (i)(9)'s meaning before and after Bulletin 14H.

II. ADMINISTRATIVE HISTORY

Rule 14a-8 originally included only a single exclusion. Companies could omit proposals not deemed "proper subject for action by the security holders."[7] Over time, additional exclusions were added. In 1967, the Commission permitted the exclusion of "counter proposals to any matter

1. 17 C.F.R. § 240.14a-8 (2012).
2. 17 C.F.R. § 240.14a-8(i)(9) (2012).
3. Craig Eastland, *Through(out) the looking-glass: Proving eligibility to submit a shareholder proposal under SEC rule 14a-8(b)*, THOMSON REUTERS (May 2014), http://legalsolutions.thomsonreuters.com/law-products/news-views/corporate-counsel/through-out-the-looking-glass-proving-eligibility-to-submit-a-shareholder-proposal-under-sec-rule.
4. Announcement of the Division of Corporation Finance Related to Exchange Act Rule 14a-8(i)(9) for Current Proxy Season (Jan. 16, 2015).
5. SEC Staff Legal Bulletin No. 14H (CF) (Oct. 22, 2015).
6. *Id.*
7. SEC Release No. 417 (Dec. 18, 1942).

to be submitted by the management . . . ."[8] The exclusion was intended to prevent shareholders from soliciting votes that amounted to "a vote against management's proposal."[9]

The staff of the Commission allowed omission where a proposal was an implicit "no" vote on a management initiative.[10] The no-action letter issued in 1973 to Wilson Brothers reflected this approach. The shareholder proposal mandated management's use of an independent outside auditing firm.[11] Wilson Brothers sought the exclusion of a proposal, noting that the company annually ratification of the auditor by shareholders.[12] Wilson Brothers argued the shareholder proposal was really intended as a solicitation against management's proposal.[13] The staff agreed.[14]

In 1976, the Commission made sweeping amendments to Rule 14a-8, but largely left the exclusion for conflicting proposals unchanged.[15] Companies could exclude "a proposal that is counter to a proposal to be presented by the management may be omitted from an issuer's proxy materials."[16] Nor did the no-action letters adopted after the changes reflect any change in the interpretation of the exclusion.

The staff continued to apply the provision to proposals that were largely the opposite of what management sought.[17] In *Florida Power*, the

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8. The release announcing the amendment of the counter proposal rule to 14a-8(a) provides no explanation for its inclusion. SEC Release No. 5200, 1967 WL 88215 at 3 (Dec. 14, 1967). Interestingly enough, the 1966 proposal release suggested a change to paragraph (b) to "discourage the use of the rule by persons who may be motivated by a desire for publicity . . . ." SEC Release No. 8000, 1966 WL 85608 at 1 (Dec. 5, 1966).

9. In response to a question concerning the procedure by which the counter-proposal amendment was adopted, the Commission replied: "This amendment was included in the adopted proposals on the basis that it was merely a codification of the proper interpretation of Rule 14a-8 and therefore involved no substantial change in the rule. The reason for this position is that counter proposals are, in effect, a solicitation of a vote against the management's proposal. Melvin Aron Eisenberg, *Access to the Corporate Proxy Machinery* 83 HARV. L. REV. 1489, 1525 n.140 (citing Letter to Author from Charles J. Sheppe, Chief, Branch of Forms, Regulations, and Legislative Matters to Melvin Eisenberg (May, 21, 1969)).

10. *See* Wilson Brothers, SEC No-Action Letter, 1973 WL 8479 at 9 (Apr. 17, 1973); RCA Corp., SEC No-Action Letter, 1986 WL 66535 at 2 (Jan. 16, 1986) (granting no-action on the omission of a shareholder proposal urging shareholders to vote against the merger agreement the board was submitting to shareholders for approval); *see also* SEC Release No. 19602, 1976 WL 160410 at 1 (July 7, 1976).

11. Wilson Brothers, SEC No-Action Letter, 1973 WL 8479 at 9 (Apr. 17, 1973) ("Proposal #4: Proposed that WLB secure the services of an independent outside auditing firm which is truly independent and not in the employ of any of the previously mentioned Victor Posner-controlled corporations").

12. *Id.* at 1–5.

13. Management was planning on submitting to shareholders, for ratification, its chosen auditing company that was not one of the Posner-controlled corporations the shareholder proposal mentioned. *Id.* at 9.

14. *Id.*

15. The Commission did renumber the exclusion to 14a-8(c)(9). SEC Release No. 12999, at 5, 8–9, 18 (Nov. 22, 1976); *see also* SEC Release No. 9343, 1976 WL 160410 at 4–5, 9 (July 7, 1976).

16. SEC Release No. 9343, at 9 (July 7, 1976).

17. Florida Power and Light Co., SEC No-Action Letter, 1977 WL 13769 (Feb. 14, 1977); *see also*, International Banknote Co, Inc., SEC No-Action Letter, 1982 WL 30438 at *2–3 (Feb. 3, 1982)

Board proposed the elimination of preemptive rights.[18] The shareholder resolution requested the company restore these rights.[19] The staff granted the no-action request, finding the shareholder proposal's request was "counter to" management's proposal.[20]

Nonetheless, the staff also began to expand the reach of the exclusion, applying it to proposals that simply differed with the management alternative. In *GAF Corp.*,[21] the company sought to submit an option plan to shareholders for approval. Shareholders, in turn, proposed alternative provisions that amounted to amendments to the plan.[22] The staff allowed for exclusion of the proposal in large part because of the potential for an "inconclusive" mandate from shareholders.[23] As the no-action letter reasoned:

> "[E]ven if the subject proposal were revised into amendment form, as the proponents have expressed a willingness to do, it is our view that the proposal could still be omitted from the company's proxy material as a counter proposal. In whatever form the proposal appears, the stock option provisions advocated by the proponents would be in contradiction to the provisions of the Plan to be submitted by the management, and a favorable shareholder vote on both the management's and proponents' proposals would result in an inconsistent and inconclusive mandate from the shareholders. In the event of such a vote, the management would not be able to determine which form of the Plan had been approved."[24]

Unlike prior letters, the proposal did not involve the "opposite" of what management sought but instead presented shareholders with a different and arguably incompatible version. The argument presupposed that shareholders would be unable to distinguish between the proposals and adopt both. The possibility of "inconsistent and inconclusive" results, therefore, was premised on a lack of confidence in shareholders making an informed decision.[25]

(granting no-action relief because the two proposals at issue were, in essence, in opposition of one another).

18. Florida Power and Light Co., at 1.
19. *Id.*
20. *Id.*
21. GAF Corp., SEC No-Action Letter, 1976 WL 11010 (March 9, 1976).
22. *Id.* at 1.
23. *Id.*
24. *Id.* at 8.
25. The staff's interpreted "inconsistent and inconclusive" broadly, often finding proposals conflicted in inconsistent and inconclusive grounds without delineating whether the proposal was inconsistent, inconclusive, or both. *See* Arden-Mayfair, Inc., SEC No-Action Letter, 1978 WL 11629 at *1 (May 31, 1978); Bio-Medical Sciences, Inc. SEC No-Action letter, 1978 Wl12183 at *9 (Nov. 27, 1978); Midlantic Banks, Inc. SEC No-Action Letter, 1982 WL 28821 at*5 (Jan. 1, 1982); Valencia Bancorp, SEC No-Action Letter, 1984 WL 47313 at *1 (Nov. 19,1984).

Proposals, therefore, did not have to be tantamount to a no vote, they merely had to differ from management's approach.[26] For the most part, this required material differences in the two proposals. In *Bio-Medical Sciences*,[27] the shareholder proposal called for, among other things, the par value of company stock to remain at $0.10 a share.[28] Management, in a merger agreement, sought a par value of $0.01 per share.[29] The company argued the implementation of both proposals was impossible because of they required a different valuation of the company stock.[30] The staff granted omission of a proponent's proposal after determining it would result in an "inconsistent and inconclusive mandate."[31]

Sometimes the staff allowed companies to omit the shareholder proposal even when management did not submit the full text of its alternative.[32] For example, in *General Motors Corp.*, the staff was not provided the details of the material provisions of management's proposal for "confidentiality purposes."[33] Instead, General Motors represented that the proposed bonus plan "will include provisions–which are *directly counter* to the proponents' proposal, in respect of the level of earnings below which no bonus may be paid and the rate at which benefits may

26. *See generally* Arden-Mayfair, Inc., SEC No-Action Letter, 1978 WL 11629 (May 31, 1978); Bio-Medical Sciences, Inc., SEC No-Action Letter, 1978 WL 12183 at *9 (Nov. 27, 1978)("In the event of such a vote, the management would not be able to determine whether the proposed transaction, of which the reduction in par value is an inseparable part, had been approved or not."); Midlantic Banks, Inc., SEC No-Action Letter, 1982 WL 28821 (Jan. 1, 1982); Valencia Bancorp, SEC No-Action Letter, 1984 WL 47313 (Nov. 19,1984).

27. Bio-Medical Sciences, Inc., SEC No-Action Letter, 1978 WL 12183 (Nov. 27, 1978).

28. *Id.* at 8.

29. *Id.* at 8–9.

30. *Id.* at 9 ("In the event of such a vote, the management would not be able to determine whether the proposed transaction, of which the reduction in par value is an inseparable part, had been approved or not.").

31. *Id.* at 8–9.

32. The staff generally looks for "some basis" for exclusion that shows a contradiction between the proposals submitted, and that a favorable vote on both proposals would result in an inconsistent and inconclusive mandate from the shareholders. *See* General Motors Corporation, SEC No-Action Letter, 1982 WL 28918 at 2 (Mar. 1, 1982) (accepting the company argument of direct conflict without written details of the provisions claimed to be in conflict); International Banknote Co., Inc., SEC No-Action Letter, 1982 WL 30438 at 1 (Feb. 3, 1982) ("*There appears to be some basis for your opinion* that the proposal may be omitted from the Company's proxy material under Rule 14a–8(c)(9) on the ground that it will be a counter proposal to a matter to be submitted to the shareholders by the Company's management.") (emphasis added); May Petroleum Inc., SEC No-Action Letter, 1988 WL 234049 at 1 (Jan. 1, 1998) ("*There appears to some basis for your view* that the proposal may be omitted from the Company's proxy material under Rule 14a–8(c)(9).") (emphasis added).

33. General Motor's did state generally that management's proposed bonus plan would directly conflict with the shareholder's proposal "in respect of the level of earnings below which no bonus may be paid and the rate at which benefits may otherwise be paid," however, the details of the plan were deemed "confidential" by General Motors and not revealed until the company filed its preliminary proxy materials on March 26, 1982. General Motors Corporation, SEC No-Action Letter, 1982 WL 28918 at 2, (Mar. 1, 1982).

otherwise be paid under the Bonus Plan."[34] Based upon the characterization by General Motors, the staff agreed to exclude the proposal.[35]

The staff agreed to exclude proposals because of the risk of inconclusive results even when shareholders took steps to prevent the result.[36] For instance, in the letter issued to *Tri-South Investments, Inc.*,[37] the company argued that simultaneous adoption of the shareholder and management proposal could result in "inconsistent and inconclusive" results. Shareholders argued that concern over simultaneous adoption could be addressed by including a boldface statement to the effect that the shareholders should not vote for both.[38] The staff, however, granted the requested no-action relief.[39]

Similarly, the staff routinely allowed the exclusion of precatory proposals under the subsection. These proposals advised rather than mandated action by the board. With directors having the authority to ignore the advice, the proposals generated no actual conflict with a management alternative. The no-action letters never explained how a non-binding proposal could "directly counter" those submitted by management.[40]

The Commission made no significant changes to the exclusion until 1998.[41] That year, the Commission rewrote Rule 14a-8 in plain English

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34. *Id.* (emphasis added).

35. *Id.* at 1.

36. The issue of inconclusive and ambiguous results could not be overcome by clear language indicating shareholders should only vote for a single proposal. *See* Tri-South Investments Inc., SEC No-Action Letter, 1985 WL 53924 (Mar. 6, 1985) (shareholder proposal excludable notwithstanding argument by shareholder's counsel that the concern over an inconsistent and inconclusive mandate could be dealt with by including a boldface statement to the effect that the shareholders should not vote for both proposals); Fitchburg Gas & Electric Light, SEC No-Action Letter, 1991 WL 176897 (July 30, 1991) (granting request for no-actionno-action notwithstanding shareholder's argument that potential concerns regarding an inconsistent or inconclusive mandate could be addressed by structuring a proxy card which made clear that shareholders would not be able to vote in favor of both proposals but rather could vote only "either/or"); *see also* Gyrodyne Co. of America, Inc., SEC No-Action Letter, 2005 WL 3198956 (Oct. 31, 2005).

37. Tri-South Investments Inc., SEC No-Action Letter, 1985 WL 53924 (Mar. 6, 1985).

38. *Id.*

39. *Id.*

40. The Commission has applied subsection (i)(9) to both precatory and mandatory proposals. *See* Int'l Banknote Co., Inc., SEC No-Action Letter, 1986 WL 65141 (Jan. 13, 1986) (deciding to not recommend action if the company omitted a shareholder proposal requesting the board take steps necessary to create a share requirement for director membership); May Petroleum, Inc., SEC No-Action Letter, 1988 WL 234049 at 1 (Jan. 29, 1988) (granting no-action on the omission of a shareholder proposal requesting management consider an alternative the merger being submitted for approval); Pac. First Fin. Corp., SEC No-Action Letter, 1989 WL 246415 at 1 (Sept. 25, 1989) (granting no-action on the omission of shareholder proposal that requested management cancel a merger agreement the board sought approval for at the shareholder meeting); *see also* Republic Steel Corp., SEC No-Action Letter, 1983 WL 28892 at 2 (Dec. 2, 1983); Bluefield Supply Co., SEC No-Action Letter, 1985 WL 54123 (Apr. 15, 1985).

41. In 1976 the SEC made changes to 14a-8 that resulted in altering the location of the exclusion to sub-paragraph (c) of the rule alongside other substantive grounds for exclusion. SEC Release No. 19602, 1976 WL 160410 at 5, 8-9 (July 7, 1976).

using a Question and Answer format.[42] In addition, the Commission suggested granting no-action relief for proposals that "directly conflict[ed] with one of the company's own proposals to be submitted to shareholders at the same meeting."[43] The change reflected "the Division's long-standing interpretation permitting omission of a shareholder proposal if the company demonstrated that its subject matter *directly conflicts* with all or part of one of management's proposals."[44] Despite one commenter's concern that the proposed amendment would narrow the exclusion,[45] the SEC adopted the proposed language.[46]

III. STAFF INTERPRETATION

Through 1998, the staff rarely permitted the omission of proposals under the "counter proposal" exclusion.[47] Proposals no longer had to be the opposite; substantial duplication was enough. This was mostly limited to shareholder proposals seeking to modify stock option plans,[48] and addressing the selection process for auditing firms.[49]

The Commission has precluded companies from excluding shareholder proposals when it is plausible for the company to implement both proposals despite their sharing a similar aim.[50] Additionally, the staff did not allow exclusion where the lack of specificity in the shareholder's proposal could result in an inconsistent or ambiguous result.[51]

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42. The SEC was hoping to "decrease the time and expense incurred by both shareholders and companies attempting to comply with its provisions." SEC Release No. 23200, 1998 WL 254809 at 14 (May 21, 1998) [hereinafter Release No. 23200].

43. *Id.*

44. SEC Release No. 39093, at 7 n.47 (Sept. 18, 1997) (citing General Electric Corp., SEC No-Action Letter, 1997 WL 37671 (Jan. 28, 1997) (shareholder proposal requiring company to modify stock option plans conflicted with company proposal)) [hereinafter Release No. 39093]; Northern States Power Co., SEC No-Action Letter (July 25, 1995) (shareholder proposal counter to management's) (emphasis added).

45. "[T]he word 'directly' makes the proposed language too narrow and potentially unavailable because it introduces a potentially imprecise hurdle that is difficult to meet. Instead, we suggest the Commission modify its proposed language to read 'conflicts in substance with one of the company's own proposals to be submitted by shareholders'." Comments of John M. Liftin, Philip R. Lochner, Jr., Dean Farris, James Tobin, American Bar Association, at 13, (December 23, 1997), http://www.sec.gov/rules/proposed/s72597/liftin5.htm.

46. Release No. 23200, *supra* note 43 at 3 n.27 (citing SBC Communications, SEC No-Action Letter (Feb. 2, 1996) (shareholder proposal on calculation of non-cash compensation directly conflicted with company's proposal on a stock and incentive plan)).

47. Memorandum from Bill Morely to Lee B. Spencer, Jr. at 19 (noting that (i)(9)'s predecessor "is another paragraph of the rule that is not frequently used or commented upon") (on file with author), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1982_0318_MorleyKargula.pdf.

48. *See* Pacific Gas & Electric Co., SEC No-Action Letter, 1997 WL 34887 (Jan. 16, 1997).

49. *See* General Electric Co., SEC No-Action Letter, 1995 WL 765414 (Dec. 28, 1995); B.F. Saul Real Estate, SEC No-Action Letter, 1981 WL 25462 (Nov. 24, 1981).

50. *See* AT&T Corp., SEC No-Action Letter, 2006 WL 401195 (Feb. 14, 2006).

51. The company presented a number of arguments regarding conflicts with respect to the action being requested and by the scope of the shareholder proposal. Whole Foods Market, Inc., SEC No-Action Letter, 2005 WL 3451379 at 1–3 (Dec. 14, 2005).

A. Interpreting "Alternate and Conflicting Decisions"

In the aftermath of the 1998 amendments,[52] the staff permitted exclusion of proposals characterized as an alternative to, rather than the opposite of, the company's proposal.[53] For exclusion to occur, however, adoption of both had to present the risk of inconclusive or ambiguous result.[54] In the *Interlinq Software Corp.* letter, for example, management proposed a merger that gave shareholders the right to tender shares at a specific price.[55] The shareholder proposed proposal sought a "self-tender offer" as an alternative to the merger.[56] Management asserted that the two proposals directly conflicted.[57] The staff granted no-action because "the two proposals . . . could provide inconsistent and ambiguous results."[58]

The staff, however, broadened the exclusion significantly in connection with no-action letters addressing special meetings. In *Gyrodyne*, shareholders proposed the right to call special meetings "at the request of the holders of not less than fifteen percent (15%) of shares entitled to vote."[59] The company's alternative sought to set the threshold at 30%.[60] Gyrodyne argued the shareholder proposal was "at best an alternative to, and at worst inconsistent with," the company's proposal.[61] The Commission agreed.[62]

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52. *Compare* Lowe's Co., Inc., SEC No-Action Letter, 2008 WL 670167 (Mar. 10, 2008) (finding no alternate or conflicting decision to be made by shareholders if a proposal requiring simple majority voting for all shareholder issues and a proposal requiring 50% of shareholder voting issues be determined by simple majority while the other 50% be determined by super majority), *with* Occidental Petroleum Corp., 2009 WL 772863 (Mar. 12, 2009) (finding shareholders would be presented with alternate and conflicting decisions between a shareholder proposal requiring 10% threshold for calling special meetings and company proposal requiring 25% threshold).

53. *See* Release No. 39093, *supra* note 45 at 7, n.47 (citing General Electric Corp., SEC No-Action Letter, 1997 WL 37671 (Jan. 28, 1997) (granting no-action relief where two proposals presented "alternative" decisions)); Release No. 23200, *supra* note 43 at 3, n.27 (citing SBC Communications, SEC No-Action Letter (Feb. 2, 1996) (shareholder proposal on calculation of non-cash compensation directly conflicted with company's proposal on a stock and incentive plan)); Chevron Corporation, SEC No-Action Letter, 1991 WL 178510 (Feb. 27, 1991); H.J Hienz Co., SEC No-Action Letter, SEC No-Action Letter, 2007 WL 1245835 (Apr. 23, 2007); Gyrodyne Co. of America, Inc., SEC No-Action Letter, 2005 WL 3198956 (Oct. 31, 2005).

54. The staff began using the "ambiguous" language in the *Mattel, Inc.* letter, however, they continued to use inconsistent during that proxy season as well. Mattel, Inc., SEC No-Action Letter, 1999 WL 114383 (Mar. 4, 1999) (granting no-action relief on grounds that "the two proposals present alternative and conflicting decisions for shareholders and that submitting both to a vote could provide inconsistent and ambiguous results"); Interlinq Software Corp., SEC No-Action Letter, 1999 WL 231218 (Apr. 20, 1999).

55. Interlinq Software Corp., at 4.

56. *Id.* at 2.

57. *Id.* at 6 ("In this situation, there is no question whatsoever that the Pauly proposal directly conflicts with Interlinq's own proposal -- it is expressly an alternative to Interlinq's own proposal.").

58. *Id.* at 1.

59. The meeting would be able to be called "at any time by the President, Chairman of the Board, the Board of Directors" as well. Gyrodyne Co. of America, Inc., at 2.

60. *Id.*

61. *Id.*

62. *Id.* at 1.

The *Gyrodyne* letter applied to proposals that were not confusing or opposite in result. The letters agreed that shareholders should have the right to call a special meeting. They also generally agreed on the process for calling a meeting. They differed for the most part only in the percentage of shares needed to call a meeting. Moreover, shareholder typically phrased their proposal as a request. As a result, they merely provided management with the collective views of shareholders on the appropriate percentage needed for calling a meeting.[63]

Thereafter, the staff consistently issued no-action letters under subsection (i)(9) with respect almost any proposal that differed in the percentages required to call a special meeting.[64] Shareholders commonly sought the right to call a meeting at 15% or 25%, although sometimes they proposed percentages as low as 5% or 10%.[65] Management in turn proposed percentages as high as 40%.[66] Despite the differences and the practical impact of the higher percentages, the staff routinely allowed for exclusion.

The staff also applied the same approach to proposals seeking to alter supermajority provisions. In 2007, in *H.J. Heinz Co.*[67] the bylaws

63. Interlinq Software Corp., SEC No-Action Letter, 1999 WL 231218 at 6 (Apr. 20, 1999).

64. *See* Lowe's Companies, Inc., SEC No-Action Letter, 2010 WL 302773 at 1 (Mar. 22, 2010) (accepting company position that a shareholder proposal seeking 10% threshold for calling special meeting directly conflicts with a company proposal setting a 25% threshold); Raytheon Company, SEC No-Action Letter, 2010 WL 387511 at 1 (Mar. 29, 2010) (accepting company position that a shareholder proposal seeking 10% threshold for calling special meeting directly conflicts with a company proposal setting a 25% threshold); Devon Energy Corporation, SEC No-Action Letter, 2012 WL 664817 at 1 (Feb. 21, 2012); Omnicom Group, Inc., SEC No-Action letter, 2012 WL 642695 at 1 (Feb. 27, 2012) (accepting company position that a shareholder proposal seeking 10% threshold for calling special meeting directly conflicts with a company proposal setting a 25% threshold); Advance Auto Parts, Inc., SEC No-Action Letter, 2013 WL 638604 at 1 (Feb. 8, 2013) (accepting company position that a shareholder proposal seeking 10% threshold for calling special meeting directly conflicts with a company proposal setting a 25% threshold).

65. *See* Altera Corp., SEC No-Action Letter, 2011 WL 190597 at 1 (Jan. 14, 2011) (accepting company position that a shareholder proposal seeking 10% threshold for calling special meeting directly conflicts with a company proposal setting a 20% threshold); *see also* Western Union Co., SEC No-Action Letter, 2013 WL 354798 at 1 (Feb. 14, 2013) (accepting company position that a shareholder proposal seeking 10% threshold for calling special meeting directly conflicts with a company proposal setting a 20% threshold); CF Industries Holdings, Inc., SEC No-Action Letter, 2014 WL 131675 at 1 (Feb. 19, 2014) (accepting company position that a shareholder proposal seeking 15% threshold for calling special meeting directly conflicts with a company proposal setting a 25% threshold).

66. *See* Int'l Paper Co., SEC No-Action Letter, 2009 WL 772847 at 1 (Mar. 17, 2009)(concurring in the exclusion of a shareholder proposal requesting the calling of special meetings by holders of 10% of the company's outstanding common stock when a company proposal would require the holding of 40% of outstanding common stock to call such meetings); EMC Corp., SEC No-Action Letter, 2009 WL 851504 1 (Feb. 24, 2009)(allowing exclusion of a shareholder proposal seeking 10% threshold to call special meetings when company proposal would require the holding of 40% of outstanding common stock); *see also* Verisign, Inc., SEC No-Action Letter, 2014 WL 202673 at 1 (Feb. 24, 2014)(accepting company position that a shareholder proposal seeking 15% threshold for calling special meeting directly conflicts with a company proposal setting a 35% threshold).

67. *Compare* Int'l Paper Co., *and* Whole Foods Market, Inc., SEC No-Action Letter, 2005 WL 3451379 at 2 (Dec. 14, 2005), *with* H.J. Heinz Co., SEC No-Action Letter, 2007 WL 1245835 at 1 (Apr. 23, 2007) (granting the company's no-action request). *See also* The Hain Celestial Group,

required eighty percent (80%) super majority for certain shareholder votes.[68] The shareholder proposal sought to lower the percentage to 51% or "to the greatest extent possible."[69] An alternative submitted by H.J. Heinz sought to lower the super majority vote to 60%.[70] Although the proposals shared the same general aim, the company argued that both could not be implemented.[71] The staff agreed, finding that submitting the two proposals to the shareholders could lead to inconsistent and ambiguous results.[72] The staff also applied this approach in letters addressing cumulative voting rights.[73]

B. Revising the Interpretation of Subsection (i)(9): The Whole Foods Market No-Action Letter

1. Shareholder Access and Subsection (i)(9)

The staff's interpretation with respect to special meetings and super majority provisions set the stage for a proposal involving shareholder access. In *Whole Foods*, the shareholder proposal "would allow individual shareholders or groups holding 3% of the outstanding common stock for three years to place up to two nominees on the corporate proxy."[74] Whole Foods proposed to allow a right to access but only where a single shareholder held 9% of the voting shares. At the time, no shareholder met the standard.[75] The company argued that adoption of both would result in "alternative and conflicting decisions for the Company's shareholders and would create the potential for inconsistent and ambiguous results."[76] The staff agreed that the exclusion applied.[77]

The shareholder appealed to the full Commission. Letters supporting the appeal were submitted and a New York Times article criticized the staff's position.[78] In response, the Chair of the Commission instructed the staff to withdraw the letter.[79] She ordered an end to no-action let-

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Inc., SEC No-actionNo-action Letter, 2010 WL 3638801 (Sept. 16, 2010) (granting no-action relief for the omission of a shareholder proposal requesting 10% requirement to call special meeting)

68. H.J. Heiz Co., at 4.
69. *Id.* at 2.
70. *Id.* at 4.
71. *Id.* at 1, 4.
72. *Id.* at 1 (granting the company's no-action request).
73. AT&T Inc., SEC No-Action Letter, 2006 WL 328321 at 1, 12 (Feb. 7, 2006)(agreeing with management's argument that the staff's finding in *Gyrodyne* was applicable to cumulative voting); .
74. Whole Foods Market, Inc., SEC No-Action Letter, 2014 WL 546272 at 6 (Dec. 1, 2014).
75. Gretchen Morgenson, *Whole Foods' High Hurdle for Investors*, N.Y. TIMES, Jan. 4, 2015, at BU1 ("At Whole Foods, only two outside shareholders own stakes of 5 percent; eight stockholders own stakes of at least 3 percent.").
76. Whole Foods Market, Inc., at 10.
77. *Id.* at 4.
78. *Whole Foods' High Hurdle for Investors*, at BU1.
79. *See* Whole Foods Market, Inc.

ters under subsection (i)(9) pending a review concerning "the proper scope and application" of the subsection.[80]

2. Staff Bulletin 14H

The Division issued the revised interpretation of subsection (i)(9) in October 2015.[81] The change altered the application of (i)(9) and provided relief to shareholders. The Division noted the subsection's original intent was "to prevent shareholders from using Rule 14a-8 to circumvent the proxy rules governing solicitations."[82] It decided to return to this interpretation—focusing on opposites between proposals rather than the alternatives.[83]

The Division's new definition of "direct conflict" allowed for no-action relief where "a reasonable shareholder could not logically vote in favor of both proposals, *i.e.*, a vote for one proposal would be tantamount to a vote against the other proposal."[84] The staff noted that exclusion would not be permitted when "both proposals generally seek a similar objective . . . and the proposals do not present shareholders with conflicting decisions such that a reasonable shareholder could not logically vote in favor of both proposals."[85] The approach applied to proposals submitted by shareholders and management on shareholder access, at least where they had modest differences,[86] and on executive compensation awards, at least where the only difference was the length of a vesting schedule.[87]

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80. Statement from Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Proxy Proposals (Jan. 16, 2015).

81. SEC Staff Legal Bulletin No. 14H (CF) (Oct. 22, 2015).

82. The staff substantiated its reasoning by stating it did not "believe the shareholder proposal process should be used as a means to conduct a solicitation in opposition without complying with these requirements." *Id.*

83. *Id.* (noting the application of the exclusion "focused on the potential for shareholder confusion and inconsistent mandates, instead of more specifically on the nature of the conflict between a management and shareholder proposal").

84. *Id.*

85. *Id.*

86. *Id.* ("For example, if a company does not allow shareholder nominees to be included in the company's proxy statement, a shareholder proposal that would permit a shareholder or group of shareholders holding at least 3% of the company's outstanding stock for at least 3 years to nominate up to 20% of the directors would not be excludable if a management proposal would allow shareholders holding at least 5% of the company's stock for at least 5 years to nominate for inclusion in the company's proxy statement 10% of the directors. This is because both proposals generally seek a similar objective, to give shareholders the ability to include their nominees for director alongside management's nominees in the proxy statement, and the proposals do not present shareholders with conflicting decisions such that a reasonable shareholder could not logically vote in favor of both proposals. ").

87. *Id.* ("Similarly, a shareholder proposal asking the compensation committee to implement a policy that equity awards would have no less than four-year annual vesting would not directly conflict with a management proposal to approve an incentive plan that gives the compensation committee discretion to set the vesting provisions for equity awards. This is because a reasonable shareholder could logically vote for a compensation plan that gives the compensation committee the discretion to determine the vesting of awards, as well as a proposal seeking implementation of a specific vesting policy that would apply to future awards granted under the plan.").

The standard narrowed the exclusion. Mere differences would no longer be sufficient. The staff provided two examples.[88] The first involved mergers.[89] The staff explained that where the company sought a merger and shareholders submitted a proposal seeking a "vote against" the merger, "we would agree that the proposals directly conflict."[90] The second example explained that a shareholder proposal asking a separation of the company's chairman and CEO "would directly conflict with a management proposal seeking approval of a bylaw provision requiring the CEO to be the chair at all times."[91]

Nonetheless, Bulletin 14H left interpretive gaps. The staff had to determine the meaning of "reasonable shareholder." In addition, proposals could involve similar subject matter but contain terms that no reasonable shareholder would support. Indeed, *Whole Foods* represented a possible example.[92] Both sought to provide shareholders with the right of access but the 9% threshold proposed by the company effectively meant that no shareholder would have the ability to use the right. The proposal submitted by shareholders, in contrast, had a lower percentage that could be achieved by existing shareholders. This lack of clarity created the potential for companies to submit alternative proposals and obtain exclusion of a shareholder proposal by arguing that the two proposals had incompatible terms, despite a common goal.[93]

Bulletin 14H also added some confusion.[94] Footnote 16 noted that "there may be instances in which a binding shareholder and management proposal would directly conflict," and that this would likely occur where both proposals were binding.[95] The approach suggests that mere differences in proposals will be enough to permit exclusion, at least where shareholders seek binding action. The effect of the footnote is to push shareholders to submit non-binding, precatory proposals. Commenters have noted that this is inconsistent with the "reasonable shareholder test" set out in Bulletin 14H and may effectively "reinstate" the analysis that led to the staff's reevaluation of the rule after *Whole Foods*.[96]

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88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *See generally* Whole Foods Market, Inc., SEC No-Action Letter, 2014 WL 5426272 (Dec. 1, 2014).
93. *See generally*, J. Robert Brown, Jr., *Shareholder Proposals & Staff Legal Bulletin No. 14H (CF): Analysis of the (i)(9) Guidance (Part 5)*, THERACETOTHEBOTTOMBLOG.COM (Oct. 30, 2015), http://www.theracetothebottom.org/home/shareholder-proposals-staff-legal-bulletin-no-14h-cf-analysi.htmlstaff-legal-bulletin-no-14h-cf-analysi.html.
94. SEC Staff Legal Bulletin No. 14H (CF), n.16 (Oct. 22, 2015).
95. *Id.* ("We do not believe that a reasonable shareholder would logically vote for two proposals, each of which has binding effect, that contain two mutually exclusive mandates").
96. J. Robert Brown, Jr., *Shareholder Proposals & Staff Legal Bulletin No. 14H (CF): The Unnecessary Encouragement of Precatory Proposals (Part 9)*, THERACETOTHEBOTTOMBLOG.COM (Nov. 5, 2015), http://www.theracetothebottom.org/home/shareholder-proposals-staff-legal-bulletin-no-14h-cf-the-unn.html.

IV. CONCLUSION

The staff interpretation of rule (i)(9) prior to the issuance of Bulletin 14H set a low burden for companies seeking to exclude shareholder proposals. Providing an alternative that differed from the shareholder proposal was enough. Bulletin 14H altered this approach. As the Division acknowledged, the new "reasonable shareholder" test could potentially impose a higher burden on companies seeking to exclude shareholder proposals on the basis of a conflicting alternative.[97]

The staff approach in Bulletin 14H creates additional interpretive issues. The test puts the staff in the position of determining what is reasonable for shareholders despite any expertise on the topic. Moreover, Bulletin 14H provides an obvious avenue for use of the exclusion. Management need only propose an alternative sufficiently different such that no reasonable shareholder would support both.

Issuers have already begun to test this approach, with some success.[98] In connection with a proposal submitted to Illumina, Inc., shareholders wanted to lower supermajority percentages in the company's articles and bylaws to a majority.[99] Management countered by seeking "ratification of the retention of" the super majority provisions.[100] Illumina, therefore, sought to exclude the shareholder proposals by submitting a proposal that sought to negate the outcome favored by the shareholder.[101]

Most troubling, the issuer sought exclusion not by proposing any affirmative change.[102] The management proposal merely sought "ratification" of existing provisions. To the extent the staff allowed for exclusion, shareholders would not be confronted with any change in the company's governance structure. Thus, this approach is not the same as two separate proposals calling for the separation of chairman and CEO, and one calling for non-separation.[103] Nonetheless, the staff granted the no action request.[104]

The positions in Bulletin 14H and the proposal submitted to Illumina, however, raise a more fundamental concern with subsection (i)(9). The staff may have narrowed the exclusion, but the exclusion in this nar-

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97. SEC Staff Legal Bulletin No. 14H (CF), (Oct. 22, 2015).

98. *See, e.g.,* Letter from Keir D. Gumos on behalf of Illumina, Inc., to Office of Chief Counsel, Division of Corporate Finance, Securities Exchange Commission, No-Action Relief Request letter (Jan. 19, 2016) (on file with author).

99. *Id.* at 2.

100. *Id.*

101. *Id.*

102. *Id.*

103. *See* SEC Staff Legal Bulletin No. 14H (CF) (Oct. 22, 2015).

104. Illumina, Inc., SEC No-Action Letter, 2016 WL 1105437 (March 16, 2016) ("In our view, the proposal directly conflicts with management's proposal because a reasonable shareholder could not logically vote in favor of both proposals.").

row state still interferes with the rights of shareholders. While shareholders can vote against and defeat a management proposal that would require the CEO to always be the chair, this prevents the CEO from sometimes serving as the chair. A shareholder proposal seeking to separate the two positions would do this. Yet, Bulletin 14H makes clear that (i)(9) would permit the exclusion of the shareholder proposal. This result suggests that narrowing is not enough, but that repeal of the exclusion may be a better alternative.

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