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THE EVOLUTION OF RULE 14A-8(J): THE GOOD CAUSE TO CLARIFY GOOD CAUSE

I. INTRODUCTION

Rule 14a-8 allows shareholders to include proposals in a company's proxy materials.¹ The Rule also permits the exclusion of a proposal on certain procedural and substantive grounds.² In addition, the Rule specifies the process for omitting a proposal. Specifically, subsection (j) specifies that companies intending to exclude a shareholder proposal must "file its reasons" with the staff (the Staff) of the Securities and Exchange Commission (SEC) "no later than 80 calendar days" before the filing of the definitive proxy statement.³ The Staff uses the information to determine whether to issue a no-action letter allowing for exclusion of the proposal.⁴

Initially, the rule did not address the consequences of late filings. Eventually, the SEC amended the rule to permit the filing of a no action request at "such shorter period . . . as the Commission may permit. . . ."⁵ A company not filing within the required time period, however, could show "good cause" for failing to meet the statutory deadlines.⁶

This paper will address the "good cause" language in subsection (j). The paper will first analyze the administrative evolution of the requirement. The paper will then examine the Staff's interpretation of good cause. Finally, the paper will provide analysis of the Staff's interpretation.

II. THE EVOLUTION OF RULE 14A-8(J)

The initial version of Rule 14a-8 allowed issuers to exclude proposals but did not specify a process for doing so.⁷ In 1948, the Commission amended the Rule both to expand the number of exclusions and, for the first time, to include procedures for omitting shareholder proposals.⁸ The procedures, among other things, required the company to "file" a copy of the proposal "and any statement in support thereof" with "the Commis-

1. 17 C.F.R. § 240.14a-8 (2011).

2. *Id.*

3. *Id.*

4. *Id.*

5. Adoption of Amendments to Proxy Rules, Exchange Act Release No. 4979, 1954 WL 5772 (Jan. 6, 1954).

6. Adoption of Amendments Relating to Proposals by Security Holders. Exchange Act Release No. 9343, Investment Company Act Release No. 19,602, 1976 WL 160410 (July 7, 1976).

7. J. Robert Brown, Jr., *The Politicization of Corporate Governance: Bureaucratic Discretion, The SEC, and Shareholder Ratification of Auditors*, 2 HARV. BUS. L. REV. 501, 507. (2011).

8. Adoption of Amendments to Proxy Rules, Exchange Act Release No. 4185, 1948 WL 28695 (Nov. 5, 1948).

sion” and a statement “of the reasons why management deems such omission to be proper in the particular case.”⁹ The material was to be submitted “not later than the date preliminary copies of the proxy statement and form of proxy are filed.”¹⁰ Additionally, the company had to notify the shareholder “at the same time” of the intention of omitting the proposal and “the reasons for such omission.”¹¹

Amendments adopted in 1954 altered the time period for the submission of a no action request. Companies were required to submit the information to the Commission not later than twenty days before the filing of preliminary proxy materials.¹² The change provided “more time to consider the problems involved in such cases” and would give shareholders “an opportunity to consider the management’s position and take such action as may be appropriate.”¹³ The final rule also allowed for the submission of materials in “such shorter period to such date as the Commission may permit,” something that could only be done upon a showing of “good cause.”¹⁴ The release, however, did not define “good cause.”

In 1971, the Commission again lengthened the time period for seeking no action relief to thirty days.¹⁵ The amendment sought to reduce the time pressure imposed on the company and the staff of the Commission.¹⁶ In addition, shareholders had more time to pursue relevant remedies.¹⁷ Five years later, the Commission extended the deadline from thirty to fifty days.¹⁸ The amendment addressed concerns of management that the short time period could disrupt the printing schedules for proxy materials.¹⁹ Moreover, the amendments clarified that filing with the Commission was

9. *Id.*

10. *Id.*

11. Notice of Proposal to Amend Proxy Rules, Exchange Act Release No. 4114, 1948 WL 28637 (July 6, 1948).

12. Notice of Proposed Amendments to Proxy Rules, Exchange Act Release No. 4950, 1953 WL 5756 (Oct. 9, 1953)., “Whenever the management asserts that a proposal...may properly be omitted from its proxy statement..., it shall file with the Commission, *not later than 20 days* prior to the date the preliminary copies of the proxy statement and form of proxy are filed...” (emphasis added).

13. Notice of Proposed Amendments to Proxy Rules, Exchange Act Release No. 4950, 1953 WL 5756 (Oct. 9, 1953).

14. Adoption of Amendments to Proxy Rules, Exchange Act Release No. 4979, 1954 WL 5772 (Jan. 6, 1954).

15. Shareholder Proposals, Exchange Act Release No. 9432, Investment Company Act Release No. 6908, 1971 WL 126135 (Dec. 22, 1971).

16. Shareholder Proposals, Exchange Act Release No. 9432, Investment Company Act Release No. 6908, 1971 WL 126135 (Dec. 22, 1971)., (“The amendment would tend to relieve undue pressure of work on both the Commission’s staff and company’s personnel in the later stages of processing proxy material and would provide more time for the security holder to pursue, if he so elects, any remedies he may have available.”).

17. Solicitations of Proxies, Exchange Act Release No. 9784, Investment Company Act Release No. 7375, 1972 WL 125400 (Sept. 22, 1972)., “The Commission believes that the revision will also be beneficial to both managements and shareholders.... Shareholders who submit proposals will also benefit from the revision because they will have more time, if they so elect, to enforce their rights in court in the event managements decide to omit their proposals.”

18. Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 19602, 1976 WL 160410 (July 7, 1976).

19. *Id.*

required where the company sought to exclude a proposal “for any reason” and that good cause could be determined by “the Staff.”²⁰

The Commission lengthened the time period twice in the 1980s. Amendments in 1982 provided for a sixty day period²¹ and extended the deadline to eighty days in 1987.²² The 1987 changes also required companies to compute the time period from the date of filing definitive, rather than preliminary, proxy materials.²³

The SEC decided to completely rewrite Rule 14a-8 into a question and answer format in 1998.²⁴ The substance of Rule 14a-8(j) remained largely unchanged. The Commission did, however, explicitly add the “good cause” language to the rule. Companies missing the eighty day deadline had to demonstrate good cause for doing so.²⁵ Once again, the Commission provided no explanation for, or definition of, “good cause.”

III. STAFF INTERPRETATION OF GOOD CAUSE

Companies seeking to omit a shareholder proposal “must” provide the Commission with “its reasons” within the specified time period before the filing of proxy materials.²⁶ Companies failing to meet the eighty day filing requirement must demonstrate “good cause.”

The Staff has most commonly found good cause where a shareholder failed to submit the proposal within the prescribed time period.²⁷ Good cause also existed where management delayed filing a no action request in anticipation of the release of Commission guidance or in the event of a change in the company’s fiscal year. On one occasion, a company argued that ongoing negotiations with a competitor company constituted good cause.

20. *Id.* Specifically, the purpose of adding “for any reason” to the forepart of the Rule “is to dispel the erroneous belief of some managements that they need not comply with the requirements of paragraph (d) when a proposal is clearly excludable for a procedural reason (e.g., timeliness).” Additionally, “the staff” was added “to make clear that the staff may act on a request for a waiver of the 50-day filing requirement without the necessity for referring the request to the full Commission.”

21. Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 20091, 28 S.E.C. Docket (Aug. 16, 1983).

22. Proxy Rules; Amendments to Eliminate Filing Requirements for Certain Preliminary Proxy Material; Amendments With Regard to Rule 14a-8, Shareholder Proposals, Exchange Act Release No. 25217, 39 S.E.C. Docket 1071 (Dec. 21, 1987).

23. *Id.*

24. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 40018, Investment Company Act Release No. 23200, 67 S.E.C. Docket 373 (May 21, 1998). The rewriting of the Rule changed Rule 14a-8(d) to what is now Rule 14a-8(j), Question 10.

25. *Id.* See supra note 15. The 1954 release stated a company could exclude a proposal if good cause was shown. However, the phrase was not expressly stated in the rule, rather, it was simply implied.

26. Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 939 (1998).

27. See 14a-8, 17 CFR 240.14a-8 (requiring shareholders to file proposals not later than 80 days before the filing of the definitive proxy materials).

Not all justifications, however, constitute good cause. Negotiations with the shareholder over the withdrawal of the proposal does not constitute good cause. When a company's board of directors is on holiday vacation, causing a submission with the Commission to be late, that will not be deemed good cause.

Where the company does not demonstrate good cause, the Staff will nonetheless consider the no action request.²⁸ In some instances, the Staff has found that the proposal may be excluded. On other occasions, the company has excluded the proposal despite failing to meet the eighty day filing requirement.

A. Shareholder Delay

The Staff issued no action letters waiving the eighty day requirement where shareholders did not submit proposals in a timely fashion. For example, in a 2001 no-action letter, GameTech International, Inc. shareholders submitted a proposal after the 120 day time period had expired. The company did not file the request within the eighty day time period. In arguing for good cause, the company indicated that it "(i) did not receive the proposals in time to prepare its response and make an earlier filing and (ii) does not wish to delay its annual meeting simply because of the lateness" of the proposal. The Staff issued the requested no action relief and waived the eighty day requirement.

The Staff reiterated the position in in Legal Bulletin 14B.²⁹ As the Staff reasoned, "[t]he most common basis for the company's showing of good cause is that the proposal was not submitted timely and the company did not receive the proposal until after the 80-day deadline had passed."³⁰

B. Awaiting Guidance from the Commission

The Staff granted a waiver of the filing deadline where the company pointed to the need to conduct an internal investigation in connection with the shareholder's proposal. In a 1976 no-action letter, Firestone argued that the additional time was needed to uncover the facts used to substantiate an argument for exclusion on the basis of mootness. Additionally, Firestone anticipated that recent amendments to Rule 14a-8 were applicable. The Staff did not explicitly respond to the analysis but did grant the request for no action relief despite the late submission.³¹

The Staff granted a waiver where the company missed the deadline in anticipation of Commission guidance. Bank of America Corporation

28. SEC Staff Legal Bulletin No. 14B, 2004 WL 3711971 (Sept. 15, 2004).

29. *Id.*

30. *Id.*

31. Firestone Tire & Rubber Company, SEC No-Action Letter, 1972 WL 8534 (Dec. 28, 1976).

(Bank of America) delayed its submission while waiting for interpretations from the Division of Corporation Finance concerning the application of the American Recovery and Reinvestment Act of 2009 (AARA). Only after the Division issued the guidance did the Bank decide to omit the shareholder's proposal.³² The Staff, noting "the circumstances of the delay," granted the waiver.³³

The Staff waived the requirement where a company accelerated the date of the annual meeting. Ronson Corporation (Ronson) opted to advance the date of the annual meeting and submitted a no action request on the date proxy materials were "scheduled for mailing." The Staff granted Ronson's waiver request, noting the "respective dates on which the proposals were received"³⁴

The Staff also granted a waiver of the requirement where a company changed the end date of the fiscal year. The Seagram Company Ltd. (Seagram) altered the fiscal year from January 31 to June 30. With the next annual meeting scheduled for Oct. 30, Seagram set August 1, 1996 for submission of proposals, a date of less than eighty days before the proposed filing date. Noting that "the 80-day timetable does not contemplate two meetings of shareholders and related proxy solicitations within five months," the company sought a waiver. After considering the circumstances, the Staff granted Seagram's request.³⁵

C. Reevaluation of Excludability of Shareholder's Proposal

The Staff has sometimes permitted oral waivers. In Boeing Company (Boeing), shareholders submitted a proposal requesting that the Boeing report to shareholders on the Company's relationship with Short Brothers PLC (Short Brothers) and to call on Short Brothers to adhere to the Boeing's non-discrimination employment policy.³⁶ In justifying the failure to request no action relief in a timely fashion, Boeing noted that the "shorter period" was:

"in keeping with that discussed with, and permitted by, Commission staff member Cecilia D. Blye, Esq., Special Counsel, Office of the Chief Counsel, Division of Corporation Finance. The proposal was received by the Company on the last day permitted under the Commission's Rule 14a-8(a)(3) for a timely shareholder proposal. The exten-

32. Bank of America Corporation, SEC No-Action Letter, 2009 WL 799989 (March 11, 2009). ("The Corporation has acted in good faith and in a timely manner following the release of the Division Guidance."). See also CoBiz Financial Inc, SEC No-Action Letter, 2009 WL 890003 (March 25, 2009).

33. *Id.*

34. Ronson Corporation, SEC No-Action Letter, 1990 WL 286624 (June 29, 1990) ("Noting the respective dates on which the proposals were received, the staff waives the 80-day requirement.").

35. The Seagram Company Ltd., SEC No-Action Letter, 1996 WL 473395 (Aug. 21, 1996).

36. The Boeing Company, SEC No-Action Letter, 1987 WL 107646 at 1 (Feb. 19, 1987).

sion of time has permitted the Company to gather information necessary to accurately evaluate the statements made in the proponent's proposal and to utilize a pertinent analyses of Shorts' hiring practices, which analysis was released only yesterday, December 16, 1986."³⁷

In response, the Staff considered the no-action request without mentioning the company's delay in filing, apparently accepting the explanation as good cause.³⁸

In some cases, the company sought and received a waiver without providing an explicit explanation for the additional time. In AenCorp.,³⁹ the company received the same proposal from a shareholder on two prior occasions. In each case, the Staff allowed for exclusion. When the shareholder submitted the proposal for a third time, the company again sought no action relief. The company acknowledged that the request was filed "somewhat less than 60 days from the date of filing the enclosed letter" and requested "that the staff permit such shorter time period. As indicated in the enclosed letter."⁴⁰ Other than noting prior consideration of the proposal by the Staff, the company gave no explanation for the late filing.⁴¹ The Staff granted the waiver.⁴²

The Staff denied a waiver when the late submission resulted from the company using a recently issued no-action letter to reevaluate the excludability of a shareholder's proposal. In J.P. Morgan & Co. Incorporated (J.P. Morgan), the company wanted to omit the proposal as substantially implemented and as "ordinary business."⁴³ The company provided no explanation for the delay in filing for no action relief but did rely on a letter issued by the Staff about a month earlier.⁴⁴ The Staff "not[ed] the circumstances" but was "unable to waive the 80-day requirement."⁴⁵

A waiver was also not granted by the Staff where a late submission resulted from the failure of a shareholder to withdraw a proposal that the Staff had previously found subject to exclusion. JP Morgan sought delay "due to its similarity to other proposals of [the proponent] as to which the Division has issued no-action positions and lack of a response from the

37. *Id.*

38. *Id.*

39. AenCorp, SEC No-Action Letter, 1985 WL 55702 (Dec. 12, 1985).

40. *Id.*

41. The company noted that the proposal had "been considered by the staff on numerous prior occasions and on at least seven prior occasions the staff has concurred in the view that the proposal can be omitted . . ." *Id.*

42. The no action letter did not specifically address the waiver. The failure indicated at least a *sub silentio* finding of good cause. *Id.*

43. J.P. Morgan & Co. Incorporated, SEC No-Action Letter, 1997 WL 123747 at 2 (March 17, 1997).

44. *Id.*

45. *Id.* "The staff notes that the Company did not file its statement of objection to including the proposal at least 80 days prior to the date on which definitive proxy materials will be filed as required under Rule 14a-8(d). Noting the circumstances, the staff is unable to waive the 80-day requirement."

Proponent to a request to withdraw the Proposal.” The Staff granted the requested no action relief but did not approve the waiver.⁴⁶

D. Ongoing Negotiations with Shareholder Regarding Proposal

Furthermore, the Staff granted a waiver, albeit without comment, when a company missed the filing deadline due to negotiations with the shareholder regarding the proposal. General Motors Corporation (GM) asked for a waiver, reasoning that the delayed submission resulted from ongoing discussions with the proponents of the proposal, a religious organization.⁴⁷ The Staff did not comment on the company’s reasons for the delay in filing the no action request, but apparently granted the waiver. The Staff did not issue the requested relief.⁴⁸

Alternatively, the Staff declined to grant a waiver two decades later under similar circumstances. In Aquila, Inc. (Aquila),⁴⁹ the company argued that the late submission arose following an unsuccessful effort to convince the shareholder withdraw the proposals.⁵⁰ The company “expressed the view” to, and continued to discuss the matters with, the submitting shareholder. Nonetheless, despite these efforts the shareholder had “not yet withdrawn its proposal.” The Staff declined to issue the no action request and the waiver.⁵¹

The Staff declined another waiver request based upon shareholder interaction. In Kohl’s Corporation (Kohl’s), the company, after extensive conversations with the shareholder, was under the “firm impression” that the proposal would be withdrawn.⁵² Nonetheless, the shareholder ultimately decided not to do so. Once aware of the decision, Kohl’s filed an untimely request for no action relief.⁵³ The Staff declined to issue the requested no action relief or waive the eighty day requirement.⁵⁴

46. J.P. Morgan & Co. Incorporated, SEC No-Action Letter, 1997 WL 123746 (March 17, 1997). Although finding “some basis” for excluding the proposal as “vague and indefinite” the letter noted that under the circumstances, the staff is unable to waive the 80-day requirement.”

47. “The delay is attributable to the conduct of negotiations with the proponents. Unfortunately, these negotiations have not resulted in withdrawal of the proposal.” General Motors Corporation, SEC No-Action Letter, 1985 WL 54025 (March 28, 1985).

48. *Id.*

49. Aquila, Inc., SEC No-Action Letter, 2006 WL 568662 (March 2, 2006).

50. *Id.*

51. *Id.* See also Kohl’s Corporation, SEC No-Action Letter, 2007 WL 1125497 (March 30, 2007), Morgan Stanley, SEC No-Action Letter, 2009 WL 772879 (March 12, 2009), XTO Energy Inc., SEC No-Action Letter, 2010 WL 810290 (March 4, 2010), American Tower Corp., SEC No-Action Letter, 2011 WL 683828 (April 5, 2011), and Apple, Inc., SEC No-Action Letter, 2014 WL 6576874 (Dec. 30, 2014).

52. “Following my conversation with Mr. Durkin, as indicated in the December 20, 2006 email attached hereto in Exhibit B, [Kohl’s] was under the firm impression that Proponent would withdraw the Proposal or, at the least, that a response one way or another would be immediately forthcoming.” Kohl’s Corporation, SEC No-Action Letter, 2007 WL 1125497 (March 30, 2007).

53. “While it is true that Kohl’s could have made its submission before receiving the Proponent’s long-awaited response, Kohl’s did not do so because of the undersigned’s strong belief that the withdrawal was little more than a formality.” *Id.*

54. *Id.*

E. Submission Delay Caused by Ongoing Litigation with Competitor.

The Staff granted a waiver, although without comment, when the delay apparently arose from the consequences of ongoing litigation. In Texaco Incorporated (Texaco), a shareholder submitted a proposal recommending that the company take steps to liquidate. The company sought exclusion in an untimely manner. In explaining the delay the company pointed to matters arising from ongoing litigation.⁵⁵ The Staff did not address the reasons for the delay in filing the no action request, apparently granting the waiver, and but did decline to issue the requested relief.⁵⁶

F. Company Transferring Files to New Counsel.

The filing requirement was not waived when a company missed the deadline after having obtained new legal counsel. Toys “R” Us, Incorporated (Toys “R” Us) attributed the delay to the decision to obtain new counsel and the transfer of legal work from the previous firm. Although not expressly addressing the argument, the no action letter stated that “the fact that the staff has responded to the Company’s filing should not be construed as a waiver of that 80-day requirement.”⁵⁷

G. Holiday Travel Schedule

The Staff did not grant a waiver when the company attributed the failure to file in a timely fashion due to the board’s holiday travel schedule. CoBiz Financial Inc. (CoBiz) received the shareholder’s proposal in mid-December 2010; however, the board did not have an opportunity to address the matter until a mid-January meeting when the board adopted revised corporate governance guidelines. CoBiz requested a waiver of the eighty day requirement, reasoning that the board of directors did not review the proposal until returning from holiday vacation, which was after the filing deadline had passed. The Staff, in response, did grant the no action request but did not waive the eighty day requirement.⁵⁸

IV. THE LACK OF ENFORCEMENT OF THE FILING REQUIREMENT

In the absence of good cause, companies filing an untimely request can avoid violating the rule by including the proposal in the proxy materials. They can also avoid a violation by extending the time period for filing

55. Texaco Incorporated, SEC No-Action Letter, 1986 WL 66579 (March 26, 1986) (“The timing of our submission of this request for no action has necessarily been impacted by the timing of Texaco’s litigation with Pennzoil Company. As discussed in the enclosed opinion of counsel, the decision of the Court of Appeals for the Second Circuit in the matter of *Texaco Inc. v. Pennzoil Company* was rendered on February 20, 1986. Also, Texaco’s motion for a new trial in the Texas trial court, which if granted would have removed some of Texaco’s objections to the Proposal, was pending until February 23, 1986.”).

56. *Id.*

57. Toys “R” Us, Incorporated, SEC No-Action Letter, 1992 WL 72719 (April 7, 1992).

58. CoBiz Financial Inc., SEC No-Action Letter, 2010 WL 1139457 (March 22, 2010). *See Also* Calgene Corporation, SEC No-Action Letter, 2010 WL 707705 (April 5, 2010).

the definitive proxy materials. Such delays, however, could lead to a disruption in the printing schedules for the proxy materials or delay the annual meeting of shareholders.

In some cases, the company does neither. Instead, the company excludes the proposal despite violating the Rule. As discussed in Bulletin 14B,⁵⁹ the Staff has developed a practice of declining to find a waiver but nonetheless resolving the no action request submitted by the company. The Staff “generally will consider the bases upon which the company intends to exclude a proposal, as [the Staff] believes that is an appropriate exercise of responsibilities under rule 14a-8.”⁶⁰ In those instances, therefore, the Staff may find both an absence of good cause and “some basis” for omitting the proposal.⁶¹

Bulletin 14B acknowledges that companies failing to demonstrate good cause “should be aware that, despite [the Staff’s] expression of a view with regard to the application of the eligibility or substantive requirements of rule 14a-8 to a proposal, the filing of their definitive proxy materials before the expiration of the 80-day time period in that situation may not be in accordance with the procedural requirements of rule 14a-8.”⁶² Moreover, the Bulletin warned that “in issuing such a response [to a no action request], we are making no determination as to the appropriateness of filing definitive proxy materials less than 80 days after the date of the rule 14a-8(j) submission.” The language, therefore, suggested that companies unable to demonstrate good cause would not be permitted to delete the proposal unless altering the date for filing definitive materials in a manner that would make the request timely.

In American International Group, Inc. (AIG), the company filed, on March 20, 2008, for no action relief within the eighty day period. The company argued for a waiver “based upon the Staff no-action letters . . . relating to proposals with identical resolutions that have only recently become publicly available, and in all cases less than 80 days before the Company expects to file its proxy materials.”⁶³ The company noted in the request that it anticipated commencing the printing of definitive proxy materials on April 2 and mail them to shareholders “on or about” April 4. AIG filed the definitive proxy materials with the SEC on April 4.⁶⁴ On

59. SEC Staff Legal Bulletin No. 14B, 2004 WL 3711971 (Sept. 15, 2004).

60. *Id.*

61. “[The Staff] will consider the timeliness of a rule 14a-8 no-action request in determining whether to respond. [The Staff] reserves the right to decline to respond to rule 14a-8 no-action requests if the company does not comply with the time frame in rule 14a-8(j).” *Id.*

62. *Id.*

63. American International Group, Inc., SEC No-Action Letter, 2008 WL 887161 (March 28, 2008).

64. American International Group, Inc., Definitive Proxy Materials. http://www.sec.gov/Archives/edgar/data/5272/000093041308002228/c52434_def14a.htm

March 28, the Staff did not grant a waiver, but did find basis for an exclusion under 14a-8(i)(2).⁶⁵ The company did not, apparently, extend the deadline for filing the definitive proxy statement in order to make the filing of the no action request timely.

V. ANALYSIS

The Staff does not enforce the filing deadline imposed on issuers seeking no action requests. To the extent the company fails to meet the eighty day requirement, the Staff frequently finds good cause and grants a waiver. Even when the Staff does not, however, issuers incur no meaningful consequences. The Staff will still consider the no action request and, in some cases, inform the issuer that a basis exists for exclusion of the proposal. Companies thereafter can decide whether to exclude the proposal without meeting the filing deadline.⁶⁶ Moreover, there appear to be no examples of the Staff sanctioning or even criticizing companies for doing so.

The failure to meet the eighty day requirement can harm shareholders and damage the integrity of the process. First, the approach reflects a disparity in treatment. The deadlines imposed on shareholders are enforced.⁶⁷ Second, the failure to meet the eighty day time requirement effectively shortens the period available to shareholders to respond to a no action request.

The Staff could choose to do nothing and continue to allow the eighty day time requirement to have little practical meaning. In those circumstances, the requirement could be repealed with little practical effect. Companies could submit no action requests at any time. Either they can wait for a ruling before filing definitive proxy materials or distribute supplemental materials once a resolution has been received.

Alternatively, the Staff can take steps to make the filing deadline meaningful. Doing so would need to take into account the control of the company over the deadline for filing no action requests. In the absence of good cause, the company always has the ability to delay the filing of the definitive proxy materials until the eighty day period has been met.

65. American International Group, Inc., SEC No-Action Letter, 2008 WL 887161 (March 28, 2008).

66. The failure can be inconvenient. The company may learn of a denial of no action relief shortly before the filing of definitive proxy materials, imposing delay and cost.

67. Sea Pines Associates, Inc., SEC No-Action Letter, 1999 WL 11549 (Jan. 11, 1999) (Where the Company requested to exclude the shareholder's proposal because the timeliness requirements under 14a-8(e)(2), requiring that the proposal be received by the company at least 120 days prior to the filing of the proxy statement, were not met.); CNS, Inc., SEC No-Action Letter, 2000 WL 325028 (March 9, 2000) (Reasoning that the filing deadline could not be met because of the shareholder's untimely submission. The Staff granted the company's waiver request); Noble Affiliates, Inc., SEC No-Action Letter, 2002 WL 834231 (March 28, 2002) (Where the Company requested a waiver of the filing deadline due to a late submission by the shareholder. The shareholder's proposal was submitted 45 days after the 14a-8 deadline. The Staff granted the company's waiver request).

As a result, the Staff could require that untimely requests include a commitment from the company to delay the filing of definitive materials in the event no action relief is provided.⁶⁸ Alternatively, the Commission could bring an action or at least admonish a company that filed a late request without good cause and did not delay the filing of definitive proxy materials.

Finally, the Commission could rewrite the rule to remove the company's ability to control the deadline. The time period could, like the deadline for shareholders submitting proposals, be tied not to the date of the filing of definitive proxy materials but to the date of the distribution of proxy materials the prior year. In those circumstances, the Staff could decline to resolve the no action request for late filings where good cause was not present.

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68. The Staff might consider resolving the no action request where the company, as part of the process, committed to delaying the filing of definitive proxy materials in order to meet the 80 day requirement.

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