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RULE 14A-8(I)(10): HOW SUBSTANTIAL IS “SUBSTANTIALLY” IMPLEMENTED IN THE CONTEXT OF SOCIAL POLICY PROPOSALS?

I. INTRODUCTION

Rule 14a-8 (the Rule) allows shareholders to include proposals in the company’s proxy statement. The Rule also has thirteen substantive grounds for exclusion, with the burden on the company to demonstrate proper reliance to omit a proposal.¹ Subsection (i)(10) (14a-8(i)(10)) allows exclusion of proposals “substantially implemented” by the company.²

Originally applicable to proposals deemed moot, the Securities and Exchange Commission (the SEC or Commission) added the provision to the Rule in 1976.³ The exclusion at first permitted the omission of proposals “fully effected.”⁴ A mandated change in administrative interpretation extended the exclusion to proposals “substantially implemented.”⁵ The change led to increasingly inconsistent determinations by an overburdened SEC staff.

This paper will trace the administrative history of 14a-8(i)(10), including the impact of amendments to the provision. Next, the paper will analyze the current staff interpretation of the subsection through no action letters issued in the new millennium. Finally, this paper will suggest strategies for drafting proposals and provide insight into how the staff’s current role hinders shareholder participation in the proxy process.

II. ADMINISTRATIVE HISTORY

Prior to 1976, SEC staff allowed for the exclusion of shareholder proposals from proxy statements for mootness.⁶ The Commission treated proposals as moot where the company complied⁷ or intended to comply⁸

1. 17 C.F.R. § 240.14a-8(g) (2011).

2. 17 C.F.R. § 240.14a-8(i)(10) (2011).

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

4. Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-20091 (Aug. 16, 1983).

5. *Id.*

6. Adoption of Amendments Relating to Proposals by Security Holders, Release No. 34-12999 (Nov. 22, 1976).

7. New Mexico & Arizona Land Co., SEC No-Action Letter, 1973 WL 9126 (Feb. 8, 1973) (Company passed resolution “effectuating the intended objective of the proposal.”); Electronics Corp. of Am., SEC No-Action Letter, 1974 WL 21154 (Jan. 16, 1974) (“[P]roposal is moot because the company is already submitting a full post-meeting report to its shareholders.”); Long Island Lighting Co., SEC No-Action Letter, 1974 WL 6949 (Mar. 1, 1974) (“[P]roposal mandates action that will have already been implemented by the company.”); Warnco, Inc., SEC No-Action Letter,

with the substance of the proposal. The staff's strict interpretation of mootness barred exclusion where the company's actions varied, even slightly, from the terms of proposal.⁹

The SEC integrated informal staff interpretations for mootness into the Rule in 1976.¹⁰ The Commission proposed to allow for the exclusion of shareholder proposals from proxy materials where they "[had] been rendered moot by the actions of management."¹¹ The Proposing Release explained this change was "designed to avoid the possibility of shareholders having to consider matters which already have been favorably acted upon by the management,"¹² including situations where management agreed "to implement a proponent's proposal in its entirety."¹³

The final rule abandoned the reference to "actions of management." The Commission reasoned, "mootness can be caused for reasons other than the actions of management, such as statutory enactments, court decisions, business changes and supervening corporate events."¹⁴ For example, when a "Company is already legally bound to carry out the action called for by the proposal," specific actions need not be taken by man-

1975 WL 9919 (Apr. 4, 1975) (Proposal requests "action that has already been taken by the Company's Board of Directors."); Northrop Corp., SEC No-Action Letter, 1975 WL 9938 (May 24, 1975) ("[T]here appears to be some basis for the opinion of your counsel that the first proposal of Mr. McCrea may be excluded on the ground of mootness, since it requests action that appears to have been taken by the Company's Board of Directors.").

8. Am. Tel. & Tel. Co., SEC No-Action Letter, 1973 WL 9116 (Feb. 1, 1973) (Company "has agreed to comply with the substance of the proposal."); Consumers Power Co., SEC No-Action Letter, 1973 WL 8481 (1973) (Company "has taken steps to comply with [proposals] terms."); Gen. Elec. Co., SEC No-Action Letter, 1973 WL 9132 (Feb. 15, 1973) ("[C]ompany already provides, or will provide subject to the terms of the proposal, the information requested in the proposal."); Elba Sys. Corp., SEC No-Action Letter, 1973 WL 9198 (July 23, 1973) ("[C]ompany will take steps to comply with the terms of the proposal."); Gen. Refractories Co., SEC No-Action Letter, 1974 WL 8863 (Feb. 22, 1974) (Company "intends to comply with his proposal.").

9. First Equity Fin. Corp., SEC No-Action Letter, 1973 WL 9200 (Oct. 15, 1973) (Shareholders proposed that the company actively seek merger. Staff denied no action relief where "[t]he board's prior action of setting up a committee 'to receive proposals by other firms . . . regarding mergers or acquisitions' and giving such committee the power 'to institute discussions with other companies' would not appear to conform to the request made in the proposal."); United Presbyterian Church, SEC No-Action Letter, 1974 WL 6954 (Jan. 29, 1974) (Shareholders proposed creation of a South African Review Committee to issue reports and make recommendations regarding company activities in South Africa. Staff denied relief because the company's "Public Issues Committee involves only the review of 'the (c)ompany's posture, policies, programs and practices on public issues of significance... as they may affect the operations of the (c)ompany.'"); Northrop Corp., SEC No-Action Letter, 1975 WL 9938 (May 24, 1975) (Shareholders proposed that the company "affirm the political non-partisanship of the Corporation" and staff denied relief because "practices set forth in paragraph nos. 2, 4 and 5 of the proposal are not specifically referred to either in the Resolution or the Statement of Policy, and that one might not necessarily imply from those documents that such practices are prohibited.").

10. Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders (S7-643), Release No. 12598, 9 SEC Docket 1030 (July 7, 1976).

11. *Id.* at *1035.

12. *Id.* at *1035.

13. *Id.* at *1035.

14. Adoption of Amendments Relating to Proposals by Security Holders, Release No. 34-12999 (Nov. 22, 1976).

agement for the proposal to be rendered moot.¹⁵ Thus, proposals “rendered moot for whatever reason” were “excludable from an issuer’s proxy materials.”¹⁶

Following adoption of the amendment, the staff granted no action relief where the companies took action that “exactly encompass[ed]” a proposal’s considerations.¹⁷ Companies could exclude proposals seeking “to create a situation which already exist[ed]”¹⁸ or that had already “been undertaken by the Company.”¹⁹ Consequently, even modest differences between a proposal and the company’s implementation resulted in the inapplicability of the exclusion.

As a result, the mootness exclusion did not apply when a shareholder proposed a permanent change to corporate bylaws and the company agreed to implementation only for a specified period of time.²⁰ Similarly, the staff found that a proposal requesting annual reports to “include a summary of the charitable contributions by the corporation and the percentage relationship of the total to pretax domestic earnings” was not moot even though the company disclosed the amount of charitable contributions and a shareholder could compute the percentage based on other information in the report.²¹

The Commission ultimately intervened to overturn what it perceived as an excessively narrow and inflexible interpretation. The Commission did so not by amending the language of the subsection but by altering the staff’s interpretation. To be excluded, proposals did not have to be “fully” effected but only “substantially implemented.”²² Although more subjective, the Commission reasoned that the approach would prevent “abuse of the security holder process” by preventing shareholders from circumventing exclusion by submitting proposals that only varied slightly from existing policies.²³ Despite objections to the change,²⁴ the

15. Upjohn Co., SEC No-Action Letter, 1977 WL 11675, at *7 (Feb. 25, 1977).

16. Adoption of Amendments Relating to Proposals by Security Holders, Release No. 34-12999 (Nov. 22, 1976).

17. Pub. Serv. Co. of New Hampshire, SEC No-Action Letter, 1981 WL 26569, at *2 (Mar. 9, 1981).

18. Bethlehem Steel Corp., SEC No-Action Letter, 1978 WL 10593, at *7 (Dec. 6, 1978).

19. S. California Edison Co., SEC No-Action Letter, 1978 WL 12585, at *7 (Dec. 20, 1978).

20. Int’l Tel. and Tel. Corp., SEC No-Action Letter, 1983 WL 30878, at *2 (Mar. 7, 1983) (Proposal calling for annual meetings to be held in the US was not rendered moot by the company’s decision to do so at the next meeting. “[T]he proposal submitted by the Proponent refers to a permanent, fixed date for all future annual meetings, while the action taken by the Company refers exclusively to setting the date for the upcoming annual meeting.”) See also *Id.* at *1 (The staff denied relief in the same no action letter where shareholders proposed that all annual meetings be held in the United States and the company agreed to provide live two-way satellite transmission from London. Even though attendees could watch and participate from the United States, the staff reasoned that this was not “equivalent to holding the meeting itself in the United States.”).

21. E.I. Du Pont De Nemours & Co., SEC No-Action Letter, 1981 WL 25774 (Jan. 16, 1981).

22. Proposed Amendments to Rule 14a-8, Release No. 12734, 26 SEC Docket 494 (Oct. 14, 1982).

23. *Id.*

Commission concluded that the staff's interpretation was "more restrictive than [was] necessary to achieve the purposes of the rule"²⁵ and adopted the new interpretation.²⁶

The Release provided little useful guidance on the meaning of substantially implemented, leaving the interpretation to the staff.²⁷ Where management implemented a proposal in all material respects, the staff had little difficulty issuing the requisite no action letter.²⁸ Topics unrelated to the company's business likewise were routinely excluded.²⁹ In other cases, however, the staff struggled with whether the difference between the shareholder proposal and the action by management varied in a substantial fashion.

For example, the staff allowed for exclusion on the basis of *de minimus* variations. In Eastman Kodak, shareholders sought disclosure of "all fines paid for violations of environmental laws and regulations" in the past five years.³⁰ The staff agreed to the company's requested no action relief, noting that compliance with Item 103 of regulation S-K

24. The Commission did so over the objection of at least some on the staff. Memorandum to Lee. B. Spencer, Jr., from Bill Morley, Proposed Revision of Rule 14a-8, at 20 (Mar. 18, 1982), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1982_0318_MorleyKargula.pdf ("[I]t has been suggested that we should go to a test of permitting the exclusion of proposals where the company is doing substantially what the proponents asks. We would recommend that such a test not be applied. We already have enough trouble with rests based on 'significantly' and 'substantially' without increasing the number of situations where we have to make subjective judgments. The provision as interpreted may limit its usefulness, but at least everyone has a good idea of how it will be interpreted."). See also Leila N. Sadat-Keeling, *The 1983 Amendments to Shareholder Proposal Rule 14a-8: A Retreat from Corporate Democracy?*, 59 TUL. L. REV. 161, 190 (Oct. 1984) ("Sixty-five of seventy-nine commentators addressing this issue were in favor of this change, with those opposed concerned primarily with the subjectivity involved in determining whether a proposal had been 'substantially implemented.'").

25. Proposed Amendments to Rule 14a-8, Release No. 12734, 26 SEC Docket 494 (Oct. 14, 1982).

26. Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-20091 (Aug. 16, 1983).

27. The SEC also sought to increase the subjectivity of the exclusion by adding a "good faith" test. The proposed amendment would allow for exclusion where the "board of directors considered the request in good faith and determined not to act." Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-20091 (Aug. 16, 1983). Due to the difficulty of administering the test however, the Commission did not to add the "good faith" test to this subsection. *Id.*

28. Digital Equip. Corp., SEC No-Action Letter, 1996 WL 426412 (July 30, 1996); Am. Stores Co., SEC No-Action Letter, 1991 WL 176968 (Apr. 8, 1991).

29. The staff also interpreted "substantially implemented" to apply where the proposal involved a topic unrelated to the company's activities. For example, the staff denied relief where shareholders requested an annual report disclosing risks and estimates of "base load power plants." Duke Power Co., SEC No-Action Letter, 1986 WL 65300 (Feb. 26, 1986). The company represented that it had no intention of building these types of plants. *Id.* Similarly, the staff granted relief where the proposal requested the company to stop purchasing human fetuses and the company did not, and did not plan to, buy human fetuses. Eli Lilly Co., SEC No-Action Letter, 1999 WL 32992 (Jan. 25, 1999).

30. Eastman Kodak Co., SEC No-Action Letter, 1991 WL 176616, at *4 (Feb. 1, 1991) (Shareholder's proposal).

required the company to disclose, publically, all fines other than *de minimus* amounts.³¹

Similarly, companies could exclude proposals where the company was already performing the relevant task. For example, shareholders proposed that the board of directors "establish a healthcare compliance committee."³² The staff found substantial implementation because the company had an "ethics, compliance, and corporate responsibility" committee and "empowered and required an executive officer to address the issue of healthcare compliance."³³

At the same time, the staff denied no action relief where modest differences existed between the proposal and company practices. For example, shareholders sought disclosure of attendance of outside directors at board and committee meetings.³⁴ The proposal would require the names and actual attendance of all outside directors.³⁵ The staff found that the company's requirement to disclose names of directors who attended 75% or fewer meetings did not constitute substantial implementation.³⁶

The staff also barred exclusion where the company's actions failed to satisfy the proposal's overall objective. For example, shareholders requested that an independent third party receive and tabulate proxies to "insure that all voting materials which identify shareholders be kept permanently confidential."³⁷ The corporation argued for substantial implementation by pointing to the existing use of an independent third party to receive and tabulate proxies.³⁸ The staff found the proposal had not been substantially implemented because corporate policies did not envision an "overall system of confidentiality."³⁹

In 1998, the Commission amended the subsection to reflect current staff interpretation by replacing mootness with "substantially implement-

31. Eastman Kodak Co., SEC No-Action Letter, 1991 WL 176616 (Feb. 1, 1991).

32. The Columbia/hca Healthcare Corp., SEC No-Action Letter, 1998 WL 80223 (Feb. 18, 1998).

33. *Id.* Exclusion was also granted where shareholders requested the company form a committee "to establish corporate environmental and occupational safety and health policy," because the company already had a committee to "to address safety, health and environmental issues" in one action. E.I. Du Pont De Nemours & Co., SEC No-Action Letter, 1990 WL 286089 (Feb. 12, 1990). Exclusion was similarly granted where the company had a committee to recommend and adopt policies "relating to environmental and employee safety issues" in different request for relief. Chevron Corp., SEC No-Action Letter, 1990 WL 286048 (Feb. 14, 1990). Likewise, omission was granted where the proposal sought formation of a committee to "study and develop criteria for the acceptance and execution the Company's military contracts." Gen. Dynamics Corp., SEC No-Action Letter, 1992 WL 77633 (Mar. 12, 1992). The staff noted that the company already had in place various committees accountable for the issues. *Id.*

34. Playboy Ent., Inc., SEC No-Action Letter, 1983 WL 28578 (Aug. 18, 1983).

35. *Id.*

36. *Id.*

37. First Bank Sys., Inc., SEC No-Action Letter, 1992 WL 43421, at *1 (Feb. 27, 1992).

38. *Id.*

39. *Id.* at *1.

ed.”⁴⁰ Despite the shift in language, the SEC noted that the revision “reflect[ed] an interpretation that we adopted in 1983.”⁴¹ Thus, the modification did not result in a substantive change to the interpretation of the exclusion.⁴²

III. STAFF INTERPRETATION

The requirement of substantial implementation has proved particularly difficult in the context of proposals relating to social policy. The staff often must determine whether the company’s existing “policies, practices, and procedures compare favorably with the guidelines of the proposal.”⁴³ To do so, the company’s policies must “satisfactorily [address] both the proposal’s underlying concerns and its essential objective(s),”⁴⁴ with small or immaterial differences disregarded.⁴⁵ In analyzing the issue, the staff will consider employee handbooks, governing principles, public disclosures, and other actions the corporation has taken on the issue at hand.⁴⁶

a. Adherence to Third Party Principles

Shareholders occasionally submit proposals that recommend adherence to standards or principles created by third parties. Shareholders have submitted proposals seeking the implementation of standards set by the International Labour Organization (ILO). The ILO developed guidelines designed to limit exploitation of workers and provide a safe, fair, and ethical workplace.⁴⁷ The staff has considered arguments that 14a-8(i)(10) justified exclusion in seventeen no action letters addressing proposals seeking the adoption of ILO standards.⁴⁸ Only once did the staff agree to permit exclusion.⁴⁹

40. Amendments to Rules on Shareholder Proposals, Release No. 34-40018 (May 28, 1998).

41. Amendments to Rules on Shareholder Proposals, Release No. 34-40018 (May 28, 1998).

42. The only additional change has been the addition of a note to (i)(10) to allow for the exclusion of proposals that sought say-on-pay votes in certain circumstances. Shareholder Approval of Executive Comp. & Golden Parachute Comp., Release No. 9178 (Jan. 25, 2011).

43. Texaco Inc., SEC No-Action Letter, 1991 WL 178690, at *1 (Mar. 28, 1991). *See also* J.M. Smucker Co., SEC No-Action Letter, 2011 WL 1787182 (May 9, 2011).

44. 1 Publicly Traded Corporations Handbook § 10:23 (2015).

45. Where a proposal sought that McDonald’s purchase at least 5 percent of its eggs from cage-free hens, the staff found that the company had substantially implemented the proposal since 4.72 percent of the eggs purchased were from cage-free hens. McDonald’s Corp., SEC No-Action Letter, 2008 WL 698915 (Mar. 12, 2008). The staff felt that the discrepancy between 4.72% and 5% was an immaterial difference and thus the proposal had been substantially implemented. *Id.*

46. Exxon Mobil Corp., SEC No-Action Letter, 2015 WL 364995 (Mar. 13, 2015) (public disclosures); Wal-Mart Stores, Inc., SEC No-Action Letter, 2010 WL 1256519 (Mar. 30, 2010) (internal policies; governing principles); McDonald’s Corp., SEC No-Action Letter, 2014 WL 263003 (Jan. 21, 2014) (corporate guidelines).

47. INTERNATIONAL LABOUR ORGANIZATION, ABOUT THE ILO, <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (Last visited Feb. 2016).

48. Appendix A: ILO No Action Letters, <http://www.law.du.edu/documents/corporate-governance/empirical/sharifi-rule-14a-8i10/ILO-NoAL.xlsx>.

49. *Id.*

One proposal requested that the company present the ILO principles in a single accessible place.⁵⁰ The staff denied no action relief because the company followed the policies but did not make them sufficiently accessible.⁵¹ In some cases, the company’s policies did not sufficiently conform to the ILO standards. For example, the staff denied relief where a company’s policies required “freedom of association” rather than “collective bargaining” as required by the ILO.⁵² Likewise, where shareholders explicitly sought adoption of collective bargaining, the staff denied relief despite arguments that the company’s code of conduct mandated adherence to local and international laws that already governed collective bargaining.⁵³

In proposing adoption of ILO standards, shareholders often included a requirement that the company employ independent and external monitoring systems. The staff denied relief as substantially implemented where the company already engaged in monitoring but only on an internal basis,⁵⁴ failed to disclose whether the monitoring process was internal or external,⁵⁵ or used both internal and external monitoring systems.⁵⁶ To the extent employing outside auditors, however, the staff provided companies with greater flexibility in the selection of the relevant firm.⁵⁷

In the only instance the staff granted no action relief, the company already covered the main ILO principles.⁵⁸ The staff found that the requirement that “[w]orkers representatives shall not be the subject of discrimination and shall have access to all workplaces necessary to enable them to carry out their representation functions,”⁵⁹ was substantially implemented by the section of company’s code that read “[w]orkers are free to choose whether or not to lawfully organize and join associations. Factories must not interfere with workers who wish to lawfully and peacefully associate, organize or bargain collectively.”⁶⁰

The only significant difference was the request by shareholders that the company use an external and independent human rights or religious organization to monitor workplace conditions of international employ-

50. McDonald's Corp., SEC No-Action Letter, 2007 WL 895066 (Mar. 22, 2007).

51. McDonald's Corp., SEC No-Action Letter, 2007 WL 895066 (Mar. 22, 2007); Sara Lee Corp., SEC No-Action Letter, 2003 WL 22097490 (Sept. 8, 2003).

52. Sara Lee Corp., SEC No-Action Letter, 2003 WL 22097490 (Sept. 8, 2003).

53. Family Dollar Stores, Inc., SEC No-Action Letter, 2012 WL 5248057 (Oct. 23, 2012).

54. Revlon, Inc, SEC No-Action Letter, 2002 WL 1058526 (Apr. 5, 2002); Sara Lee Corp., SEC No-Action Letter, 2003 WL 22097490 (Sept. 8, 2003); Target Corp. by the New York City Employees' Ret. Sys., SEC No-Action Letter, 2002 WL 975860 (Apr. 1, 2002).

55. Abercrombie & Fitch Co., SEC No-Action Letter, 2010 WL 620060 (Apr. 12, 2010).

56. Target Corp., SEC No-Action Letter, 2002 WL 975860 (Apr. 1, 2002).

57. The Talbots Inc, SEC No-Action Letter, 2002 WL 1058537 (Apr. 5, 2002). Shareholders proposed that the external monitoring be conducted by a “respected human rights” or “religious organization” and the staff granted relief where the company had an independent, external firm conduct the monitoring, even though the firm was not a human rights or religious organization. *Id.*

58. The Talbots Inc, SEC No-Action Letter, 2002 WL 1058537 (Apr. 5, 2002).

59. *Id.* at *11 (Shareholder’s proposal).

60. *Id.* at *13.

ees.⁶¹ The company instead relied only on an external and independent compliance firm.⁶² The staff reasoned that an independent compliance firm was sufficient to substantially implement the essential objectives (ensure compliance with international employee guidelines) as well as the underlying concerns of shareholders (that internal or corporate-controlled compliance checks could lead to false reports).⁶³

Aside from ILO principles, the staff has also examined other third party standards, such as McBride and CERES principles. In dealing with the CERES principles, the staff has not considered “compliance with the guidelines on a ‘point-by-point’ basis, but rather on whether a registrant appears to have addressed the major themes under the guidelines and whether its actions compare favorably with the guidelines.”⁶⁴ The staff would not grant no action relief where the company did not meet its burden of showing it had substantially implemented “the principles of (i) periodic disclosure of the issuer's statistical data and (ii) agreeing to be subject to a compliance review.”⁶⁵

For example, in R.R. Donnelley & Sons Company, shareholders requested that the company adhere to certain environmental practices contained in the CERES principles,⁶⁶ including “periodic disclosure and compliance review.”⁶⁷ Compliance review under the CERES principles required external evaluation of environmental performance. The company had in place internal review procedures for environmental compliance but did not publicly disclose the results.⁶⁸ Thus, the staff was “unable to conclude that the Company’s existing policies, practices and procedures with respect to the environment address these guidelines and particularly those providing for disclosure and compliance.”⁶⁹

b. Sustainability and Related Reports

Shareholders sometimes propose that a company issue reports, with a significant number addressing issues of sustainability and related topics. Sustainability reports delineate the economic, environmental, and

61. *Id.*

62. *Id.*

63. *Id.*

64. Harold S. Bloomenthal and Samuel Wolff, *Proposals Substantially Implemented*, 3E SEC. & FED. CORP. LAW § 24:124 (2d ed. Mar. 2016).

65. *Id.*

66. R.R. Donnelley & Sons Co., SEC No-Action Letter, 1993 WL 18607 (Jan. 26, 1993). CERES Principles include 1. Protection of the biosphere; 2. Sustainable use of natural resources; 3. Waste reduction and disposal; 4. Energy conservation; 5. Risk reduction; 6. Safe products and services; 7. Environmental restoration; 8. Informing the public; 9. Management commitment; 10. Audits and reports. *Id.*

67. *Id.*

68. *Id.*

69. R.R. Donnelley & Sons Co., SEC No-Action Letter, 1993 WL 18607 (Jan. 26, 1993). *See also* Sears, Roebuck and Co., SEC No-Action Letter, 1999 WL 80272 (Feb. 16, 1999) (The staff denied relief where endorsement of CERES principles was proposed).

social impacts caused by the business activities of the company.⁷⁰ Since 1998, the staff has considered sixteen no action requests under 14a-8(i)(10) for proposals seeking sustainability reports and permitted exclusion in ten cases.⁷¹ Staff granted relief less often for reports more specific than sustainability reports. Since 1998, shareholders have made sixty-seven proposals regarding publication of various social and environmental reports, of which the staff granted relief only twenty-two times.⁷²

The Commission has found substantial implementation where the differences between the report requested and the information supplied by the company were immaterial. Where a proposal sought “a report on the company’s response to rising regulatory, competitive and public pressure to develop renewable energy technologies and products,”⁷³ the staff found substantial implementation through the issuance of a report “relating to (i) the Company’s long-term energy outlook, (ii) greenhouse gas emissions, (iii) technology options for the longer term (including assessing the potential of new and alternative energy options), and (iv) managing investments and operations through a period of changing expectations and regulatory uncertainty.”⁷⁴ The staff viewed as immaterial the failure of the report to respond directly to the social changes mentioned in the shareholder proposal.⁷⁵ The exclusion also applied where the company used a different method of public disclosure than what shareholders requested.⁷⁶

The staff granted no action relief more often where the proposal was vague with respect to the contents of the report. These situations gave management greater latitude to argue for implementation. The staff granted relief where a proposal merely recommended a method to use in creating sustainability reports, even though the company took a different approach.⁷⁷ In Honeywell International, Inc., the proposal requested the

70. GRI, ABOUT SUSTAINABILITY REPORTING, <https://www.globalreporting.org/information/sustainability-reporting/Pages/default.aspx> (Last visited Feb. 2016).

71. Appendix B: Sustainability and Related Reports No Action Letters, <http://www.law.du.edu/documents/corporate-governance/empirical/sharifi-rule-14a-8i10/Sustainability-NoAL.xlsx>.

72. *Id.*

73. Exxon Mobil Corp., SEC No-Action Letter, 2007 WL 945182, at *1 (Mar. 23, 2007).

74. *Id.* at *3 (Company’s letter to SEC on Jan. 18, 2007).

75. *Id.*

76. The staff also granted no action relief if the company made public disclosure of the information sought, rather than delivery a physical copy of sustainability reports to shareholders. Acceptable methods of transmission vary. *See* Abercrombie & Fitch Co., SEC No-Action Letter, 2012 WL 587600 (Mar. 28, 2012) (the corporate website); Honeywell Int’l Inc., SEC No-Action Letter, 2006 WL 435405 (Feb. 21, 2006) (the corporate website); Albertson’s, Inc., SEC No-Action Letter, 2005 WL 701614 (Mar. 23, 2005) (Company Profile); Raytheon Co., SEC No-Action Letter, 2006 WL 212203 (Jan. 25, 2006) (Stewardship Report); Conagra Foods, Inc., SEC No-Action Letter, 2005 WL 1470572 (May 20, 2005) (Corporate Responsibility Report); Lowe’s Companies, Inc., SEC No-Action Letter, 2005 WL 678885 (Mar. 21, 2005) (Social Responsibility Report).

77. MGM Resorts Int’l, SEC No-Action Letter, 2012 WL 109886 (Feb. 28, 2012). As MGM argued, “a company need not implement a proposal in exactly the manner set forth by the proponent.

issuance of “a sustainability report to shareholders, at reasonable cost, and omitting proprietary information,” but made no explicit mention of the need to include quantitative data.⁷⁸ Even though proponents argued that the company's website contained “vague aspirations”⁷⁹ and “lack[ed] any hard data,”⁸⁰ the staff granted the requested relief.⁸¹

Likewise, shareholders proposed that Caterpillar prepare a global warming report but did not suggest a format.⁸² Instead, the proposal stated that the report “may describe and discuss” the impacts of Caterpillar’s actions on global climate change.⁸³ The staff found as sufficient the annual Sustainability Report that included “detailed information concerning the Company's efforts to reduce carbon dioxide emissions and combat global warming,” despite the lack of data regarding the impact of Caterpillar’s actions.⁸⁴

On the other hand, the staff denied no action relief where the company proposed, but did not undertake, specific methods and disclosures. For example, in Wendy’s International, Inc., shareholders requested the company use indicators to measure long-term social and environmental sustainability.⁸⁵ The staff denied relief because the company’s Corporate Responsibility Report made no mention of these indicators.⁸⁶ The proposal specifically referenced the need for “substantive and quantitative measures.”⁸⁷

Similarly, in a no action letter to Lowe’s, shareholders sought disclosure of “specific scientific data and studies management relied upon to determine the need for policies and expenditures with environmental goals and an estimate of the costs and benefits to Lowe's of its sustainability policy.”⁸⁸ The company argued that the essential objective of the proposal was profit maximization, satisfied by the disclosure of data about the benefits wrought from sustainability.⁸⁹ The staff did not agree since the proposal sought “specific scientific data”⁹⁰ and the cost-benefit estimates were only one of the proposal’s essential objectives.⁹¹

At any rate, the Proponent has only recommended that the Company use the referenced Guidelines...” *Id.*

78. Honeywell Int’l Inc., SEC No-Action Letter, 2006 WL 435405, at *8 (Feb. 21, 2006) (Shareholder’s proposal).

79. *Id.* at *9 (Shareholder letter to SEC on Jan. 27, 2006).

80. *Id.* at *9 (Shareholder letter to SEC on Jan. 27, 2006).

81. *Id.*

82. Caterpillar Inc., SEC No-Action Letter, 2008 WL 670183 (Mar. 11, 2008).

83. *Id.* at *5 (Shareholder’s proposal).

84. *Id.* *2 (Company’s letter to SEC on Feb. 1, 2008).

85. Wendy's Int'l, Inc., SEC No-Action Letter, 2006 WL 435399 (Feb. 21, 2006).

86. *Id.*

87. *Id.* at *11 (Shareholder’s proposal).

88. Lowe's Companies, Inc., SEC No-Action Letter, 2014 WL 331308, at *1 (Jan. 24, 2014).

89. *Id.*

90. *Id.* at *19 (Shareholder’s proposal).

91. *Id.* at *2.

SEC staff will also deny relief if the report fails to include all proposed topics. For example, shareholders requested a report on social and environmental sustainability.⁹² The staff denied relief since the company’s report contained no information on social sustainability.⁹³ In a similar situation, the staff declined to issue no action relief where shareholders requested review of current policies and practices related to environmental, social, and economic sustainability and the company’s publication did not sufficiently address social and economic sustainability.⁹⁴

Similarly, the staff will deny relief where shareholders request reports and the company has not yet taken action. For example, shareholders proposed that the company disclose actual performance related to sustainability.⁹⁵ The staff denied relief because the company only mentioned sustainability as an aspirational goal and had not disclosed actions taken.⁹⁶ The staff also denied no action relief where companies promised to issue a report but had not yet done so. For example, shareholders requested issuance of a sustainability report and the company responded by indicating plans to issue a Corporate Responsibility Report.⁹⁷ In denying relief, the staff relied on the company’s contentions that the “specific form and substance of the report” was undecided and a date for publication not yet set.⁹⁸ Likewise, where a company committed to publishing a report within the proposed timeframe, the staff denied relief because it was “impossible . . . to evaluate whether the non-existent report” would contain the information requested.⁹⁹

IV. ANALYSIS

a. Drafting Proposals

Examination of the staff’s interpretation provides guidance for shareholders in drafting and submitting proposals that potentially overlap with company policies and practices. Although the staff’s inconsistent decisions make it difficult to navigate the boundaries of the exclusion, companies and shareholders should be aware of certain strategies.

First, in drafting a proposal, shareholders should request specific information from the company, including quantifiable data. Broad requests provide the company with greater room to argue that existing policies substantially implement the proposal. Greater specificity makes this argument more difficult.

92. Boston Properties, Inc., SEC No-Action Letter, 2011 WL 442364 (Jan. 28, 2011).

93. *Id.*

94. Johnson Controls, SEC No-Action Letter, 2002 WL 31562565 (Nov. 14, 2002).

95. Terex Corp., SEC No-Action Letter, 2005 WL 678883 (Mar. 18, 2005).

96. *Id.*

97. Burlington Res. Inc., SEC No-Action Letter, 2005 WL 310441 (Feb. 4, 2005).

98. *Id.* at *8 (Company’s letter to SEC on Dec. 20, 2004).

99. The Kroger Co., SEC No-Action Letter, 2006 WL 871035, at *11 (Mar. 29, 2006) (Shareholder’s letter to SEC on Mar. 6, 2006).

Second, the proposal should specify the method of implementation. The staff has consistently allowed for the exclusion of proposals where no method was specified, so long as the essential objective was carried out. Omission also provides the company with free reign to choose the process, which may not result in the shareholder's intended outcome. Thus, specificity can result in more favorable outcomes for shareholders, both in terms of the proposal being included in the proxy statement, as well as the method of the proposal's implementation.

Proposals relying on third party standards appear to reduce the risk of exclusion. Introduction of third party principles provides the staff with guidance on important considerations and the underlying purpose. In drafting the proposal, shareholders may choose to highlight the most important aspects of the principles to ensure companies give appropriate weight to and do not overlook those standards.

Last, shareholders should be careful with including non-essential considerations in the proposal. Since the staff focuses on the underlying concerns and essential objectives in determining substantial implementation, the company can neglect anything the staff considers non-essential. Therefore, shareholders should ensure that the substance of the proposal is important to the requested outcome and clear in its objective and reasoning.

b. Staff's Role

At its inception, 14a-8(i)(10) had a clear purpose of efficiency—to exclude matters that were moot and therefore not worthwhile for inclusion in a company's proxy statement. This benefitted both the shareholders and the company. Shareholders did not have to read about, and vote on, matters that would have no impact on the company's operations, and companies did not have to waste resources delivering lengthy proxy statements and tabulating meaningless votes.

Over time, however, the Commission altered the purpose of the subsection. Although ostensibly premised on efficiency, the staff has played an increasing role in using the exclusion to omit proposals with overlapping but varying content. Rather than promote efficiency, the staff has supplanted shareholders by making subjective determinations about the importance of these differences, typically over the objection of the proponent. For example, the staff, rather than shareholders, determined that the need for the external monitor to be a "respected human rights organization" was sufficiently unimportant to permit exclusion.¹⁰⁰

The approach paints an unfortunate picture of shareholders. A reasonable proponent would generally not waste the time or resources to recommend action that a company has already taken. By disregarding the

100. The Talbots Inc, SEC No-Action Letter, 2002 WL 1058537 (Apr. 5, 2002).

differences in the shareholder proposal and the management action, the staff implies that the proponent and other shareholders are not able to evaluate current policies in relation to those suggested.

The staff’s role likely increases the number of challenges by companies to proposals¹⁰¹ and inhibits shareholder participation; something made more problematic considering that Rule 14a-8 is the only practical method for shareholders to address, collectively, changes to corporate policies. The approach also effectively denies the board of directors information about the collective views of shareholders. Most shareholder proposals merely recommend, not mandate, the company to take action. Regardless of whether the proposal receives a majority vote, tabulation provides quantitative data illustrating the opinions of shareholders. Broad exclusion under 14a-8(i)(10) makes the information unavailable.

Where objective differences are present, shareholders are better situated than SEC staff to determine whether the company should consider the recommendation. The staff should return to the original purpose of the exclusion, permitting the omission of proposals that are moot. Where differences exist, the burden in the Rule rests with management to establish the availability of the exclusion.¹⁰² Particularly where shareholders disagree that management’s alternative substantially implements the proposal, the staff should err on the side of inclusion rather than exclusion. Shareholders can then decide whether the differences matter.

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101. Arthur Fleischer, Jr. et al., *Takeover Defense: Mergers and Acquisitions*, § 10.08 STOCKHOLDER PROPOSALS (2016) (“This exclusion was granted more frequently in 2008 than in prior years on the grounds that the companies had already implemented the proposed changes or were proposing to submit them for shareholder approval.”).

102. The company has the burden of demonstrating the availability of the exemptions. *See* 17 C.F.R. § 240.14a-8(g).

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