

JAN 15 1972

MEMORANDUM

TO: The Commission

FROM: The Division of Corporation Finance

RE: Proposed release concerning informal advice with respect to questions arising under Rule 14a-8 under the Securities Exchange Act.

RECOMMENDATION: That said Release not be issued.

The Division wishes to comment on the proposed release, transmitted to the Commission by the Office of the General Counsel on January 13, 1972 dealing with the staff's longstanding practice of giving interpretative advice on proxy rule 14a-8 and rendering comments on managements' reasons for excluding shareholder proposals from their proxy soliciting materials. The General Counsel's recommendation would have the effect of substantially curtailing this practice. The Division recommends that the Commission not issue the proposed release.

The release states as a basis for departing from the prior practice that "it is increasingly apparent to the Commission, in light of other functions its staff might perform, that the amount of staff time devoted to these matters is far out of proportion to any possible benefits that might be considered to exist." The Division does not concur with this statement. The staff time which will be devoted to processing shareholder proposals will not be excessive. The Division has adopted expedited procedures for processing such proposals and, more importantly, the factor that required most of the staff's time during the last proxy season, i.e. Rodney Shields' proposals, has been dealt with in a manner that will not require significant staff time in the future.

Moreover, the release states that "the Commission's staff will continue to review materials filed under Rule 14a-8, and where a filing suggests a clearly unwarranted refusal to include a proposal, the staff will be free to suggest the possibility of Commission enforcement action." In view of the fact that the staff will continue to review Rule 14a-8 materials, no significant staff time will be saved through the issuance of the proposed release.

The proposed release also infers that the informal comment procedure has had the effect of inappropriately dissuading managements and security holders from litigating their disputes. The Division is not aware of the basis for this inference. To the extent that the comment procedure has assisted in the resolution of disputes in the shareholder proposal area, the Division believes that the procedure has furthered the interests of both shareholders and companies by forestalling costly corporate meeting delays and avoiding unnecessary litigation. In the Division's view, the

primary effect of the release recommended by the General Counsel's Office would be to encourage litigation against companies by persons or groups with particular points of view who have the resources and expertise to conduct such litigation. The Division does not believe that a policy of encouraging such litigation would be in the public interest generally. Further, many small security holders, because of their limited resources, would be unable or unwilling to enforce their rights under the proxy rules in the appropriate courts. The Mills case does not hold that shareholder proposal litigation expenses are recoverable by successful litigants, and in any event, a small shareholder might not have the resources to initiate litigation.

Shareholder proposals are an integral part of the proxy soliciting materials. The staff has long followed the practice of giving comments on these materials in the same manner that it comments on other filings. These informal comments have been of assistance to persons seeking to comply with our statutory and rule provisions and the practice of giving such informal advice has been favorably commented upon over the years.<sup>1</sup> The Division does not believe that the public interest or the protection of investors would be served by singling out filings relating to shareholder proposals and departing from the customary comment procedures in dealing with such filings.

While the Division shares the concern of the General Counsel's Office about the prospects for future Medical Committee type litigation, it does not believe that the proposed release provides an appropriate answer to the problem. If the Commission at a future time desires to review the staff comments on a shareholder proposal matter, consideration can then be given to Medical Committee problems in the light of the particular facts of the matter presented for review.

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<sup>1</sup> The Commission's rendering of informal advice through such procedures has been commended as an "excellent practice in administrative procedure." Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedures (1955, p-189).