MEMORANDUM

JUN 7 1983

TO : Lee Spencer
John Huber

FROM : Linda Quinn
Bill Morley
John Gorman

RE : Outline for Revision of Rule 14a-8

We have attached a draft of the summary of the more than 400 comment letters received in response to the proposed amendments to Rule 14a-8. After consideration of the comments, we have prepared this outline for a revised rule.

A. Access

The first question raised in the Proposing Release was whether there was a need for and desireability of providing a right of security holder access to the issuer's proxy statement under the 1934 Act. The comments received were almost universally supportive of the concept of shareholder access to the proxy statement.

B. Alternatives to Current Rule 14a-8

The majority of the commentators expressing a view as to which one of the three approaches proposed by the Commission favored Proposal I. _/ Many of the commentators who supported Proposal I did so only

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_/ There were over 100 commentators who took the position that there should be no change in the existing rule.

after indicating that they would prefer no change in the rule and almost all of the commentators supporting Proposal I had suggestions for modification of some of the proposed provisions of the rule. The support for Proposal I cut across the entire spectrum of the commentators including issuers, proponents and institutions.

There was some limited support for Proposal II, almost exclusively from issuers. Many commentators felt, however, that Proposal II would create problems because it would result in a lack of uniformity and consistency in dealing with shareholder proposals.

Finally, there were only a few commentators who supported Proposal III. Most people commenting on this approach felt that it would result in costly litigation which would not benefit issuers or their shareholders. In addition, many commentators were concerned about the lottery involved in selecting proposals for inclusion.

After considering the comments it is our view that we should recommend to the Commission the adoption of Proposal I with certain revisions discussed below.

C. Outline of Revised Rule 14a-8

1. Rule 14a-8(a)

As proposed:

If any security holder of an issuer notifies the issuer of his intention to present a proposal for action at a forthcoming meeting of the issuer's security holders, the issuer shall set forth the proposal in its proxy statement and identify it in its form of proxy and provide means by which security holders can make the specification required by Rule 14a-4(b) [17 CFR 240.14a-4(b)]. Notwithstanding

> the foregoing, the issuer shall not be required to include the proposal in its proxy statement or form of proxy unless the security holder (hereinafter, the "proponent" has complied with the requirements of this paragraph and paragraphs (b) and (c) of this Section:

This introductory paragraph as proposed contained no changes from existing Rule 14a-8. No comments were received on this section of the rule and we propose no changes.

2. Rule 14a-8(a)(1)(i) - Eligibility

As proposed:

> Eligibility. (i) At the time he submits the proposal, the proponent shall be a record or beneficial owner of at least 1% or $1,000 in market value of securities entitled to be voted at the meeting on his proposal, and have held such securities for at least one year at the time he submits the proposal, and he shall continue to own such securities through the date on which the meeting is held. If the issuer requests documentary support for a proponent's claim that he is a beneficial owner of at least $1,000 in market value of such voting securities of the issuer or that he has been a beneficial owner of the securities for one or more years, the proponent shall furnish appropriate documentation within 14 calendar days after receiving the request. In the event the issuer includes the proponent's proposal in its proxy soliciting materials for the meeting and the proponent fails to comply with the requirement that he continuously hold such securities through the meeting date, the issuer shall not be required to include any proposals submitted by the proponent in its proxy materials for any meeting held in the following two calendar years.

There were more comments received on the first sentence of the revised eligibility requirements than on any other single aspect of Proposal I. When you include those commentators who expressed the view that there should be no change in the existing rule at all, the number of commentators supporting the proposed new eligibility requirement and the number opposed is very close.

The commentators opposed to the change and even some of those supporting the change pointed out the following problems with the proposed provision: (1) The $1000 requirement raises an appearance of discrimination against small shareholders; (2) The computation of the $1000 amount could raise tremendous practical difficulties because of changing market prices; and (3) The 1 year period is too long when combined with the 120 day requirement for submission of proposals and the 2 or 3 months that elapse before the meeting is actually held. In addition, we believe that there is evidence to suggest, particularly with respect to social issue proposals, that the $1000 and one year requirement would have little effect on limiting the number of such proposals submitted to issuers. Information obtained from the IRRC indicates that in almost all cases the proponents of social issue proposals would easily meet the proposed eligibility requirements.

Given the limited effect of the provision and the serious public relations aspect of seeming discrimination against small shareholders we would suggest a revision of the proposed eligibility requirement. We would suggest an alternative test. A proponent would have to be a shareholder for one year at the time he submits the proposal or he would have to own 100 shares of the issuer's securities.

Why not Short both

The one year provision would help to control the abuse by a proponent who buys a single share to submit a proposal, but it also would permit small shareholders to submit proposals so long as they have shown an investment interest for 1 year. The 100 share alternative

would allow an investor who makes a significant investment to submit a proposal even where he has not held for 1 year. The 100 share requirement also alleviates the practical difficulties caused by changing market prices. In addition, the 100 share amount will partially satisfy commentators who sought eligibility amounts over $1000. A 100 share purchase would in most cases require an investment of over $1000.

The Proposing Release also included a revision of the second sentence of Rule 14a-8(a)(1) that would have changed the time limit for a proponent to provide documentation of his beneficial ownership of the issuers securities from 10 business days to 14 calendar days. While there was no opposition to this change, several commentators suggested that the Rule require the proponent to submit such documentation when he submits the proposal. We propose to include that requirement in Rule 14a-8(a)(2) and delete the second sentence of Rule 14e-8(a)(1) entirely.

No changes in the third sentence of Rule 14a-8(a)(1) were proposed, and no comments were received on that provision.

Our proposed revision of Rule 14a-8(a)(1)(i) reads as follows:

> (1) Eligibility. (i) At the time he submits the proposal, the proponent shall be a record or beneficial owner of at least one hundred shares of a security entitled to be voted at the meeting on his proposal, or have held any amount of such securities for at least one year at the time he submits

the proposal, and he shall continue to own such securities through the date on which the meeting is held. In the event the issuer includes the proponent's proposal in its proxy soliciting material for the meeting and the proponent fails to comply with the requirement that he continuously hold such securities through the meeting date, the issuer shall not be required to include any proposals submitted by the proponent in its proxy materials for any meeting held in the following two calendar years.

3. Rule 14a-8(a)(1)(ii) - General Solicitation

As proposed:

(ii) Proponents who participate in a general proxy solicitation through the use of written proxy soliciting materials with respect to the same meeting of security holders will be ineligible to use the provisions of Rule 14a-8 for the inclusion of the proposal in the issuer's proxy soliciting materials. In the event the issuer includes a proponent's proposal in its proxy materials and the proponent thereafter engages in a proxy solicitation with respect to such meeting, the issuer shall not be required to include any proposals submitted by that proponent in its proxy soliciting materials for any meeting held in the following two calendar years.

Do we need this at all?

Dangerous!

The commentators were about evenly split on this proposal. One point that was mentioned by supporters, as well as, opponents of this provision was that a definition of "general solicitation" was necessary. We would propose the addition of a sentence at the end of Rule 14a-8(a)(1)(ii) which indicates that written or oral solicitation of holders of less than 25% of an issuer's outstanding securities will not constitute a general solicitation.

Whether we say it or not it will be used in other areas.

We would also propose to indicate in the adopting release that any general advertisement relating to the proposal would not constitute a "general solicitation" for purposes of this one provision. Further, the release would indicate that in addition to the two year prohibition on future proposals, a "general solicitation" with respect to a proposal included in an issuer's proxy statement would constitute a violation of the proxy rules.

advertisement

We would propose the addition of the following sentence to 14a-8(a)(1)(ii) as proposed:

> "Solely for purposes of this paragraph a mailing to holders of less than 25% of the issuers outstanding securities or publication of an advertisement will not be deemed a general solicitation."

4. Rule 14a-8(a)(2) - Notice

As proposed:

> At the time he submits a proposal, a proponent shall provide the issuer in writing with his name, address, the number of the issuer's voting securities that he holds of record or beneficially and the dates upon which he acquired such securities. A proposal may be presented at the meeting either by the proponent or his representative who is qualified under state law to present his proposal on the proponent's behalf at the meeting. In the event that the proponent or his representative fails, without good cause, to present the proposal for action at the meeting, the issuer shall not be required to include any proposals submitted by the proponent in its proxy soliciting material for any meeting held in the following two calendar years.

The first proposed change to Rule 14a-8(a)(2) involved the elimination of the current requirement that a proponent notify the issuer of his intention to appear personally at the meeting to present the proposal. The commentators were split on this proposed change,

but we continue to believe that the old requirement is a mere formality which adds nothing to the rule.

The second proposed change would codify an existing interpretation to the effect that a proponent may arrange from the outset, to have any person who is permitted under applicable state law present the proposal for action at the meeting. There were more commentators who supported this change than there were opposed to the change. The major point raised by those persons who were opposed was that the annual meeting is a shareholders meeting and that any representative selected to present the proposal should be a shareholder. We believe, however, that if state law permits a person other than a shareholder to act as proxy for a shareholder then such person should be permitted to present the shareholder proposal.

The final change proposed to Rule 14a-8(a)(2) would require a proponent to provide to the issuer at the time he submits his proposal, his name, address, the number of shares of the issuer's securities that he holds of record or beneficially, and the dates upon which he acquired the securities. There was almost no opposition to this change; accordingly we believe that it should be adopted. We would, however, suggest one change referred to earlier and that is that the proponent automatically provide documentation for any claimed beneficial ownership.

We would suggest that the first sentence of proposed Rule 14a-8(a)(2) be revised to read:

> "At time he submits a proposal, a proponent shall provide the issuer in writing with his name, address, the number of the issuer's voting securities that he holds of record or beneficially, the dates upon which he acquired such securities, and documentary support for a claim of beneficial ownership."

The Commission also proposed a change in an interpretation under Rule 14a-8(a)(2). Under that interpretation attendance at another shareholder's meeting was deemed to be good cause for failure to present a proposal at another meeting. It was proposed that attendance at another meeting not be good cause for failure to present a proposal. Only one commentator, Evelyn Davis, was opposed to this change. We believe the change should be adopted.

5. Rule 14a-8(a)(3) - Timeliness

As proposed:

The proponent shall submit his proposal sufficiently far in advance of the meeting so that it is received by the issuer within the following time periods:

(i) Annual Meetings. A proposal to be presented at an annual meeting shall be received at the issuer's principal executive offices not less than 120 days in advance of the date of the issuer's proxy statement released to security holders in connection with the previous year's annual meeting of security holders, except that if no annual meeting was held in the previous year or the date of the annual meeting has been changed by more than 30 calendar days from the date contemplated at the time of the previous year's proxy statement, a proposal shall be received by the issuer a reasonable time before the solicitation is made.

> (ii) <u>Other Meetings</u>. A proposal to be presented at any meeting other than an annual meeting specified in paragraph (a)(3)(i) of this section shall be received a reasonable time before the solicitation is made.
>
> NOTE: In order to curtail controversy as to the date on which a proposal was received by the issuer, it is suggested that proponents submit their proposals by Certified Mail-Return Receipt Requested.

The only change proposed was an increase from 90 days to 120 days in the deadline for submission of proposals. The vast majority of the commentators supported the change and we believe that it should be adopted.

There is, however, one question that must be considered and that is the effective date of this change. When the rule was last amended in 1976 the timeliness requirement was not made effective until 3 months after the other revisions became effective because the change would have made all proposals late for that year. There is a further problem now because Rule 14a-5(f) requires issuers to list the last day for submission of proposals in their proxy statements. All 1983 proxy statements have already given a date for 1984 meetings. Under that rule if we change the timeliness requirement for 1984 meetings, all issuers will have to inform their shareholders of the new date. Under the circumstances it might be better to hold the timeliness change off until 1985.

6. Rule 14a-8(a)(4) - Number and Length of Proposals

As proposed:

> The proponent may submit a maximum of one proposal and an accompanying supporting statement for inclusion in the issuer's proxy materials for a meeting of security holders. If the proponent submits more than one proposal, or if he fails to comply with the 500 word limit mentioned in paragraph

> (b) of this section, he shall be provided the opportunity to reduce the items submitted by him to the limits required by this rule, within 14 calendar days of notification of such limitations by the issuer.

The first proposed change would reduce the number of proposals permitted per proponent from two to one. There were more commentators in favor of this change than opposed. The comments split along predictable lines. Issuers supported the change, proponents were opposed. Supporters suggested that the change could result in cost savings for issuers. The opponents indicated that there was no evidence of excessive burdens in connection with the present rule.

We would suggest adoption of the proposed change, but without a great deal of conviction. It is not clear why the limitation on two was selected in the first place so there is no firm basis for that number. The suggestion of a cost savings as a result of the reduction does support the change. A negative factor in the one proposal limitation may be that proposals become more confusing because a proponent may try to make all of his points in one proposal where splitting the information into two proposals might be clearer.

Several commentators suggested that the provision might be modified to include a limitation on the total number of proposals that an issuer must include in its proxy statement. This concept is of course included in Proposal III. We do not believe that such a limitation would be appropriate in Proposal I because the approach utilized in Proposal I is to consider each proposal on its merits.

The second proposed change to Rule 14a-8(a)(4) would give a proponent 14 calendar days rather than 10 business days "to reduce the number of words or the number of proposals" after being notified by the issuer that he had exceeded the limits set forth in the rule. The commentators supported this change. We would, however, propose the deletion of the last sentence of the proposed provision. As with the change suggested in Rule 14a-8(a)(1) we are suggesting the change for the purpose of streamling the procedures under Rule 14a-8. The adopting release should point out that proponents will no longer have an opportunity to make corrections if they do not comply with the procedural requirements when the proposals are submitted.

Why? It disadvantages the once in a while proponent

7. Requests for Comment on a Fee for Proponents

The Proposing Release requested comment on the possibility of requiring a proponent to pay a fee in connection with the submission of their proposals. The fee would be intended to cover the Commission's cost in processing the proposals. A majority of the commentators, almost exclusively issuers, supported the idea of a fee. Those comments, however, raised a great many questions as to the appropriate amount of any fee and the manner in which the fee should be collected. In light of the significant questions on the practicality and the feasibility of the fee we would suggest that no fee requirement be adopted at this time.

8. Rule 14a-8(b)(1) - Supporting Statement

As proposed:

> The issuer, at the request of the proponent, shall include in its proxy statement a statement of the proponent in support of the proposal, which statement shall not include the name and address of the proponent. A proposal and its supporting statement, in the aggregate shall not exceed 500 words. The supporting statement shall be furnished to the issuer at the time that the proposal is furnished, and the issuer shall not be responsible for such statement and the proposal to which it relates.

The first proposed revision would permit proponents to include a supporting statement whether or not the issuer opposed the proposal. Presently, a supporting statement need not be included if the issuer does not oppose the proposal. There were more commentators in favor of this change than were opposed.

We believe that the change should be adopted. The supporting statement generally provides background information that is valuable in deciding whether to vote for or against the proposal. In addition, with the change permitting the proponent to allocate his 500 words in any way he wishes it would be difficult to administer a prohibition on a supporting statement. Accordingly we are not recommending any change to Rule 14a-8(b)(1) as proposed.

The second change proposed would permit a proponent to use an aggregate of 500 words for the proposal and the supporting statement, which would be allocated at the discretion of the proponent. The rule currently permits 300 words for the proposal and 200 words for the supporting statement. There was almost universal support for the

change except for persons who would like the total number of words to be allocated to be reduced. We suggest no change to the proposed revision.

9. Rule 14a-8(b)(2) - Identification of Proponent

> The proxy statement shall also include either the name and address of the proponent and the number of shares of the voting security held by the proponents or a statement that such information will be furnished by the issuer to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor.

Rule 14a-8 currently gives the issuer the option of printing the name and address of a proponent or indicating that such information will be available from the issuer or the Commission. The rule as revised would delete the option of coming to the staff to get the name of the proponent. There was little opposition to this change. Several commentators did suggest that it be made clear that the issuer has the option as to whether or not to identify the proponent in the proxy statement. We do not believe that there is a need to change the proposed rule, but we will make sure that the adopting release makes it clear that the issuer has the option.

10. Rule 14a-8(c)(1) - Proposals that Are not a Proper Subject for Action by Security Holders

> The existing rule reads as follows:
>
> If the proposal is, under the laws of the issuer's domicile, not a proper subject for action by security holders.

> NOTE: A proposal that may be improper under the applicable state law when framed as a mandate or directive may be proper when framed as a recommendation or request.

No changes to Rule 14a-8(c)(1) were proposed. A number of commentators, however, suggested that the Note to paragraph (c)(1) should be deleted. The Note was first added in 1976 to explain the staff's interpretive approach in considering the application of paragraph (c)(1). That interpretation was based on a view that under most state corporation statutes a request for the board of directors to consider certain actions would not infringe upon the directors statutory authority to manage the corporation.

While we continue to believe that this interpretive position is correct, we would concur in the commentators suggestion to remove the Note. Our position in this regard is based upon a conclusion that the language of the Note gives the misleading impression that our interpretation is based solely on the form of the proposal as opposed to a legal analysis of the proper application of the state statute involved. In addition, to deleting the Note we would recommend a discussion in the adopting release setting forth the legal analysis underlying our interpretive position.

If we think its correct and are going to use it why not keep it in

11. Rule 14a-8(c)(2) - Proposals that Would Require the Issuer to Violate a Law

The existing rule reads as follows:

> If the proposal, if implemented, would require the issuer to violate any state law or federal law of the United States, or any law of any foreign jurisdiction to which the issuer is subject, except that this provision shall not apply with respect to any foreign law compliance with which would be violative of any state law or federal law of the United States.

No revisions to this provision were proposed, and the commentators did not discuss Rule 14a-8(c)(2) at all. We would suggest that the provision remain unchanged.

12. Rule 14a-8(c)(3) - Proposals that are Contrary to the Commission's Proxy Rules, Including Rule 14a-9.

The existing rule reads as follows:

> If the proposal or the supporting statement is contrary to any of the Commission's proxy rules and regulations, including Rule 14a-9 [17 CFR 240.14a-9], which prohibits false and misleading statements in proxy soliciting materials;

Although no changes were recommended in Rule 14a-8(c)(3), the proposing release did discuss certain staff procedures used in administering that provision. It was indicated that generally the staff gave proponents an opportunity to amend portions of proposals or supporting statements to correct false or misleading statements or implications. A few commentators were critical of the latitude given to proponents to make changes.

We do not believe that any change is necessary in the provision or in the prevailing staff practice. In this regard it should be noted that the staff practice permitting proponents to make changes to correct statements which would be violative of Rule 14a-9 is consistent with the staff practice in reviewing preliminary proxy materials filed by issuers.

13. Rule 14a-8(c)(4) - Personal Grievance

As proposed:

> If the proposal relates to the redress of a personal grievance against the issuer or any other person, or represents an attempt to further a personal interest, or if it is designed to result in a benefit to the proponent not shared with the other security holders at large;

The proposed change to Rule 14a-8(c)(4) was intended to clarify the scope of the exclusionary paragraph and to insure that the proposal process would not be abused by proponents attempting to achieve personal ends which are not necessarily in the common interest of the issuers' security holders generally.

The comments on proposed Rule 14a-8(c)(4) were largely supportive of the Commission's efforts to redefine personal grievance. There was some concern expressed, by persons supporting the change as well as by those opposed, that the clause relating to proposals attempting to further a "personal interest" might be used to exclude proposals relating to social or ethical issues.

Although we attempted to make it clear in the proposing release that the "personal interest" clause was not intended to apply to such matters, there appears to be some continuing concern. Accordingly, we would suggest the following modification to paragraph (c)(4):

> "If the proposal relates to the redress of a personal grievance against the issuer or any other person, or if it is designed to result in a benefit to the proponent or to further a personal interest, not shared with the other security holders at large."

What does this mean?

14. Rule 14a-8(c)(5) - Not Significantly Related to Issuer's Business

    As Proposed:

    > If the proposal relates to operations which account for less than 5% of the issuer's gross assets at the end of its most recent fiscal year, and for less than 5% of its gross earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the issuer's business;

We've just increased these figures in 404 to 5% — Inconsistent to go back to 1% in this area.

The rule as proposed would include economic factors as a partial determining factor in deciding whether proposals are significantly related to an issuer's business. Those economic tests were set at 5% of an issuer's assets, sales and earnings. In addition, the provision would provide that proposals would not be excludable, notwithstanding the failure to reach the specified economic levels, if a significant relationship to the issuer's business is demonstrated in the proposal or supporting statement.

The majority of the commentators specifically discussing this position supported the concept of economic criteria, but expressed reservation about the last clause of the proposed rule. The view was expressed that that clause would emasculate any reliance upon an economic test. Those commentators who were opposed to the proposed rule were opposed not only to the concept of an economic test, but also to the 5% threshold set for the test.

We would like to maintain the rule as proposed with one change. That change would be to lower the percentage test to 1%. In our view, the 5% test is too high given the fact that most of the companies who receive proposals are large issuers who are members of the fortune 500. A 5% test for those companies would eliminate almost any proposal on a strictly economic basis.

We do not believe that politically we could go to a straight earnings test. That would be a major change in the way shareholder proposals are regulated and we believe that it would give rise to significant lobbying efforts with the Congress by social activists including the unions, and there is little likelihood that issuers would rally with a significant response. To the extent the courts have spoken in Medical Committee and Bellotti, there seems to be judicial acceptance of the policy type vote. We think it would be a no-win situation.

Even though the last clause of the rule as proposed would be a major limiting factor on the economic tests, we believe that the inclusion of the economic test has merit because it focuses the consideration with respect to the proposal on the proper question by emphasizing the fact that we must consider the proposals as business questions. In addition, we think that the release should emphasize the fact that this provision relates to proposals concerning the issue of how to run the economic business of the company and not matters like shareholder's rights; e.g., cummulative voting.

If it is determined that we want to stay with a 5% test as opposed to a 1% test, we could consider going to an alternative dollar test to limit the application to very large issuers. For example, 5% or $25 million, whichever is less.

Better

~~Proposed revision of~~ the proposed rule:

> "If the proposal relates to operations which account for less than 1% of the issuer's "total" assets at the end of its most recent fiscal year, and for less than 1% of its "net" earnings and gross sales for its most recent fiscal year and it is not otherwise significantly related to the issuer's business."

15. Rule 14a-8(c)(6)

The existing rule reads as follows:

> If the proposal deals with a matter that is beyond the issuer's power to effectuate;

No changes were proposed in the existing rule and no comments were received. We would suggest no change.

16. Rule 14a-8(c)(7) - Ordinary Business

The existing rule reads as follows:

> If the proposal deals with a matter relating to the conduct of the ordinary business operations of the issuer;

No changes were proposed in the rule, but a change was proposed in an important interpretation of Rule 14a-8(c)(7). In the past, the staff has taken the position that proposals requesting issuers to prepare reports on specific matters or to form special committees to study a segment of the issuer's business would not be excludable under Rule 14a-8(c)(7). The Commission proposed a revision of this interpretation which would have the staff consider in each instance whether the subject matter of the special report or committee involved a matter of ordinary business, and if it did the proposal would be excludable under Rule 14a-8(c)(7).

The majority of the commentators expressing a view on this change supported the changed interpretation suggesting that the current interpretation elevates form over substance. Persons opposed to the change suggested that in fact there was a difference in asking for a report or a committee and that in fact such a request did not amount to ordinary business. In addition, it was suggested that institutions voting on proposals treated a request for a special report differently and were more likely to vote for such a proposal.

We continue to believe that the change in interpretation makes sense and should be adopted. The fact that institutions may vote differently does not mean that the preparation of such a report relating to a matter of ordinary business is not a matter of ordinary business itself.

Several commentators also suggested a change in another of the staff's longstanding positions. That position involves the application of Rule 14a-8(c)(7) to proposals relating to compensation. The staff has consistently said that such proposals are excludable under Rule 14a-8(c)(7). Recently, the pressure has increased to change this position in connction with proposals relating to "golden parachutes." We do not intend to change our existing position on the applicability of Rule 14a-8(c)(7) to remuneration proposals. We do not believe that there is any way to distinquish "golden parachute" contracts from other items of remuneration.

17. Rule 14a-8(c)(8) - Election to Office

The exsiting rule reads as follows:

If the proposal relates to an election to office;

No changes were proposed in Rule 14a-8(c)(8). Three commentators suggested that the staff should review the provision to permit the nomination of particular individuals for election to the board of directors. We do not believe that such a change woold be appropriate

18. Rule 14a-8(c)(9) - Counter Proposals

The existing rule reads as follows:

If the proposal is counter to a proposal to be submitted by the issuer at the meeting;

No changes were proposed in this provision and no comments were received.

19. Rule 14a-8(c)(10) - Moot

The existing rule reads as follows:

If the proposal has been rendered moot;

No changes were proposed in Rule 14a-8(c)(10). The Commission did, however, propose a change in the interpretation of this rule.

In the past, the staff has permitted the exclusion of proposals under Rule 14a-8(c)(10) only in those cases where the action requested by the proposal has been fully effectuated. The Commission proposed a change to permit the omission of a proposal that has been "substantially implemented by the issuer."

The vast majority of the commentators supported this change. While noting that the change would involve a more subjective standard, the commentators felt that the current test elevated form over substance. There was also some suggestions that the test should be put in the rule rather than just being made as an interpretive change.

The proposed change raises a conflict between the two themes that characterize the project to revise Rule 14a-8. On the one hand we are striving for objectivity and on the other hand we are trying to get away from interpretations which recognize only the form of the proposal while ignoring the substance of what is being proposed. We believe that the form over substance argument wins out over objectivity in this instance. As a result, we believe the interpretation should be changed as proposed.

We have no strong feelings one way or the other as to whether the paragraph should be amended rather than just announcing an interpretive change. The problem has, in the past, been one of interpretation so we would suggest leaving it as an interpretation.

The Commission also requested comment on the adoption of an interpretation under Rule 14a-8(c)(10) which would permit the omission of a precatory proposal where the board of directors has considered the request in good faith and determined not to act.

The majority of the commentators (generally all issuers) addressing this point did support the proposal. Those persons who were opposed to it, however, raised a number of important points. They pointed out that this interpretation could spell the death knell for shareholder proposals when combined with paragraph (c)(1). This interpretation would permit exclusion of almost all precatory proposals and Rule 14a-8(c)(1) would provide for exclusion of almost all mandatory proposals.

Opponents also questioned the ability to police the "good faith test." Finally, it was suggested the board members might vote differently on a proposed action if they knew that a significant number of shareholders had expressed an interest in the proposed action.

We believe that the problems suggested by the commentators raise legitimate questions about the propriety of the suggested interpretation. Accordingly, ~~we recommend~~ that it not be adopted.

20. Rule 14a-8(c)(11) - Duplicative Proposals That Are Being Included

The existing rule reads as follows:

> If the proposal is substantially duplicative of a proposal previously submitted to the issuer by another proponent, which proposal will be included in the issuer's proxy material for the meeting;

No changes were proposed in Rule 14a-8(c)(11) and no comments were received.

21. Rule 14a-8(c)(12) - Repeat Proposals

As proposed:

> If the proposal deals with substantially the same subject matter as a prior proposal submitted to security holders in the issuer's proxy statement and form of proxy relating to any annual or special meeting of security holders held within the preceding 5 calendar years, it may be omitted from the issuer's proxy materials relating to any meeting of security holders held within 3 calendar years after the latest such previous submission:
>
> Provided, That
>
> (i) If the proposal was submitted at only one meeting during such preceding period, it received less than 3 percent of the total number of votes cast in regard thereto; or
>
> (ii) If the proposal was submitted at only two meetings during such preceding period, it received at the time of its second submission less than 6% of the total number of votes cast in regard thereto; or
>
> (iii) If the prior proposal was submitted at three or more meetings during such preceding period, it received at the time of its latest submission less than 10 percent of the total number of votes cast in regard thereto; and

By same subject we mean that subject!

The existing rule permitted the exclusion of a proposal if substantially the same proposal had been included in the issuer's proxy statement in prior years and the proposal failed to generate a specified percentage

of the votes cast. The proposed change would permit exclusion of proposals dealing with substantially the same subject matter as proposals submitted in prior years but which failed to receive the requisite percentage of votes.

The majority of the commentators did support the change suggesting that it was an appropriate response to counter the abuse of the process by certain proponents that make subtle changes in proposals each year which permit them to keep raising the same issue despite the fact that shareholders have indicated by their votes that they are not interested in that issue.

Those commentators who opposed the change argued that the proposed change was too broad and could be used to exclude proposals that had only a vague relation to an earlier proposal. Many of those commentators suggested that such a broad change was not necessary and that all that was needed was a revision in the way that the staff interprets the existing provision.

We would suggest that the proposed revision of the rule not be adopted and that we maintain the existing language of the rule, but announce a new interpretive stance in the adopting release. We share the concern of certain of the commentators that the same subject matter test may be too broad. As an example, consider three separate proposals to a bank holding company. First, that the constituent banks not lend money to the South African Government

until the system of aparatheid has been abolished. Two, that the banks not lend money for nuclear power construction until a safe system of nuclear waste is developed. Three, that the banks make loans for new home purchases without considering location of the home to be purchased. Those three proposals all are concerned with different social issues, but each could be said to involve the same subject matter; bank lending policies.

We believe that the past interpretation of the rule has caused problems because we have focused too closely on the language of the proposal and not considered the concerns raised by the proposal. In effect focusing once again on form over substance. We would suggest that the adopting release should announce a test that the staff will permit the exclusion of proposals that reflect the same concerns as proposals submitted in previous years notwithstanding the fact that those proposals suggested different actions to deal with that concern. This approach would, of course, involve difficult subjective judgments for the staff and on that basis is not wholly satisfactory, but it would get at the problem of form over substance. As an example of the way that the proposed test might work we can look at three proposals to a manufacturer doing military defense work. The first proposal would be a request that the company discontinue all defense contracts. That proposal receives less than the required percentage of the votes cast. The next year one proposal is received to stop producing a particular weapons system.

That proposal could be excluded because it relates to the same concern about the company's involvement in military production. A second proposal, however, calls for the close of a particular facility making a weapons system. That proposal is received from a union concerned with the asbestos exposure involved in the production at the plant. The concern here is worker safety rather than military production. The second proposal would not be excludable.

The Commission also requested comment on the advisability of raising the percentage tests for resubmission of proposals. Currently, the rule requires a 3% vote the first time the proposal is included, 6% the second year the proposal is voted upon, and 10% every year thereafter.

Issuers that commented strongly supported an increase in the percentage tests. Proponents were opposed to any increase.

Some argument could be made that a percentage increase would not be inappropriate because evidence exists that institutions are considering proposals more on their merits now than has been the case in the past. As a result, more institutions are voting to support proposals which has raised the votes being received by proponents. We believe, however, that a 10% vote should remain for the final leval. Anytime a proposal receives 10% of the votes cast, in our view, indicates a significant interest of shareholders in the proposal. Accordingly, we would suggest a raise from 3% to 5% for the first year, and from 6% to 8% for the second year with the final percentage remaining at 10%.

Proposed

This is OK! But is not consistent with discussion supra.

Our proposed revision of Rule 14a-8(c)(12) reads as follows:

> If substantially the same proposal has previously been submitted to security holders in the issuer's proxy statement and form of proxy relating to any annual or special meeting of security holders held within the preceding 5 calendar years, it may be omitted from the issuer's proxy materials relating to any meeting of security holders held within 3 calendar years after the latest such previous submission;
>
> Provided, That
>
> (i) If the proposal was submitted at only one meeting during such preceding period, it received less than 5 percent of the total number of votes cast in regard thereto; or
>
> (ii) If the proposal was submitted at only two meetings during such preceding period, it received at the time of its second submission less than 8 percent of the total number of votes cast in regard thereto; or
>
> (iii) If the prior proposal was submitted at three or more meetings during such preceding period, it received at the time of its latest submission less than 10 percent of the total number of votes cast in regard thereto; and

22. Rule 14a-8(c)(13) - Dividend Proposals

The existing rule reads as follows:

> If the proposal relates to specific amounts of cash or stock dividends.

No changes were proposed in Rule 14a-8(c)(13) and no comments were received on this provision.

23. Rule 14a-8(d) - Procedural Requirements for Issuers

As proposed:

> Whenever the issuer asserts, for any reason, that a proposal and any statement in support thereof received from a proponent may properly be omitted from its proxy statement and form of proxy, it shall file with the Commission not later than 60 days prior to the date the preliminary copies of the proxy statement and form of proxy are filed pursuant to Rule 14a-6(a) [17 CFR 240.14a-6(a)], or such shorter period prior to such date as the Commission or its staff may permit, five copies of the following items: (1) the proposal; (2) any statement in support thereof as received from the proponent; and (3) a statement of the reasons why the issuer deems such omission to be proper in the particular case; and where such reasons are based on matters of law, a supporting opinion of counsel. The issuer shall at the same time, if it has not already done so, notify the proponent of its intention to omit the proposal from its proxy statement and form of proxy and shall forward to him a copy of the statement of reasons why the issuer deems the omission of the proposal to be proper and a copy of such supporting opinion of counsel.

Only one change was proposed. That change would require an issuer to notify the Commission and the proponent of its intention to omit a proposal 60 days in advance of the filing of the preliminary proxy material rather than 50 days in advance of such filing. The commentators approved this change almost unanimously.

We would suggest no change in the rule as proposed, but we note that if the increase to 120 days proposed for Rule 14a-8(a)(3) is delayed for one year then this change should likewise be delayed.

Yes but is it needed?

24. Rule 14a-8(e) - Issuer's Statements in Opposition

The existing rule reads as follows:

> If the issuer intends to include in the proxy statement a statement in oposition to a proposal received from a proponent, it shall, not later than ten calendar days prior to the date the preliminary copies of the proxy statement and form of proxy are filed pursuant to Rule 14a-6(a), or, in the event that the proposal must be revised to be includable, not later than five calendar days after receipt by the issuer of the revised proposal promptly forward to the proponent a copy of the statement in opposition to the proposal.
>
> In the event the proponent believes that the statement in opposition contains materially false or misleading statements within the meaning of Rule 14a-9 and the proponent wishes to bring this matter to the attention of the Commission, the proponent should promptly provide the staff with a letter setting forth the reasons for this view and at the same time promptly provide the issuer with a copy of such letter.

If we are increasing the others.. why not these?

No changes were proposed and no comments were received.

25. No-Action Procedures

The Commission also requested comment on the advisability of eliminating the staff's administrative role in the current process under Rule 14a-8. The commentators were almost without exception opposed to the discontinuation of the staff's no-action procedures. Reluctantly we are not recommending any change in the existing procedures.

26. <u>Bellotti</u>

There was no mention made of <u>Bellotti</u> in the proposing release. We believe, however, that this past shareholder proposal season indicates that it is an issue which we must bring to the Commission's attention in the action memo and that should be addressed in the release.

Not mentioned in proposing release.

The first point that should be made, is that the decision in the Bellotti case did not refer specifically to Rule 14a-8 and did not say that shareholder proposals relating to political activities were matters which were always proper subjects for shareholder proposals. The decision merely indicated that shareholder proposals might be one way in which shareholders could make their views known to an issuer's management concerning the issuer's political activity.

We would suggest the following approach for determining whether shareholder proposals involving political activities may properly be excluded from an issuer's proxy statement. We would distinguish proposals which involve specific referenda or lobbying activities which relate to an issuer's ordinary business operations from proposals which involve general political activities. As to the latter, it would appear that proposals involving requests that an issuer engage in general political activities or proposals that request that an issuer discontinue such activities would be deemed to be "specifically related" to an issuer's business under the last clause of the proposed revision of Rule 14a-8(c)(5). In this regard it would appear that such proposals involve socially significant policy issues that may be deemed to be related to an issuer's business whether or not the amounts being spent by the issuer reach the proposed threshold levels. As with other proposals under Rule 14a-8(c)(5), if the issuer is not engaged in any general political activities then proposals on such activities would not be considered to be specifically related to its business. With respect to proposals requesting expenditures on particular referenda issues or the discontinuance of such expenditures, the staff would consider the underlying

subject matter of the lobbying or political activity. If it is determined that the proposed activity relates to the issuer's ordinary business, then the proposal would be excludable under Rule 14a-8(c)(7). For example, a proposal to Coca-Cola that they lobby with respect to proposed bottle bills would be deemed to relate to Coca-Cola's ordinary business.

One of the more difficult Bellotti type proposals that the staff has been called upon to consider involves political action committees (PAC's). In the one instance where this arose in the current proxy season we determined not to express any view. It is difficult to apply the interpretative procedure discussed above to proposals relating to PAC's. If an issuer has a PAC then the first exception to the general proposition that proposals involving political activities are significantly related to an issuer's business would not apply. In addition, it does not appear that a PAC proposal would be related to an issuer's ordinary business. Issuers have argued, however, that PAC's are not significantly related to their business because they are not operated by the issuer but by a committee of the employees. The counter argument is that PAC's could not operate without the cooperation of the issuer in permitting their activities on company time and on company property. We would suggest that this would be an appropriate time to make the policy decision required as to the position that the Division is going to take on such proposals.

Form over substance

If company has a PAC or is going to why not allow it?

ATTACHMENT

Draft Summary of Comments