VIA ELECTRONIC DELIVERY: i9review@sec.gov

July 6, 2015

Keith Higgins, Director
David Fredrickson, Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Staff Review of Rule 14a-8(i)(9)

Dear Mr. Higgins and Mr. Fredrickson:

The undersigned write as shareowners and institutions with a significant stake in the Rule 14a-8 shareholder resolution process that represent individual institutions with $280.8 billion in assets under management ("AUM"), and associations that represent $2.16 trillion in AUM. We wish to provide brief comments and register specific concerns regarding the interpretation of Rule 14a-8(i)(9) (the "Rule") which allows exclusion of a shareholder proposal that "directly conflicts" with a management proposal. Each of the organizations, funds, and institutions listed is actively engaged as shareowners, either directly or indirectly, in filing proposals and engaging with companies pursuant to Rule 14a-8.

ANALYSIS

We appreciate that Staff has initiated a review process and is seeking input in regard to interpretation of the Rule. Although correspondence from the corporate community has implied that the positions taken by Staff rulings in recent years are acceptable and appropriate,[1] we believe that interpretations of the Rule have strayed from its original, narrow purpose. In particular, we are concerned that interpretations advanced by the corporate bar and registrant community could negatively impact the shareholder resolution process as a whole, which currently allows shareholders to submit and vote upon proposals on a diverse range of topics. Recent years have seen companies target for exclusion *proxy access* and *special meeting* proposals, especially, through use of an overly broad interpretation of Rule 14a-8(i)(9). We are concerned that this process of preemptive action will expand if the corporate bar's approach is accepted.

[1] See, *inter alia*, June 10, 2015 correspondence from Gibson Dunn & Crutcher LLP and four other law firms headed *Application of Rule 14a-8(i)(9) to Conflicting Shareholder Proposals.*

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Our approach to this issue is informed by our understanding that a vote on a duly submitted shareholder proposal provides materially important information to both shareholders and the Board in regard to available policy alternatives and shareholder preferences. In line with this, an examination of the origins of Rule 14a-8(i)(9) demonstrates that the Rule was intended to address exceptional circumstances, where a shareholder knew of a pre-existing management proposal (such as a merger) and attempted to use the shareholder resolution process to circumvent proxy solicitation rules.

In contrast to this narrow construction, positions taken recently by the corporate community[2] suggest that the mere assertion that a future company proposal is possible could cause exclusion of a shareholder-sponsored proposal even though the company proposal: **(a)** did not exist at the time the shareholder's proposal was filed, **(b)** may state the negative or opposite of a duly submitted shareholder proposal, or **(c)** might address the subject matter of the shareholder proposal, but in terms that undermine or even negate the proponent's intent.

Affording companies such broad opportunity to exclude shareholder proposals under Rule 14a-8(i)(9) would invite registrants to circumvent rules the SEC has carefully administered over many years to ensure fairness and balance between registrants and shareowners. A broad interpretation encourages gamesmanship by registrants that wish to exclude proposals, and could immerse registrants, shareholders, and the Staff in a quagmire of debate over motivation, timing, good faith, and proper interpretation of the Rule.

2015 CASE STUDY

It has been amply demonstrated how the Rule has been used in recent years to obstruct *proxy access* proposals.[3] The SEC's wise decision to suspend comment on applicability of the Rule during the 2015 proxy season, following its reconsideration of the no-action decision in *Whole Foods Market,* January 16, 2015, set the stage for a real-time case study as to how the companies that submitted Rule 14a-8(i)(9) no-action letters on *proxy access* proposals subsequently dealt with purportedly conflicting shareholder proposals on *proxy access* that appeared in the same proxy.[4]

[2] See, e.g., June 10, 2015 letter from Gibson Dunn & Crutcher LLP and four other law firms.

[3] See Michael Garland, Office of NYC Comptroller, June 17, 2015 letter to Keith Higgins on behalf of New York City pension systems (hereafter, "*NYC Pension Systems letter*").

[4] Data derived from *NYC Pension Systems letter*.

Seven companies included in their proxy both the management and the allegedly conflicting shareholder proposal. Of these, at least three companies provided a clear explanation of the difference between the two proposals. The outcomes were not confusing. Instead, they provided a valuable additional source of information to the Board regarding shareholder preferences.[5]

However, viewed in retrospect, at a number of other companies the facts demonstrate a clear pattern of gamesmanship.[6] For instance, a number of companies filed no-action requests that expressly indicated the company's intent to publish its own *proxy access* proposal; however, they subsequently failed to place a company proposal on the proxy. Some of these companies, while failing to publish their own proposal, also opposed the concept of *proxy access* in opposition statements to the respective shareholder proposals. Taken together, these facts suggest that for these companies the true intent was to distort the use and purpose of Rule 14a-8(i)(9) so as to exclude shareholder proposals and to thwart opportunities for shareholders to vote on *proxy access*.

The Rule's purpose is not to provide an avenue for management to develop after-the-fact "counterproposals" for the purpose of excluding properly submitted shareholder proposals.[7] A broad interpretation of the type put forward by the corporate bar would reverse the Rule's original intent, and permit this sort of gamesmanship.

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[5] Positive models of AES Corporation, Exelon and Visteon are cited in the *NYC Pension Systems letter*.

[6] The *NYC Pension Systems letter* notes: "Despite those public promises to the SEC and to investors that each company would be presenting a proxy access proposal, 13 of the 25 companies failed to present any company-sponsored proposal on proxy access. Indeed, in their opposition statements to shareowner proxy access resolutions, 11 of those 13 companies opposed and argued against the entire concept of proxy access in any form."

[7] *Cypress Semiconductor Corp.* (March 11, 1998) denying exclusion under 14a-8(c)(9): "[S]taff notes that it appears that the Company prepared its proposal on the same subject matter significant part in response to the Mercy Health Services proposal." *Genzyme Corporation* (March 20, 2007) denying exclusion under 14a-8(i)(9). "[W]e note your representation that you decided to submit the company proposal on the same subject matter to shareholders, in part, in response to your receipt of the AFL-CIO Reserve Fund proposal."

RECOMMENDATIONS

Accordingly, the undersigned recommend that Staff adopt the following approach to interpretation of Rule 14a-8(i)(9), which would reflect and restore the Rule's original intent and would also preclude the kind of gamesmanship that has been evident in recent years:

1. A "direct conflict" could be found if a company's and a shareholder's proposals are both legally binding *and* there is a direct conflict between the terms of each proposal.

2. The potential for exclusion under Rule 14a-8(i)(9) should not apply to shareholder proposals that were submitted prior to the public announcement of an allegedly conflicting management proposal.

3. In the event that a binding shareholder proposal is found to directly conflict with a binding management proposal, the shareholder should be granted an opportunity to resolve the conflict by revising the proposal so as to make it advisory.[8]

4. In conjunction with a Rule 14a-8(i)(9) no-action request, a company should be required to provide the text of its proposal, and demonstrate in what manner specific elements "directly conflict" with the shareholder proposal.

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[8] This is consistent with the approach taken in Staff Legal Bulletin 14, in which Staff stated it would allow Proposals to be modified to make them nonbinding so that they are not excludable on that basis.

IN CLOSING

In response to recent events surrounding the Rule, we welcome the Staff's careful consideration of its approach to Rule 14a-8(i)(9), and would also welcome further dialogue with Staff to expand on our concerns regarding this matter.

Sincerely:

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