Division of Corporation Finance
Securities and Exchange Commission

Shareholder Proposals

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Summary: This staff legal bulletin provides information for companies and shareholders regarding Rule 14a-8 under the Securities Exchange Act of 1934.

Supplementary Information: The statements in this bulletin represent the views of the Division of Corporation Finance (the "Division"). This bulletin is not a rule, regulation or statement of the Securities and Exchange Commission (the "Commission"). Further, the Commission has neither approved nor disapproved its content.

Contacts: For further information, please contact the Division's Office of Chief Counsel by submitting a web-based request form athttps://tts.sec.gov/cgi-bin/corp_fin_interpretive.

A. The purpose of this bulletin

This bulletin is part of a continuing effort by the Division to provide guidance on important issues arising under Exchange Act Rule 14a-8. Specifically, this bulletin contains information about the Division's views on:

- the scope and application of Rule 14a-8(i)(9); and
- the scope and application of Rule 14a-8(i)(7) in light of *Trinity Wall Street v. Wal-Mart Stores, Inc.*[1]

You can find additional guidance about Rule 14a-8 in the following bulletins that are available on the Commission's website: SLB No. 14, SLB No. 14A,SLB No. 14B, SLB No. 14C, SLB No. 14D, SLB No. 14E, SLB No. 14F and SLB No. 14G.

B. Rule 14a-8(i)(9)

1. Background

Rule 14a-8(i)(9) is one of the substantive bases for exclusion of a shareholder proposal in Rule 14a-8. It permits a company to exclude a proposal "[i]f the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting."

During the most recent proxy season, questions arose about the Division's interpretation of Rule 14a-8(i)(9). In light of these questions, Chair Mary Jo White directed the Division to review the proper scope and application of the rule.[2] As part of this review, we reviewed,

among other things, Commission and Division statements and other materials, and considered approaches suggested by commenters.

2. History of Rule 14a-8(i)(9)

This exclusion was first adopted in 1967. At that time, the Commission amended Rule 14a-8(a), which already stated that Rule 14a-8 did not apply to elections to office, to codify the Commission's view that Rule 14a-8 "does not apply ... to counter proposals to matters to be submitted by the management."[3]

In 1976, the Commission renumbered and amended the exclusion. As adopted, Rule 14a-8(c)(9) provided that management could omit a proposal and any statement in support thereof from its proxy statement and form of proxy "[i]f the proposal is counter to a proposal to be submitted by the management at the meeting."[4] The Commission stated in the adopting release that "subparagraph (c)(9) of the revised rule merely restates a ground for omission already set forth in the existing rule. That is, a proposal that is counter to a proposal to be presented by the management may be omitted from an issuer's proxy materials."[5]

In 1982, the Commission characterized the exclusion as one of the substantive bases under Rule 14a-8 designed to permit omission of a shareholder proposal that "constitute[s] an abuse of the security holder proposal process."[6]

In 1998, the Commission revised Rule 14a-8 into its current Q&A, plain English format. In connection with these amendments, the Commission replaced the language in Rule 14a-8(c)(9) with Rule 14a-8(i)(9)'s current language, which allows the exclusion of a proposal that "directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting."[7] The Commission also added a note to the rule stating that a "company's submission to the Commission under this section should specify the points of conflict with the company's proposal."[8] In proposing this revision, the Commission stated that the amended rule would "reflect the Division's long-standing interpretation permitting omission of a shareholder proposal if the company demonstrates that its subject matter directly conflicts with all or part of one of management's proposals."[9] At adoption, the Commission clarified that "by revising the rule we do not intend to imply that proposals must be identical in scope or focus for the exclusion to be available."[10]

3. The Division's application of Rule 14a-8(i)(9)

Based on our review of the history of the exclusion, we believe that it was intended to prevent shareholders from using Rule 14a-8 to circumvent the proxy rules governing solicitations. When a shareholder solicits in opposition to a management proposal, the Commission's proxy rules contain additional procedural and disclosure requirements that are not required by Rule 14a-8.[11] We do not believe the shareholder proposal process should be used as a means to conduct a solicitation in opposition without complying with these requirements. Several commenters agreed with this view.[12]

Many of the Division's response letters granting no-action relief under the exclusion have expressed the view that a shareholder proposal was excludable if including it, along with a management proposal, could present "alternative and conflicting decisions for the shareholders" and create the potential for "inconsistent and ambiguous results."[13] The response letters have used variations of this language for decades to articulate when a shareholder proposal may be excluded.[14] This language focused on the potential for

shareholder confusion and inconsistent mandates, instead of more specifically on the nature of the conflict between a management and shareholder proposal.

After reviewing the history of Rule 14a-8(i)(9) and based on our understanding of the rule's intended purpose, we believe that any assessment of whether a proposal is excludable under this basis should focus on whether there is a direct conflict between the management and shareholder proposals. For this purpose, we believe that a direct conflict would exist if a reasonable shareholder could not logically vote in favor of both proposals, *i.e.*, a vote for one proposal is tantamount to a vote against the other proposal. While this articulation may be a higher burden for some companies seeking to exclude a proposal to meet than had been the case under our previous formulation, we believe it is most consistent with the history of the rule and more appropriately focuses on whether a reasonable shareholder could vote favorably on both proposals or whether they are, in essence, mutually exclusive proposals.[15]

In considering no-action requests under Rule 14a-8(i)(9) going forward, we will focus on whether a reasonable shareholder could logically vote for both proposals. For example, where a company seeks shareholder approval of a merger, and a shareholder proposal asks shareholders to vote against the merger, we would agree that the proposals directly conflict. Similarly, a shareholder proposal that asks for the separation of the company's chairman and CEO would directly conflict with a management proposal seeking approval of a bylaw provision requiring the CEO to be the chair at all times.

We will not, however, view a shareholder proposal as directly conflicting with a management proposal if a reasonable shareholder, although possibly preferring one proposal over the other, could logically vote for both. For example, if a company does not allow shareholder nominees to be included in the company's proxy statement, a shareholder proposal that would permit a shareholder or group of shareholders holding at least 3% of the company's outstanding stock for at least 3 years to nominate up to 20% of the directors would not be excludable if a management proposal would allow shareholders holding at least 5% of the company's stock for at least 5 years to nominate for inclusion in the company's proxy statement 10% of the directors. This is because both proposals generally seek a similar objective, to give shareholders the ability to include their nominees for director alongside management's nominees in the proxy statement, and the proposals do not present shareholders with conflicting decisions such that a reasonable shareholder could not logically vote in favor of both proposals.

Similarly, a shareholder proposal asking the compensation committee to implement a policy that equity awards would have no less than four-year annual vesting would not directly conflict with a management proposal to approve an incentive plan that gives the compensation committee discretion to set the vesting provisions for equity awards. This is because a reasonable shareholder could logically vote for a compensation plan that gives the compensation committee the discretion to determine the vesting of awards, as well as a proposal seeking implementation of a specific vesting policy that would apply to future awards granted under the plan.

In the preceding examples, the board of directors may have to consider the effects of both proposals if both the company and shareholder proposals are approved by shareholders. We do not believe, however, that such a decision represents the kind of "direct conflict" the rule was designed to address.[16]

Commenters generally agreed that Rule 14a-8(i)(9) is designed to ensure that Rule 14a-8 is not used as a means to circumvent the Commission's proxy rules governing solicitations,[17] and suggested several alternatives for administering the exclusion going forward. We agree that proponents should not be able to use Rule 14a-8 to circumvent the proxy rules governing solicitations and believe that focusing on whether a reasonable shareholder could logically vote for both proposals effectively addresses such concerns.

Some commenters suggested that the Division should take the view that precatory proposals do not directly conflict with management proposals because they are not binding.[18] We believe that a precatory shareholder proposal, while not binding, may nevertheless directly conflict with a management proposal on the same subject if a vote in favor is tantamount to a vote against management's proposal. Other commenters suggested that the exclusion should not apply when a shareholder submits his or her proposal before the company approves its proposal.[19] This approach would not necessarily prevent a shareholder from submitting a proposal opposing a management proposal, in contravention of the proxy rules governing solicitations. Finally, other commenters suggested that the Division either continue its historic application of the exclusion[20] or adopt a broader, subject matter exclusion.[21] We believe that these approaches do not take full account of the language of the exclusion because they may allow the exclusion of proposals that propose different means of accomplishing an objective, but do not directly conflict. In our view, granting no-action relief only if a reasonable shareholder could not logically vote in favor of both proposals is more appropriately rooted in the exclusion's intended purpose and language, and better helps companies, proponents and the staff determine when two proposals "directly conflict."[22]

C. Rule 14a-8(i)(7)

In *Trinity Wall Street v. Wal-Mart Stores, Inc.*, the U.S. Court of Appeals for the Third Circuit addressed the application of Rules 14a-8(i)(3) and 14a-8(i)(7).[23] Reversing a decision by the U.S. District Court for the District of Delaware which ruled that a shareholder proposal could not be excluded, a three-judge panel held that a shareholder proposal submitted to Wal-Mart Stores, Inc. ("Wal-Mart") was excludable under Rules 14a-8(i)(3)[24] and 14a-8(i)(7). The staff had previously agreed that Wal-Mart could exclude the proposal under Rule 14a-8(i)(7).[25]

In analyzing whether the proposal was excludable under Rule 14a-8(i)(7), the Third Circuit concluded that the proposal's subject matter related to Wal-Mart's ordinary business operations - specifically, "a potential change in the way Wal-Mart decides which products to sell." This conclusion was the same as our conclusion when responding to Wal-Mart's no-action request. We believe our analysis in this matter is consistent with the views the Commission has expressed on how to analyze proposals under the ordinary business exclusion, *i.e.*, the analysis should focus on the underlying subject matter of a proposal's request for board or committee review regardless of how the proposal is framed.[26]

The panel also considered whether the significant policy exception to the ordinary business exclusion applied. The majority opinion employed a new two-part test, concluding that "a shareholder must do more than focus its proposal on a significant policy issue; the subject matter of its proposal must 'transcend' the company's ordinary business."[27] The majority opinion found that to transcend a company's ordinary business, the significant policy issue must be "divorced from how a company approaches the nitty-gritty of its core business."[28] This two-part approach differs from the Commission's statements on the ordinary business exclusion and Division practice.

In contrast, the concurring judge analyzed Rule 14a-8(i)(7) in a manner consistent with the approach articulated by the Commission and applied by the Division, including in Wal-Mart's no-action request. Summarizing the Commission's history on this exclusion, the judge noted that "whether a proposal focuses on an issue of social policy that is sufficiently significant is not separate and distinct from whether the proposal transcends a company's ordinary business. Rather, a proposal is sufficiently significant 'because' it transcends day-to-day business matters."[29] The judge also explained that the Commission "treats the significance and transcendence concepts as interrelated, rather than independent."[30]

Although we had previously concluded that the significant policy exception does not apply to the proposal that was submitted to Wal-Mart, we are concerned that the new analytical approach introduced by the Third Circuit goes beyond the Commission's prior statements and may lead to the unwarranted exclusion of shareholder proposals. Whereas the majority opinion viewed a proposal's focus as separate and distinct from whether a proposal transcends a company's ordinary business, the Commission has not made a similar distinction. Instead, as the concurring judge explained, the Commission has stated that proposals focusing on a significant policy issue are not excludable under the ordinary business exception "*because*the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote."[31] Thus, a proposal may transcend a company's ordinary business operations even if the significant policy issue relates to the "nitty-gritty of its core business." Therefore, proposals that focus on a significant policy issue transcend a company's ordinary business operations and are not excludable under Rule 14a-8(i)(7).[32] The Division intends to continue to apply Rule 14a-8(i)(7) as articulated by the Commission and consistent with the Division's prior application of the exclusion, as endorsed by the concurring judge, when considering no-action requests that raise Rule 14a-8(i)(7) as a basis for exclusion.

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[1] 792 F.3d 323 (3d Cir. 2015).

[2] *See* Statement from Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Proxy Proposals (Jan. 16, 2015), *available at*http://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html.

[3] Release No. 34-8206 (Dec. 14, 1967).

[4] Release No. 34-12999 (Nov. 22, 1976).

[5] *Id*.

[6] Release No. 34-19135 (Oct. 14, 1982).

[7] Release No. 34-40018 (May 21, 1998).

[8] *Id*.

[9] Release No. 34-39093 (Sept. 18, 1997).

[10] Release No. 34-40018.

[11] The Commission defined "solicitation in opposition" in Exchange Act Rule 14a-6. *See* Note 3 to Rule 14a-6(a). The discussion in this section is not intended to apply outside of the Division's application of Rule 14a-8(i)(9).

[12] *See* letters from (i) Faegre Baker Daniels LLP dated March 6, 2015 ("Faegre"); (ii) the Society of Corporate Secretaries & Governance Professionals dated March 25, 2015 (the "Society"); (iii) Gibson, Dunn & Crutcher LLP, Sidley Austin LLP, Wilmer Cutler Pickering Hale and Dorr LLP, Morrison & Foerster LLP and Skadden, Arps, Slate, Meagher & Flom LLP dated June 10, 2015 (the "Law Firms"); (iv) Business Roundtable dated June 10, 2015 ("Business Roundtable"); (v) Domini Social Investments LLC dated June 22, 2015 ("Domini"); (vi) US SIF: The Forum for Sustainable and Responsible Investment dated July 6, 2015 ("US SIF"); and (vii) Adrian Dominican Sisters, *et al.*, dated June 18, 2015 (the "Proponents").

[13] *See*, *e.g.*, *SBC Communications, Inc.* (Feb. 2, 1996). This articulation of the scope and application of the exclusion evolved over time. In the 1970s, some of the Division's response letters referenced the potential for inconsistent mandates if shareholders approved both proposals. *See*, *e.g.*,*General Mills, Inc.* (Jul. 6, 1979). Response letters in the early 1980s occasionally stated that inclusion of the proposal "may cause shareholder confusion," *see*, *e.g.*, *Ehrenreich Photo-Optical Industries, Inc.* (May 5, 1981), or "would be the source of shareholder confusion," *see*, *e.g.*,*Executive Industries, Inc.* (Jun. 26, 1981). By the 1990s, these concepts came together in the Division's most recent articulation of what constitutes a direct conflict, which references "alternative and conflicting decisions" and "inconsistent and ambiguous results." Two commenters highlighted the different language the staff has used over the years. *See* letters from Domini dated June 22, 2015 and Professor J. Robert Brown, Jr. dated June 30, 2015.

[14] *See id.*

[15] We remind companies that the staff may need a complete copy of a company's proposal to evaluate a no-action request under Rule 14a-8(i)(9) and that the staff may not be able to agree that the company has met its burden of demonstrating that a shareholder proposal is excludable if those materials are not included with the company's no-action request. This same principle applies when the staff evaluates no-action requests under Rule 14a-8(i)(10).

[16] We recognize, however, that there may be instances in which a binding shareholder and management proposal would directly conflict. We do not believe that a reasonable shareholder would logically vote for two proposals, each of which has binding effect, that contain two mutually exclusive mandates. However, consistent with the Division's practice under Rule 14a-8(i)(1), our no-action response may allow proponents to revise a proposal's form from binding to nonbinding. If revised within a specified time, and a reasonable shareholder could otherwise logically vote for both proposals, the shareholder proposal would not be excludable under Rule 14a-8(i)(9). In addition, a binding shareholder proposal on the same subject as a binding management proposal may be excludable under Rules 14a-8(i)(1) or 14a-8(i)(2) to the extent a company demonstrates that it is excludable under one of those bases.

[17] *See supra*, note 12.

[18] *See* letters from (i) The Marco Consulting Group dated January 9, 2015; (ii) the Council of Institutional Investors dated January 9, 2015 and March 25, 2015; (iii) the New York City Comptroller dated January 15, 2015 and June 17, 2015; (iv) the California Public Employees Retirement System and the California State Teachers' Retirement Systems dated May 21, 2015; (v) James McRitchie dated June 8, 2015 ("McRitchie"); (vi) Domini; (vii) US SIF; (viii) the Proponents; (ix) the New York State Comptroller dated July 7, 2015; (x) John Chevedden dated July 14, 2015 ("Chevedden"); (xi) Steve Nieman dated July 14, 2015 ("Nieman"); and (xii) the State Board of Administration of Florida dated August 7, 2015.

[19] *See* letters from (i) McRitchie; (ii) Domini; (iii) the Proponents; (iv) US SIF; (v) Chevedden; and (vi) Nieman.

[20] *See* letters from (i) American Bankers Association, *et al*., dated February 24, 2015;(ii) the Law Firms; and (iii) Business Roundtable.

[21] *See* letters from Faegre and the Society.

[22] Where a shareholder proposal is not excluded and companies are concerned that including proposals on the same topic could potentially be confusing, we note that companies can, consistent with Rule 14a-9, explain in the proxy materials the differences between the two proposals and how they would expect to consider the voting results. As always, we expect companies and proponents to respect the Rule 14a-8 process and encourage them to find ways to constructively resolve their differences.

[23] Rule 14a-8(i)(3) permits a company to exclude a shareholder proposal "[i]f the proposal or supporting statement is contrary to ... [Rule] 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials" and Rule 14a-8(i)(7) permits a company to exclude a shareholder proposal "[i]f the proposal deals with a matter relating to the company's ordinary business operations."

[24] Two judges concluded that the proposal could be excluded under Rule 14a-8(i)(3). The Division was not asked to express a view on the application of Rule 14a-8(i)(3) to this proposal in the no-action process and therefore we do not express a view in this bulletin.

[25] *Wal-Mart Stores, Inc.* (Mar. 20, 2014). In our view, the proposal was excludable because it related to the company's ordinary business operations and did not focus on a significant policy issue.

[26] Release No. 34-20091 (Aug. 16, 1983).

[27] *Trinity*, 792 F.3d at 346-347.

[28] *Id*. at 347.

[29] *Id*. at 353 (Schwartz, J., concurring).

[30] *Id*.

[31] Release No. 34-40018 (emphasis added).

[32] Whether the significant policy exception applies depends, in part, on the connection between the significant policy issue and the company's business operations. *See* Staff Legal Bulletin No. 14E (Oct. 27, 2009) (stating that a proposal generally will not be excludable "as long as a sufficient nexus exists between the nature of the proposal and the company").