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SHAREHOLDER PROPOSALS

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Rule 14a-8(a) defines a shareholder proposal as a ''recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders.'' In addition, ''[u]nless otherwise indicated, the word 'proposal' as used in this section refers both to your proposal, and to your corresponding statement in support of your proposal (if any).''

Compliance with the eligibility, form, timeliness, and other procedural rules described below is only the first step for a proponent seeking inclusion of a shareholder proposal in a company's proxy material. The second step is to withstand possible challenge on the 13 separate substantive grounds upon which a company may omit a shareholder proposal and supporting statement under Rule 14a-8(i).[1]

B. 500-Word Limit

Rule 14a-8(d) provides that a proposal may be no more than 500 words in length. The purpose of this provision is to limit the expense associated with including shareholder proposals in company proxy materials. The Commission's position is that long proposals ''constitute an unreasonable exercise of the right to submit proposals at the expense of other shareholders and tend to obscure other material matters in the proxy statements of companies, thereby reducing the effectiveness of such documents.''[2] Though this provision sounds straightforward, in practice it can be challenging to determine what words and symbols should be included in the count and how (e.g., whether a hyphenated word should be counted as one or two words), so one cannot merely rely on a word count program.

In Staff Legal Bulletin No. 14, the Division of Corporation Finance explained that a company may count the words in a proposal's ''title'' or ''heading'' in determining whether the proposal exceeds the 500-word limit if those words are, in effect, ''arguments in support of the proposal.''[3]

In that same Staff Legal Bulletin, the Division of Corporation Finance also explained that if a shareholder references a website address in the proposal or supporting statement, that does not violate the 500-word limit. However, it noted, that ''a website address could be subject to exclusion if it refers readers to information that may be materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the proxy rules.''[4] In Staff Legal Bulletin No. 14G, the SEC reiterated that a reference to a website counts as one word for the purposes of the 500-word limit.[5]

Most recently, in Staff Legal Bulletin No. 14I, the Commission staff has taken the position that graphics or other images are not ''words'' for purposes of the 500-word limit and therefore may not be counted in making an argument for exclusion under Rule 14a-8(d).[6] Staff Legal Bulletin No. 14I does provide that exclusion would be appropriate under Rule 14a-8(d) where ''the total number of words in a proposal, including words in the graphics, exceeds 500.''[7] There may be other bases on which to argue for exclusion of graphics or other images, however, including that the graphics or images are false or misleading.[8] For instance, Staff Legal Bulletin No. 14I states that graphs and images could be excluded under Rule 14a-8(i)(3) where they:

- make the proposal materially false or misleading;
- render the proposal so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing it, would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires;
- directly or indirectly impugn character, integrity or personal reputation, or directly or indirectly make charges concerning improper, illegal, or immoral conduct or association, without factual foundation; or
- are irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote.[9]

C. Who Is Eligible to Submit a Proposal?

Rule 14a-8(b) provides that in order to be eligible to submit a proposal, a shareholder must have continuously held at least $2,000 in market value, or 1 percent, of the company's outstanding securities entitled to be voted on the proposal at the meeting for at least one year as of the date on which the shareholder submits the proposal. The shareholder also must continue to hold those securities through the date of the meeting.

1. $2,000 or 1 percent requirement

While Rule 14a-8(b) provides that a shareholder is eligible to submit a proposal if the proponent meets either the $2,000 or 1 percent requirement, it will almost always be easier for the shareholder to satisfy the $2,000 requirement. Acquiring 1 percent of the stock of most public companies would require an investment far in excess of $2,000 by the shareholder.

To determine whether the $2,000 requirement is satisfied, the Commission staff looks at ''whether, on any date within the 60 calendar days before the date the shareholder submits the

[1] See *Substantive Bases for Exclusion*, § V, *infra*.

[2] Exchange Act Release No. 12,999 (Nov. 22, 1976).

[3] Staff Legal Bulletin No. 14, Item C2(a) (July 13, 2001).

[4] *Id.* at Item C2(b).

[5] Staff Legal Bulletin No. 14G, Item D (Oct. 16, 2012). For more details on Staff Legal Bulletin No. 14G, please see *Rule 14a-8(i)(3)—Violation of proxy rules*, § V-B3, *infra*.

[6] Staff Legal Bulletin No. 14I, Item E (Nov. 1, 2017); *see* General Electric Company, SEC No-Action Letter (Feb. 23, 2016).

[7] Staff Legal Bulletin No. 14I, Item E2 (Nov. 1, 2017).

[8] *See* General Electric Company, Reconsideration Request, SEC No-Action Letter (Feb. 23, 2017) (concurring in exclusion from a proposal of an image containing emojis and charts comparing different companies debts and earnings pursuant to Rule 14a4-8(i)(3), finding such image ''irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote'').

[9] Staff Legal Bulletin No. 14I, Item E2 (Nov. 1, 2017).

proposal, the shareholder's investment is valued at $2,000 or greater, based on the average of the bid and ask prices.''[10]

Depending on the market on which the company's stock is listed, it may be difficult to obtain bid and ask prices. When this is the case, ''companies and shareholders should determine the market value by multiplying the number of securities the shareholder held for the one-year period by the highest selling price during the 60 calendar days before the shareholder submitted the proposal. For purposes of this calculation, it is important to note that a security's highest selling price is not necessarily the same as its highest closing price.''[11]

Despite Rule 14a-8(b)'s language that a proponent ''must have continuously held at least $2,000 in market value,'' the market value used for this test is based on the highest trading price during the 60-day period preceding the submission of the proposal.

It is important to note that the Commission staff has expressed the view that shareholders may aggregate their shares to satisfy this minimum ownership requirement. For example, in AMR Corporation, the Commission staff rejected a request to exclude a shareholder proposal under Rule 14a-8(b) where a group of shareholders had aggregated their shares to satisfy Rule 14a-8's minimum ownership requirements.[12]

2. Shares entitled to be voted

Rule 14a-8(b) provides that a proponent may only submit a proposal if it would be entitled to vote on the proposal at the shareholders' meeting at which the proposal would be presented. Companies that have issued multiple classes or series of securities may have outstanding securities with limited voting rights. A holder of securities with limited voting rights cannot rely on Rule 14a-8 in submitting a proposal if it would not be entitled to vote on the proposal being submitted.[13]

3. Holding period

a. Requirements

Under Rule 14a-8(b), the proponent must have held the company's securities for at least one year before the date on which it submits a proposal. The ownership must be continuous over the year.

Rule 14a-8(b) requires that proponents provide the company with a written statement that it intends to continue to own the securities through the date of the shareholders' meeting. This representation must come from the proponent, even if the proponent is not the record holder of the stock. The Commission staff does not accept restricted or qualified statements from a proponent about its intent to hold the securities.

Under Rule 14a-8(f)(2), if the company includes a proposal, but the proponent disposes of its securities before the meeting date, the company may exclude any proposal submitted by the proponent for any meeting to be held during the following two calendar years. The proponent must demonstrate uninterrupted ownership of the requisite amount of securities from the date of submission of the proposal through the date of the meeting.

b. Two common errors

In Staff Legal Bulletin No. 14F, the Commission staff noted that shareholder proponents often make two errors in submitting proof of ownership. First, proponents may fail to prove ownership for the full year preceding the proposal. In this regard, many proof of ownership letters as of a date before the date the proposal is submitted, thereby leaving a gap between the date of the verification and the date the proposal is submitted. In other cases, the proof of ownership letter speaks as of a date after the date the proposal was submitted but covers a period of only one year, thus failing to verify the shareholder's beneficial ownership over the required full one-year period preceding the date of the proposal's submission.[14]

Second, many letters fail to confirm continuous ownership of the securities, such as when a broker or bank submits a letter that confirms the shareholder's beneficial ownership only as of a specified date but omits any reference to continuous ownership for a one-year period.

The Commission staff indicated that brokers or banks providing proof of ownership statements could avoid these two errors by adhering to the following standard formulation: ''As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least one year, [number of securities] shares of [company name] [class of securities].''[15]

c. Ownership in merged entities

Proponents are not allowed to tack their prior ownership of stock of a company that is merged out of existence. In the context of a business combination, the Commission staff has allowed a company to exclude a proposal if the proponent acquired its shares pursuant to a business combination within one year of submitting the proposal, based on the position that business combinations constitute separate sales and purchases of securities under the federal securities laws and restart the clock for a proponent's holding period from the effective date of the business combination.[16]

In these situations, companies are not required to provide proponents with an opportunity to cure under Rule 14a-8(f) because the deficiency cannot be remedied.

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[10] Staff Legal Bulletin No. 14, Item C1(a) (July 13, 2001).

[11] *Id.*

[12] *See* AMR Corp., SEC No-Action Letter (March 12, 2009) (''We are unable to concur in your view that AMR may exclude the proposal under Rule 14a-8(f). We note in particular that you did not assert that the aggregated holdings of the co-proponents do not satisfy the minimum share ownership requirements specified by Rule 14a-8(b). Accordingly, it is our view that AMR may not omit the proposal from its proxy materials in reliance on Rule 14a-8(b).''). Even if shares are aggregated, however, the shares aggregated must have the right to vote. *See* Xerox Corp., SEC No-Action Letter (Feb. 19, 1992).

[13] *See, e.g.,* RAIT Financial Trust, SEC No-Action Letter (March 10, 2017); New York Times Co., SEC No-Action Letter (Dec. 31, 2008).

[14] Staff Legal Bulletin No. 14F, Item C (Oct. 18, 2011).

[15] Note, however, that the Commission staff has expressly clarified that this language, while acceptable for purposes of Rule 14a-8(b), is not mandatory or exclusive. Staff Legal Bulletin No. 14F, n.11 (Oct. 18, 2011).

[16] *See, e.g.*, Merck & Co., Inc., SEC No-Action Letter (March 16, 2011, recon. denied March 31, 2011) (concurring in exclusion of a proposal pursuant to Rule 14a-8(b) where the proponent failed to supply, within 14 days of receipt of Merck's request, documentary support sufficiently evidencing that it satisfied the minimum ownership requirement for the one-year period as of the date that it submitted

In contrast, the Commission staff has taken the view that a shareholder can include the time that such shareholder owned stock in the former parent of a spun-off company if such former parent was a public company, in determining whether the shareholder satisfies the minimum holding period of Rule 14a-8.[17]

d. Ownership following initial public offering

The Commission also has taken the position that a company may exclude a shareholder proposal on the basis that the proponent failed to meet the one-year ownership requirement where the subject company's initial public offering took place less than one year before the deadline for submission of shareholder proposals, therefore rendering it impossible for a shareholder proponent to meet the holding period requirement.[18] The practical result of this is that newly-public companies generally will have at least a year from their initial public offering before they will be required to include a shareholder proposal submitted pursuant to Rule 14a-8.

D. Proof of Ownership

1. In general

Rule 14a-8(b) requires proponents to provide information to help the company verify ownership information. Rule 14a-8(a)(1) requires shareholder proponents to submit with their proposals their names, addresses, and the number of voting securities held of record or beneficially. Inexperienced proponents may be unfamiliar with these requirements and may thus fail to follow the requisite procedures when a company asks them to verify their eligibility.

Under Rule 14a-8(a)(1), a company may (but is not required to) request documentation from the proponent about its claim that it is the beneficial owner of the required amount of securities for the requisite period and has the intent to hold the securities through the meeting date.

In order for a company to exclude a shareholder proposal on the grounds that the shareholder does not satisfy the minimum ownership requirements or on the grounds that it failed to provide sufficient documentation of its ownership, however, the company must submit a timely notification of the deficiency that requests such information.[19]

If the proponent is the registered owner of the shares (also known as the ''record holder''), a company can verify the proponent's eligibility by reviewing its records of ownership, including the shareholder list. Few shareholders hold stock of record, however; most are beneficial owners or ''street name'' holders, whose shares are held in the name of an intermediary, usually the proponent's bank or broker. Because the holdings of beneficial owners do not appear in the company's records, the proponent must prove its eligibility to submit a proposal. A shareholder can do so in one of two ways:

- The first way is to submit to the company a written statement from the ''record'' holder of the securities (usually a broker or bank) verifying that, at the time the shareholder submitted his or her proposal, he or she continuously held the securities for at least one year. The shareholder must also include his or her own written statement that he or she intends to continue to hold the securities through the date of the meeting of shareholders.

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the original version of the proposal as required by Rule 14a-8(b), where less than one year had passed since the merger of Merck and Schering-Plough and where the proponent owned shares in the target company prior to the merger and failed to submit proof of ownership of shares in Schering-Plough, the formerly public parent company of the post-merger surviving entity, Merck & Co., Inc.); Green Bankshares, Inc., SEC No-Action Letter (Feb. 13, 2008) (''There appears to be some basis for your view that Green Bankshares may exclude the proposal under rule 14a-8(b), because at the time the proponent submitted the proposal, he did not own for one year 1% or $2,000 in market value of Green Bankshares securities entitled to be voted at the meeting, as required by rule 14a-8(b). We note in particular that the proponent acquired shares of Green Bankshares voting securities in connection with a plan of merger involving Green Bankshares. In light of the fact that the transaction in which the proponent acquired these shares appears to constitute a separate sale and purchase of securities for the purposes of the federal securities laws, it is our view that the proponent's holding period for Green Bankshares shares did not commence earlier than May 18, 2007, the effective time of the merger.''); AT&T, Inc., SEC No-Action Letter (Jan. 18, 2007) (''There appears to be some basis for your view that AT&T, Inc. may exclude the proposal under rule 14a-8(b), because at the time the proponent submitted the proposal, she did not own for one year 1% or $2,000 in market value of securities entitled to be voted at the meeting, as required by rule 14a-8(b). We note in particular that the proponent acquired shares of AT&T, Inc. voting securities in connection with a plan of merger involving AT&T, Inc. In light of the fact that the transaction in which the proponent acquired these shares appears to constitute a separate sale and purchase of securities for the purposes of the federal securities laws, it is our view that the proponent's holding period for AT&T, Inc. shares did not commence earlier than November 18, 2005, the effective time of the merger.'').

[17] *See, e.g.*, ESCO Electronics Corp., SEC No-Action Letter (Dec. 12, 1990) (denying no-action relief and allowing shareholders of a company that was spun-off from a public company less than a year prior to the submission of the shareholder proposal to include the period during which they owned the securities of the predecessor entity to satisfy Rule 14a-8's minimum ownership requirements).

[18] *See, e.g.*, SeaWorld Entertainment, Inc., SEC No-Action Letter (March 10, 2014) (''There appears to be some basis for your view that SeaWorld may exclude the proposal under rule 14a-8(b). We note your representation that the proponent does not satisfy the minimum ownership requirement for the one-year period specified in rule 14a-8(b).''); Meridian Interstate Bancorp, Inc., SEC No-Action Letter (June 17, 2008) (same).

[19] *See* Smithfield Foods, Inc., SEC No-Action Letter (July 1, 2010) (''We are unable to concur in your view that Smithfield may exclude the proposal under rules 14a-8(b) and 14a-8(f). In our view, the proposal was submitted by The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America and The Church Pension Fund. We note that Smithfield did not provide The Church Pension Fund with a request for documentary support for that proponent's claim of beneficial ownership, as required by rule 14a-8(f). In addition, in our view, The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America has provided sufficient evidence to satisfy the eligibility requirements set forth in rule 14a-8(b).''); PSB Holdings, Inc., SEC No-Action Letter (Jan. 23, 2002) (''We are unable to concur in your view that PSB Holdings may exclude the proposal under rule 14a-8(b). In arriving at this position, the staff notes that PSB Holdings did not provide the proponent with a request for documentary support for the proponent's claim of beneficial ownership, as required by rule 14a-8(f).''); *see also Deficient Submissions*, § II-G, *infra*.

- The second way to prove ownership applies only if the shareholder has filed a Schedule 13D, Schedule 13G, Form 3, Form 4 and/or Form 5, or amendments to those documents or updated forms, reflecting ownership of the shares as of or before the date on which the one-year eligibility period begins. If the shareholder has filed one of these documents with the SEC, he or she may demonstrate eligibility by submitting to the company:
  - a copy of the schedule and/or form, and any subsequent amendments reporting a change in ownership level;
  - a written statement that the shareholder continuously held the required number of shares for the one-year period as of the date of the statement; and
  - a written statement that the shareholder intends to continue holding the shares through the date of the annual or special meeting.

Generally, a brokerage or account statement would not be enough to demonstrate proof of ownership. According to the Commission staff, ''[a] shareholder must submit an affirmative written statement from the record holder of his or her securities that specifically verifies that the shareholder owned the securities continuously for a period of one year as of the time of submitting the proposal.''[20]

Proponents often complain that the record holder of their shares will not cooperate with the company's request for documentary support. Nevertheless, the Commission staff will typically allow a company to exclude a proposal even if the broker is the likely cause of insufficient or untimely documentation.

2. Determining who the record holder is

In Staff Legal Bulletin No. 14F, the Commission staff took the position that, ''because of the transparency of [Depository Trust Company] participants' positions in a company's securities, we will take the view going forward that, for Rule 14a-8(b)(2)(i) purposes, only DTC participants should be viewed as 'record' holders of securities that are deposited at DTC. As a result, we will no longer follow *Hain Celestial*.''[21] Further, the staff indicated that, to satisfy Rule 14a-8(b), a shareholder must obtain proof of ownership from the DTC participant through which its securities are held, and if the securities are held through an introducing broker, the shareholder must provide two proof of ownership statements—one from the shareholder's broker or bank confirming the shareholder's ownership, and the other from the DTC participant confirming the broker or bank's ownership.[22] As a result of this guidance, a company that intends to exclude a shareholder proposal on this basis must first notify the shareholder of this deficiency and give the shareholder an opportunity to cure the defect.

The Commission staff clarified in Staff Legal Bulletin 14G that the proof of ownership letter from an affiliate of a DTC participant satisfied the requirement to provide a proof of ownership letter from a DTC participant, even if the affiliate of the DTC participant was not itself a DTC participant.[23] The staff interpreted an ''affiliate'' of a DTC participant to be an entity which, directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the DTC participant.

3. Proposals submitted on behalf of shareholders

Rule 14a-8 does not directly address shareholders' ability to submit proposals through a representative. This so-called ''proposal by proxy'' approach is frequently observed in prac-

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[20] Staff Legal Bulletin No. 14, Item C1(c)(2) (July 13, 2001).

[21] Staff Legal Bulletin No. 14F (Oct. 18, 2011). The Commission staff's position was the result of developments arising out of litigation involving John Chevedden, a frequent participant in the Rule 14a-8 process for his failure to provide valid proof of ownership from a record holder of his shares. In early 2010, a federal court shed some insight into who is a ''record holder'' for the purposes of Rule 14a-8. In that case, Apache Corporation filed a lawsuit against Chevedden for his failure to provide valid proof of ownership from a record holder of his shares. Chevedden had instead provided proof of ownership from RAM Trust Services (''RTS'')—an unregistered entity that was not a DTC participant. Chevedden relied on a precedent where the shareholder at issue had provided a letter from its introducing broker in order to substantiate its satisfaction of Rule 14a-8's minimum ownership requirements. *See* The Hain Celestial Group, Inc., SEC No-Action Letter (Oct. 1, 2008). The U.S. District Court for the Southern District of Texas ruled that the RTS letters were not sufficient to prove eligibility under Rule 14a-8(b)(2), particularly when the company had identified grounds for believing that the proof of eligibility is unreliable. Apache Corp. v. Chevedden, 696 F. Supp. 2d 723 (S.D. Texas 2010). The court declined to decide whether an introducing broker could be a ''record holder'' and instead found that the staff had not reversed its position in *Hain Celestial*. The court did, however, suggest that an introducing broker who is not a DTC participant is not a record holder: ''By contrast, a separate certification from a DTC participant allows a public company at least to verify that the participant does in fact hold the company's stock by obtaining the Cede breakdown from the DTC, as Apache did in May 2009 and March 2010.'' Following the *Apache* ruling, another federal district court reached a similar conclusion. KBR v. Chevedden, C.A. No. H-11-0196, 2011 U.S. Dist. LEXIS 36431 (S.D. Tex. April 4, 2011) (''Apache found that RTS was not a 'record holder' of Apache shares under Rule 14a-8(b) because the summary judgment evidence did not show that RTS appeared on either the NOBO list or on any 'Cede breakdown,' nor was RTS a DTC participant.''). On appeal, the Fifth Circuit affirmed the district court's decision on jurisdictional issues, but did not discuss the question of ownership. KBR v. Chevedden, No. 11-20921, 2012 U.S. App. LEXIS 11784 (5th Cir. June 11, 2012).

[22] *See* Bank of America Corp., SEC No-Action Letter (Feb. 29, 2012) (denying no-action relief under Rule 14a-8(b) where the broker that provided proof of ownership was not on the DTC participant list but was still an affiliate of an entity listed on the DTC participant list); 3M Company, SEC No-Action Letter (Feb. 29, 2012) (same).

[23] Staff Legal Bulletin No. 14G, Item B1 (Oct. 16, 2012); Vornado Realty Trust, SEC No-Action Letter (March 28, 2012) (denying no-action relief where proof of ownership was provided by a ''division'' of a DTC participant); Merck & Co., Inc., SEC No-Action Letter (March 7, 2012) (denying no-action relief where ''the proof of ownership statement was provided by a broker that provides proof of ownership statements on behalf of its affiliated DTC participant''); Omnicom Group Inc., SEC No-Action Letter (Feb. 22, 2012) (denying no-action relief where proof of ownership was provided by a ''department'' of a DTC participant), as distinguished from cases where the proof of ownership is from a non-DTC participant, Johnson & Johnson, SEC No-Action Letter (March 2, 2012) (concurring in exclusion of a proposal where the shareholder's proof of ownership was from an entity that was not a DTC participant).

tice, and the Commission staff confirmed its view in Staff Legal Bulletin No. 14I that such approach is consistent with Rule 14a-8. To address concerns and challenges presented by this approach, the Commission staff expects shareholders who submit a proposal by proxy to provide evidence that describes the shareholder's delegation of authority to the proxy.[24] In this regard, the Commission staff expects the documentation to:

- identify the shareholder-proponent and the person or entity selected as proxy;
- identify the company to which the proposal is directed;
- identify the annual or special meeting for which the proposal is submitted;
- identify the special proposal to be submitted (e.g., proposal to lower the threshold for calling a special meeting from 25% to 10%); and
- be signed and dated by the shareholder.[25]

A basis for exclusion may exist under Rule 14a-8(b) if such documentation is not provided.

E. One-Proposal Rule

Rule 14a-8(c) provides that each shareholder may submit only one proposal to a company for a particular shareholders' meeting. Often, what is submitted as a single shareholder proposal will seek action on multiple issues. Whether such a shareholder submission should be considered a single proposal or multiple proposals is often a point of contention between the proposing shareholder and the company. The Commission staff has based its determination of whether a submission consists of one proposal or multiple proposals on whether the submission relates to a single, specific concept. If it relates to a single, specific concept, a shareholder proposal will be allowed, notwithstanding that it may address multiple issues. However, if it relates to more than a single, specific concept, it may be excluded.[26]

If a shareholder seeks to submit more than one proposal to a company for a particular shareholders' meeting by having someone else submit an additional proposal on the shareholder's behalf, the company can assert that this ''alter ego'' arrangement constitutes a violation of the one-proposal rule. The Commission has permitted proposals to be excluded on this basis. For example, in 2009, Alaska Airlines successfully argued that a person who was acting as ''proxy'' for two shareholders at Alaska Air, each of whom had submitted a shareholder proposal, violated the one-proposal restriction due to the breadth of the ''proxy'' granted by such shareholders.[27]

F. Deadline for Submitting Proposals

Rule 14a-8(e) provides that for a regularly scheduled annual meeting, shareholders must submit proposals to the company not less than 120 days before the date of the company's proxy statement for the previous year's annual meeting. A proposal that is even one day late may be excluded under Rule 14a-8(e).[28] Accordingly, a shareholder must make adequate arrangements to ensure that its proposal is received before the

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[24] Staff Legal Bulletin No. 14I, Item D (Nov. 1, 2017).

[25] *Id.*

[26] For example, the Staff has permitted the exclusion of multiple proposals that appear to relate to the general subject matter of making directors more accountable to shareholders. *See, e.g.*, The Goldman Sachs Group, Inc., SEC No-Action Letter (March 7, 2012) (concurring in exclusion of a proposal containing six paragraphs regarding nominations for director and one paragraph regarding events that would not be considered in a change in control, and noting that the latter ''constitutes a separate and distinct matter'' from the former); Eaton Corp., SEC No-Action Letter (Feb. 21, 2012) (concurring in exclusion of a proposal relating to (a) the method of reporting corporate ethics and (b) employee compensation relating to, and accounting for, sales to independent distributors, accounting practices relating to goodwill and other intangible assets, and concerns relating to operations in India, and noting that the former proposal ''involves a separate and distinct matter'' from the latter); Streamline Health Solutions, Inc., SEC No-Action Letter (March 23, 2010) (concurring in exclusion of a proposal relating to the number of directors, director independence, the conditions for changing the number of directors and the voting threshold for the election of directors, and noting that the proposal relating to director independence ''involves a separate and distinct matter'' from the other proposals); PG&E Corp., SEC No-Action Letter (March 11, 2010) (concurring in exclusion of a proposal requesting that, pending completion of certain studies, the company mitigate potential risks encompassed by such studies, defer requests for or expenditure of public or corporate funds for license renewal and not increase production of certain waste, despite the proponent's argument that the purpose of the proposal was to promote adherence to state laws regarding environmental, public health and fiscal policy matters relating to a particular nuclear plant); Parker-Hannifin Corp., SEC No-Action (Sept. 4, 2009) (concurring in exclusion of a proposal requesting that the board of directors institute a triennial executive pay vote program with three parts, with the first two parts relating to shareholder votes on executive compensation and the third part relating to a discussion forum on executive compensation policies and practices, and noting that the third part ''involves a separate and distinct matter'' from the first two parts). *But see* Walgreens Boots Alliance, Inc., SEC No-Action Letter (Nov. 3, 2016) (denying no-action relief and concluding that ''the proponent has submitted only one proposal'' with respect to a proposal seeking three separate amendments to the company's proxy access bylaw); The Walt Disney Company, SEC No-Action Letter (Nov. 3, 2016) (same); Whole Foods Market, Inc., SEC No-Action Letter (Nov. 3, 2016) (same).

[27] *See* Alaska Air Group, Inc., SEC No-Action Letter (March 5, 2009). The proxy at issue in that letter stated, ''This is the proxy for Mr. Richard D. Foley and/or his designee to act on my behalf in all shareholder matters, including this Rule 14a-8 proposal for the forthcoming shareholder meeting before, during and after the forthcoming shareholder meeting.'' Noting that this broad proxy created a beneficial ownership interest under the SEC's beneficial ownership rules, Alaska Air argued that the proxy holder had violated the one-proposal limitation because he submitted two proposals for the same meeting. The SEC staff granted no-action relief under Rule 14a-8(c). Other examples include Drexler Technology Corporation, SEC No-Action Letter (June 14, 1999); BankAmerica Corp., SEC No-Action Letter (Feb. 8, 1996). *But see* North Bancshares, Inc., SEC No-Action Letter (Jan. 29, 1998) (denying no-action relief and concluding that the company ''has not met its burden of establishing that [a son] is acting on behalf of, under the control of, or as the alter ego of [his father],'' where the son shared a residence with his father and submitted a proposal separate from his father that was formatted similarly).

[28] *See, e.g.*, Alliance Data Systems Corp., SEC No-Action Letter (Feb. 13, 2015); Verizon Commc'ns Inc., SEC No-Action Letter (Jan. 7, 2011); Smithfield Foods, Inc., SEC No-Action Letter (June 4, 2007); Int'l Bus. Machines Corp., SEC No-Action Letter (Dec. 5, 2006); Hewlett-Packard Co., SEC No-Action Letter (Nov. 27, 2000).

deadline.[29] If the company did not have an annual meeting during the previous year, or if the date of the annual meeting has been changed by more than 30 days from the date of the previous year's annual meeting, then the deadline is a reasonable time before the company begins to print and mail its proxy materials.[30] A shareholder must send the proposal to the company's principal executive offices. This address can be found in a company's proxy materials. The Commission staff has indicated that a shareholder cannot submit a shareholder proposal to any other location, ''even if it is to an agent of the company or to another company location.''[31] Similarly, a proposal must be sent to the correct fax number to avoid exclusion.[32]

G. Deficient Submissions

The Commission staff routinely reviews a company's notice to the proponent to ensure that it has properly requested the proponent to cure any deficiencies. The Commission staff's review of a notice is not dependent on a proponent claiming a deficiency.

Specifically, the company's request to a proponent must describe how the proponent may document ownership and must make clear that the proponent must respond within 14 calendar days. A company may do this by providing the proponent with a copy of Rule 14a-8 and referring to the applicable provisions in the rule. However, merely providing a copy of the rule is insufficient to comply with the notice requirement. If the company's request is deficient in any way, the Commission staff will normally provide a proponent with seven additional calendar days from the date of the Commission staff's response letter to respond fully to the company's corrected request.

The Commission staff has warned that companies should be careful not to include a particular date by which they need to hear back from proponents.[33] Rule 14a-8(f) provides that shareholders must respond within 14 calendar days of actual receipt of the notice. If a company provides a specific date, it is possible that the deadline set by the company will be shorter than the 14-day period required. If a proponent provides a revised proposal after being notified of a defect by the company, the proponent need prove ownership only as of the date the original proposal is submitted.[34]

In Staff Bulletin 14G, the Commission staff noted that in many cases, the notices of defect under Rule 14a-8(f) given by companies to shareholder proponents did not provide an adequate description of the defects of the proposal or an explanation of what the proponent was required to do to remedy defects in proof of ownership letters.[35] In particular, the Commission staff noted that some companies' notices of defect made no mention of the gap in the period of ownership covered by the proponent's proof of ownership letter or other specific deficiencies that the company has identified. The Commission staff therefore warned that the staff would not permit the exclusion of a proposal under Rules 14a-8(b) and 14a-8(f) on the basis that a proponent's proof of ownership did not cover the one-year period preceding and including the date the proposal is submitted unless the company provided a notice of defect that (i) identified the specific date on which the proposal was submitted and (ii) explained that the proponent must obtain a new proof of ownership letter verifying continuous ownership

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[29] Staff Legal Bulletin No. 14, Item C3(d) (July 13, 2001). *See, e.g.,* General Electric Company, SEC No-Action Letter (Jan. 24, 2013) (concurring in exclusion of a proposal that was received one day after the submission deadline, even though it was postmarked prior to the deadline); Equity LifeStyle Properties, SEC No-Action Letter (Feb.10, 2012) (concurring in exclusion of a proposal that was received after the submission deadline, even though it was mailed prior to the deadline).

[30] *See* BioPharmX Corp., SEC No-Action Letter (July 27, 2016) (concurring in exclusion of a proposal under Rule 14-8(e)(2) where the company received the proposal 33 days after the company filed its proxy materials with the Commissions which was not ''a reasonable time before beginning to print and mail its proxy materials''); Jefferson Pilot Corp., SEC No-Action Letter (Jan. 30, 2006) (concurring in exclusion of a proposal under Rule 14a-8(e) in connection with a special meeting where the company had announced that the record date for a merger-related special meeting would be February 3, 2006, that the special meeting would be held on March 20, 2006, but the proposal at issue was not submitted until January 17, 2006 (100 days after the company had announced the merger and 40 days after the company's preliminary proxy materials were filed with the SEC)); Greyhound Lines, Inc., SEC No-Action Letter (Jan. 8, 1999) (concurring in exclusion of a proposal that was received 14 days after the company filed its preliminary proxy materials untimely under Rule 14a-8(e)(3); Scudder New Europe Fund, SEC No-Action Letter (Nov. 10, 1998) (concurring in exclusion of a proposal that was received the same day the company filed its preliminary proxy materials, which was six weeks after the company had notified the public of its intention to file its proxy materials in connection with a transaction that would be subject to shareholder approval); Public Service Company of Colorado, SEC No-Action Letter (Nov. 29, 1995) (concurring in exclusion under Rule 14a-8(a)(3) [the predecessor to Rule 14a-8(e)] of a proposal that was submitted one month after the company filed its preliminary proxy materials, and three months after the announcement of the transaction that would be submitted for shareholder approval); *see also* Aero Services International, Inc., SEC No-Action Letter (March 1, 1990) (concurring in exclusion of a proposal that was submitted two days before the company filed its preliminary proxy materials, and where the proponent, as a director of the company had adequate notice of the company's filing schedule); Telecom Plus International, SEC No-Action Letter (Feb. 10, 1987) (concurring in exclusion of a proposal that was submitted three days after the filing of the preliminary proxy materials).

[31] *See* Staff Legal Bulletin No. 14, Item C3(c) (July 13, 2001).

[32] *See, e.g.*, Eli Lilly and Co., SEC No-Action Letter (Jan. 6, 2017) (concurring in exclusion of a proposal that was received by the company after the deadline with copies of fax transmissions attached thereto that were submitted prior to the deadline but to an unknown fax number and to a fax number associated with a philanthropic foundation formed by the Lilly family but unaffiliated with the company); Illumina, Inc., SEC No-Action Letter (Feb. 17, 2015) (concurring in exclusion of a proposal where ''the facsimile number used for delivery was not a facsimile number at Illumina's principal executive offices''); Hess Corporation, SEC No-Action Letter (March 19, 2012) (concurring in exclusion of a proposal that was faxed to a division of the company instead of the principal executive offices); The Dow Chemical Company, SEC No-Action Letter (Feb. 23, 2009) (concurring in exclusion of a proposal that was faxed to the company's manufacturing facility instead of the principal executive offices); Alcoa Inc., SEC No-Action Letter (Jan. 12, 2009) (proposal excludable when faxed to an office other than the company's principal executive offices).

[33] *See* Staff Legal Bulletin No. 14, Items C6(b), G3 (July 13, 2001).

[34] Staff Legal Bulletin No. 14F, Item D3 (Oct. 18, 2011).

[35] Staff Legal Bulletin No. 14G, Item C (Oct. 18, 2011).

of the requisite amount of securities for the one-year period preceding and including such date to cure the defect. In addition, companies should include copies of the postmark or evidence of electronic transmission with their no-action requests.

1. Deficiency unable to be overcome

Rule 14a-8(f) allows companies to forego providing notice of a deficiency if the proposal has a deficiency that cannot be corrected. However, under Rule 14a-8(j), a company still must notify the proponent if it intends to exclude the proposal by providing a copy of its request to the Commission staff. The Commission staff has provided the following examples of incurable defects:

- the shareholder indicated that he or she does not own at least $2,000 in market value, or 1 percent, of the company's securities;
- the shareholder indicated that he or she had owned securities entitled to be voted on the proposal for a period of less than one year before submitting the proposal;
- the shareholder indicated that he or she did not own securities entitled to be voted on the proposal at the meeting;
- the shareholder failed to submit a proposal by the company's properly determined deadline; or
- the shareholder, or his or her qualified representative, failed to attend the meeting or present one of the shareholder's proposals that was included in the company's proxy materials during the past two calendar years.[36]

2. Proponent's failure to satisfy request for information deadline

Under Rule 14a-8(f), if a company adequately and timely requests proof and the proponent fails to respond in a proper and timely manner, the company can rely on this exclusion. The Commission staff applies the 14-day deadline strictly and there are no exceptions, even for good cause. The proponent must provide all of the information requested within the 14-day period. It cannot provide some of the information by the deadline and promise to provide the remainder at a later date. However, in its discretion, a company can waive the deadline.

Where the shareholder failed to respond or provided an inadequate response to an adequate and timely request for proof of ownership, the Commission staff generally will grant relief under Rule 14a-8(b) and (f).[37] If the request for proof of ownership is itself deficient, however, the Commission staff has granted relief under Rules 14a-8(b) and (f) but given the shareholder an opportunity to provide adequate proof of ownership.[38]

If a company has information suggesting that the shareholder proponent does not satisfy the minimum ownership requirements it should still request proof of ownership. The Commission staff has afforded the proponent additional time to provide proof of ownership where the company failed to request such proof of ownership.[39]

H. Co-Sponsorship

More than one shareholder may sponsor a proposal, provided that each shareholder meets the eligibility requirements of Rule 14a-8. However, pursuant to Rule 14a-8(l), the company has the discretion to omit the names of co-sponsors from its proxy materials, thus eliminating one of the benefits of co-sponsorship—the fact that multiple shareholders support it.

I. Failure to Appear at Shareholders' Meeting to Present the Proposal

Either the proponent or a representative of the proponent who is duly qualified under state law may present a shareholder proposal. If, in the absence of good cause, neither the proponent nor such authorized representative presents the proposal at the meeting, the company may refuse to include any proposal submitted by the proponent in its proxy material for any meet-

[36] Staff Legal Bulletin No. 14, Item C6 (July 13, 2001).

[37] *See, e.g.,* Investors Bancorp, Inc., SEC No-Action Letter (March 15, 2017) (concurring in exclusion of a proposal under Rule 14a-8(b) where the proponent, in response to the company's deficiency letter, provided no proof of ownership documentation and responded with a letter stating ''[o]wning $2000 worth of stock for a year seems like an archaic requirement''); salesforce.com, inc., SEC No-Action Letter (Feb. 14, 2017) (concurring in exclusion of a proposal under Rules 14a-8(b) and 14a-8(f) where ''the proponent appears not to have responded to Salesforce's request for documentary support indicating that the proponent has satisfied the minimum ownership requirement for the one-year period required by rule 14a-8(b)''); USEC, Inc., SEC-No-Action Letter (July 19, 2002) (concurring in exclusion of a proposal under Rule 14a-8(b) where the proponent's proof of ownership consisted of a chart from his broker indicating that he owned USEC securities during May 2001, through September 2001, the beginning of the one-year period preceding the submission of the proposal).

[38] *See* PG&E Corp., SEC No-Action Letter (March 17, 2017) (''We note that PG&E did not provide the proponent with a notice of defect that complies with this guidance. Accordingly, unless the proponent provides PG&E with a proof of ownership letter verifying continuous ownership for the one-year period preceding and including December 12, 2016, within seven calendar days after receiving this letter, we will not recommend enforcement action to the Commission if PG&E omits the proposal from its proxy materials in reliance on rules 14a-8(b) and 14a-8(f).''); Citigroup Inc., SEC No-Action Letter (Feb. 12, 2014) (''[T]he proponent has not provided a statement from the record holder evidencing documentary support of continuous beneficial ownership of $ 2,000, or 1%, in market value of voting securities, for at least one year prior to submission of the proposal. We note, however, that Citigroup failed to inform the proponent of what would constitute appropriate documentation under rule 14a-8(b) in Citigroup's request for additional information from the proponent. Accordingly, unless the proponent provides Citigroup with appropriate documentary support of ownership, within seven calendar days after receiving this letter, we will not recommend enforcement action to the Commission if Citigroup omits the proposal from its proxy materials in reliance on rules 14a-8(b) and 14a-8(f).'').

[39] *See, e.g.*, General Motors Corp., SEC No-Action Letter (March 2, 2004) (concurring in exclusion of a proposal under Rule 14a-8(b) where the shareholder held less than 1 percent or $2,000 in market value in registered shares of the company's stock, but allowing the shareholder the opportunity to demonstrate that it otherwise satisfied the requirements of Rule 14a-8(b)); Nortel Networks Corp., SEC No-Action Letter (May 6, 2002) (same).

ing held in the following two calendar years.[40] In this regard, based on a letter issued to Marriott International, it appears that so long as the proponent or a representative appears and speaks, failure to present the correct proposal will not serve as a basis to exclude future proposals.[41]

The Commission rarely determines that ''good cause'' exists for a shareholder who does not attend a meeting once their proposal has been submitted. However, there are instances where the SEC has made the exception. For example, the Commission considered the Los Angeles riots of 1992 ''good cause'' for a shareholder who missed the annual meeting and was scheduled to present his proposal.[42] The Commission also has considered an unforeseeable illness ''good cause'' for non-attendance of a proponent at an annual meeting.[43] Although there is no solid definition of what constitutes ''good cause'' under this section of the rule, the Commission has defined instances that do *not* qualify as ''good cause.'' These instances include traffic delays, financial burdens, and personal inconvenience and certain foreseeable health circumstances.[44] From these letters, it appears that the Commission staff's view is that, unless a shareholder can demonstrate that, due to unforeseen circumstances, they are unable to appear to present their proposal or find a representative to appear and present the proposal on their behalf, they cannot claim good cause for their failure to appear and present a shareholder proposal that a company includes in its proxy materials on their behalf. In this regard, the Commission has declined to determine that good cause existed for being unable to attend a meeting if something prevented the shareholder from doing so, but there was adequate time for the shareholder to arrange for a representative to do so on the shareholder's behalf.[45]

It bears noting that the company's decision to present a shareholder proposal at the meeting does not impact the shareholder's responsibilities under Rule 14a-8(h)(3) unless the company agrees to do so on the proponent's behalf. For example, in 2002, the Commission staff agreed with Safeway that it could omit from its proxy materials a shareholder proposal submitted by gadfly Evelyn Davis. In that letter, the shareholder argued that Safeway's presentation of her proposal at the preceding year's annual meeting and her hospitalization were good cause. The Commission staff rejected her arguments, in part, it appears, because the proponent was at a prescheduled medical appointment and because the company explicitly indicated that it was not presenting the proposal in satisfaction of her responsibilities.[46]

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[40] Rule 14a-8(h), Question 8; 17 C.F.R. § 240.14a-8(h).

[41] Marriott International, Inc., SEC No-Action Letter (Jan. 10, 2017) (in which the staff declined to concur that a proposal could be excluded pursuant to Rule 14a-8(h) on the basis that it had not been ''presented'' after the shareholder proponent representative described the proposal incorrectly).

[42] Chevron Corp., SEC No-Action Letter (Feb. 25, 1993).

[43] I.C. Industries, Inc., SEC No-Action Letter (Aug. 10, 1982).

[44] *See* Aetna Inc., SEC No-Action Letter (Feb. 1, 2017) (where proponent's designated representative arrived after the annual meeting adjourned ''due to traffic, and also because of difficulty of finding a parking spot,'' as described by the company); Verizon Communications Inc., SEC No-Action Letter (Nov. 6, 2014) (concurring in exclusion of a proposal under Rule 14a-8(h)(3) where proponent asserted only after the meeting that his absence was for ''good cause,'' nothing that ''I should think that living on the West Coast and that my wife has advanced dementia tying up my time and resources towards her care is ample excuse for not attending the meeting, or alternatively, procuring representation''); Providence and Worcester Railroad Company, SEC No-Action Letter (Jan. 17, 2013) (concurring in exclusion of a proposal under Rule 14a-8(h)(3) despite proponent's claim that intestinal distress the morning of the shareholder meeting constituted good cause for missing the meeting); E.I. du Pont de Nemours and Company, SEC No-Action Letter (Feb. 16, 2010) (concurring in exclusion of a proposal under Rule 14a-8(h)(3) where proponent could not attend the meeting due to his wife's ''planned surgery with unexpected timing''); Intel Corp., SEC No-Action Letter (Jan. 22, 2008) (concurring in exclusion of a proposal under Rule 14a-8(h)(3) where proponent missed meeting to attend to his wife's medical needs); ConocoPhillips, SEC No-Action Letter (March 5, 2007) (where proponent did not attend the annual meeting due to ''travel difficulties''); Exxon Mobil Corp., SEC No-Action Letter (Dec. 14, 2004) (concurring in exclusion of a proposal under Rule 14a-8(h)(3) where proponent could not attend the meeting due to his wife's medical condition); IDACORP, Inc., SEC No-Action Letter (Oct. 21, 2004) (where proponent did not attend the annual meeting because he had a meeting two days prior in another city, the travel expenses would be exorbitant, and there was no Amtrak service to the city where the annual meeting was being held); NCR Corp., SEC No-Action Letter (Jan. 2, 2003) (where the shareholder refused to attend the meeting to present his proposal because of the unfairness of the financial burden he would have to bear); Safeway, Inc., SEC No-Action Letter (March 7, 2002) (concurring in exclusion of a proposal under Rule 14a-8(h)(3) and rejecting the proponent's claim that the company's presentation of the proposal and her hospitalization were good cause where the proponent was at a prescheduled medical appointment); Masco Corp., SEC No-Action Letter (March 20, 2001) (concurring in exclusion of a proposal under Rule 14a-8(h)(3) where the proponent's designated representative failed to present the proposal due to the sudden onset of an embarrassing medical condition, where the illness was foreseeable); Southwest Airlines Co., SEC No-Action Letter (April 10, 2000) (concurring in exclusion of a proposal under 14a-8(h)(3) where the proponent's authorized representative failed to appear and present the proposal because he missed his flight); Lucent Technologies, Inc., SEC No-Action Letter (Sept. 21, 1999) (concurring in exclusion of a proposal under Rule 14a-8(h)(3) where the proponent called the company the day of the meeting to tell them he couldn't present his proposal due to a persistent cough); Sonat, Inc., SEC No-Action Letter (Jan. 6, 1994) (where the proponent arrived late due to traffic delays); Transamerica Corp., SEC No-Action Letter (Dec. 27, 1989) (concurring in exclusion of a proposal and finding that ''an extremely slow commute'' was not good cause for failing to present a proposal).

[45] *See* Medco Health Solutions, Inc., SEC No-Action Letter (Dec. 3, 2009) (concurring in exclusion of a proposal under Rule 14a-8(h)(3) where proponent could not attend the meeting due to illness in the family, but he had sufficient time and opportunity to arrange to send a duly authorized representative); Merck & Co., Inc., SEC No-Action Letter (Dec. 14, 2004) (concurring in exclusion of a proposal where a shareholder who needed to attend to his ill wife had adequate time to arrange for a qualified representative to present his proposal at the annual meeting).

[46] Safeway, Inc., SEC No-Action Letter (March 7, 2002) (''There appears to be some basis for your view that Safeway may exclude the proposal under rule 14a-8(h)(3). We note your representation that Safeway included the proponent's proposal in its proxy statement for its 2001 annual meeting, but that neither the proponent nor her representative appeared to present the proposal at this meeting. Moreover, the proponent has not stated a 'good cause' for the failure to appear. Under the circumstances, we will not recommend enforcement action

to the Commission if Safeway omits the proposal from its proxy materials in reliance on rule 14a-8(h)(3).''); *accord* Procter & Gamble Co., SEC No-Action Letter (July 24, 2008) (staff concurred in exclusion of proposal under Rule 14a-8(h) notwithstanding that the company introduced a prior-year proposal from the proponent and allowed shareholders to vote on the proposal despite the proponent's failure to attend the meeting and present the proposal as required under Rule 14a-8); Texaco, Inc., SEC No-Action Letter (Dec. 19, 1980) (granting relief under Rule 14a-8(a)(2), the predecessor to Rule 14a-8(h)(3), where the shareholder ''appointed'' the company's chairman to present the proposal after being made aware of his obligations under Rule 14a-8(a)(2)); CBS, Inc., SEC No-Action Letter (Jan. 31, 1977).

