SOCIETY
of Corporate Secretaries
& Governance Professionals

March 25, 2015

Keith Higgins
Director, Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Rule 14a-8(i)(9)

Dear Mr. Higgins,

Founded in 1946, the Society is a professional membership association of more than 3,200 corporate secretaries, in-house counsel and other governance professionals who serve approximately 1,600 entities, including 1,000 public companies of almost every size and industry. The Society represents 75% of the S&P 500 and about half of the Russell 1000 companies.

Society members are responsible for supporting the work of corporate boards of directors and their committees and the executive managements of their companies regarding corporate governance and disclosure. Our members generally are responsible for their companies' compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements.

We write to express our views on the SEC's historical application of Rule 14a-8(i)(9), as well as our concerns about the near-term and broader implications of the SEC's recent decision to express no view on the application of the rule during the 2015 proxy season.

Executive Summary

The Society believes there is strong legal and logical support for the SEC's historical position and robust precedent involving Rule 14a-8(i)(9). Under that precedent, the SEC has consistently allowed companies to exclude shareholder proposals that conflict with management proposals concerning the same subject matter. We believe that changing that position now will undermine the shareholder proposal process under Rule 14a-8.

We also believe that the inability of companies to receive no action relief under Rule 14a-8(i)(9) with respect to shareholder proposals that conflict with management proposals will:

– Erode the principles supporting the board's duty to consider actions and make decisions in the context of the best interests of all shareholders and the company as a whole;

– Penalize boards for their responsiveness since it could result in companies having to include shareholder proposals and conflicting management proposals in the same proxy materials; and

– Confuse shareholders, lead to uncertain shareholder votes and make the boards of such companies vulnerable to criticism from shareholders and shareholder groups.

Furthermore, the SEC's recent suspension of its views on the applicability of Rule 14a-8(i)(9) in the middle of the proxy season and retroactive application are unfair to those companies that have already relied on no-action relief for the 2015 proxy season or that have already taken steps that would entitle them to relief under Rule 14a-8(i)(9), and have put them in a no-win situation. For these reasons, we ask that the SEC restore its historical approach to Rule 14a-8(i)(9) as expeditiously as possible.

I. Legal Bases for the SEC's Historical Position on Rule 14a-8(i)(9) Are Sound

- The SEC's approach to conflicting proposals has been deliberate and long-standing

Historical SEC rulemaking and the SEC Staff's long-standing position and precedent involving Rule 14a-8(i)(9) support the exclusion of conflicting shareholder proposals on the same subject matter in the issuer's proxy statement regardless of specific terms.

The exclusion dates from 1967, when the SEC made a company's obligation to include a shareholder proposal under Rule 14a-8 inapplicable to "counter proposals to matters to be submitted by the management." SEC Release 34-8206 (Dec. 14, 1967). At that time, the SEC noted that the rule "does not apply to elections to office. It has been further amended to provide also that the rule does not apply to counter proposals to any matter to be submitted by the management."

The SEC's 1982 Proposing Release on amendments to Rule 14a-8 categorized the exclusion for a proposal that is "counter to a proposal submitted by the issuer at the meeting" (the text at that time) as a type of proposal "…that constitute[s] an abuse of the security holder proposal process." SEC Release No. 34-19135 n. 27 (Oct. 14, 1982).

Although a shareholder's ability to submit a proposal for inclusion in an issuer's proxy statement pursuant to Rule 14a-8 is now frequently referred to as a "right," it historically has been characterized by the SEC and the courts as a "privilege."[1]

[1] See, for example, Leila N. Sadat-Keeling, *The 1983 Amendments to Shareholder Proposal Rule 14A-8: A Retreat from Corporate Democracy?*, 59 TUL. L. REV. 161 (1984), note 47, at 167-68, noting that as the Rule allegedly was being abused and used for purposes other than it was intended, the SEC started restricting the shareholders' "privilege" of having proposals included in the proxy statement; the SEC's release announcing the adoption of the 1948 amendments to the rule explained: "This rule requires management to include in its proxy material, proposals reasonably submitted by security holders which are proper subjects for action by security holders. The SEC has found that in a few cases security holders have abused this privilege by using the rule to achieve personal ends which are not necessarily in the common interests of the issuer's security holders generally," Securities Exchange Act of 1934 Release No. 4185 (July 6, 1948), 13 Fed. Reg. 3973 (1948).; Dyer v. SEC, 266 F.2d 33, 41 (8th Cir.

- <u>The ability of companies to exclude shareholder proposals that conflict with management proposals under Rule 14a-8(i)(9) and the Staff's consistent interpretation of the rule support the integrity of the proxy rules and process</u>

The SEC's historical interpretation of Rule 14a-8(i)(9) has maintained the integrity of the proxy filing, disclosure, and solicitation rules, particularly the rules governing proxy contests. Without the exclusion as historically interpreted and applied by SEC Staff, a shareholder who intends to present a proposal that conflicts with a management proposal on the same subject matter would be required to comply with the rules governing proxy contests, i.e., they would be required to prepare and file their own proxy materials and distribute those proxy materials to the company's shareholders - all at their own expense. Consequently, the SEC's current approach to Rule 14a-8(i)(9) creates an opportunity for shareholders to mount proxy contests without complying with the proxy rules, and without an appropriate exemption from the proxy filing or disclosure rules.

When the SEC proposed changing the language of the conflicting proposal exclusion in 1997, it stated: "We propose to revise current paragraph (c)(9) to reflect the Division's long-standing interpretation permitting omission of a shareholder proposal if the company demonstrates that its ***subject matter directly conflicts*** [emphasis added] with all or part of one of management's proposals." SEC Release No. 34-39093 (Sept. 19, 1997). This language was subsequently adopted as proposed in SEC Release No. 34-40018 (May 21, 1998). The deliberate use of "subject matter" rather than, e.g., terms, conditions, particulars, details, etc., is important. If management is including a proposal (e.g., to declassify the board, adopt majority voting, approve an equity compensation plan, or implement proxy access for shareholders to nominate directors), any shareholder proposal dealing with the same subject matter should be excluded to the extent that there is a conflict between the management proposal and the shareholder proposal regardless of the approach of the conflicting proposal (e.g., reflecting opposite approaches to an issue).

- <u>Continuing the SEC's historical application of the rule prevents inconsistency and ambiguity that would otherwise accompany same subject matter counter-proposals</u>

The Staff has specifically noted that the use of the term "directly conflicts" in Rule 14a-8(i)(9) does not mean that the two "proposals must be identical in scope or focus for the exclusion to be available." SEC Release 34-40018 (May 21, 1998). Rather, the Staff has logically interpreted the rule to permit the exclusion of any proposal where the company can demonstrate that the inclusion of the management proposal and the shareholder proposal in the same proxy statement could "present alternative and conflicting decisions for shareholders and that submitting both proposals to a vote could provide inconsistent and ambiguous results." *See, e.g.*, BankBoston Corporation, SEC No-Action Letter (June 7, 1999) (proposal requiring the company to prepare a report on the effect of a merger on its employees and the communities where it does business permitted to be excluded from the company's proxy materials for a merger proposal);

1959) - stating that "Rule [14a-8] affords a privilege, which does not otherwise ordinarily exist in favor of stockholders"; Dyer v. SEC, 289 F.2d 242, 247 (8th Cir. 1961), where the court observed: "Rule 14A-8 of the Commission, which is the source of the privilege to stockholders of making request for inclusion of proposals by them in management's proxy material, contains an express provision that 'This section shall not apply, however, to elections to office.'"

INTERLINQ Software Company, SEC No-Action Letter (April 20, 1999) (proposal for company to effect a self-tender permitted to be excluded from company's proxy materials for a merger proposal).

If, for example, both a shareholder proposal and management proposal on the same subject matter were to be included and receive majority support, different interpretations of the meaning of the votes and how the proposal should be implemented are likely.

The SEC has expressed the underlying purpose of Rule 14a-8 as follows: "to place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation; that is, such matters relating to the affairs of the company concerned as are proper subjects for stockholders' action under the laws of the state under which it was organized." SEC Release No. 34-3638 (Jan. 3, 1945).

If management does not intend to bring a particular matter before shareholders at an annual meeting, a shareholder may do so. If, however, management intends to submit a matter to shareholder vote - regardless of whether management's approach to a particular issue is acceptable to a particular shareholder seeking to submit a proposal on the same subject matter - the fundamental purpose of Rule 14a-8 has been satisfied; that is, a matter of concern will be brought before all shareholders. And, if management's proposal is not approved, shareholders will have sent management a message that they do not approve of management's approach to a particular issue. Of course the converse is true is well: if the proposal is approved, that approval will represent an endorsement by shareholders of management's approach to the issue. In either case, if a particular shareholder is not satisfied with the outcome, the shareholder may submit a shareholder proposal on the topic the following year.

If, however, a shareholder disapproves of a management proposal and does not want to wait a year to submit a shareholder proposal on the topic under Rule 14a-8, the shareholder could instead conduct a solicitation in opposition to the management proposal with its own, separate proxy materials, without burdening other shareholders with the expense. We believe that this framework is what the SEC intended to preserve with its adoption of Rule 14a-8(i)(9) and interpretive positions under the rule.

- <u>Companies should not be penalized for their responsiveness to shareholders</u>

Disallowing exclusion of shareholder proposals where company management has proposed an alternative on the same subject matter penalizes, rather than fosters, board responsiveness. Notwithstanding the legal and logical bases for the historical interpretation of Rule 14a-8(i)(9), a number of investor groups are responding to the SEC's recent actions (i.e., review of the rule and suspension of views in the interim) by distinguishing stand-alone management-initiated proposals from those that appear to be submitted *in response to* a shareholder proposal. In these cases, some investors argue that exclusion of the same subject matter shareholder proposal should not be allowed. However, logically, this "first to propose" theory -- i.e., investors' views that only management proposals that were not developed in response to a shareholder proposal are entitled to Rule 14a-8(i)(9) relief – does not make sense.

First, whether the board has already discussed, considered, deliberated on an issue that is being raised by a shareholder proposal would not necessarily be known. Note that CII's January 29, 2015 letter to ISS and Glass Lewis states that every company planning to propose its own proxy access proposal "tactically decided to do so only following the receipt" of the shareholder proposal.[2] However, the Society believes that it is appropriate for companies to submit management proposals in response to previously submitted shareholder proposals, particularly after engaging with shareholders. In fact, this activity should be fostered and encouraged rather than prohibited.

Second, if a board is considering adopting a practice or even if it has not yet considered the idea, but is open to it based on shareholders' interests or concerns, it is appropriate for the board then to act at the time it deems appropriate. The board's consideration and deliberation of issues triggered by shareholders' inquiries or requests via submittal of proposals should be indicative of board responsiveness and viewed favorably. It shouldn't be a race to determine who thought of, and developed a tangible proposal based on, an idea first. That policy position significantly dis-incentivizes management and board responsiveness and shareholder engagement.

II. The Suspension of Rule 14a-8(i)(9) Is Unfair and Distracting to Companies Relying on the Process

- <u>The SEC's recent suspension of the issuance of no-action letters under Rule 14a-8(i)(9) has effectively made the rule unavailable to issuers as a practical matter</u>

The SEC's action to suspend no action relief under Rule 14a-8(i)(9) based on its concern with a conflicting management proposal on proxy access has implications well beyond the access issue. Indeed, the suspension impacts every company seeking such relief on shareholder proposals on any topic. While our members understand that the Rule continues to be available from a technical standpoint, practically speaking, that is not the case. Using the proxy access proposal as an example for purposes of this letter (with the understanding that the implications extend equally to other types of same subject matter counter proposals), companies that elect to rely on the rule or seek relief from the courts to exclude a conflicting shareholder proposal have been advised by many institutional investors that they will vote against the company's directors. Similarly, they have been told by proxy advisors that they, too, will recommend a vote against directors if a company relies on the rule.

We believe companies should be entitled to propose a proxy access scheme to their shareholders or - absent a concurrent management proposal - shareholders should be able to propose a proxy access scheme under Rule 14a-8. If a management proposal receives the affirmative vote of a majority of the shares of stock present in person or by proxy and entitled to vote on the proposal, a shareholder who is unhappy with it may then submit a proposal the next year to revise the proxy access bylaw as adopted.

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[2] *See generally* CII letter to ISS and Glass Lewis (publicly available at: http://www.cii.org/files/issues_and_advocacy/correspondence/2015/01_29_15_ISS_GL_access.pdf)

Absent a management proposal, if a shareholder's precatory proposal passes, the board should have the right to take into consideration the shareholder vote and any discussions with shareholders it has had regarding proxy access, and/or seek additional shareholder input. Based on that input and the board's judgment, the board should determine the optimal way to proceed pursuant to its fiduciary duty to the company.

In the absence of the SEC Staff's normal course no-action relief historically afforded on Rule 14a-8(i)(9) proposals, boards that elect to exclude a same subject matter proposal in reliance on the rule by exercising their judgment about what is in companies' and all of their shareholders' best interests have been advised that they will be subject to "vote no" campaigns.

Companies, including those that previously received and relied upon Rule 14a-8(i)(9) no-action relief from SEC Staff for the 2015 proxy season, are thus faced with these choices:

- Excluding a shareholder proposal and including the company's proposal, triggering investor votes against directors and a heightened risk of litigation with the proponent
- Including both the shareholder and management proposal - risking confusion, ambiguity and inconsistencies among investors and the issuer as to the voting alternatives and implications
- Seeking declaratory relief in the courts, causing unnecessary delay and expense, and triggering investors' votes against directors
- Including only the shareholder's proposal and excluding the company's proposal - effectively allowing a minority of investors to usurp the board's judgment as to what is in the company's and all shareholders' best interests
- Adopting a proxy access bylaw (or other measure depending on the subject matter of the proposal) in advance of the meeting and excluding the shareholder proposal on "substantially implemented" grounds, triggering investor votes against directors

This situation is untenable and unfair to issuers. We also believe it does not serve the interests of the majority of shareholders. Company boards and management and their counsel are spending significant time and resources on this issue trying to determine next steps in their annual meeting preparation process in a situation where the goalposts have been moved after the field goal kicker has kicked the ball.

In closing, we respectfully request that the status quo be restored as expeditiously as possible.

Thank you very much for your consideration.

Sincerely,

Darla C. Stuckey

Darla C. Stuckey
President & CEO
Society of Corporate Secretaries and Governance Professionals