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June 30, 2015

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

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

Dear Keith:

I am submitting this letter to clarify what I think is some confusion in the record over the application of the Administrative Procedure Act ("APA") in connection with the staff's review of subsection (i)(9).[1]

A letter submitted by a number of law firms (Letter) took the position that "any significant change in how the SEC and its Staff administer Rule 14a-8(i)(9) would effectively constitute a substantive amendment of Rule 14a-8(i)(9)" and therefore require "a proper rulemaking" under the APA.[2] This position, however, does not accurately recite the requirements of the APA or reflect the actual practice of the staff with respect to interpretive changes under Rule 14a-8.

I. Staff Consistency

In addressing this issue, the position in the Letter appears premised upon the view that the staff has interpreted subsection (i)(9) in a consistent fashion. Thus, for example, the Letter states:

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[1] I teach in the area and am a co-author on a casebook that addresses administrative law. *See* Schwartz, Corrada & Brown, **ADMINISTRATIVE LAW** (7th Edition; Aspen Publisher). In addition, a number of my articles have examined securities issues from an administrative law perspective. *See* J. Robert Brown, Jr., *Shareholder Access and Uneconomic Economic Analysis: Business Roundtable v. SEC*, 88 DU *Denver University Law Review Online, 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917451*

[2] *See* Letter from Gibson Dunn & Crutcher LLP; Morrison & Foerster LLP Sidley Austin LLP; Skadden, Arps, Slate, Meagher & Flom LLP; and Wilmer Cutler Pickering Hale and Dorr LLP to the SEC, June 10, 2015, *available at* http://www.sec.gov/comments/i9review/i9review-5.pdf In raising the issue, the Letter referenced only one type of change that required notice and comment, exceptions for proposals that dealt with a specific subject matter.

> Rule 14a-8(i)(9) plays a critical role in ensuring the integrity of the proxy process. As set out by the Staff in many years of no-action letters, the rule is intended to ensure that shareholders are not presented with **"alternative and conflicting decisions"** and that the inclusion of a shareholder proposal will not result in "inconsistent and ambiguous results." (emphasis added).

In fact, however, the positon of the staff under subsection (i)(9) has not been consistent but has varied significantly. In earlier no-action letters, for example, the staff emphasized concerns that were opposite those cited in the Letter. The subsection was intended to guard against not "conflicting" decisions but "complementary" ones. Thus, as the staff described:

> You represent that the compliance, disclosure and management matters under the two proposals present **alternative and complimentary decisions** for shareholders and that implementing both would provide inconsistent and ambiguous results. Under these circumstances, the staff will not recommend enforcement action to the Commission if the proposal is omitted from the Company's proxy materials.[3]

Commentators have noted other interpretive variations employed by the staff with respect to subsection (i)(9).[4]

Likewise, the notion that the staff has significantly changed its interpretation is supported by the dramatic increase in the number of letters relying on subsection (i)(9) since 2009. As you stated in your speech before the Practicing Law Institute earlier this year in New York, "[u]ntil relatively recently, the Rule 14a-8(i)(9) exclusion had been used infrequently, with companies most often using the exclusion for proposals relating to stock compensation plans."[5] The shift in frequency is potentially explained by a change in the staff interpretation that broadened the applicability of the subsection.

All of this indicates that the staff's interpretation of (i)(9) has varied over time, sometimes significantly. As a result, any changes made by the staff as a result of the ongoing review of this subsection cannot be characterized as changes to a consistent interpretation that has existed over the life of the provision.

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[3] *Chevron Corporation* (Feb. 27, 1991). *See also General Electric Company* (Dec. 28, 1995) ("You indicate that the two proposals present alternative and complementary decisions for shareholders and that submitting both to a vote could provide inconsistent and ambiguous results. Accordingly, this Division will not recommend enforcement action to the Commission if the proposal is omitted from the Company's proxy materials."); *The Bureau of National Affairs, Inc.* (Feb. 21, 1995) ("You represent that the matter to be voted on at the upcoming shareholders' meeting consists of a proposal sponsored by management that the board of directors neither retain any broker or financial advisor for the purpose of soliciting offers to acquire the Company by sale or merger nor otherwise actively solicit such offers. You indicate that the two proposals present alternative and complementary decisions for shareholders and that submitting both to a vote could provide inconsistent and ambiguous results.").

[4] *See* Letter from Adam Kanzer, Managing Director, Domini Social Investments, to Keith Higgins, Director, Division of Corporation Finance, Securities & Exchange Commission, June 22, 2015 (noting that earlier iterations of "inconsistent and ambiguous results" referenced "the problem of an inconsistent and inconclusive 'mandate' from shareholders")

[5] http://www.sec.gov/news/speech/rule-14a-8-conflicting-proposals-conflicting-views-.html

II. Staff Interpretation and Notice/Comment

In any event, as the Supreme Court had made clear in a case decided this term (and one not cited in the Letter) that notice and comment is not required even for significant changes in an agency's interpretive position.[6]

Agencies may interpret their own rules and when they do, the interpretations are controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 US 452, 461 (1997). Moreover, agencies may change their interpretations without resorting to notice and comment. *See Perez v. Mortgage Bankers Association*, Nos. 13-1041 (March 9, 2015).

As *Perez* held, the need for notice and comment turns not on the significance of the position under consideration but on the function undertaken by the relevant agency.[7] New rules require notice and comment; interpretations of existing rules, including changes in their interpretation, do not.[8] In this case, the staff is being asked to properly interpret the "directly conflicts" language in subsection (i)(9). As an interpretation, the SEC has no obligation to provide notice or an opportunity for comment.

This perspective in fact reflects the staff's longstanding practice. The staff has often changed its interpretive positon under Rule 14a-8, sometimes significantly, without resorting to notice and comment.[9] The staff has, for example, altered positions that elevate "form over substance."[10] Indeed, the staff's willingness to shift interpretations likely explains at least some of the volume of no action letter requests under Rule 14a-8.[11]

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[6] *See Perez v. Mortgage Bankers Association*, Nos. 13-1041 (March 9, 2015) (disagreeing with a lower court standard that required notice and comment upon a "fundamental change" in interpretation).

[7] The Court in *Perez* specifically rejected the argument that notice and comment applied "where an agency significantly alters a prior, definitive interpretation of a regulation". The Court noted that the argument was unable to explain why a standard of notice and comment applicable to "revised interpretations should not also extend to the agency's first interpretation."

[8] *Perez v. Mortgage Bankers Association*, Nos. 13-1041 (March 9, 2015) ("Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.").

[9] *See* J. Robert Brown, Jr., *Essay: The Politicization of Corporate Governance: Bureaucratic Discretion, the SEC, and Shareholder Ratification of Auditors*, *2 Harv. Bus. L. Rev.* 501, 511 (2012) ("Staff interpretations of the "ordinary business" exclusion under Rule 14a-8 change regularly."), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1781987

[10] *See* Staff Bulletin No. 14E, Division of Corporation Finance, n. 3, October 27, 2009

[11] *See* Brown, *supra* note 9, at 532 ("The approach will impose significant costs. With respect to interpretations under Rule 14a-8, issuers have an incentive to challenge shareholder proposals, a not inexpensive process. Moreover, given the changes that occur from administration to administration, issuers rationally may seek the omission of proposals that address issues 'definitively' resolved by the staff.").

III. Conclusion

The APA requirement of notice and comment offers no meaningful obstacle to any change in the staff's interpretation of Rule 14a-8(i)(9). Moreover, resorting to notice and comment would set a very bad precedent. Significant changes to other interpretive positions would presumably also have to be preceded by notice and comment.

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Thank you again for considering these concerns. I'm happy to discuss this with you or the staff of the Division.

With regards.

Yours truly,

J. Robert Brown, Jr.
Professor of Law & Director, Corporate & Commercial Law Program
University of Denver Sturm College of Law