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Dated: May 19, 1998.

By the commission.

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–40018; IC–23200; File No. S7–25–97]

RIN 3235–AH20

Amendments To Rules On Shareholder Proposals

AGENCY: Securities and Exchange Commission.

ACTION: Final Rule.

SUMMARY: The Securities and Exchange Commission (''we'' or ''Commission'') is adopting amendments to its rules on shareholder proposals. The amendments recast rule 14a–8 into a Question & Answer Format that both shareholders and companies should find easier to follow, and make other modifications to existing interpretations of the rule. We are also amending rule 14a–4 to provide clearer ground rules for companies' exercise of discretionary voting authority, and making related amendments to rule 14a–5.

EFFECTIVE DATE: The amendments are effective June 29, 1998.

FOR FURTHER INFORMATION CONTACT: Frank G. Zarb, Jr., of Sanjay M. Shirodkar, Division of Corporation Finance, (202) 942–2900, or Doretha M. VanSlyke, Division of Investment Management, at (202) 942–0721, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to rules 14a–8,[1] 14a–4,[2] and 14a–5[3] under the Securities Exchange Act of 1934 (the ''Exchange Act'').[4]

I. Executive Summary

With modifications, we are adopting some of the amendments to our rules on shareholder proposals that we initially proposed on September 18, 1997.[5] As explained more fully in this release, we modified our original proposals based on our consideration of the more than 2,000 comment letters we received from the public.[6]

Our proposed changes evoked considerable public controversy, as have our earlier efforts to reform these rules. Some shareholders and companies expressed overall support for our proposals.[7] Certain of our proposals, however, were viewed as especially controversial, and generated strong comments in favor, as well as heavy opposition.[8]

The amendments adopted today:

- Recast rule 14a–8 into a Question & Answer format that is easier to read;
- Reverse the *Cracker Barrel* no-action letter on employment-related proposals raising social policy issues;
- Adopt other less significant amendments to rule 14a–8; and
- Amend rule 14a–4 to provide shareholders and companies with clearer guidance on companies' exercise of discretionary voting authority.

These reforms, in our view, will help to improve the operation of the rules governing shareholder proposals and will address some of he concerns raised by shareholders and companies over the last several years on the operation of the proxy process.

We have decided not to adopt other elements of our original proposals, due in part to strong concerns expressed by commenters. We are not adopting our original proposals to increase the percentage of the vote a proposal needs before it can be resubmitted in future years;[9] to streamline the exclusion for matters considered irrelevant to corporate business;[10] or to modify our administration of the rule that permits companies to exclude proposals that further personal grievances or special interests.[11] We are also not adopting the proposed ''override'' mechanism that would have permitted 3% of the shareownership to override a company's decision to exclude proposals under certain of the bases for exclusion set forth under Question 9 of amended rule 14a–8.[12]

Some of the proposals we are not adopting share a common theme: to reduce the Commission's and its staff's role in the process and to provide shareholders and companies with a greater opportunity to decide for themselves which proposals are sufficiently important and relevant to the company's business to justify inclusion in its proxy materials. However, a number of commenters resisted the idea of significantly decreasing the role of the Commission and its staff as informal arbiters through the administration of the no-action letter process. Consistent with these views, commenters were equally unsupportive of fundamental alternatives to the existing rule and process that, in different degrees, would have decreased the Commission's overall participation.

While we have tried to provide the most fair, predictable, and efficient system possible, these rules, even as amended, will continue to require us to make difficult judgments about interpretations of proposals, the motives of those submitting them, and the policies to which they relate. We will continue to explore ways to improve the process as opportunities present themselves.

II. Plain-English Question & Answer Format

We had proposed to recast rule 14a–8 into a more plain-English Question & Answer format.[13] We are adopting that proposal, and the amended rule will be

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[1] 17 CFR 240.14a–8.

[2] 17 CFR 240.14a–4.

[3] 17 CFR 240.14a–5.

[4] 15 U.S.C. 78a *et seq.*

[5] See our Proposing Release, Exchange Act Release No. 29093 (Sept. 18, 1997) [62 Fed. Reg. 50682].

[6] The comment letters are available for inspection and copying in the Commission's Public Reference Room in file number S7–25–97. Comments that were submitted electronically are available on the Commission's website (www.sec.gov).

[7] See, *e.g.,* Comment Letters From Teachers Insurance and Annuity Assoc./College Retirement Equities Fund, Nov. 19, 1997 (''TIAA–CREF Letter''); California Public Employees' Retirement System, Nov. 10, 1997 (''CALPERS Letter''); American Society of Corporate Secretaries, Dec. 8, 1997 (''ASCS Letter''); the Business Roundtable, Dec. 9, 1997 (''BRT Letter''); Barclays Global Investors, Dec. 4, 1997; Georgeson & Company Inc., Dec. 31, 1997 (''Georgeson Letter'').

[8] See, *e.g.,* New York City Employees Retirement System, Nov. 5, 1997 (''NYCERS Letter''); Interfaith Center on Corporate Responsibility, Dec. 23, 1997 (''ICCR Letter''); American Bar Ass'n, Dec. 23, 1997 (''ABA Letter''); Labor Policy Ass'n, Nov. 17, 1997 (''LPA Letter'').

[9] See paragraph (12) under Question 9, formerly rule 14a–8(c)(12) [17 CFR 240.14a–8(c)(12)].

[10] Paragraph (5) under Question 9, former rule 14a–8(c)(5)[17 CFR 240.14a–8(c)(5)].

[11] Paragraph (4) under Question 9, former rule 14a–8(c)(4)[17 CFR 240.14a–8(c)(4)].

[12] The mechanism had been included in Paragraph 10 of rule 14a–8 as proposed to be amended. See Proposing Release.

[13] Unless specifically indicated otherwise, none of these revisions are intended to signal a change in our current interpretations.

the Commission's first in question and answer format. Most commenters who addressed this proposal expressed favorable views, believing that it would make the rule easier for shareholders and companies to understand and follow.[14]

In addition to the other amendments described in this release, we have made some minor revisions to the language we had proposed to conform with the new plain English format. For example, on the proposed revisions to paragraph (1) under Question 9, which is former rule 14a–8(c)(1),[15] commenters stated, and we agree, that the reference to ''the state of the company's incorporation'' may appear narrower than the actual scope of the rule because some entities that may be subject to the rule, such as partnerships, are not ''incorporated.''[16] Accordingly, the rule as adopted refers to ''the laws of the jurisdiction of the company's organization.''

We are adopting minor plain—English revisions to paragraphs (2), (3), and (4) under Question 9, former rules 14a–8(c)(2),[17] (c)(3),[18] and (c)(4). Because we are not adopting the proposed substantive amendments to paragraph (5), former rule 14a–8(c)(5), we are making only minor, non-substantive modifications to the language of that rule so that it conforms to the new plain-English approach.

We are adopting the revisions to former rule 14a–8(c)(6),[19] now paragraph (6) under Question 9, as proposed.[20]

While we are making minor conforming changes to the language of paragraph (7) under Question 9, formerly rule 14a–8(c)(7),[21] we have decided not to adopt the proposed language changes to this rule, or the list of illustrative examples, other than to replace the reference to ''registrant'' with ''company.''[22] We had proposed to revise the rule's language because we thought that the legal term-of-art ''ordinary business'' might be confusing to some shareholders and companies. The term refers to matters that are not necessarily ''ordinary'' in the common meaning of the word, and is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations. Several companies and shareholders nonetheless objected to the proposed revisions, particularly the elimination of the ''ordinary business'' language, on the ground that most participants in the shareholder proposal process are now so familiar with the ''ordinary business'' language that they might misconstrue the revisions as signaling an interpretive change.[23] Indeed, since the meaning of the phrase ''ordinary business'' has been developed by the courts over the years through costly litigation and essentially has become a term-0f-art in the proxy area, we recognize the possibility that the adoption of a new term could inject needless costs and other inefficiencies into the shareholder proposal process.

We are adopting with one modification the proposed language changes to paragraph (8) under Question 9, formerly rule 14a–8(c)(8).[24] The rule as proposed would have permitted companies to exclude a proposal that ''relates to an election for membership on the company's board of directors.'' Based on a suggestion from one commenter, in order to account for non-corporate entities with principal governing bodies bearing names other than the ''board of directors,'' the rule as adopted refers explicitly to elections to an ''analogous governing body.''[25]

We are adopting as proposed our revisions to paragraph (9) under Question 9, formerly rule 14a–8(c)(9).[26] As amended, the rule permits a company to exclude a proposal that ''directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting.''[27]

We are adopting as proposed the revisions to paragraphs (10) and (11) under Question 9, formerly rules 14a–8(c)(10)[28] and 14a–8(c)(11).[29] The revisions to paragraph (10) reflect an interpretation that we adopted in 1983.[30]

Although we are not adopting proposed substantive revisions to paragraph (12), formerly rule 14a–8(c)(12),[31] we are adopting non-substantive revisions to conform the rule to the new plain-English approach.

The Commission, through the Division of Corporation Finance (the ''Division''), anticipates establishing a special electronic mailbox only for rule 14a–8 correspondence through which both shareholders and companies will be permitted to make electronic submissions under this rule, including follow-up correspondence.

III. The Interpretation of Rule 14a–8(c)(7): The ''Ordinary Business'' Exclusion

We proposed to reverse the position announced in the 1992 *Cracker Barrel* no-action letter concerning the Division's approach to employment-related shareholder proposals raising social policy issues.[32] In that letter, the Division announced that

The fact that a shareholder proposal concerning a company's employment

[14] *See, e.g.,* CALPERS Letter; State Teachers' Retirement Sys. (California), Jan. 12, 1998; Ethics in Investment Committee of the Sisters of Charity of Saint Elizabeth Station, Nov. 19, 1997; Mr. H. Carl McCall, Comptroller of the State of New York, Dec. 24, 1997; American Corporate Counsel Assoc., Dec. 31, 1997 (''ACCA Letter''); ASCS Letter; Eastman Kodak Co., Nov. 25, 1997; Banc One Corp., Dec. 9, 1998. Some commenters, however, did not believe that the new format would significantly improve the rule's operation. *See, e.g.,* ABA Letter; New York State Bar Assoc., Dec. 10, 1997 (''New York State Bar Letter'').

[15] Rule 14–8(c)(1) [17 CFR 240.14a–8(c)(1)].

[16] *See* ABA Letter; ICCR Letter; Investment Company Institute, Dec. 30, 1997 (''ICI Letter'').

[17] Rule 14a–8(c)(2) [17 CFR 240.14a–8(c)(2)].

[18] Rule 14a–8(c)(3) [17 CFR 240.14a–8(c)(3)].

[19] Rule 14a–8(c)(6) [17 CFR 240.14a–8(c)(6)].

[20] One commenter thought the proposed language could be read as precluding companies from excluding proposals that companies lack power to implement. *See* ABA Letter. To the contrary, the revised rule continues to refer to situations where a company lacks ''power'' to implement the proposal. Thus, for example, exclusion may be justified where implementing the proposal would require intervening actions by independent third parties. *See,* e.g., SCEcorp (Dec. 20, 1995) (proposal that unaffiliated fiduciary trustees amend voting agreements). Under current staff interpretations, however, exclusion would not normally be justified if the proposal merely requires the company to *ask* for cooperation from a third party. *See, e.g., Northeast Utilities System* (Nov. 7, 1996) (proposal that the company ask a third party to coordinate annual meetings held by public companies).

[21] Rule 14a–8(c)(7) [17 CFR 240.14a–8(c)(7)].

[22] Two commenters suggested that we include a non-exclusive list of examples of matters particular to investment companies that would be excludable per se under the ordinary business exception. *See* ICI Letter; Gordon Altman Butowsky Weitzen Shalov & Wein, Dec. 16, 1997. We have not followed the suggestion. We believe that investment companies are not sufficiently different from other types of issuers to make it appropriate for us to designate a predefined set of topics that would be excepted from the shareholder proposal process established under Rule 14a–8.

[23] *See, e.g.,* ICCR Letter; Jessie Smith Noyes Foundation, Nov. 14, 1997 (''Jessie Smith Noyes Letter''); Long View Collective Investment Fund, Jan. 5, 1998 (''Long View Letter''); ABA Letter; The Chase Manhattan Corp., Jan. 14, 1998 (''Chase Manhattan Letter'').

[24] Rule 14a–8(c)(8) [17 CFR 240.14a–8(c)(8)].

[25] *See* ABA Letter.

[26] Rule 14a–8(c)(9) [17 CFR 240.14a–8(c)(9)].

[27] One commenter thought that the word ''directly'' may appear to signal a narrowing of the exclusion. *See* ABA Letter. We believe that the revisions accurately convey our current interpretations of the rule; of course, 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. *See, e.g., SBC Communications* (Feb. 2, 1996) (shareholder proposal on calculation of non-cash compensation directly conflicted with company's proposal on a stock and incentive plan).

[28] Rule 14a–8(c)(10) [17 CFR 240.14a–8(c)(10)].

[29] Rule 14a–8(c)(11) [17 CFR 240.14a–8(c)(11)].

[30] In Exchange Act Release No. 20091 (Aug. 16, 1983) [48 FR 38218], we stated that a proposal may be excluded under the rule if it has been ''substantially implemented.''

[31] As explained in Section VI below, we have decided not to modify the percentage of the shareholder vote that a proposal must receive in order to be entitled to re-submission in future years.

[32] *See Cracker Barrel Old Country Stores, Inc.* (Oct. 13, 1992).

policies and practices for the general workforce is tied to a social issue will no longer be viewed as removing the proposal from the realm of ordinary business operations of the registrant. Rather, determinations with respect to any such proposals are properly governed by the employment-based nature of the proposal.

We are adopting our proposal to reverse the *Cracker Barrel* position, which provided that all employment-related shareholder proposals raising social policy issues would be excludable under the ''ordinary business'' exclusion.[33] The Division will return to its case-by-case approach that prevailed prior to the *Cracker Barrel* no-action letter.

In applying the ''ordinary business'' exclusion to proposals that raise social policy issues, the Division seeks to use the most well-reasoned and consistent standards possible, given the inherent complexity of the task. From time to time, in light of experience dealing with proposals in specific subject areas, and reflecting changing societal views, the Division adjusts its view with respect to ''social policy'' proposals involving ordinary business. Over the years, the Division has reversed its position on the excludability of a number of types of proposals, including plant closings,[34] the manufacture of tobacco products,[35] executive compensation,[36] and golden parachutes.[37]

We believe that reversal of the Division's *Cracker Barrel* no-action letter, which the Commission had subsequently affirmed,[38] is warranted. Since 1992, the relative importance of certain social issues relating to employment matters has reemerged as a consistent topic of widespread public debate.[39] In addition, as a result of the extensive policy discussions that the *Cracker Barrel* position engendered, and through the rulemaking notice and comment process, we have gained a better understanding of the depth of interest among shareholders in having an opportunity to express their views to company management on employment-related proposals that raise sufficiently significant social policy issues.

Reversal of the *Cracker Barrel* no-action position will result in a return to a case-by-case analytical approach. In making distinctions in this area, the Division and the Commission will continue to apply the applicable standard for determining when a proposal relates to ''ordinary business.'' The standard, originally articulated in the Commission's 1976 release, provided an exception for certain proposals that raise significant social policy issues.[40]

While we acknowledge that there is no bright-line test to determine when employment-related shareholder proposals raising social issues fall within the scope of the ''ordinary business'' exclusion, the staff will make reasoned distinctions in deciding whether to furnish ''no-action'' relief. Although a few of the distinctions made in those cases may be somewhat tenuous, we believe that on the whole the benefit to shareholders and companies in providing guidance and informal resolutions will outweigh the problematic aspects of the few decisions in the middle ground.

Nearly all commenters from the shareholder community who addressed the matter supported the reversal of this position.[41] Most commenters from the corporate community did not favor the proposal to reverse *Cracker Barrel*, though many indicated that the change would be acceptable as part of a broader set of reforms.[42]

Going forward, companies and shareholders should bear in mind that the *Cracker Barrel* position related only to employment-related proposals raising certain social policy issues. Reversal of the position does not affect the Division's analysis of any other category of proposals under the exclusion, such as proposals on general business operations.

Finally, we believe that it would be useful to summarize the principal considerations in the Division's application, under the Commission's oversight, of the ''ordinary business'' exclusion. The general underlying policy of this exclusion is consistent with the policy of most state corporate laws: to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting.

The policy underlying the ordinary business exclusion rests on two central considerations. The first relates to the subject matter of the proposal. Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. However, proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, 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.[43]

The second consideration relates to the degree to which the proposal seeks to ''micro-manage'' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.[44] This consideration may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.

A similar discussion in the Proposing Release of the primary considerations underlying our interpretation of the ''ordinary business'' exclusion as applied to such proposals raised some questions and concerns among some of the commenters. Because of that concern, we are providing clarification of that position.[45] One aspect of that

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[33] The reversal is effective as of May 21, 1998, and will apply to future Division no-action responses. It will apply to any rule 14a–8 no-action submission that the Division has received before May 21, 1998 if the Division has not issued a corresponding no-action response by the close of business on May 20, 1998.

[34] *See Pacific Telesis Group* (Feb. 2, 1989).

[35] *See Phillip Morris Companies, Inc.* (Feb. 13, 1990).

[36] *See Reebok Int'l Ltd.* (Mar. 16, 1992).

[37] *See Transamerica Corp.* (Jan. 10, 1990).

[38] *See* Letter dated January 15, 1993 from Jonathan G. Katz, Secretary to the Commission, to Sue Ellen Dodell, Deputy Counsel, Office of Comptroller, City of New York.

[39] *See e.g.*, Investors Focus on Diversity at Texaco Annual Meeting: Company Faces 94 Discrimination Filings, *The Washington Post*, May 14, 1997; Shareholders Press Shoney's on Bias Issue, *The New York Times*, Dec. 26, 1976).

[40] *See* Exchange Act Release No. 12999 (Nov. 22, 1976) [41 FR 52994].

[41] *See e.g.*, Calvert Group, Nov. 26, 1997 (''Calvert Letter''); Center for Responsible Investing, Rec'd Nov. 3, 1997; Captains Endowment Assoc., Rec'd Nov. 6, 1997; Social Investment Forum, Jan. 2, 1998 (''Social Investment Forum Letter'').

[42] *See, e.g.*, ASCS Letter; ACCA Letter; BRT Letter; AlliedSignal Inc., Nov. 24, 1997; Ashland Inc., Nov. 21, 1997; LPA Letter; Sullivan & Cromwell, Dec. 29, 1997 (''Sullivan & Cromwell Letter'').

[43] *See, e.g., Reebok Int'l Ltd.* (Mar. 16, 1992) (noting that a proposal concerning senior executive compensation could not be excluded pursuant to rule 14a–8(c)(7)).

[44] Exchange Act Release No. 12999 (Nov. 22, 1976).

[45] The exclusion has been interpreted previously by the Commission. *See, e.g.*, Exchange Act Release No. 20091 (Aug. 16, 1983) [48 FR 38218]; Exchange Act Release No. 12999 (Nov. 22, 1976) [41 FR 52994]; Exchange Act Release No. 4950 (Oct. 9, 1953) [18 FR 6646]. It has also been interpreted by the courts. *See, e.g., Grimes* v. *Ohio Edison Co.*, 992 F.2d 455 (2d Cir. 1993); *Roosevelt* v. *E.I. Du Pont De Nemours & Co.*, 958 F.2d 416 (D.C. Cir. 1992);

discussion was the basis for some commenters' concern that the reversal of *Cracker Barrel* might be only a partial one. More specifically, in the Proposing Release we explained that one of the considerations in making the ordinary business determination was the degree to which the proposal seeks to micro-manage the company. We cited examples such as where the proposal seeks intricate detail, or seeks to impose specific time-frames or to impose specific methods for implementing complex policies. Some commenters thought that the examples cited seemed to imply that all proposals seeking detail, or seeking to promote time-frames or methods, necessarily amount to ''ordinary business.''[46] We did not intend such an implication. Timing questions, for instance, could involve significant policy where large differences are at stake, and proposals may seek a reasonable level of detail without running afoul of these considerations.[47]

Further, in a footnote to the same sentence citing examples of ''micromanagement,'' we included a citation to *Capital Cities/ABC, Inc.,* (Apr. 4, 1991) involving a proposal on the company's affirmative action policies and practices.[48] Some commenters were concerned that the citation might imply that proposals similar to the *Capital Cities* proposal today would automatically be excludable under ''ordinary business'' on grounds that they seek excessive detail. Such a position, in their view, might offset the impact of reversing the *Cracker Barrel* position. However, we cited *Capital Cities/ABC, Inc.* only to support the general proposition that some proposals may intrude unduly on a company's ''ordinary business'' operations by virtue of the level of detail that they seek. We did not intend to imply that the proposal addressed in *Capital Cities,* or similar proposals, would automatically amount to ''ordinary business.'' Those determinations will be made on a case-by-case basis, taking into account factors such as the nature of the proposal and the circumstances of the company to which it is directed.

IV. Rule 14a–4: Discretionary Voting Authority

We had proposed amendments to rule 14a–4, and related amendments to rule 14a–5, to provide clearer guidelines for companies' exercise of discretionary voting authority in connection with annual shareholder meetings.[49] We are adopting our proposals with some modifications.

As we explained in the Proposing Release, rule 14a–4 did not clearly address the exercise of discretionary voting authority if a shareholder proponent chooses not to use rule 14a–8's procedures for placing his or her proposal in the company's proxy materials. This may occur if the proponent notifies the company in advance of the meeting of his or her intention to present the proposal from the floor of the meeting, and commences his or her own proxy solicitation, without ever invoking rule 14a–8's procedures. Our amendments to rule 14a–4(c)(1), and new paragraphs 14a–4 (c)(2) and (c)(3), are designed to provide companies with clearer guidance on the scope of permissible discretionary voting power in the context of a non-14a–8 proposal.

A. Rule 14a–4(c)(1)

We are adopting essentially as proposed new rule 14a–4(c)(1), which replaces a ''reasonable time'' standard with a clear date after which notice to the company of a possible shareholder proposal would not jeopardize a company's ability to exercise discretionary voting authority on that new matter when and if raised at the annual meeting. Most commenters who addressed this proposal expressed favorable views.[50] Amended paragraph 14a–4(c)(1) allows a company voting discretionary authority where the company did not have notice of the matter by a date more than 45 days before the month and day in the current year corresponding to the date on which the company first mailed its proxy materials for the prior year's annual meeting of the shareholders, or by a date established by an overriding advance notice provision.[51]

As an example, assume a company mailed this year's proxy materials on March 31, 1998 for an annual meeting on May 1, 1998. Next year, the company also schedules an early May annual meeting. The notice date established by new rule 14a–4(c)(1) for non-14a–8 proposals is 45 days before March 31, or February 14. Thus February 14, 1999 would represent the notice date for the purposes of amended rule 14a–4(c)(1) unless a different date is established by an overriding advance notice provision in the company's charter or bylaws.[52]

A few commenters thought that advance notice of 45 days might provide an insufficient amount of time for some companies with longer printing and mailing schedules.[53] However, we do not believe that it is necessary to extend the 45-day advance notice period, since most companies should have some flexibility under state law to prolong the period through advance notice provisions. We stated in the Proposing Release that we did not intend to interfere with the operations of state law authorized definitions of advance notice set forth in corporate bylaws and/or articles of incorporation, and a number of commenters supported this approach.[54] Accordingly, an advance notice provision would override the 45-day period under rule 14a–4, resulting

Medical Committee for Human Rights v. *SEC,* 432 F.2d 659 (D.C. Cir. 1970); *New York City Employee's Retirement Sys.* v. *SEC,* 843 F. Supp. 858, *rev'd* 45 F.3d 7 (2d Cir. 1995); *Amalgamated Clothing and Textile Workers Union* v. *Wal-Mart Stores, Inc.,* 821 F. Supp. 877, 891 (S.D.N.Y. 1993).

[46] *See, e.g.,* ICCR Letter; LongView Letter; Letter from Professor Harvey J. Goldschmid of Columbia University School of Law, and Ira M. Millstein, Senior Partner, Weil, Gotshal & Manges LLP, Dec. 23, 1997 (''Goldschmid and Millstein Letter''). *Compare* Chase Manhattan Letter.

[47] *See, e.g., Roosevelt* v. *E.I. Du Pont De Nemours & Co.,* 958 F.2d at 424–427 (one-year difference in timing of CFC production phase-out does not implicate significant policy, but longer period might implicate significant policy). In *Amalgamated Clothing and Textile Workers Union,* 821 F. Supp. at 891, the court required Wal-Mart to include a proposal in its proxy materials that sought information on the company's affirmative action policies and practices, although it also required the proponents to make certain revisions designed to ensure that the proposal did not seek excessive detail.

[48] *See* Proposing Release, Footnote 79.

[49] Discretionary voting authority is the ability to vote proxies that shareholders have executed and returned to the company, on matters not specifically reflected on the proxy card, and on which shareholders have not had an opportunity to vote by proxy. While not necessarily limited to annual meetings involving the election of directors, this has been the context in which companies have expressed concerns about proponents' attempts to ''end run'' around the rule 14a–8 process.

[50] *See, e.g.,* ICCR Letter; TIAA–CREF Letter; LongView Letter, BRT Letter; ACCA Letter; Barclays Global Investors, Dec. 4, 1997; United Brotherhood of Carpenters and Joiners of America (''Carpenters Letter''); International Union of Operating Engineers, Dec. 29, 1997 (''Engineers Letter''); International Brotherhood of Teamsters, Dec. 23, 1997 (''Teamsters Letter''). A few commenters did not favor the proposal. *See e.g.,* Gannett Corp., Nov. 20, 1997; CALPERS Letter; Union of Needletrades, Industrial and Textile Employees, Jan. 2, 1998 (''UNITE Letter'').

[51] An advance notice provision is a requirement in a company's charter or bylaws that a shareholder proponent notify the company of his/her intention to present a proposal a certain number of days or weeks prior to the shareholders' meeting or the mailing of proxies.

[52] As amended, rule 14a–5(e) requires companies to disclose this date in each annual meeting proxy statement or its equivalent. *See* Section V below.

[53] *See, e.g.,* ACCA Letter; Citicorp, Dec. 23, 1997 (''Citicorp Letter'').

[54] *See, e.g.,* Air Products and Chemicals, Inc., Dec. 22, 1997; NationsBank, Nov. 21, 1997; BRT Letter; Sullivan & Cromwell Letter. Other commenters who generally supported proposed new paragraph 14a–4(c)(1) did not note an objection to this aspect of the rules operation. *See e.g.,* Carpenters Letter, Longview Letter; Engineers Letter; ICCR Letter; TIAA–CREF Letter.

in a shorter[55] or longer period.[56] The rule continues to require inclusion of a specific statement, in either the proxy statement or proxy card, of an intent to exercise discretionary voting authority in these circumstances.

Paragraph 14a–4(c)(1) as adopted continues to incorporate a ''reasonable time'' standard if the company did not hold an annual meeting of shareholders during the prior year, or if the date of the annual meeting has changed by more than 30 days from the prior year. While one commenter suggested an alternative mechanism designed to provide a more specific ''default'' date, we were concerned that such an alternative approach might make the rule unjustifiable complex.[57]

B. Rule 14a–4(c)(2)

Proposed new paragraph 14a–4(c)(2) addressed a company's ability to exercise discretionary voting authority for an annual shareholders' meeting notwithstanding its receipt of ''timely'' advance notice of a non-14a–8 shareholder proposal as defined by paragraph 14a–4(c)(1).[58] We are adopting new paragraph (c)(2), but with some modifications of the original proposal.

As originally proposed, paragraph 14a–4(c)(2) would have permitted the exercise of discretionary voting authority by company management if the company's proxy materials were to include: (i) in the proxy statement, a discussion of the nature of the matters as to which adequate advance notice has been received, and how the company intends to exercise its discretion to vote on each such matter should it be presented to shareholders at the meeting, and (ii) on the proxy card, a cross-reference to the discussion in the proxy statement and a box allowing shareholders to withhold discretionary authority from management to vote on the designated matter(s). The pre-conditions to reliance on the rule are discussed below.

1. Proxy Statement Disclosure

On the first pre-condition of the proposed rule, requiring disclosure of the nature of potential non-14a–8 shareholder proposals, a number of commenters objected to our use of the word ''discussion.''[59] In their view, the word ''discussion'' appears to signal a departure from the Division's current position expressed in its *Idaho Power* and *Borg-Warner* no action letter responses.[60] Under those no-action responses, companies must only ''advise'' shareholders of, rather than ''discuss,'' the nature of proposals that may be raised. Because we intended no departure from the disclosure element of the Division's no-action position, paragraph (c)(2) as adopted replaces the word ''discussion'' with ''advice.'' We remind you that the disclosure prescribed by amended rule 14a–4(c)(2), as with any disclosure item, must take into account the disclosure requirements of the proxy anti-fraud rule.[61]

2. No Separate Voting Box

On the second pre-condition of proposed paragraph 14a–4(c)(2), a number of commenters objected to the inclusion of a separate voting ''box'' permitting shareholders to withhold discretionary authority from management on a non-14a–8 shareholder proposal as to which adequate advance notice had been received in the context of an annual meeting or its equivalent. Some stated that a voting box permitting shareholders to withhold discretionary voting authority in some circumstances may be confusing if shareholders are also independently solicited by the proponent in support of the same proposal.[62] We agree that inclusion of the proposed box on companies' proxy cares may be confusing in some circumstances.[63]

Other commenters objected to the separate voting box because they believe that the potential availability of the box would in effect create a new system for submitting shareholder proposals without having to comply with the restrictions under rule 14a–8.[64] In their view, the prospect of obtaining a voting box with a cross-reference to disclosure of the nature of the potential proposal in the proxy statement would encourage the submission of more shareholder proposals outside rule 14a–8's mechanisms.

Accordingly, we have decided not to include the new voting box as part of new rule 14a–4(c)(2). A shareholder's execution of a proxy card will confer discretionary voting authority if the requirements of the rule are satisfied.

3. Percentage of Shareholders to be Solicited

Several commenters also objected to proposed new paragraph 14a–4(c)(2) on grounds that it would permit a company to exercise discretionary voting authority at an annual shareholders meeting even if the shareholder proponent had independently solicited the percentage of shareholders required to carry the proposal.[65] These commenters believe that a company should not be permitted to vote uninstructed proxies if the proponent has put the proposal ''in play'' by providing a proxy statement and form of proxy to a significant percentage of the company's sharehownership. On this point, proposed paragraph 14a–4(c)(2) represented a departure from the

[55] A company that mails its proxy materials before the expiration of the period established by an advance notice bylaw would continue to be subject to the notice even though it has already mailed its proxies.

[56] One commenter suggested that we move the parenthetical referring to the effect of advance notice provisions from the middle of the first sentence of paragraph 14a–4(c)(1) as proposed to the end of that sentence in order to clarify that an advance notice provision would override the 45-day period established by the rule whether the provision runs from the meeting date or from the mailing date. *See* Sullivan & Cromwell Letter. We agree and have made the revision.

[57] *See* Sullivan & Cromwell Letter.

[58] A few commenters also thought that we should further clarify that new paragraph 14a–4(c)(2) comes into play only if the company receives timely notice of a non-14a–8 proposal for the purposes of paragraph (c)(1). We added clarifying language to the end of paragraph (c)(1) and the beginning of paragraph (c)(2) in response to these comments.

[59] *See e.g.,* Chevron Corp, Nov. 25, 1997; USX Corp., Dec. 18, 1997.

[60] *Idaho Power Co.* (Mar 13, 1996); *Borg-Warner Security Corp.* (Mar. 14, 1996).

[61] *See* rule 14a–9 [17 CFR 240.14a–9].

[62] *See, e.g.,* Georgeson Letter; ICCR Letter; UNITE Letter; Davis, Cowell & Bowe, LLP, Jan. 2, 1998. One commenter gave the following example. An insurgent sends out a proxy card seeking shareholder votes on its shareholder resolution. A shareholder who receives the insurgent's card votes in favor of the proposal, and executes and returns the insurgent's card. But then the company either solicits, or resolicits, the same shareholder, and includes a ''withhold'' box on management's proxy card relating to the same non-14a–8 proposal. Since the shareholder does not wish to grant management discretionary voting authority on the proposal, it checks the box. But then, in the commenter's view, it may be unclear whether the shareholder has executed a subsequent proxy that revokes the shareholder's execution of the insurgent's card under applicable state law. *See* ICCR Letter at 32–33.

[63] A few commenters from the shareholder community suggested that we overcome possible confusion by requiring companies to permit shareholders to vote ''for'' or ''against'' non-14a–8 proposals. Commenters from the corporate community that addressed the matter opposed such an approach, and we believe that the amendments adopted today adequately accomplish our goal of providing clearer guidelines in this area. Contrary to the statements by some commenters, it is not necessarily a precondition for the exercise of discretionary voting authority under the Division's current no-action letters that companies include an extra item on their proxy cards permitting shareholders to vote ''for'' or ''against'' non-14a–8 proposals. *See Idaho Power* and *Borg-Warner.*

[64] *See, eg.,* BRT Letter; ASCS Letter; J.C. Penny Company, Dec. 19, 1997; Champion Int'l Corp., Dec. 18, 1997; International Paper, Nov. 19, 1997.

[65] *See, e.g.,* Mr. Jack Sheinkman, Vice-Chair Amalgamated Bank of New York, and President Emeritus Amalgamated Clothing and Textile Workers Union AFL–CIO, CLC, Nov. 7, 1997; Service Employees Int'l Union, Dec. 31, 1997; Engineers Letter; Carpenters Letter; National Electrical Benefit Fund, Dec. 22, 1997 (''NEBF Letter'').

''percentage of shares solicited'' standard articulated in the Division's *Idaho Power* and *Borg-Warner* no-action positions.

In response to these comments, and in light of our decision not to adopt the proposal to require that the Company include an additional box on its proxy cards for withholding discretionary voting authority, we have decided to codify the ''percentage of shares solicited'' standard of the Division's current no-action positions. The final rule therefore precludes a company from exercising discretionary voting authority on matters as to which it has received adequate advance notice if the proponent provides the company as part of that notice with a statement that it intends to solicit the percentage of shareholder votes required to carry the proposal, followed with specified evidence that the stated percentage had actually been solicited.

As we explained in the Proposing Release, this aspect of the Division's no-action position had been the source of uncertainty for companies. A company may not know whether a shareholder intends to begin to solicit proxies independently, or how many shareholders will be solicited if a solicitation is actually commenced. We understand that in a number of instances companies were forced to guess whether its ability to exercise discretionary authority had been restricted. A number of commenters from both the corporate and shareholder communities suggested that we overcome the potential for uncertainty by requiring proponents to provide advance written notice if they intend to deliver a proxy statement and form of proxy to holders of at least the minimum number of the company's voting shares that is required to carry the proposal, including measures to help ensure that such notice is bona fide.[66]

We have revised new paragraph (c)(2) to reflect these comments, and the rule as adopted requires a shareholder proponent to provide the company with written notice within the timeframe established by paragraph 14a–4(c)(1), that is, earlier than 45 days or in compliance with advance notice provisions. In order to help ensure that the notice has been provided in good faith, paragraph 14a–4(c)(2) as adopted also requires the proponent to repeat the statement (that it intends to solicit proxies to prevail) in its proxy materials to underscore the applicability of rule 14a–9, the anti-fraud rule. To further emphasize this point, and to provide interested parties with the ability to proceed against a proponent that does not fulfill its good faith promise to solicit the required number of shareholders, the rule requires the proponent to provide the company with a statement from the solicitor or other person with knowledge indicating that the proponent has taken the steps necessary to solicit the percentage of the company's shareownership required to approve the proposal. A statement executed by the shareholder insurgent will satisfy this requirement only to the extent that it was actually involved in carrying out the solicitation.

C. Rule 14a–4(c)(3)

We are also adopting a new paragraph 14a–4(c)(3) to further clarify the rule's operation in connection with special shareholders' meetings and other solicitations. Rules 14a–4(c)(1) and 14a–4(c)(2) as proposed to be amended, and as adopted, establish a clearer framework for companies' exercise of discretionary voting authority for annual shareholder meetings or their functional equivalents. We did not intend for that framework to apply to other solicitations, or to solicitations by persons other than management, such as special meetings or consent solicitations unrelated to the election of directors, which would continue to be governed by the ''reasonable time'' standard that had applied to all solicitations under former rule 14a–4(c)(1). Although there does not appear to have been confusion among commenters on this point, new paragraph (c)(3), and new introductory language to new paragraphs (c)(1) and (c)(2), should help clarify the point.

Tracking much of the language of former paragraph 14a–4(c)(1), new paragraph (c)(3) provides for the exercise of discretionary voting authority ''[f]or solicitations other than for annual meetings or for solicitations by persons other than the registrant, [on] matters which the persons making the solicitation do not know, a reasonable time before the solicitation, are to be presented at the meeting, if a specific statement to that effect is made in the proxy statement or form of proxy.''[67]

D. Filing in Preliminary Form

Finally, in the Proposing Release, we stated that during the 1996 proxy season the Division permitted several companies to avoid filing proxy materials in preliminary form despite receipt of adequate advance notification of a non-14a–8 shareholder proposal, so long as these companies disclosed in their proxy statements the nature of the proposal and how management intended to exercise discretionary voting authority if the proposal were actually to be presented to a vote at the meeting. We also stated that, in light of the proposed amendments to rule 14a–4, we might reverse that informal position, so that companies receiving notice of a non-14a–8 proposal before the filing of their proxy materials would be required to file their materials in preliminary form to preserve discretionary voting authority under rule 14a–4(c)(2). A number of commenters opposed reversal of the position, stating that in ordinary circumstances little would be gained by staff review of this material, and that potential delays resulting from preliminary filings could unjustifiably interfere with companies' mailing schedules.[68] The Division has decided not to reverse its position at this time, but may evaluate the position again in the future after monitoring proxy filings under the amended rules.

V. Other Amendments

We are adopting other modifications to rules 14a–8 and 14a–5.

We are adopting as proposed the answer to Question 1 of the amended rule defining a proposal as a request or requirement that the board of directors take an action.[69] One commenter objected to the proposal on grounds that the definition appeared to preclude all shareholder proposals seeking information.[70] In formulating the definition, it was not our intention to preclude proposals merely because they seek information, and the fact that a proposal seeks only information will not alone justify exclusion under the definition.

Also as proposed, we are increasing the dollar value of a company's voting shares that a shareholder must own in order to be eligible to submit a shareholder proposal—from $1,000 to $2,000—to adjust for the effects of inflation since the rule was last revised.[71] There was little opposition to

[66] *See, e.g.,* NEBF Letter, Carpenters Letter; UNITE Letter, Engineers Letter; Long View Letter; Citicorp Letter; Questar Corp., Dec. 31, 1997; Harrah's Entertainment, Inc., Dec. 31, 1997; *see also* Goldschmid and Millstein Letter.

[67] *See United Mine Workers* versus *Pittston Co.,* [1989–1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 94,946 (D.D.C. Nov. 24, 1989); and *Larkin* versus *Baltimore Bancorp,* 769 F. Supp. 919 (D. Md. 1991).

[68] *See, e.g.,* ABA Letter; BRT Letter; ASCS Letter; Goldschmid and Millstein Letter. A few commenters within the shareholder community supported reversal of the position. *See, e.g.,* Engineers Letter; Carpenters Letter.

[69] For favorable comments, see, *e.g.,* TIAA–CREF Letter; ABA Letter; GE Stockholders' Alliance, Oct. 16, 1997. But see, *e.g.,* ICCR Letter.

[70] *See* Calvert Letter.

[71] *See* The answer to Question 2.

the proposed increase among commenters, although several do not believe the increase is great enough to be meaningful, especially in light of the overall increase in stock prices over the last few years.[72] Nonetheless, we have decided to limit the increase to $2,000 for now, in light of rule 14a–8's goal of providing an avenue of communication for small investors. There was no significant support for any modifications to the rule's other eligibility criteria, such as the one-year continuous ownership requirement.

A number of commenters supported, and few opposed, our proposal to establish a uniform 14-day period in which shareholders would be required to respond to a company's notification that the shareholder has failed to comply with one or more procedures under rule 14a–8, such as the submission deadlines and the rule's for establishing proponent eligibility.[73] We are adopting the 14-day period as proposed. In response to one commenter's suggestion, we have added a sentence to the rule clarifying that a company need not provide notice of a deficiency that cannot be remedied. If the company intends to exclude the proposal, it nonetheless would later have to make a submission under rule 14a–8, and provide a copy to the proponent.[74]

We are also adopting amendments to rule 14a–5(e), with a few modifications from our proposals. As proposed to be amended, that rule would require companies to disclose the date after which proposals submitted outside the framework of rule 14a–8 are considered untimely for the purposes of amended rule 14a–4(c)(1).[75]

Two commenters objected to our proposal to amend rule 14a–5(e) to require disclosure of the date by which shareholders must notify the company of any non-14a–8 proposals under amended rule 14a–4(c)(1).[76] They were concerned that disclosure of the date would appear to formalize a new system for submitting shareholder proposals in competition with the mechanisms of rule 14a–8, and would encourage the submission of proposals outside of that process. We do not agree that mere disclosure of the date would likely have that effect, and we believe that disclosure is necessary because shareholders often would not have enough information to deduce the date reliably on their own. We are also adopting the other proposed modifications to rule 14a–5(e) designed to streamline the rule's operation.

One commenter pointed out that it is unclear from the rule as drafted whether the new disclosure in the company's proxy statement should reflect the ''default'' date under amended rule 14a–4(c)(1), or instead the date established by an overriding advance notice provision, if any.[77] We have revised the rule to clarify that companies should disclose the date established by an overriding advance notice provision, and in the absence of such a provision, the ''default'' date for submitting non-14a–8 proposals, which normally would be 45 days before the date the company mailed its proxy materials for the prior year. Because the rule also requires companies to disclose the deadline for submitting rule 14a–8 proposals, companies' disclosure should clearly distinguish between the two dates.

Finally, in the answer to Question 8 of amended rule 14a–8, we proposed to include an advisory that the proponent or the proponent's representative make sure that he/she follows applicable procedures proper under state law for appearing at the meeting and/or presenting the proposal. Most commenters who addressed the proposal viewed the advisory as a helpful aid.[78] We have included the advisory as proposed.

VI. Proposals Not Adopted

We have decided not to adopt some of our original proposals, due in part to concerns expressed by some commenters. These proposals generally received support from some commenters, but equally strong opposition from others.

Personal Grievance Exclusion

Paragraph (4) under Question 9, formerly rule 14a–8(c)(4), permits companies to exclude proposals furthering personal grievances or special interests. We had proposed to modify the way the Division administers the rule so that the staff would concur in the exclusion of a proposal on this ground only if the proposal on its face were to relate to a personal grievance or special interest. In other circumstances, under our proposal, the Division would express ''no view'' in its no-action response. The proposal reflected our view that the Division's ability to make the necessary factual findings is limited in the context of evaluating an otherwise ''facially neutral'' proposal, and that companies and shareholders themselves possess much of the factual information relevant to the applicability of the ''personal grievance'' exclusion.

Shareholders expressed serious concerns about this proposal.[79] A number of commenters from the shareholder community were concerned that companies might use the increased flexibility provided by a ''no view'' no-action response to exclude proposals that do not in actuality further personal grievances of special interests. In their view, a shareholder, in these circumstances, might be forced to incur the expense of litigation to prevent exclusion of the proposal. Some shareholders, for instance, were concerned that companies might rely on the rule to exclude proposals focusing on social policy matters.[80] We agree that the proposal might increase the likelihood of disputes between shareholders and companies. We have therefore decided not to implement the proposal, and will continue to administer the rule consistently with our current practice of making case-by-case determinations on whether the rule permits exclusion of particular proposals.

Resubmission Thresholds

If a proposal fails to receive a specified level of support, paragraph (12) under Question 9, formerly rule 14a–8(c)(12), permits a company to exclude a proposal focusing on substantially the same subject matter for a three-year period. In order to avoid possible exclusion, a proposal must receive at least 3% of the vote on its first submission, 6% on the second, and 10% on the third. We had proposed to raise the percentage thresholds respectively to 6%, 15%, and 30%.

Many commenters from the shareholder community expressed serious concerns about this proposal.[81]

[72] *See, e.g.,* ASCS Letter; ABA Letter; BRT Letter; see also ICCR Letter.

[73] *See, e.g.,* ABA Letter; ASCS Letter; TIAA–CREF Letter; GE Stockholders' Alliance, Oct. 16, 1997. *But see* ICCR Letter; Carpenters Letter.

[74] *See* Rule 14a–8(j)(Question10).

[75] *See* Section IV above. The new information, if applicable, would be disclosed under Item 5 of Form 10–Q or 10–QSB (''Other Information'').

[76] *See* ABA Letter; New York State Bar Letter.

[77] *See* W.R. Grace & Co., Oct. 28, 1997.

[78] *See, e.g.,* CALPERS Letter; ICCR Letter; ASCS Letter.

[79] *See e.g.,* ICCR Letter; Teamsters Letter; Captains Endowment Ass'n, rec'd Nov. 6, 1997; Davis, Cowell & Bowe LLP, Jan. 2, 1998 (''Davis, Cowell & Bowe Letter'').

[80] Social issue proposals are generally not excludable under paragraph (4). In 1983, we amended the rule to clarify that it would not apply, without other factors, to exclude a proposal ''relating to an issue in which proponent was personally committed or intellectually and emotionally interested.'' Exchange Act Release No. 20091 (Aug. 16, 1983)[48 FR 38218].

[81] *See, e.g.,* ICCR Letter; NYCERS Letter; Calvert Letter; Social Investment Forum Letter; the School Sisters of Notre Dame, Oct. 20, 1997; the Conference on Corporate Responsibility of Indiana and Michigan, Oct. 14, 1997; CALPERS Letter (indicating that it might support more modest

We have decided not to adopt the proposal, and to leave the thresholds at their current levels.

Proposed Override Mechanism

We had proposed a new mechanism that would have permitted 3% of a company's shareownership to override the ''ordinary business'' exclusion and the ''relevance'' exclusion, paragraphs (7) and (5) under Question 9.

Several commenters opposed the proposal.[82] Other commenters supported the override concept as proposed, but expressed concerns about specific aspects, including whether the proposed 3% threshold may be too low and lead to erosion of the ''ordinary business'' and ''relevance'' exclusions that would be subject to an override.[83] Some shareholders thought the opposite, that 3% support of a company's shareownership would be too difficult for a shareholder proponent to obtain.

We have decided not to adopt the proposed ''override'' mechanism. Because we are not adopting the ''override,'' we also are not adopting ancillary amendments designed to help implement the mechanism, including the proposed qualified exemption under the proxy rules, the proposed safe harbor from the beneficial ownership reporting requirements under section 13(d) of the Exchange Act, and the proposed shortening of companies' deadlines for making their rule 14a–8 no-action submissions to the Division.

The ''Relevance'' Exclusion

Paragraph (5) under Question 9 permits companies to exclude proposals

> Relating to operations which account for less than 5 percent of the registrant's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the registrant's business.

We had proposed to revise the rule to apply a purely economic standard. Under the proposal, the exception for proposals that are ''otherwise significantly related'' would have be deleted. A company would have been permitted to exclude proposals relating to matters involving the purchase or sale of services or products that represent $10 million or less in gross revenue or total costs, whichever is appropriate, for the company's most recently completed fiscal year.

Few commenters indicated strong support for the proposed amendments, and we are not making any substantive changes to the rule. Many commenters within the corporate community agreed in concept with our proposal to base the rule on an objective economic standard, and to eliminate the subjective ''not otherwise significantly related'' part of the rule.[84] But most of those commenters thought that the proposed $10 million threshold was so low that companies would too infrequently be in a position to rely on the exclusion. Comments from the shareholder community were mixed.[85] Some shareholders opposed the elimination of the ''not otherwise significantly related'' part of the rule, while other shareholders expressed varying degrees of support for the approach, with some expressing concern that companies might apply the rule to exclude proposals on subjects that are difficult to quantify, despite the ''safeguards'' that we included as part of the proposed amendments.

Statements in Opposition: Commission Review

Finally, we had proposed eliminating rule 14a–8(e), which requires a company to provide a proponent with an advance copy of any statement in opposition to the proposal that it intends to include in its proxy materials. This provision also provides a mechanism for shareholders to bring materially false or misleading statements to the Division's attention. A number of commenters from the shareholder community opposed elimination of these procedures because they believed that the potential for proponent objections deters companies from making materially false or misleading statements, and encourages negotiation between the company and proponent.[86] We have decided not to adopt that proposal, and are retaining the mechanisms of former rule 14a–8(e) in the context of the answer to Question 13 of amended rule 14a–8.

VII. Final Regulatory Flexibility Analysis

We have prepared this Final Regulatory Flexibility Analysis under 5 U.S.C. 603 concerning the amendments to rules 14a–8, 14a–4, and 14a–5 as a follow-up to the Initial Regulatory Flexibility Analysis (''IRFA'') that we prepared in connection with the Proposing Release.[87] We received few comments, and no significant empirical data, in response to the requests for further information included in the IRFA.

The purpose of the amendments is to streamline the operation of the rule, and address concerns raised by both shareholder and corporate participants. We are adopting the amendments pursuant to Sections 14 and 23 of the Exchange Act[88] and Section 20(a) of the Investment Company Act of 1940[89] (Investment Company Act'').

Specifically, we are:

- Recasting rule 14a–8 into a more plain-English Question & Answer format;
- Reversing the *Craker Barrel* interpretive position on employment-related proposals raising significant social policy issues; and
- Amending rule 14a–4 to provide shareholders and companies with clearer guidance on companies' exercise of discretionary voting authority.

We have decided not to adopt other elements of our original proposals. We are *not adopting* our original proposals to:

- Increase the percentage of the vote a proposal must receive before it can be resubmitted in future years if it is not approved;
- Streamline the exclusion for matters considered irrelevant to corporate business,[90]
- Modify our administration of the rule permitting companies to exclude proposals furthering personal grievances of special interests; or
- Implement an ''override'' mechanism that would have permitted 3% of the share ownership to override a company's decision to exclude a proposal under certain of the bases for exclusion set forth under Question 9 of amended rule 14a–8.[91]

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increases in the thresholds); but see TIAA–CREF Letter (supporting the increases at the levels proposed). These commenters were concerned that the increases would operate to exclude too great a percentage of proposals—particularly those focusing on social policy issues which tend to receive lower percentages of the shareholder vote.

[82] Former paragraphs (c)(7) and (c)(5) of rule 14a–8. *See, e.g.,* ABA Letter; ACCA Letter; LPA Letter; AT&T, Dec. 24, 1997; Household Int'l, Inc., Jan. 6, 1998; Federal Express Corp., Jan. 2, 1998; ICI Letter (concerned that proposal if adopted might be costly and disruptive for investment companies).

[83] *See, e.g.,* ASCS Letter; BRT Letter; FMC Corp., Dec. 5, 1997; Ford Motor Company, Dec. 23, 1997; New York State Bar Letter.

[84] *See, e.g.,* ASCS Letter; BRT Letter; Unocal Corp., Nov. 24, 1997.

[85] *See, e.g.,* TIAA–CREF Letter; CALPERS Letter; Carpenters Letter; Jessie Smith Noyes Letter; NYCERS Letter; ICCR Letter.

[86] *See, e.g.,* ICCR Letter; LongView Letter. *See also* ICI Letter.

[87] *See* Proposing Release, Section V.

[88] 15 U.S.C. 78m, 78n, & 78u.

[89] 15 U.S.C. 80a–1 *et seq.*

[90] Paragraph (5) under Question 9, former rule 14a–8(c)(5).

[91] Because we are not adopting the proposed ''override'', we also are not adopting certain measures, designed to enable shareholders to use it, including the proposed qualified exemption from the proxy rules, and safe harbor from beneficial ownership reporting obligations under Section 13(d) of the Exchange Act.

The amendments will affect small entities that are required to file proxy materials under the Exchange Act or the Investment Company Act. Exchange Act rule 0–10 defines ''small business'' as a company whose total assets on the last day of its most recent fiscal year were $5 million or less.[92] Investment Company Act rule 0–10 defines ''small entity'' as an investment company with net assets of $50 million or less as of that date.[93] We are currently aware of approximately 1,000 reporting companies that are not investment companies with assets of $5 million or less. There are approximately 800 investment companies that satisfy the ''small entity'' definition. Only approximately one-third of all investment companies have shareholder meetings and file proxy materials annually.

Therefore, we believe approximately 250 small entity investment companies may be affected by the amendments.

Plain-English Question & Answer Format

Our revision of rule 14a–8 to create a more understandable Question & Answer format should help decrease the time and expense incurred by both shareholders and companies attempting to comply with its provisions companies frequently consult with legal counsel in preparing no-action submissions under rule 14a–8. The rule's added clarity may obviate the need for a shareholder or company to consult with counsel, depending on the issues raised by the submission. Under some circumstances, however, companies' submissions must include supporting opinions of counsel.

No comments submitted empirical data demonstrating how much it costs companies to consider and prepare an individual no-action submission under rule 14a–8. Question 13 of a Questionnaire that we made available in February 1997 [94] asked respondent companies how much money they spend on average each year determining whether to include or exclude shareholder proposals and following Commission procedures in connection with any proposal that they wish to exclude (including internal costs as well as any outside legal and other fees). While responses may have accounted for consideration of more than one proposal, the costs of making a determination whether to include a proposal reported by 80 companies averaged approximately $37,000.[95] We do not believe, however, that the cost is likely to vary depending on the size of the company. That is, the cost to a small entity is likely to be the same as the cost to a larger entity, depending on the number of proposals received and how many the company seeks to exclude under the staff no-action letter process.

Because the rule's added clarity may make it easier for shareholders to understand the procedures for submitting shareholder proposals, the amendments may encourage shareholders to submit more shareholder proposals to companies each year. In turn, companies may be required to make more rule 14a–8 no-action submissions to the Commission.

In the period from September 30, 1996 to September 30, 1997, we received submissions from a total of 245 companies, and only 6 (i.e., 2%) were ''small businesses.'' While we received no empirical data on the number of small businesses that receive shareholder proposals each year, one commenter with substantial experience submitting shareholder proposals to companies reported that small companies seldom receive shareholder proposals.[96]

We also received no empirical information in response to our request for data on the marginal cost of including an additional shareholder proposal in companies' proxy materials. However, the Questionnaire asked each company respondent how much money on average it spends in the aggregate on printing costs (plus any directly related costs, such as additional postage and tabulation expenses) to include shareholder proposals in its proxy materials. While individual responses may have accounted for the printing of more than one proposal, the average cost reported by 67 companies was approximately $50,000.[97] By contrast, one commenter noted that the cost for companies, excluding the largest corporations, should average about $10,000 per proposal.[98] We expect that any additional printing costs are lower for small entities, since small entities typically should have to print fewer copies of their proxy materials because they have fewer shareholders.

A company that receives a proposal has no obligation to make a submission under rule 14a–8 unless it intends to exclude the proposal from its proxy materials. Accordingly, any costs of including an additional proposal should be offset, at least partially, by not having to make a rule 14a–8 submission. No commenters responded to our request for empirical data on the potential cost savings.

Reversal of Cracker Barrel

In the 1992 *Cracker Barrel* no-action letter, the Division stated that henceforth it would concur in the exclusion of all employment-related shareholder proposals raising social policy issues under rule 14a–8(c)(7), the ''ordinary business'' exclusion. Before the announcement of the position, the Division analyzed employment related proposals tied to social issues on a case-by-case basis, concurring in the exclusion of some, but not others. Reversal of the position will result in a return to the case-by-case analysis that prevailed before the position was announced.

Our decision to reverse the *Cracker Barrel* position on employment-related shareholder proposals may therefore result in an increase in the number of employment-related proposals tied to social issues that are submitted to companies each year, and that companies must include in their proxy materials. During the 1997 proxy season, the Division received approximately 30 submissions involving employment-related proposals tied to social issues, none from ''small businesses.'' [99]

While it is unclear whether the number of proposals submitted to small businesses and included in their proxy statements will increase as a result of the reversal of *Cracker Barrel*, we have analyzed under ''Plain English Question & Answer Format'' above the potential costs to companies of considering and including additional proposals in their proxy materials.

Discretionary Voting Authority

The amendments to rule 14a–4 should favorably affect companies, including ''small businesses,'' because they would provide clearer ground rules as to the ability to exercise discretionary voting power when a shareholder presents a proposal without invoking rule 14a–8. We do not routinely record information on the number of ''small businesses'' that receive non-rule 14a–8 proposals

[92] 17 CFR 240.0–10.

[93] 17 CFR 270.0–10.

[94] *See* Proposing Release, Footnote 14.

[95] This average is based on respondents reporting costs greater than zero. Reported costs ranged from a low of $10 to a high of approximately $1,200,000. The median cost was $10,000.

[96] ICCR Letter at 9.

[97] This average is based on respondents reporting costs greater than zero. Reported costs ranged from a low of $200 to a high of nearly $900,000. The median cost was $10,000.

[98] *See* ICCR Letter at 9–10.

[99] No commenters provided information on the likely impact reversal of the position will have on the number of shareholder proposals submitted to companies each year.

each year, since non-14a–8 proposals do not necessarily lead to a submission to the Commission. The Investor Responsibility Research Center (''IRRC'') has reported to the Commission staff, however, that it is aware of a total of 19 independent proxy solicitations during calendar years 1996 and 1997 in support of non-14a–8 proposals, and none appear to have involved ''small businesses.'' In addition, one commenter indicated that, since 1991, there have been 66 independent shareholder solicitations in support of shareholder resolutions.[110] None of the companies subject to the 66 solicitations appear to have been ''small businesses.''

To the extent that ''small businesses'' receive such proposals, we believe that the amendments to rule 14a–4 will favorably affect them by reducing uncertainty, and decreasing the likelihood that such companies would have to incur the delay and expense of rescheduling the shareholders meeting, or resoliciting shareholders. Some commenters thought that the proposal to require companies wishing to preserve voting authority to include an extra voting box on their proxy cards might encourage the submission of more non-14a–8 shareholder proposals. We have decided not to adopt that aspect of our original proposal. Some shareholders thought that the amendments as proposed might effectively inhibit independent proxy solicitations because they would have permitted companies to retain voting authority even if the shareholder solicited the percentage of shareownership required to carry the proposal. We also have decided not to adopt that aspect of our original proposal.

Under our amendments to rule 14a–4, a company wishing to preserve discretionary voting authority on certain proposals that might be presented to a vote may be required to advise shareholders of the nature of such proposals. We note, however, that this precondition is consistent with the Division's no-action positions predating the adoption of the amendments. No commenters provided empirical data on incremental costs likely to result from this amendment to rule 14a–4. Daniels Financial Printing informed the staff that in most cases adding up to three-fourths of a page in the proxy statement would not increase the cost to the company, and that adding more than three-fourths of a page could increase costs by about $1,500 for an average sized company.

Under our amendments to rule 14a–4, a shareholder undertaking an independent proxy solicitation would be required to provide a company with advance written notice of its intention to solicit the percentage of the company's shareownership to carry the proposal, followed by other measures to help ensure that the notice has been provided in good faith. These amendments would impose no additional costs on companies receiving such notice, since no action by them is required. The amendments should impose only de minimis additional costs on shareholders who undertake independent proxy solicitations.[101]

Our amendment to rule 14a–5 would require companies to disclose an additional date in their proxy statements. Disclosure of the date should require no more than an additional sentence, and therefore should result in no, or negligible, additional printing costs.

We considered significant alternatives to the proposed amendments for small entities with a class of securities registered under the Exchange Act. We considered, for instance, exempting small businesses from any obligation to include shareholder proposals in their proxy materials. Such an exemption, however, would be inconsistent with the current purpose of the proxy rules, which is to provide and regulate a channel of communication among shareholders and public companies. Exempting small entities would deprive their shareholders of this channel of communication.

We also considered other alternatives identified in Section 603 of the Regulatory Flexibility Act to minimize the economic impact of the amendments on small entities. We considered the establishment of different compliance requirements or timetables that take into account the resources available to small entities. Different timetables, however, may make it difficult for the Division to issue responses in a timely manner, and could otherwise impede the efficient operation of the rule.

We also considered the clarification, consolidation, or simplification of the rule's compliance requirements for small entities. As explained more fully in section II of this release, we are recasting and reformatting rule 14a–8 into a more understandable, Question & Answer format. As explained in Section IV above, we are adopting clearer guidelines for companies' exercise of discretionary voting authority under rule 14a–4. These modifications should simplify and facilitate compliance by all companies, including small entities. We do not believe that there is any appropriate way further to facilitate compliance by small entities without compromising the current purposes of the proxy rules.

We also considered the use of performance rather than design standards. The rules that we are amending are not specifically designed to achieve certain levels of performance. Rather, they are designed to serve other policies, such as to ensure adequate disclosure of material information, and to provide a mechanism for shareholders to present important and relevant matters for a vote by fellow shareholders. Performance standards accordingly would not directly serve the policies underlying the rules. We do not believe that any current federal rules duplicate, overlap, or conflict with the rules that we propose to amend.

VIII. Cost-Benefit Analysis

This cost-benefit analysis follows a preliminary analysis request for comments and empirical information included in the Proposing Release.[102] We received few comments and no significant empirical data, in response to our requests for further information.

The amendments to the rules on shareholder proposals should improve the efficiency of the process for determining which shareholder proposals must be included in proxy materials distributed by companies. They should help to make the rule understandable to the numerous shareholders and companies that refer to the rule each year, ensure that companies include certain employment-related proposals raising significant social policy issues in their proxy materials, and provide clearer guidelines for a company's exercise of discretionary voting authority when notified that a shareholder intends to present a proposal without invoking rule 14a–8's mechanisms.

Specifically, we are:

- Recasting rule 14a–8 into a more plain-English Question & Answer format;
- Reversing the *Cracker Barrel* interpretive position on employment-related proposals raising significant social policy issues; and
- Amending rule 14a–4 to provide shareholders and companies with clearer guidance on companies' exercise of discretionary voting authority.

[100] UNITE Letter.

[101] In order to comply, an insurgent is required to send to the company advance written notice of its intention to solicit the percentage of a company's shareownership required to carry the proposal, followed by evidence of the solicitation, and to include what should in most cases amount to little more than an additional sentence in the insurgent's proxy statement.

[102] *See* Proposing Release, Section VI.

We have decided not to adopt other elements of our original proposals. We are *not adopting* our original proposals to:

- Increase the percentage of the vote a proposal must receive before it can be resubmitted in future years if it is not approved;
- Streamline the exclusion for matters considered irrelevant to corporate business;[103]
- Modify our administration of the rule permitting companies to exclude proposals furthering personal grievances of special interests; or
- Implement an ''override'' mechanism that would have permitted 3% of the share ownership to override a company's decision to exclude a proposal under certain of the bases for exclusion set forth under Question 9 of amended rule 14a–8.[104]

We have considered whether the amendments we are adopting would promote efficiency, competition and capital formation. Rule 14a–8 requires companies to include shareholder proposals in their proxy materials, subject to specific bases for excluding them. We believe that the rule enhances investor confidence in the securities markets by providing a means for shareholders to communicate with management and among themselves on significant matters.

Plain-English Question & Answer Format

Our revision of the rule to create a more understandable Question & Answer format should help decrease the time and expense incurred by both shareholders and companies attempting to comply with its provisions. Companies frequently consult with legal counsel in preparing no-action submissions under rule 14a–8. The rule's added clarity may obviate the need for a shareholder or company to consult with counsel, depending on the issues raised by the submission. Under some circumstances, however, companies' submissions must include supporting opinions of counsel.

No commenters submitted empirical data demonstrating how much it costs companies to consider and prepare an individual no-action submission under rule 14a–8. Question 13 of the Questionnaire asked respondent companies how much money they spend on average each year determining whether to include or exclude shareholder proposals and following Commission procedures in connection with any proposal that they wish to exclude (including internal costs as well as any outside legal and other fees). While responses may have accounted for consideration of more than one proposal, the costs reported by 80 companies averaged approximately $37,000.[105]

Because the revised rule's added clarity may make it easier for shareholders to understand the procedures for submitting shareholder proposals, the amendments may encourage shareholders to submit more shareholder proposals to companies each year. In turn, companies may be required to make more rule 14a–8 no-action submissions to the Commission. A study conducted by one commenter reports that, each year, shareholder proposals come to a vote at 226 companies from among the 1,500 largest U.S. companies.[106]

We also received no information in response to our request for data on the marginal cost of including an additional shareholder proposal in companies' proxy materials. However, the Questionnaire asked each company respondent how much money on average it spends in the aggregate on printing costs (plus any directly related costs, such as additional postage and tabulation expenses) to include shareholder proposals in its proxy materials. While individual responses may have accounted for the printing of more than one proposal, the average cost reported by 67 companies was approximately $50,000.[107] By contrast, one commenter thought that this estimate is too high, although large companies in his view would incur relatively higher costs.[108]

A company that receives a proposal has no obligation to make a submission under rule 14a–8 unless it intends to exclude the proposal from its proxy materials.[109] Accordingly, any costs of including an additional proposal should be offset, at least partially, by not having to make a rule 14a–8 submission. No commenters responded to our request for empirical data on the potential cost savings.

Reversal of Cracker Barrel

In the 1992 *Cracker Barrel* no-action letter, the Division stated that henceforth it would concur in the exclusion of all employment-related shareholder proposals raising social policy issues under rule 14a–8(c)(7), the ''ordinary business'' exclusion. Before the announcement of the position, the Division analyzed employment related proposals tied to social issues on a case-by-case basis, concurring in the exclusion of some, but not others. Reversal of the position will result in a return to the case-by-case analysis that prevailed before the position was announced.

Our decision to reverse the *Cracker Barrel* position on employment-related shareholder proposals may therefore result in an increase in the number of employment-related proposals tied to social issues that are submitted to companies each year, and that companies must include in their proxy materials. During the 1997 proxy season, the Division received approximately 30 submissions involving employment-related proposals tied to social issues.[110]

We have analyzed under ''Plain English Question & Answer Format'' above the potential costs to companies of considering and including additional proposals in their proxy materials.

Shareholder proposals could have a positive or negative impact, or no impact, on the price of a company's securities.[111] Relatively few shareholder proposals are approved by shareholders each year, and the few that are approved typically focus on corporate governance matters rather than social issues.[112] Based on information provided to us by IRRC, we understand that for calendar year 1997, 22 proposals obtained

[103] Paragraph (5) under Question 9, former rule 14a–8(c)(5).

[104] Because we are not adopting the proposed ''override'', we also are not adopting certain measures designed to enable shareholders to use it, including the proposed qualified exemption from the proxy rules, and safe harbor from beneficial ownership reporting obligations under Section 13(d) of the Exchange Act.

[105] This average is based on respondents reporting costs greater than zero. Reported costs ranged from a low of $10 to a high of approximately $1,200,000. The median cost was $10,000.

[106] *See* Shareholder Rights Analysis: The Impact of Proposed SEC Rules on Resubmission of Shareholder Resolutions, Social Investment Forum Foundation, Dec. 10, 1997.

[107] This average is based on respondents reporting costs greater than zero. Reported costs ranged from a low of $200 to a high of nearly $900,000. The median cost was $10,000.

[108] *See* ICCR Letter at 9–10.

[109] In the period from September 30, 1996 to September 30, 1997, we received approximately 400 submissions under rule 14a–8.

[110] No commenters provided information on the likely impact reversal of the position will have on the number of shareholder proposals submitted to companies each year.

[111] *See, e.g.,* Michael P. Smith, Shareholder Activism by Institutional Investors: Evidence from CalPERS, *The Journal of Finance,* Vol. LI, No. 1, March 1996; Sunil Wahal, Pension Fund Activism and Firm Peformance, *Journal of Financial and Quantitative Analysis,* Vol. 31, No. 1, March 1996.

[112] Even if a proposal does not obtain shareholder approval, however, it may nonetheless influence management, especially if it receives substantial shareholder support. A proposal may also influence management even if it is not put to a shareholder vote. We understand that in some instances management has made concessions to shareholders in return for the withdrawal of a proposal.

shareholder approval out of a total of 376 proposals submitted to shareholder votes. Ten were proposals to repeal classified boards (i.e., boards with staggered terms). Ten sought redemption of companies' shareholder rights plans. One focused on ''golden parachute'' payments to executives (i.e., large payments typically contingent upon corporate change of control). One sought to restrict director pension benefits.

Proposals addressing corporate governance matters tend to receive the most substantial shareholder support and may have an identifiable impact on shareholder wealth. Examples are proposals on voting and nomination procedures for board members, and proposals to restrict or eliminate companies' shareholder rights plans (i.e., ''posion pills''). The amendments we are adopting do not focus on those type of proposals, and should not affect shareholders' ability to include them in companies proxy materials. Additionally, shareholder proposals on social issues may improve investor confidence in the securities markets by providing investors with a sense that as shareholders they have a means to express their views to the management of the companies in which they invest.

Discretionary Voting Authority

The amendments to rule 14a-4 should favorably affect companies because they should provide clearer ground rules as to the ability to exercise discretionary voting power when a shareholder presents a proposal without invoking rule 14a-8.

We do not collect information on the number of companies that receive non-rule 14a-8 proposals each year, since such proposals do not necessarily lead to a submission to the Commission. However, IRRC has reported to the Commission staff that, during the 1997 calendar year, it is aware of only two independent solicitations in support of non-14a-8 shareholder resolutions, down from 17 solicitations for calendar year 1996. In addition, one commenter indicated that, since 1991, there have been 66 independent shareholder solicitations in support of shareholder resolutions.[113]

To the extent ''small businesses'' receive such proposals, we believe that the amendments to rule 14a-4 will favorably affect them by reducing uncertainty, and decreasing the likelihood of incurring the delay and expense of rescheduling the shareholders meeting and/or resoliciting shareholders. Reducing the potential for uncertainty should also help to decrease the likelihood of related litigation.

One company estimated the cost of sending supplemental proxy material to its shareholders at about $170,000.[114] Thus, if the amendments permit companies to avoid resolicitations on five occasions, the savings would amount to about $850,000.[115]

Another commenter submitted information on the legal costs of representing insurgent shareholders in connection with court actions under the proxy rules.[116] According to that commenter, attorneys' fees and costs incurred by the insurgent ranged from $17,517 to $75,421. It is not clear whether these actions involved rule 14a-5 or discretionary voting authority, and they do not include the legal costs of other parties or any other associated expenses.

Some commenters thought that the proposal to require companies wishing to preserve voting authority to include an extra voting box on their proxy cards might encourage the submission of more non-14a.8 shareholder proposals, as well as confusion among shareholders. We have decided not to adopt that aspect of our original proposal. Other commenters thought that the proposals might effectively inhibit independent proxy solicitations because they would have provided companies with a means to retain voting authority even if the shareholder solicited the percentage of shareownership required to carry the proposal. We also have decided not to adopt that aspect of our original proposal.

Under our amendments to rule 14a-4, a company, wishing to preserve discretionary voting authority on certain proposals that might be presented to a vote, may be required to advise shareholders of the nature of such proposals. We note, however, that this precondition is consistent with the Division's no-action positions predating the adoption of these amendments. No commenters provided empirical data on incremental costs likely to result from these amendments to rule 14a-4. Daniels Financial Printing informed the staff that is most cases adding up to three-fourths of a page in the proxy statement would not increase the cost to the company, and that adding more than three-fourths of a page could increase costs by about $1,500 for an average sized company.

Under our amendments to rule 14a-4, a shareholder undertaking an independent proxy solicitation would be required to provide a company with advance written notice of its intention to solicit the percentage of the company's shareownership to carry the proposal, followed by other measures to help ensure that the notice has been provided in good faith. These amendments would impose no additional costs on companies receiving such notice, since no action by them is required. The amendments should impose only de minimis additional costs on a shareholder undertaking an independent proxy solicitation.[117]

Our amendment to rule 14a-5 would require companies to disclose an additional data in their proxy statements. Disclosure of the date should require no more than an additional sentence, and therefore should result in no, or negligible, additional printing costs.

Section 23(a) of the Exchange Act [118] requires the Commission to consider any anti-competitive effects of any rules it adopts thereunder and the reasons for its determination that any burden on competition imposed by such rules is necessary or appropriate to further the purposes of the Exchange Act. The Commission has considered the impact this rulemaking will have on competition and believes that the amendments will not impose a significant burden on competition.

IX. Paperwork Reduction Act

Regulation 14A [119] and the Commission's related proxy rules, including rules 14a-8, 14a-4, and 14a-5, were adopted pursuant to Section 14(a) of the Exchange Act. Section 14(a) directs the Commission to adopt rules ''as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.'' Schedule 14A prescribes information that a company must include in its proxy statement to ensure that shareholders are provided material information relating to voting decisions.

[113] UNITE Letter.

[114] *See* Harrah's Entertainment, Inc., Dec. 31, 1997

[115] We have no basis for estimating reliably how many resolicitations, if any, are likely to be avoided in any given year as a result of the amendments.

[116] Davis, Cowell & Bowe Letter at 4.

[117] In order to comply, an insurgent is required to send to the company advance written notice of its intention to solicit the percentage of a company's shareownership required to carry the proposal, followed by evidence of the solicition, and to include what should in most cases amount to little more than an additional sentence in the insurgent's proxy statement.

[118] 15 U.S.C. 78w(a)

[119] 17 CFR 240.14a-101.

The amendments to rules 14a-8, 14a-4(c), and 14a-5 should make it easier for shareholder proponents to include in companies' proxy materials employment-related shareholder proposals raising significant social policy matters, and provide companies subject to the proxy rules with clearer ground rules for the exercise of discretionary voting authority. The amendments should also make rule 14a-8 easier to understand the follow. The amendments focus primarily on rule 14a-8, which requires companies to include shareholder proposals in their proxy materials, subject to certain bases for excluding them. We received no Paperwork Reduction Act comments relating to the amendments.

As set forth in the Proposing Release,[120] certain provisions of rules 14a–8, 14a–4, and 14a–5 contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. § 3501 et seq.). The Commission had submitted the amendments to those rules to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. § 3507(d) and 5 CFR. 1320.11. The title for the collection of information is ''Regulation 14A.'' Except as explained below, the amendments should have no impact on the total estimated burden hours for Regulation 14A.[121]

As originally proposed, amended rule 14a–4 would have in some circumstances required companies to include an extra voting box in their proxy cards in order to preserve discretionary voting authority. We are not, however, adopting that requirement, which we believe would have increased the total annual burden by only a negligible amount, or not at all.[122] We are adopting a requirement under rule 14a–4 that a shareholder insurgent in some circumstances provide a company with advance written notice of its intention to solicit the percentage of a company's shareownership necessary to approve the proposal, followed by evidence of the solicitation, and by negligible additional disclosures in the insurgent's proxy statement.[123] We estimate that these additional requirements, in the context of other amendments adopted today, will increase the annual burden under Regulation 14A for a shareholder insurgent by approximately one hour per shareholder proponent, and that approximately 10 proponents will have to comply each year. Accordingly, we have increased our estimated total compliance burden for Regulation 14A by a total of 10 hours, to 810,935 hours.

Providing the information required by Regulation 14A is mandatory under Section 14(a) of the Exchange Act. The information will not be kept confidential. Unless a currently valid OMB control number is displayed on the Schedule 14A, the Commission may not sponsor or conduct or require response to an information collection. The OMB control number is 3235–0059. The collection is in accordance with 44 U.S.C. § 3507.

X. Statutory Basis And Text of Amendments

We are adopting amendments to Rules 14a–8, 14a–4, and 14a–5 under the authority set forth in Sections 13, 14 and 23 of the Securities Exchange Act of 1943, and Section 20(a) of the Investment Company Act.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Text of Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*(d), 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

a. By amending § 240.14a–4 by revising the introductory text of paragraph (c) and paragraph (c)(1), redesignating paragraphs (c)(2) through (c)(5) as paragraphs (c)(4) through (c)(7), and adding new paragraphs (c)(2) and (c)(3), to read as follows:

§ 240.14a–4 Requirements as to proxy.

* * * * *

(c) A proxy may confer discretionary authority to vote on any of the following matters:

(1) For an annual meeting of shareholders, if the registrant did not have notice of the matter at least 45 days before the date on which the registrant first mailed its proxy materials for the prior year's annual meeting of shareholders (or date specified by an advance notice provision), and a specific statement to that effect is made in the proxy statement or form of proxy. If during the prior year the registrant did not hold an annual meeting, or if the date of the meeting has changed more than 30 days from the prior year, then notice must not have been received a reasonable time before the registrant mails its proxy materials for the current year.

(2) In the case in which the registrant has received timely notice in connection with an annual meeting of shareholders (as determined under paragraph (c)(1) of this section), if the registrant includes, in the proxy statement, advice on the nature of the matter and how the registrant intends to exercise its discretion to vote on each matter. However, even if the registrant includes this information in its proxy statement, it may not exercise discretionary voting authority on a particular proposal if the proponent:

(i) Provides the registrant with a written statement, within the time-frame determined under paragraph (c)(1) of this section, that the proponent intends to deliver a proxy statement and form of proxy to holders of at least the percentage of the company's voting shares required under applicable law to carry the proposal;

(ii) Includes the same statement in its proxy materials filed under § 240.14a–6; and

(iii) Immediately after soliciting the percentage of shareholders required to carry the proposal, provides the registrant with a statement from any solicitor or other person with knowledge that the necessary steps have been taken to deliver a proxy statement and form of proxy to holders of at least the percentage of the company's voting shares required under applicable law to carry out the proposal.

(3) For solicitations other than for annual meetings or for solicitations by persons other than the registrant, matters which the persons making the solicitation do not know, a reasonable time before the solicitation, are to be presented at the meeting, if a specific statement to that effect is made in the proxy statement or form of proxy.

3. By amending § 240.14a-5 by revising paragraph (e), and adding paragraph (f), to read as follows:

§ 240.14a-5 Presentation of information in proxy statement.

* * * * *

(e) All proxy statements shall disclose, under an appropriate caption, the following dates:

(1) The deadline for submitting shareholder proposals for inclusion in the registrant's proxy statement and

[120] *See* Proposing Release, Section VII.

[121] 17 CFR 240.14a–101.

[122] See Section IV above.

[123] *Id.*

form of proxy for the registrant's next annual meeting, calculated in the manner provided in § 240.14a-8(d)(Question 4); and

(2) The date after which notice of a shareholder proposal submitted outside the processes of § 240.14a-8 is considered untimely, either calculated in the manner provided by § 240.14a-4(c)(1) or as established by the registrant's advance notice provision, if any, authorized by applicable state law.

(f) If the date of the next annual meeting is subsequently advanced or delayed by more than 30 calendar days from the date of the annual meeting to which the proxy statement relates, the registrant shall, in a timely manner, inform shareholders of such change, and the new dates referred to in paragraphs (e)(1) and (e)(2) of this section, by including a notice, under Item 5, in its earliest possible quarterly report on Form 10–Q (§ 249.308a of this chapter) or Form 10–QSB (§ 249.308b of this chapter), or, in the case of investment companies, in a shareholder report under § 270.30d-1 of this chapter under the Investment Company Act of 1940, or, if impracticable, any means reasonably calculated to inform shareholders.

4. By revising § 240.14a-8 to read as follows:

§ 240.14a-8 Shareholder proposals.

This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders. In summary, in order to have your shareholder proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the Commission. We structured this section in a question-and-answer format so that it is easier to understand. The references to ''you'' are to a shareholder seeking to submit the proposal.

(a) *Question 1:* What is a proposal? A shareholder proposal is your 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. Your proposal should state as clearly as possible the course of action that you believe the company should follow. If your proposal is placed on the company's proxy card, the company must also provide in the form of proxy means for shareholders to specify by boxes a choice between approval or disapproval, or abstention. Unless 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).

(b) *Question 2:* Who is eligible to submit a proposal, and how do I demonstrate to the company that I am eligible? (1) In order to be eligible to submit a proposal, you must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal. You must continue to hold those securities through the date of the meeting.

(2) If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. However, if like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own. In this case, at the time you submit your proposal, you must prove your eligibility to the company in one of two ways:

(i) The first way is to submit to the company a written statement from the ''record'' holder of your securities (usually a broker or bank) verifying that, at the time you submitted your proposal, you continuously held the securities for at least one year. You must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders; or

(ii) The second way to prove ownership applies only if you have filed a Schedule 13D (§ 240.13d–101), Schedule 13G (§ 240.13d–102), Form 3 (§ 249.103 of this chapter), Form 4 (§ 249.104 of this chapter) and/or Form 5 (§ 249.105 of this chapter), or amendments to those documents or updated forms, reflecting your ownership of the shares as of or before the date on which the one-year eligibility period begins. If you have filed one of these documents with the SEC, you may demonstrate your eligibility by submitting to the company:

(A) A copy of the schedule and/or form, and any subsequent amendments reporting a change in your ownership level;

(B) Your written statement that you continuously held the required number of shares for the one-year period as of the date of the statement; and

(C) Your written statement that you intend to continue ownership of the shares through the date of the company's annual or special meeting.

(c) *Question 3:* How many proposals may I submit: Each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.

(d) *Question 4:* How long can my proposal be? The proposal, including any accompanying supporting statement, may not exceed 500 words.

(e) *Question 5:* What is the deadline for submitting a proposal? (1) If you are submitting your proposal for the company's annual meeting, you can in most cases find the deadline in last year's proxy statement. However, if the company did not hold an annual meeting last year, or has changed the date of its meeting for this year more than 30 days from last year's meeting, you can usually find the deadline in one of the company's quarterly reports on Form 10–Q (§ 249.308a of this chapter) or 10–QSB (§ 249.308b of this chapter), or in shareholder reports of investment companies under § 270.30d–1 of this chapter of the Investment Company Act of 1940. In order to avoid controversy, shareholders should submit their proposals by means, including electronic means, that permit them to prove the date of delivery.

(2) The deadline is calculated in the following manner if the proposal is submitted for a regularly scheduled annual meeting. The proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting. However, if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the deadline is a reasonable time before the company begins to print and mail its proxy materials.

(3) If you are submitting your proposal for a meeting of shareholders other than a regularly scheduled annual meeting, the deadline is a reasonable time before the company begins to print and mail its proxy materials.

(f) *Question 6:* What if I fail to follow one of the eligibility or procedural requirements explained in answers to

Questions 1 through 4 of this section? (1) The company may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies, as well as of the time frame for your response. Your response must be postmarked, or transmitted electronically, no later than 14 days from the date you received the company's notification. A company need not provide you such notice of a deficiency if the deficiency cannot be remedied, such as if you fail to submit a proposal by the company's properly determined deadline. If the company intends to exclude the proposal, it will later have to make a submission under § 240.14a–8 and provide you with a copy under Question 10 below, § 240.14a–8(j).

(2) If you fail in your promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of your proposals from its proxy materials for any meeting held in the following two calendar years.

(g) *Question 7:* Who has the burden of persuading the Commission or its staff that my proposal can be excluded? Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.

(h) *Question 8:* Must I appear personally at the shareholders' meeting to present the proposal? (1) Either you, or your representative who is qualified under state law to present the proposal on your behalf, must attend the meeting to present the proposal. Whether you attend the meeting yourself or send a qualified representative to the meeting in your place, you should make sure that you, or your representative, follow the proper state law procedures for attending the meeting and/or presenting your proposal.

(2) If the company holds it shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person.

(3) If you or your qualified representative fail to appear and present the proposal, without good cause, the company will be permitted to exclude all of your proposals from its proxy materials for any meetings held in the following two calendar years.

(i) *Question 9:* If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal? (1) Improper under state law: If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;

Note to paragraph (i)(1): Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

(2) *Violation of law:* If the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject;

Note to paragraph (i)(2): We will not apply this basis for exclusion to permit exclusion of a proposal on grounds that it would violate foreign law if compliance with the foreign law could result in a violation of any state or federal law.

(3) *Violation of proxy rules:* If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including § 240.14a-9, which prohibits materially false or misleading statements in proxy soliciting materials;

(4) *Personal grievance; special interest:* If the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which is not shared by the other shareholders at large;

(5) *Relevance:* If the proposal relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earning sand gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business;

(6) *Absence of power/authority:* If the company would lack the power or authority to implement the proposal;

(7) *Management functions:* If the proposal deals with a matter relating to the company's ordinary business operations;

(8) *Relates to election:* If the proposal relates to an election for membership on the company's board of directors or analogous governing body;

(9) *Conflicts with company's proposal:* If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting.

Note to paragraph (i)(9): A company's submission to the Commission under this section should specify the points of conflict with the company's proposal.

(10) *Substantially implemented:* If the company has already substantially implemented the proposal;

(11) *Duplication:* If the proposal substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting;

(12) *Resubmissions:* If the proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding 5 calendar years, a company may exclude it from its proxy materials for any meeting held within 3 calendar years of the last time it was included if the proposal received:

(i) Less than 3% of the vote if proposed once within the preceding 5 calendar years;

(ii) Less than 6% of the vote on its last submission to shareholders if proposed twice previously within the preceding 5 calendar years; or

(iii) Less than 10% of the vote on its last submission to shareholders if proposed three times or more previously within the preceding 5 calendar years; and

(13) *Specific amount of dividends:* If the proposal relates to specific amounts of cash or stock dividends.

(j) *Question 10:* What procedures must the company follow if it intends to exclude my proposal? (1) If the company intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The company must simultaneously provide you with a copy of its submission. The Commission staff may permit the company to make its submission later than 80 days before the company files its definitive proxy statement and form of proxy, if the company demonstrates good cause for missing the deadline.

(2) The company must file six paper copies of the following:

(i) The proposal;

(ii) An explanation of why the company believes that it may exclude the proposal, which should, if possible, refer to the most recent applicable authority, such as prior Division letters issued under the rule; and

(iii) A supporting opinion of counsel when such reasons are based on matters of state or foreign law.

(k) *Question 11:* May I submit my own statement to the Commission responding to the company's arguments?

Yes, you may submit a response, but it is not required. You should try to submit any response to us, with a copy to the company, as soon as possible after the company makes its submission. This way, the Commission staff will have time to consider fully your submission before it issues its response. You should submit six paper copies of your response.

(l) *Question 12:* If the company includes my shareholder proposal in its proxy materials, what information about me must it include along with the proposal itself?

(1) The company's proxy statement must include your name and address, as well as the number of the company's voting securities that you hold. However, instead of providing that information, the company may instead include a statement that it will provide the information to shareholders promptly upon receiving an oral or written request.

(2) The company is not responsible for the contents of your proposal or supporting statement.

(m) *Question 13:* What can I do if the company includes in its proxy statement reasons why it believes shareholders should not vote in favor of my proposal, and I disagree with some of its statements?

(1) The company may elect to include in its proxy statement reasons why it believes shareholders should vote against your proposal. The company is allowed to make arguments reflecting its own point of view, just as you may express your own point of view in your proposal's supporting statement.

(2) However, if you believe that the company's opposition to your proposal contains materially false or misleading statements that may violate our anti-fraud rule, § 240.142–9, you should promptly send to the Commission staff and the company a letter explaining the reasons for your view, along with a copy of the company's statements opposing your proposal. To the extent possible, your letter should include specific factual information demonstrating the inaccuracy of the company's claims. Time permitting, you may wish to try to work out your differences with the company by yourself before contacting the Commission staff.

(3) We require the company to send you a copy of its statements opposing your proposal before it mails its proxy materials, so that you may bring to our attention any materially false or misleading statements, under the following timeframes:

(i) If our no-action response requires that you make revisions to your proposal or supporting statement as a condition to requiring the company to include it in its proxy materials, then the company must provide you with a copy of its opposition statements no later than 5 calendar days after the company receives a copy of your revised proposal; or

(ii) In all other cases, the company must provide you with a copy of its opposition statements no later than 30 calendar days before its files definitive copies of its proxy statement and form of proxy under § 240.14a–6.

Dated: May 21, 1998.

By the Commission.

Margaret McFarland,

Deputy Secretary.

[FR Doc. 98–14121 Filed 5–27–98; 8:45 am]

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DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 12

[T.D. 98–50]

RIN 1515–AC28

Emissions Standards for Imported Nonroad Engines

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations, in conformance with regulations of the U.S. Environmental Protection Agency (EPA), in order to include marine spark-ignition engines among those imported nonroad engines that are subject to compliance with applicable EPA emissions standards required by law. In addition, the Customs Regulations in this regard are further amended by eliminating the unnecessary, extensive replication of the particular admission requirements for subject nonroad engines that are already contained in the EPA regulations.

EFFECTIVE DATE: May 28, 1998.

FOR FURTHER INFORMATION CONTACT: Brad Lund, Office of Field Operations, (202–927–0192).

SUPPLEMENTARY INFORMATION:

Background

The Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*), which has long authorized the Environmental Protection Agency (EPA) to regulate on-highway motor vehicle and engine emissions, was amended in 1990 to extend EPA's regulatory authority to include as well nonroad engines and related vehicles and equipment (see 42 U.S.C. 7521–7525, 7541–7543, 7547, 7549, 7550, 7601(a)).

In brief, EPA was given authority, inter alia, to regulate those classes or categories of new nonroad engines and associated vehicles and equipment that contribute to air pollution, if such nonroad emissions were determined to be significant.

To this end, the EPA issued regulations in 40 CFR parts 89 and 90 that established emissions standards for new nonroad compression-ignition engines at or above 50 horsepower (37 kilowatts) as well as new nonroad spark-ignition engines at or below 25 horsepower (19 kilowatts) (see 59 FR 31306 (June 17, 1994) and 60 FR 34582 (July 3, 1995), respectively, for the background and development of these EPA regulations).

By a final rule document published in the **Federal Register** on August 27, 1996 (61 FR 43960), Customs amended its regulations to add a new § 12.74 (19 CFR 12.74) that conformed to the regulations adopted by the EPA in order to ensure the compliance of the aforementioned imported nonroad engines with applicable EPA emissions standards required by law.

The EPA has now issued regulations in 40 CFR part 91, establishing emissions standards as well for new marine spark-ignition engines (see 61 FR 52088 (October 4, 1996) for the background and development of the EPA regulations).

Accordingly, § 12.74 is hereby amended to include marine spark-ignition engines among those imported nonroad engines that are subject to applicable EPA emissions standards. Furthermore, Customs has determined to abbreviate significantly § 12.74 by simply referencing the EPA regulations concerned, and eliminating the unnecessary, extensive replication of the particular admission requirements for subject nonroad engines that are already contained in the EPA regulations.

Inapplicability of Public Notice and Comment and Delayed Effective Date Requirements, the Regulatory Flexibility Act, and Executive Order 12866

Inasmuch as these amendments merely conform the Customs Regulations to existing law and regulation as noted above, pursuant to 5 U.S.C. 553(b)(B), notice and public