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The Lack of Adequate Time to Address Deficiencies Under Rule 14A-8(F)

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THE LACK OF ADEQUATE TIME TO ADDRESS DEFICIENCIES UNDER RULE 14A-8(F)

I. INTRODUCTION

Rule 14a-8 (the Rule) sought to facilitate "functional corporate democracy" between a company's management and shareholders.[1] The Rule allows shareholders to include proposals in a company's proxy materials. Management can, however, exclude a proposal on a number of substantive and procedural grounds. Subsection (f) requires that companies provide proponents with notice of, and an opportunity to correct, certain procedural deficiencies.[2] Issuers have fourteen days to issue the notice and shareholders have the same period to respond.[3]

The provision has been a common basis for excluding shareholder proposals. Proponents frequently fail to remedy prescribed defects within the specified window. In particular, street name holders have had difficulty providing adequate evidence of stock ownership.[4] In part this arises out of unnecessary complications in establishing beneficial ownerships and vague descriptions of deficiencies provided by the company.[5]

This paper seeks to address the contours of subsection (f) particularly as it pertains to a shareholder attempting to prove eligibility under the Rule. Part II addresses the administrative history of this subsection from the original Rule to its subsequent amendments. Part III examines the SEC's no-action letters and other interpretations in connection with the eligibility requirement. Finally, Part IV analyzes the SEC's interpretations and offers suggestions for the future development of the Rule.

II. ADMINISTRATIVE HISTORY: 14A-8(F)

Under early versions of the Rule, companies had to include any proposal submitted by a "qualified security holder" that was a proper

1. Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879 (1994) ("[T]he SEC promulgated the rule in 1942 to catalyze what many hoped would be a functional 'corporate democracy.'").

2. 17 C.F.R. § 240.14a-8(f) (2011).

3. *Id.* (As a caveat to this rule, a company need not provide a notice of deficiency if the deficiency cannot be remedied, "such as if a shareholder fails "to submit a proposal by the company's properly determined deadline." The company must still comply with 14a-8(j).).

4. *See e.g.*, Qwest Commc'ns Int'l Inc., SEC No-Action Letter, 2008 WL 591021 (Feb. 28, 2008) (Shareholder raises concern in complying with Rule: "this second year in refusal to accept my valid printout of holdings with date of purchase shown. Why not ask them to verify themselves that dividends paid through their registration agent to TD Waterhouse and transferred to me would prove length and value of ownership? I cannot do so, as the registrant has no record of my holdings.").

5. SEC Staff Legal Bulletin No. 14G (CF) (Oct. 16, 2012), *available at* https://www.sec.gov/interps/legal/cfslb14g.htm (The Commission is "concerned that companies' notices of defect are not adequately describing the defects or explaining what a proponent must do to remedy defects in proof of ownership letters.").

subject for shareholders.[6] In 1948, the Commission amended the provision to add a number of procedural requirements.[7] Issuers seeking exclusion of a proposal had to notify the Commission no later than the filing of the preliminary proxy materials[8] and inform shareholders "as to the reasons for such omission."[9]

By the 1950s, the Rule extended to proposals submitted by any "security holder entitled to vote."[10] The Commission interpreted the language to require that the proponent "be a security holder . . . at the time he submits his proposals, and that he must remain a security holder at least through the record date for the meeting."[11] In addition, the SEC clarified that the right applied to both record and beneficial owner of the shares.[12]

The Commission codified these interpretations in 1976.[13] A shareholder had to own the company's shares "at the time he submits his proposal" and must "continuously own [the] security through the meeting date."[14] The provision sought to assure "that the proponent [maintained] an investment interest" in the company until voting took place.[15] The sale of shares after submission of the proposal, therefore, constituted a basis for exclusion.[16] The amendments also expressly provided that the right applied to any "record or beneficial owner of a security entitled to be voted."

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6. Exchange Release No. 34-3347, 1942 WL 34864 at *10 (Dec. 18, 1942) ("In the even that a qualified security holder of the issuer has given the management reasonable notice that such security holder intends to present for action . . . a proposal which is a proper subject for action by the security holder."). A "proper subject" turned on applicable state law. *See* J. Robert Brown, Jr., *The Evolving Role of Rule 14a-8 in the Corporate Governance Process***,** 93 DENV. L. REV. ONLINE 151 n. 5 (2016).

7. Exchange Release No. 34-4185, 1948 WL 28695 (Nov. 5, 1948).

8. *Id. See also* 17 C.F.R. § 240.14a-6(a) (2011) ("Five preliminary copies of the proxy statement and form of proxy shall be filed with the Commission at least 10 calendar days prior to the date definitive copies of such material are first sent.").

9. Exchange Release No. 34-4185, 1948 WL 28695, at *3 (Nov. 5, 1948).

10. Exchange Release No. 34-4979, 1954 WL 5772, at *3 (Jan. 6, 1954).

11. *See* Int'l Tel. & Tel. Co., SEC No-Action Letter, 1973 WL 9153 (Mar. 7, 1973) ("To interpret the rule otherwise would create the possibility that companies, by virtue of their time schedules in preparing and printing proxy material, would have to include in their material proposals submitted by persons who never become security holders.").

12. *Id*; Getty Oil Co., SEC No-Action Letter, 1974 WL 8887 (Mar. 15, 1974) ("Inasmuch as the proponent has furnished documents to the company which tend to establish that it beneficially owns [the shares], it would appear that the [proponent] has satisfied the aforementioned requirement of [the Rule].").

13. Notice of Proposal to Revise Proxy Rules, Exchange Release No. 34-12598, 1976 WL 160410 (July 7, 1976); *see also* Exchange Release No. 34-12999, 1976 WL 160347, at *2 (Nov. 22, 1976) ("a proposal may be submitted not only be a record owner of a security of the issuer, but also by a beneficial owner as well.").

14. Exchange Release No. 34-12999, *supra* note 14.

15. *Id.*

16. *See* Norsul Oil & Mining Ltd., SEC No-Action Letter, 1980 WL 17692 (Mar. 24, 1980) ("a document from the Guaranty Trust Company . . . the Company's transfer agent, which indicates that [Proponent] sold the 9,000 shares . . . referred to in his proposal . . . Rule 14a–8(a)(1) requires that a shareholder proponent continue to be a record or beneficial owner through the date on which the Company's meeting is held.").

With respect to beneficial ownership, however, companies received the right to demand proof of ownership, with the proponent given 10 business days to comply.[17] The specific time period sought to avoid "unnecessarily vague" deadlines.[18] The ten-day time period, however, had exceptions.[19] The Commission did not strictly enforce the provision when a "proponent made a good faith effort to comply with the . . . requirement" and "was frustrated in that effort by the failure of the [broker-bank], to respond in a timely manner."[20] For example, a proponent could be frustrated when the broker failed to provide the requisite documentation because of a "clerical error."[21] In those circumstances, compliance was "beyond" the proponent's control.[22]

When this occurred the staff did not grant the proponent an extension of time but instead determined that the proposal could not be excluded. The decision effectively excused the proponent from providing the necessary documentation.[23] The Commission, however, never codified the good faith exception and the approach was quickly abandoned.[24]

In 1983, the Commission for the first time imposed a minimum ownership threshold for shareholders seeking to submit proposals.[25] Proponents were required to inform companies of the number of shares

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17. Exchange Release No. 34-12999, *supra* note 14.

18. *Id*. (With regard to subsection (a)(2), Notice, "The specific time deadline . . . was substituted in the subparagraph at the suggestion of several commenters, who expressed the view that the 'reasonable time' deadline [initial proposed] . . . was unnecessarily vague.").

19. Memorandum to Lee B. Spencer, Jr., from Bill Morley, Proposed Revision of Rule 14a-8 (March 18, 1982) ("[E]xamples of no-action and interpretive letters which set forth staff positions on the various provisions of paragraph (a)(1). For Example . . . Letter to UMC Resources concerning the proponent's obligation to provide documentary proof of his ownership when a good faith effort is made within the 10 business days, and the broker fails to act promptly."); *see also* Unc Res., Inc., SEC No-Action Letter, 1980 WL 15448 (May 6, 1980).

20. *See* Texas Instruments Inc., SEC No-Action Letter, 1981 WL 26535 (Feb. 2, 1981) ("It is thus apparent that the [proponent], and within the requisite ten day period, requested the custodian of its securities to furnish to [the company] appropriate documentation of its beneficial ownership . . . [the proponent] having done all in its power to provide such documentation within the time limits of the Rule, its proposal is not excludable pursuant to Rule 14a-8(a)(1).").

21. *Id*. ("the [broker] had, due to a 'clerical error', failed to notify [the company of the [proponent's] ownership of the 4,025 shares of [company] common stock when requested to do so by the [proponent]").

22. *Id*. ("Proponent had made a good faith effort to comply…but was frustrated in that effort by the failure of First National Bank of Boston to respond in a timely manner, a circumstance…beyond the Proponent's control.").

23. *Id*. ("[T]his Division is unable to conclude that the management may rely on Rule 14a–8(a)(1) as a basis for omitting the proposal from the Company's proxy material.")

24. 1982 Memorandum, *supra* note 20 (The SEC memorandum makes reference to the good faith exception, but the exception sporadically appears from 1980 to 1982 but thereafter does not appear in the administrative record.).

25. 17 C.F.R. § 240.14a-8(a)(1) (1983) (At the submission of the proposal, "the proponent shall be a record or beneficial owner of at least 1% or $1000 in market value of securities entitled to be voted at the meeting and have held such securities for at least one year" and hold the securities through the meeting date.); *see also* Memorandum to Lee Spencer and John Huber, from Linda Quinn, Bill Morley and John Gorman, Outline for Revision of Rule 14a-8 (June 7, 1983); *see also* 1982 Memorandum, *supra* note 20 (The Staff Report on Corporate Accountability recommended against holding period or specific shareholding requirements for proponents, believing "such a change would do little to lower the number of proposals.").

owned and, with respect to beneficial owners, to provide "documentary support."[26] Companies could also request "appropriate documentation" and owners had fourteen calendar days to respond. The change in the time period aligned with the Rule's other procedural deadlines[27] and, according to the Commission, provided a "sufficient time to furnish the requisite documentary support."[28]

Issuer requests for additional documents were not subject to a specified time period. Companies often did not get around to writing the deficiency letters until the final quarter of the year, in preparation for the annual meeting.[29] Nonetheless, the letter was required. The staff declined to issue no-action relief absent a representation by the company that the documentary support had been requested.[30]

The Commission amended the requirement in 1986 in an effort to clarify the process used to establish beneficial ownership. As proposed, issuers were to be required to provide notice of any deficiency in the documentary evidence "promptly." The proposal also provided owners with a longer period to produce the requisite evidence.[31] In addition, the Commission specified that, for beneficial owners, a "written representation by an independent third party, such as a depository, a record hold-

26. This was not in the proposed rule but added as a result of comments received. *See* Exchange Release No 34-20091, 1983 WL 33272, at *3 (Aug. 16, 1983) ("It was suggested, however, that the rule require a proponent to deliver such documentation to the issuer at the time the proposal is submitted. Paragraph (a)(2) of Rule 14a-8, as adopted today, has been revised to include such a requirement."); *see also* 1983 Memorandum, *supra* note 26 ("[S]everal commentators suggested that the Rule require the proponent to submit documentation when he submits the proposal. We propose to include that requirement.").

27. Notice of Proposal to Revise Proxy Rules, Release No. 34-19135, 1982 WL 600869 (Oct. 14, 1982) (The 14 Calendar Day deadline now applied to a proponent submitting proof of eligibility, limiting the number of words in a proposal, and limiting the number of proposals submitted.).

28. *Id*; *see also* Exchange Release No. 34-20091, *supra* note 27.

29. Sun Co., Inc., SEC No-Action Letter, 1984 WL 45775 (Feb. 28, 1984) (proponent proposal sent March 12, 1983 and company did not respond until December 23, 1983); Consumer power Co., SEC No-Action Letter, 1986 WL 65151 (Jan 3, 1986) (proposal sent April 1, 1985 and company did not take action until December 12, 1985); United Telecommunications, Inc., SEC No-Action Letter, 1986 WL 67567 (Dec. 31, 1986) (proposal submitted November 17, 1986 and company did not take action until December 16, 1986).

30. Cbi Indus. Inc., SEC No-Action Letter, 1986 WL 67566 (Dec. 31, 1986) ("In the absence of a representation that the Company requested the documentary support required by Rule 14a–8(a)(2) and that the proponent did not respond by furnishing appropriate documentation within fourteen calendar days after receiving the request, this Division does not concur in your view that the proposal may be omitted pursuant to Rule 14a–8(a)(1).").

31. Notice of Proposal to Revise Proxy Rules, Exchange Release No. 34-24552, 1987 WL 847538 (June 4, 1987).

er,[32] or broker-dealer" would be "considered appropriate documentation."[33]

The final amendments replaced the need to provide the request for documentation "promptly" with a specific time period. Companies had fourteen calendar days to issue the notice of deficiency.[34] The fixed time period was designed to avoid disputes or interpretive questions.[35] The Rule also gave proponents twenty-one calendar days to respond. Commenters supported the change, noting the difficulty in obtaining the necessary documentary support from third party record holders.[36] Finally, beneficial owners were required to provide a letter from the broker holding the shares establishing ownership and conformity with the holding period.

The Commission in 1998 rewrote the Rule "into a more plain-English Question and Answer format."[37] The various procedural requirements merged to create subsection (f), a stand-alone provision, which "establish[ed] a uniform 14-day period" under the Rule. The change therefore shortened by seven days the period for beneficial owners to respond to deficiency requests.[38] The Commission expressed the belief that shorter period would "be sufficient for shareholder proponents" and would "help to streamline the [R]ule's operation by establishing a single 'shareholder response period.'"[39] Issuers welcomed the change.[40] Investors did not. As some noted, acquiring the necessary doc-

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32. The term "record holder" includes any shareowner listed on a corporation's stock ledger, which is usually the Depository Trust Company registered under its nominee name Cede and Co. Nonetheless, for purposes of Rule 14a-8, the Commission takes the position that banks or brokers participating in DTC constitute record owners. *See* SEC Staff Legal Bulletin No. 14 (July 13, 2001), *available at* https://www.sec.gov/interps/legal/cfslb14.htm ("The written statement must be from the record holder of the shareholder's securities, which is usually a broker or bank.").

33. *Id.*

34. Exchange Release No. 34-25217, 1987 WL 847542 (Dec. 21, 1987).

35. *Id.*

36. *Id.*

37. *See* Exchange Release No. 34-40018, 1998 WL 254809, at *2 (May, 21 1998) ("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."); *see also* Notice of Proposal to Revise Proxy Rules, Exchange Release No. 34-39093, 1997 WL 578696, at *3 (Sept. 18, 1997) (It is worth noting Congress required that the SEC conduct a comprehensive study of the shareholder proposal process, which analyzed whether shareholder access to proposals was impaired. As a result to this study, the SEC produced this thoroughly redrafted Rule.).

38. Exchange Release No. 34-40018, *supra* note 28; *see also* CoBancorp Inc., SEC No-Action Letter, 1996 WL 80498 (Feb. 22, 1996) ("Assuming the Proponent provides the Company with the required information within twenty one days of receipt of this letter, the staff does not believe that Rule 14a-8(a)(2) can be relied upon as a basis to omit the proposal."); C-Cor Elecs., SEC No-Action Letter, 1998 WL 416663 (July 22, 1998) ("the Proponent had twenty-one . . . calendar days from the date of receipt of the Letter (under Question 6 of the New Rules . . . must be postmarked no later than fourteen . . . days after receipt) to furnish the Company with the appropriate documentation.").

39. *Id.*

40. *Id.*

umentation often took "more than two weeks to get a broker to research and establish continuous ownership of stock."[41]

Subsequent evidence would demonstrate that the criticisms by opponents to the shorter time frame were correct.[42] Once the company sent the notice of deficiency, the Rule required a quick turnaround by the proponent. Beneficial owners, however, failed to respond in a timely fashion at least sometimes because of circumstances "beyond" their control.[43]

III. STAFF INTERPRETATION AFTER 1998 TO PRESENT DAY

The failure to cure deficiencies within fourteen calendar days represents perhaps the most common basis for omitting proposals under the Rule.[44] The proponent's response must be postmarked before expiration of the time period.[45] While a deficiency can arise as a result of a number of procedural requirements, the most frequent concerns the proponent's failure to produce sufficient evidence of beneficial ownership.[46] Moreover, the Commission has applied a rule of strict compliance[47] and does not recognize an exception for delays occurring in "good faith."[48]

Proponents sometimes fail to adequately respond to a deficiency notice. For example, the fourteen-day period may pass without any response,[49] the response fails to identify the record holder,[50] or the documentary evidence does not establish a sufficient ownership interest in the

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41. *Id.*

42. *Shareholder Proposal Developments During the 2016 Proxy Season*, GIBSON DUNN (June 28, 2016), http://www.gibsondunn.com/publications/Documents/Shareholder-Proposal-Developments-2016-Proxy-Season.pdf.

43. *See supra* note 21.

44. GIBSON DUNN, *supra* note 43 (For the first time in four years, procedural arguments [i.e., timeliness or defects in the proponent's proof of ownership] were not the most common reason for exclusions. It was surpassed by both the substantial implementation and ordinary business exclusions.).

45. *See* Rule 14a-8(f) (response must be "postmarked, or transmitted electronically, no later than 14 days from the date" the notice was received); *see also* AT&T Inc., SEC No-Action Letter, 2006 WL 354822, (Feb. 3, 2006) (rejecting argument that proposal delivered to private courier the last day of the time period because a "postmark" was only available for materials deposited with the US postal service).

46. GIBSON DUNN, *supra* note 43

47. SEC Staff Legal Bulletin No. 14F (CF) (Oct. 18, 2011), *available at* https://www.sec.gov/interps/legal/cfslb14f.htm ("[T]he requirements of [the Rule] are highly prescriptive and can cause inconvenience for shareholders when submitting proposals." The SEC's administration "is constrained by the terms of the rule."); *see also* Citigroup Inc., SEC No-Action Letter, 2002 WL 398746 (Feb. 17, 2002) (SEC allowed exclusion of proposal for missing the 14 day deadline by one day.).

48. *See supra* notes 20 and 21 (discussing the brief application of the good faith exception).

49. *See* Genworth Financial, Inc., SEC No-Action Letter, 2015 WL 154024 (Feb. 13, 2015); H. J. Heinz, SEC No-Action Letter, 2006 WL 1439863 (May 23, 2006).

50. *See* Knight-Ridder, Inc., SEC No-Action Letter, 2003 WL 942721 (Feb. 28, 2003); Usec Inc., SEC No-Action Letter, 2002 WL 1611605 (July 19, 2002).

company.[51] Nonetheless, the failure cannot always be attributable to the actions of the proponent.

The inability to respond within fourteen days may occur because of an inadequate notice of deficiency from the company or the failure of the record owner to provide the required information. In the former case, the Staff has administratively added an additional seven-day period for beneficial owners to supply the required documentary evidence. In the latter case, the Staff allows for exclusion despite the lack of culpability on the part of the proponent.

Section 3.01 Issues with the Record Holder

The Rule imposes a "chore" on brokers by requiring them to issue letters on behalf of beneficial owners that contain the required information.[52] In some cases, they may not adequately perform the required chore. The most common failures include letters that do not (1) establish ownership as of the date of submission,[53] (2) attest to continuous ownership for one year from the date of submission,[54] or (3) include the incorrect name of the company.[55] In other instances, brokers simply do not provide the information by the required deadline.

No-action letters illustrate the logistical difficulties sometimes incurred by beneficial owners seeking information from their broker.[56] In

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51. *See* Sterling Capitol Corp., SEC No-Action Letter, 2004 WL 385729 (Feb. 25, 2004); Rite Aid Corp., SEC No-Action Letter, 2009 WL 890010 (Mar. 26, 2009); Agilent Techs., Inc., SEC No-Action Letter, 2004 WL 2694596 (Nov. 19, 2004).

52. Qwest Commc'ns Int'l Inc., SEC No-Action Letter, 2008 WL 591021 (Feb. 28, 2008) (noting that the Rule imposes "a chore upon any proponent's broker or such handling the 'street' registration").

53. Viant Corporation, SEC No-Action Letter, 2002 WL 1423489 (June 28, 2002); Gen. Elec. Co., 2010, SEC No-Action Letter, WL 5505716 (Dec. 28, 2010); Medidata Sols., Inc., SEC No-Action Letter, 2014 WL 7205665 (Dec. 12, 2014); Peregrine Pharm., Inc., SEC No-Action Letter, 2013 WL 3773974 (July 15, 2013); The Pittston Co., SEC No-Action Letter, 1999 WL 92864 (Feb. 24, 1999).

54. Microchip Tech. Inc., SEC No-Action Letter, 2009 WL 1526972 (May 26, 2009) ("[A] search of the Company's stockholder records has indicated that RBC Capital Markets (United States) is a stockholder of record of the Company. However, the RBC Letter does not satisfy the requirement of a written statement from the record holder verifying that, *at the time the proposal was submitted*, Mr. Dozor continuously held the securities for at least one year." (emphasis added)); *see also* Anadarko Petroleum Corp., SEC No-Action Letter, 2011 WL 316044 (Jan. 26, 2011); H. J. Heinz, SEC No-Action Letter, 2006 WL 1439863 (May 23, 2006).

55. Transocean Ltd., SEC No-Action Letter, 2013 WL 178201 (Mar. 15, 2013) ("We note that, in response to the request by Transocean Ltd. for evidence verifying beneficial ownership of the company's securities, the proponent provided a written statement erroneously verifying beneficial ownership of 'Transocean Management Ltd.' In our view, this error could not be reasonably attributed to the information provided by Transocean Ltd. in either its request for evidence or its 2012 proxy materials. In this regard, we note that the request was printed on the letterhead of 'Transocean Ltd.,' with no instructions to verify beneficial ownership of 'Transocean Management Ltd.' or to mail the requested evidence to 'Transocean Management Ltd.'").

56. The Boeing Company, SEC No-Action Letter, 2014 WL 7326034 (Jan. 27, 2015) ("Despite my repeated insistence that Pershing (as the DTC participant) must provide an ownership letter, she was repeatedly denied such by Pershing. I also forwarded the proxy rules, Boeing's deficiency letter and all attended documents to try to educate Pershing on this matter. Despite this, Pershing refused to provide the letter.").

Pfizer Inc., the proponent engaged in an email battle between the company and broker-record holder regarding the timely submission of documentary proof.[57] In order to prove eligibility, the proponent was forced to contact the broker's customer service department, seek reassurance on multiple occasions that the processing center mailed the proof in a timely manner, and obtain agreement from the broker to execute an affidavit attesting to these facts.[58] Even with that effort, the company argued that the proponent submitted the proof of eligibility seven days before receipt of the proposal and therefore did not meet the continuous ownership requirement.[59] Upon reconsideration, the staff agreed and allowed exclusion.[60]

Section 3.02 Notice of Defect Letter and Extensions to Comply

The staff has administratively extended the fourteen-day time period upon a finding that the company issued an inadequate notice of deficiency. The notice must explicitly state the date on which the proposal was submitted and inform the proponent of the obligation to respond within fourteen calendar days.[61] Owners must receive adequate detail about the deficiencies in the documentation, including the need for a new proof of ownership letter verifying continuous ownership.[62] The SEC has recommended providing a copy of the Rule with the notice.

In the case of a notice that does not meet these requirements, the staff has sometimes given beneficial owners seven additional days to provide the necessary documentation.[63] The Commission has done so where the company failed to include the submission date for the proposal,[64] inform the proponent of what would constitute appropriate doc-

57. Pfizer Inc., SEC No-Action Letter, 2010 WL 738739, (Feb. 22, 2010).

58. *Id.* (On multiple occasions the broker assured proponent that its processing center directly provided the necessary eligibility verification to the company. In addition, proponent contacted the broker's customer service regarding the company's assertion that it did not receive the written statement of verification. The broker agreed to execute an affidavit stating that the processing center mailed the eligibility verification to the company on the specified date.).

59. *Id.* (The company argued that this was insufficient to prove continuous ownership because it would be impossible to verify ownership as of a future date since the shares could be sold.).

60. *Id.*

61. SEC Staff Legal Bulletin No. 14B (Sept. 15, 2004), *available at* https://www.sec.gov/interps/legal/cfslb14b.htm (A company does not meet its obligation to provide appropriate notice of defect if, at a minimum, it does not address specific requirements of the rule in the notice or attach a copy of the eligibility requirements to the notice.).

62. *Id.* (The proposal's date of submission is the date the proposal is postmarked or transmitted electronically.).

63. *Id.; see also* Bulletin No. 14, *supra* note 51 ("If . . . no-action response requires that the shareholder revise the proposal . . . [the Commission's] response will afford the shareholder seven calendar days from the date of receiving [it's] response to provide the company with the revisions.").

64. *See* Ncr Corp., SEC No-Action Letter, 2013 WL 6513868 (Jan. 24, 2014) (Company failed to identify "the specific date on which the proposal was submitted" in the deficiency letter); Marathon Petroleum Corp., SEC No-Action Letter, 2015 WL 9319133 (Jan. 4, 2016) (Company failed "to inform the proponent of the specific date the proposal was submitted in [company's] request for additional information.").

umentation under the Rule,[65] or explain that the proponent needed to obtain a proof of ownership letter verifying continuous ownership for the one-year period.[66]

In Palatin Techs., Inc., the company vaguely notified the shareholder of the problems with eligibility.[67] The staff noted that the letter had not informed the proponent "of what would constitute appropriate documentation . . . [of] his obligation to furnish a written statement of intent to hold the company's stock" and that "the proponent's response must be postmarked, or transmitted electronically, no later than 14 days from the date" of notification. The staff granted the proponent seven calendar days after receiving the letter to fix the deficiencies.

The staff also granted extensions in the case of non-delivery or misdelivery of the deficiency letter. For example, proponents received an extension of time where the company did not issue a deficiency letter,[68] sent the letter to the wrong address,[69] or otherwise failed to deliver the notice.[70] The staff also applied the extension when a company provided erroneous information to the proponent concerning the beneficial ownership requirements under the Rule.[71] In finding a notice deficient, the staff does not apparently make distinctions on the basis of the sophistication of the proponent.[72]

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65. Fifth Third Bancorp, SEC No-Action Letter, 2013 WL 6701955 (Feb. 4, 2014) (Company's request for additional information describing the proof of ownership was not consistent with SEC guidelines. Specifically, company "did not indicate how the proponent could determine who the DTC participant [was] for the proponent's broker or bank."); Citigroup Inc., SEC No-Action Letter, 2013 WL 6844384 (Feb. 12, 2014) (Company did not inform proponent of what would "constitute appropriate documentation under [the Rule]" in company's request for additional information.).

66. This error includes a company not mentioning the gap in the period of ownership covered by the proponent's proof of ownership letters. *See* Dst Sys., SEC No-Action Letter, 2014 WL 606197 (Feb. 4, 2014); Marathon Petroleum Corp., SEC No-Action Letter, 2015 WL 9319133 (Jan. 4, 2016).

67. Palatin Techs., Inc, SEC No-Action Letter, 2003 WL 22252871 (Oct. 1, 2003) (The letter stated the following reason: "You have not provided the information necessary for us to determine your eligibility. Please see the regulations at 17 Code of Federal Regulations, Section 240.14a-8(b)(2).").

68. Jpmorgan & Chase Co., SEC No-Action Letter, 2008 WL 653400 (Mar. 7, 2008) ("We note, however, the proponent's representation that it did not receive the request from JPMorgan Chase to provide such documentary support.").

69. AT&T Inc., SEC No-Action Letter, 2007 WL 571101 (Feb. 16, 2007) ("We note, however, that AT&T may have addressed its deficiency notice to an incorrect address.").

70. Exxon Mobil Corp., SEC No-Action Letter, 2007 WL 846608 (Mar. 19, 2007) ("We note, however, that it appears that ExxonMobil failed to notify the proponent's designated representative of any procedural or eligibility deficiencies under rule 14a-8(b), as instructed by the proponent's cover letter."); Liberte Inv'rs Inc, SEC No-Action Letter, 2002 WL 31008129 (Sept. 4, 2002) ("Liberté Investors did not provide the proponent an opportunity to provide documentary support regarding his satisfaction of the minimum ownership requirement.").

71. Wal-Mart Stores, Inc., SEC No-Action Letter, 2000 WL 381476 (Mar. 30, 2000) ("We note, however, that Wal-Mart's rule 14a-8(b) request erroneously informed the proponent that she need only own $1,000 in market value of Wal-Mart stock, and that she in fact has record ownership of at least this amount.").

72. Citigroup Inc., SEC No-Action Letter, 2013 WL 6844384, (Feb. 12, 2014) (The Company's notice of defect simple stated it needed a written statement from the record holder showing

IV. ANALYSIS

The no-action letters raise concerns with the decision to shorten the period for responding to a deficiency notice from twenty-one to fourteen days, particularly when coupled with the SEC's use of strict compliance.[73] The approach provides little time to fully understand the contents of a deficiency notice and properly respond. As a result, the staff has been forced to graft onto the Rule what amounts to a seven-day extension to resolve deficiency notices lacking in clarity. The Commission has granted a seven-day extension frequently.[74] Since 1998, the extension has appeared in at least 164 no-action letters.[75] Of that number, 68 have arisen where the company failed to adequately inform a proponent on how to properly prove eligibility.[76]

A number of problems exist with the current approach. First, the use of an extension provides no incentive on the part of companies to improve their deficiency notices. Rule 14a-8(f) requires that issuers issue the notice within fourteen days of receipt of the proposal.[77] The staff has effectively declined to enforce the requirement by excusing inadequate notices. The staff instead uses the no-action process to provide beneficial owners with notice of the deficiency and then provides a cure period not otherwise included in the Rule.

A better approach would be to treat inadequate deficiency notices as the failure to conform to the fourteen-day requirement in the Rule. By not properly notifying owners, companies presumably waive the right to

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proponent held shares continuously for a year and that the statement must be provided within 14 days. It did not mention the Rule or indicate when the proposal was submitted.).

73. *See* Bulletin No. 14B *supra* note 62 (discusses common issues with notice of defects); *see also* Bulletin No. 14F, *supra* note 47 (discussing common errors shareholders can avoid when submitting proof of eligibility).

74. The staff has also provided a seven-day extension to cure deficiencies under other sections of the Rule. *See* Paccar Inc, SEC No-Action Letter, 2004 WL 3048477 (Dec. 27, 2004) ("unable to concur…under rule 14a-8(i)(3) . . . . It appears . . . this defect could be cured if the proposals were revised."); Torotel, Inc., SEC No-Action Letter, 2007 WL 2480253 (Aug. 29, 2007) ("There appears to be some basis…that Torotel may exclude the proposal under rule 14a-8(i)(1) as an improper subject for shareholder action under applicable state law or rule 14a-8(i)(2) because it would, if implemented, cause Torotel to violate state law . . . this defect could be cured, however, if the proposal were recast as a recommendation or request."). *See also* Rule 14a-8: SEC Granting Seven-Day Extension Since 1998, available at http://www.law.du.edu/documents/corporate-governance/empirical/Rule-14a-8-SEC-Comission-Granting-Seven-Day-Extenion.pdf (The staff has applied this extension to other substance grounds for exclusion, albeit with less frequency.).

75. *See* Seven-Day Extension, *supra* note 75.

76. *Id*. The staff has sometimes granted multiple extensions, with the implicit understanding that each extension ran congruently. *See* Mirant Corp., SEC No-Action Letter, 2003 WL 354938 (Jan. 28, 2003) (In addition to the extension for the company's deficient notice letter, the staff granted three additional seven day extension on substantive grounds. The staff granted an extension for the following reasoning: (1) allowed the proponent to recast the proposal as a recommendation to the board of directors; (2) omitted the material misleading information from the proposal; and (3) clarify the proposal so that it does not get omitted under the ordinary business exception.).

77. 17 CFR 240.14a-8(f) ("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.").

object to any deficiency. Such an approach would be more consistent with the language of the Rule and provide issuers with greater incentive to ensure adequate deficiency notices.

In any event, the seven-day time period used by the staff is inconsistent with existing requirements and should be lengthened. Shareholders currently receive fourteen days to address a deficiency in the documentation. Yet where the staff finds that a company issued an inadequate letter, shareholders have only half the time to address the identified problems. The shortened period reduces the ability of beneficial owners to obtain the required documentation from record owners in a timely fashion. Shareholders should therefore receive the same fourteen-day period for responding to the deficiencies identified in the no-action letter process.

The Commission should also consider amending the Rule to lengthen the time given to beneficial owners to respond. The Rule at one time provided owners with twenty-one days. Any such extension, however, would not solve all of the problems confronted by proponents in providing the necessary documentation. The SEC should, therefore, take a more active role in ensuring that brokers and other record owners provide beneficial owners with the necessary information in a timely fashion.

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