SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–56914; IC–28075; File No. S7–17–07]

RIN 3235–AJ95

Shareholder Proposals Relating to the Election of Directors

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is publishing this adopting release to codify the meaning of Rule 14a–8(i)(8) under the Securities Exchange Act of 1934. Rule 14a–8 provides shareholders with an opportunity to place certain proposals in a company's proxy materials for a vote at an annual or special meeting of shareholders. Subsection (i)(8) of the Rule permits exclusion of certain shareholder proposals related to the election of directors. The Commission is adopting an amendment to Rule 14a–8(i)(8) to provide certainty regarding the meaning of this provision in response to a recent court decision.

DATES: *Effective Date:* January 10, 2008.

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SUPPLEMENTARY INFORMATION: We are adopting an amendment to Rule 14a–8(i)(8) [1] under the Securities Exchange Act of 1934.[2]

I. Background

A. Purpose of the Rule 14a–8(i)(8) Exclusion

On July 27, 2007, the Commission published for comment the proposed amendment to Rule 14a–8(i)(8) that we are adopting today to address the uncertainty resulting from a recent decision of the U.S. Court of Appeals for the Second Circuit that did not defer to the agency's longstanding interpretation of the Rule.[3]

Rule 14a–8, which creates a procedure under which shareholders [4] may present certain proposals [5] in the company's proxy materials, does not require the inclusion of any proposal that ''relates to an election for membership on the company's board of directors or analogous governing body.'' [6] The proper functioning of Rule 14a–8(i)(8) is particularly critical to assuring that investors receive adequate disclosure in election contests, and that they benefit from the full protection of the antifraud provisions of the securities laws. Because the inclusion of shareholder nominees for director in a company's proxy materials normally would create a contested election of directors, the protections of the proxy solicitation rules designed to provide investors with full and accurate disclosure are of vital importance in this context. An interpretation of Rule 14a–8(i)(8) that resulted in the Rule being used as a means to include shareholder nominees in company proxy materials would, in effect, circumvent the other proxy rules designed to assure the integrity of director elections.

Several Commission rules, including Exchange Act Rule 14a–12,[7] regulate contested proxy solicitations so that investors receive adequate disclosure to enable them to make informed voting decisions in elections. The requirements to provide these disclosures to shareholders from whom proxy authority is sought are grounded in Rule 14a–3,[8] which requires that any party conducting a proxy solicitation file with the Commission, and furnish to each person solicited, a proxy statement containing the information specified in Schedule 14A.[9] Items 4(b) and 5(b) of Schedule 14A require numerous specified disclosures if the solicitation is subject to Rule 14a–12(c).[10] A solicitation is subject to Rule 14a–12(c) if it is made ''for the purpose of opposing'' a solicitation by any other person ''with respect to the election or removal of directors. * * *'' [11] Thus, the result of Schedule 14A's cross-referencing of Rule 14a–12(c) is to trigger, when a solicitation with respect to the election of directors is conducted in opposition to another solicitation, a number of disclosures relevant in proxy contests.[12] In addition, Item 7 of Schedule 14A [13] requires the furnishing of additional information as to nominees for director, including nominees of ''persons other than the

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[1] 17 CFR 240.14a–8(i)(8).

[2] 15 U.S.C. 78a *et seq.*

[3] Release No. 34–56161 (July 27, 2007) [72 FR 43488] (the ''Proposing Release'').

[4] To be eligible to submit a proposal, Exchange Act Rule 14a–8(b)(1) (17 CFR 240.14a–8(b)(1)) requires the shareholder to have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal for at least one year. The Rule also contains other eligibility and procedural requirements for shareholders who wish to include a proposal in the company's proxy materials.

[5] With respect to subjects and procedures for shareholder votes, most state corporation laws provide that a corporation's charter or bylaws can specify the types of proposals that are permitted to be brought before the shareholders for a vote at an annual or special meeting. Rule 14a–8(i)(1) supports these determinations by providing that a proposal that is not a proper subject for action by shareholders under the laws of the jurisdiction of the corporation's organization may be excluded from the corporation's proxy materials.

[6] Exchange Act Rule 14a–8(i)(8).

[7] 17 CFR 240.14a–12.

[8] 17 CFR 240.14a–3.

[9] Rule 14a–3 provides, in pertinent part, that ''[n]o solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a publicly-filed preliminary or definitive written proxy statement containing the information specified in Schedule 14A. * * *''

[10] 17 CFR 240.14a–101, Items 4 and 5. Items 4 and 5 require disclosures made by participants in a solicitation. For purposes of Items 4 and 5, a ''participant'' in the solicitation includes:

- Any person who solicits proxies;
- Any director nominee for whose election proxies are being solicited; and
- Any committee or group, any member of a committee or group, and other persons involved in specified ways in the financing of the solicitation.

See Item 4, Instruction 3. Thus, for each of the numerous disclosures required as to a ''participant,'' the information must be disclosed as to all of such persons.

[11] Because numerous protections of the federal proxy rules are triggered only by the presence of a solicitation made in opposition to another solicitation, the requirements regarding disclosures and procedures in contested elections do not contemplate the presence of competing nominees in the same proxy materials.

[12] *See* 17 CFR 240.14a–101, Items 4(b) and 5(b). These disclosures include:

- By whom the solicitation is made;
- The methods to be employed to solicit;
- Total expenditures to date and anticipated in connection with the solicitation;
- By whom the cost of the solicitation will be borne;
- Any substantial interest of each participant in the solicitation;
- The name, address, and principal occupation or principal business of each participant;
- Whether any participant has been convicted in a criminal proceeding within the past 10 years;
- The amount of each class of securities of the company owned by the participant and the participant's associates;
- Information concerning purchases and sales of the company's securities by each participant within the past two years;
- Whether any part of the purchase price or market value of such securities is represented by funds borrowed;
- Whether a participant is a party to any contract, arrangements or understandings with any person with respect to securities of the company;
- Certain related party transactions between the participant or its associates and the company;
- Whether the participant or any of its associates have any arrangement or understanding with any person with respect to any future employment with the company or its affiliates, or with respect to any future transactions to which the company or its affiliates will or may be a party; and
- With respect to any person who is a party to an arrangement or understanding pursuant to which a nominee is proposed to be elected, any substantial interest that such person has in any matter to be acted upon at the meeting.

[13] 17 CFR 240.14a–101, Item 7.

[company]'' (*e.g.*, shareholders), including:

- Any arrangement or understanding between the nominee and any other person(s) (naming such person(s)) pursuant to which the nominee was or is selected as a nominee; [14]
- Business experience of the nominee; [15]
- Any other directorships held by the nominee in an Exchange Act reporting company; [16]
- The nominee's involvement in certain legal proceedings; [17]
- Certain transactions between the nominee and the company; [18] and
- Whether the nominee complies with independence requirements.[19]

Finally, and of critical importance, all of these disclosures are covered by the prohibition contained in Rule 14a–9 on the making of a solicitation containing false or misleading statements or omissions.[20]

These numerous protections of the federal proxy rules are triggered only by the presence of a solicitation made in opposition to another solicitation. Accordingly, were the election exclusion not available for proposals that would establish a process for the election of directors that circumvents the proxy disclosure rules, it would be possible for a person to wage an election contest without providing the disclosures required by the Commission's present rules governing such contests. Additionally, false and misleading disclosure in connection with such an election contest could potentially occur without liability under Exchange Act Rule 14a–9 for material misrepresentations made in a proxy solicitation. The Commission stated this rationale for the exclusion at the time it was proposed in 1976:

[T]he principal purpose of [Rule 14a–8(i)(8)] is to make clear, with respect to corporate elections, that Rule 14a–8 is not the proper means for *conducting campaigns or effecting reforms in* elections of that nature, since other proxy rules, including Rule 14a–11, are applicable thereto.[21] (Emphasis added.)

Accordingly, the staff has determined that shareholder proposals that may result in a contested election—including those which establish a procedure to list shareholder-nominated director candidates in the company's proxy materials—fall within the election exclusion. We agree with this position and believe it is consistent with the explanation that the Commission gave in 1976.

As explained in the Proposing Release, except for a few brief references to the Rule, the Commission did not discuss the meaning of Rule 14a–8(i)(8) from the time of its 1976 statement until its shareholder access proposal in October 2003,[22] and the two proposing releases [23] in July 2007. Between 1976 and the time of the *AFSCME* v. *AIG* litigation, the staff of the Commission took ''no-action'' positions on the application of the Rule. Between 1976 and 1990, in applying the Rule to proposals that would have established procedures for shareholders to nominate candidates to the board, in the limited number of cases that presented the question, the staff did not concur with companies that the proposals could be excluded under the election exclusion.[24] In 1990, however, without mentioning the pre-1990 decisions, the staff clearly stated its position that the Rule permitted exclusion of a proposal that ''would establish a procedure that may result in contested elections to the board'' in a response to a request for no-action relief from Amoco.[25] In doing so, the staff aligned its interpretation with the Commission's 1976 statement. Between 1990 and 1998, the staff granted no-action relief under the election exclusion nine times [26] and denied relief twice [27] to operating companies seeking to exclude shareholder proposals to adopt procedures that would give shareholders the ability to nominate director candidates in the company's proxy materials. For the past decade, since 1998, the Commission staff has repeatedly taken the position that shareholder proposals that may result in a contested election fall within the election exclusion. On several occasions after 1990, the Commission itself declined to review these ''no-action'' positions.[28]

B. Background Relating to Rule Amendment

In *American Federation of State, County & Municipal Employees, Employees Pension Plan* v. *American International Group, Inc.,*[29] the U.S. Court of Appeals for the Second Circuit held that AIG could not rely on Rule 14a–8(i)(8) to exclude a shareholder proposal seeking to amend the company's bylaws to establish a procedure under which the company would be required, in specified circumstances, to include shareholder nominees for director in the company's proxy materials.[30] The Second Circuit described the Commission's statement in 1976 as limiting the election exclusion ''to shareholder proposals used to oppose solicitations dealing with an identified board seat in an

[14] *See* Item 401(a) of Regulation S–K [17 CFR 229.401(a)], which is referenced in Item 7 of Schedule 14A.

[15] *See* Item 401(e)(1) of Regulation S–K [17 CFR 229.401(e)(1)], which is referenced in Item 7 of Schedule 14A.

[16] *See* Item 401(e)(2) of Regulation S–K [17 CFR 229.401(e)(2)], which is referenced in Item 7 of Schedule 14A.

[17] *See* Items 103 and 401(f) of Regulation S–K [17 CFR 229.103 and 17 CFR 229.401(f)], which are referenced in Item 7 of Schedule 14A.

[18] *See* Item 404 of Regulation S–K [17 CFR 229.404], which is referenced in Item 7 of Schedule 14A.

[19] *See* Item 407(a) of Regulation S–K [17 CFR 229.407(a)], which is referenced in Item 7 of Schedule 14A.

[20] *See* 17 CFR 240.14a–9.

[21] Release No. 34–12598 (July 7, 1976) [41 FR 29982]. The Commission's reference in its 1976 statement to ''other proxy rules, including Rule 14a–11,'' reflects the fact that, in 1976, Rule 14a–11 was the Commission proxy rule governing election contests. As part of a series of rule changes in 1999, the Commission rescinded Rule 14a–11 and moved many of the requirements of prior Rule 14a–11 to the current Rule 14a–12. [17 CFR 240.14a–12] *See* Release No. 33–7760 (October 22, 1999) [64 FR 61408]. Accordingly, the Commission's reference to Rule 14a–11 in 1976 was to the rules governing election contests, which now may be found generally elsewhere in the proxy rules and, in particular, in Rule 14a–12.

[22] Release No. 34–48626 (October 14, 2003) [68 FR 60784].

[23] *See* Proposing Release and Release No. 34–56160 (July 27, 2007) [72 FR 43466].

[24] The proposals submitted between 1976 and 1990 typically presented similar, but not identical, procedures as those presented in the direct access proposals generally submitted in recent years. *See, e.g.*, Pan Am Corp. (March 22, 1985); Union Oil Company (February 24, 1983); and Mobil Corp. (March 3, 1981). *Cf.* Tylan Corporation (September 25, 1987) (allowing exclusion under the prior version of Rule 14a–8(i)(8) of a shareholder proposal to reduce the number of directors and nominate a new slate of directors meeting certain criteria).

[25] Amoco Corporation (February 14, 1990). *See also* Thermo Electron (March 22, 1990); Unocal Corp. (February 6, 1990); and Bank of Boston (January 26, 1990).

[26] *See* Storage Technology Corporation (March 11, 1998); BellSouth Corp. (February 4, 1998); Unocal Corporation (February 8, 1991); AT&T (January 11, 1991); Flow International (July 16, 1990); Thermo Electron (March 22, 1990); Amoco Corporation (February 14, 1990); Unocal Corporation (February 6, 1990) and Bank of Boston (January 26, 1990). *See also* International Business Machine Corporation (March 4, 1992), in which the staff noted that the proposal would be excludable unless modified as specified in the staff's response letter.

[27] *See* Dravo Corporation (February 21, 1995) and Pinnacle West Capital Corporation (March 26, 1993). *See also,* TCW/DW Term Trust 2003 (July 15, 1997), in which the Division of Investment Management denied no-action relief.

[28] *See, e.g.*, Storage Technology Corporation, letter of Jonathan Katz, Secretary of the Commission, to Dr. Seymour Licht P.E. (April 6, 1998).

[29] 462 F.3d 121 (2d Cir. 2006) (*AFSCME* v. *AIG*).

[30] Consistent with the longstanding interpretation, the Commission staff had issued to AIG a letter stating that ''[t]here appears to be some basis for your view that AIG may exclude the proposal under rule 14a–8(i)(8) * * * we will not recommend enforcement action to the Commission if AIG omits the proposal from its proxy materials * * *.'' American International Group (February 14, 2005).

upcoming election and reject[ing] the somewhat broader interpretation that the election exclusion applies to shareholder proposals that would institute procedures making such election contests more likely.'' [31] After 1976, in the Second Circuit's view, the Commission gradually shifted away from this interpretation, and came to its present interpretation in 1990. The court then held ''that an agency's interpretation of an ambiguous regulation made at the time the regulation was implemented or revised should control unless that agency has offered sufficient reasons for its changed interpretation.'' [32] Finding no such sufficient reason, the court declined to defer to what it viewed as the 1990 interpretation and deemed it ''appropriate'' instead to defer to its own reading of the meaning of the 1976 interpretation.[33] It is the Commission's position that the election exclusion should not be, and was not originally intended to be, limited in this way.[34]

This decision was issued on September 5, 2006, as companies and shareholders prepared for the 2007 proxy season. Although the decision is binding only within the Second Circuit, it created uncertainty in the rest of the nation about the continuing validity of the longstanding interpretation of Rule 14a–8(i)(8). While the Commission began the process that led to the current rulemaking to clarify the Rule's application, the staff of the Division of Corporation Finance received three no-action requests seeking to exclude similar proposals under Rule 14a–8(i)(8). The staff took a position of ''no view'' on the one request for no-action relief under the Rule that it received and that was not withdrawn.[35] This request for no-action relief was submitted by Hewlett-Packard Company, which asserted that any litigation related to the proposal would be handled by the U.S. Court of Appeals for the Ninth Circuit and that the staff therefore should grant no-action relief under Rule 14a–8(i)(8) on the basis that it was consistent with the agency's interpretation of the Rule and the Ninth Circuit was not bound by the decisions of the Second Circuit. Hewlett-Packard ultimately included the proposal in its proxy materials, but the proposal did not receive a majority of shareholder votes. A second request for no-action relief was submitted by Reliant Energy. Subsequent to the staff of the Division of Corporation Finance taking a ''no view'' position on Hewlett-Packard's request, Reliant Energy filed a complaint in the U.S. District Court for the Southern District of Texas seeking a declaratory judgment that the company could properly omit a similar proposal that it had received for inclusion in its proxy materials.[36] During the pendency of this litigation and prior to the staff's response to Reliant's no-action request, the shareholder withdrew the proposal and the company therefore withdrew its no-action request.[37] A third request for no-action relief was withdrawn after the company agreed to include the proposal in its proxy materials.[38] These events demonstrate the uncertainty the Second Circuit decision created.

Compounding this uncertainty created by the Second Circuit's decision is the U.S. Supreme Court's recent unanimous reversal of another Second Circuit decision involving an agency's interpretation of its rules. In *Long Island Care at Home, Ltd.* v. *Coke,*[39] the Supreme Court addressed the validity of the Department of Labor's changed interpretation of its rules. As in *AFSCME* v. *AIG,* the Second Circuit declined to follow the agency's more recent interpretation. In rejecting the Second Circuit's view, the Supreme Court held that an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted. The Supreme Court noted that the Department of Labor ''may have interpreted these regulations differently at different times in their history.''[40] Nonetheless, ''as long as interpretive changes create no unfair surprise * * * the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation.''[41] Indeed, whereas the Second Circuit required the Commission to provide ''sufficient reason'' for what it regarded as a changed interpretation in order to merit deference, the Supreme Court, in reversing the Second Circuit's decision in another administrative law case, held that a department's change in interpretation alone presents no separate ground for disregarding the department's present interpretation. As a result of this post-*AFSCME* v. *AIG* decision, which binds all U.S. Courts of Appeals and other federal courts, it is more likely that a court would uphold this agency's interpretation of Rule 14a–8(i)(8). If a lower court were to apply the reasoning in *Long Island Care at Home* and reach a result contrary to the *AFSCME* v. *AIG* court, further litigation and confusion about the Commission's rules could follow.

To permit this escalating state of confusion to continue for the 2008 proxy season and beyond would effectively require shareholders and companies to go to court to determine the meaning of the Commission's proxy rules, and it could take years before the U.S. Supreme Court resolved any resulting conflicts between the circuits. Inaction by the Commission would thus promote further uncertainty and leave both shareholders and companies in a position of ''every litigant for himself.'' This would benefit neither shareholders nor companies. If the current environment was permitted to continue, and these types of proposals were included in proxy statements and subsequently approved, shareholders would be exposed to the risk that the disclosure provisions of the securities laws could be circumvented. And by furthering legal uncertainty about the meaning and application of the Commission's rules, it would impose needless costs on shareholders and companies alike, and undermine the Commission's statutory mission to protect investors, promote fair and orderly markets and facilitate capital formation.

The Commission has a fundamental responsibility to make sure that the rules and regulations it adopts have clear meaning so that the regulated community can conform its conduct accordingly. To that end, we previously reiterated the Commission's interpretation in the Proposing Release, and today we are adopting a clear and concise amendment to the text of Rule 14a–8 that codifies the agency's longstanding interpretation of Rule 14a–8(i)(8). It is our intention that this will enable shareholders and companies to know with certainty whether a proposal may or may not be excluded under Rule 14a–8(i)(8). It also will facilitate the staff's efforts in reviewing no-action requests and in interpreting Rule 14a–8 with certainty in responding to requests

[31] *AFSCME* v. *AIG,* 432 F.3d at 128.

[32] *Id.* at 123.

[33] *Id.* at 129.

[34] In this regard, we note that the Second Circuit decision stated that ''if the SEC determines that the interpretation of the election exclusion embodied in its 1976 Statement would result in a decrease in necessary disclosures or any other undesirable outcome, it can certainly change its interpretation of the election exclusion, provided that it explains its reasons for doing so.'' *Id.* at 130.

[35] Hewlett-Packard Company (January 22, 2007), available at *http://www.sec.gov/divisions/corpfin/cf-noaction/2007/hp012207-14a-8.htm.*

[36] The Reliant complaint may be found at *http://www.sec.gov/divisions/corpfin/cf-noaction/2007/reliantenergy011607-14a-8-incoming.pdf.*

[37] Reliant Energy, Inc. (February 23, 2007), available at *http://www.sec.gov/divisions/corpfin/cf-noaction/2007/reliantenergy011607-14a-8-incoming.pdf.*

[38] UnitedHealth Group Inc. (March 29, 2007), available at *http://www.sec.gov/divisions/corpfin/cf-noaction/2007/uhg032907-14a-8.htm.*

[39] 127 S.Ct. 2339 (2007).

[40] *Long Island Care at Home,* 127 S.Ct at 2349.

[41] *Id.*

for no-action letters during the 2008 proxy season. We believe it is important to adopt a rule change to eliminate any uncertainty, particularly in light of *Long Island Care at Home* and its implications. Thus, today's release codifies the agency's longstanding interpretation of Rule 14a–8(i)(8) and the modifications to the rule we adopt today do not affect or address any other aspect of the staff's prior determinations under the election exclusion.

II. Commission Interpretation of Rule 14a–8(i)(8)

Rule 14a–8(i)(8) permits exclusion of a proposal that would result in an immediate election contest (*e.g.*, by making or opposing a director nomination for a particular meeting) or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings.

In the *AFSCME* v. *AIG* opinion, the Second Circuit took the view that a shareholder proposal may be excluded under Rule 14a–8(i)(8) if it would result in an immediate election contest, but that a proposal may not be excluded under Rule 14a–8(i)(8) if it ''establish[es] a process for shareholders to wage a future election contest.'' [42] As the Commission stated in 1976, however, the express purpose of the election exclusion is to make clear that Rule 14a–8 is not a proper ''means'' to achieve election contests because ''other proxy rules'' are applicable to such contests. We are acting today to state clearly that the phrase ''relates to an election'' in the election exclusion cannot be read so narrowly as to refer only to a proposal that relates to the current election, or a particular election, but rather must be read to refer to a proposal that ''relates to an election'' in subsequent years as well. In this regard, if one looked only to what a proposal accomplished in the current year, and not to its effect in subsequent years, the purpose of the exclusion could be evaded easily. For example, such a reading might permit a company to exclude a shareholder proposal that nominated a candidate for election as director for the upcoming meeting of shareholders, but not exclude a proposal that resulted in the company being required to include the same shareholder-nominated candidate in the company's proxy materials for the following year's meeting.

Our interpretation of Rule 14a–8(i)(8) is fully consistent with the Commission's statement in 1976, that the Rule was not intended ''to cover proposals dealing with matters previously held not excludable by the Commission, such as cumulative voting rights, general qualifications for directors * * *.'' The Commission's references in 1976 to proposals relating to ''cumulative voting rights'' and ''general qualifications for directors'' simply reflect the long-held belief that these proposals generally do not trigger the contested elections proxy rules and therefore are not excludable under Rule 14a–8(i)(8). Accordingly, the Commission's 1976 statement should not be interpreted to mean that Rule 14a–8(i)(8) permits exclusion of proposals establishing nomination or election procedures other than those that would result in a contested election. It also is consistent with the Commission's statement in 1976 that Rule 14a–8 is not the proper means for conducting campaigns or effecting reforms in corporate elections. As explained in the Proposing Release and above, the analysis under Rule 14a–8(i)(8) does not focus on whether the proposal would make election contests more likely, but whether the resulting contests would be governed by the Commission's proxy rules for contested elections.

We received numerous public comments regarding the Proposing Release, and have carefully considered them. Commenters supporting the agency's longstanding interpretation noted that, notwithstanding the court decision, no new facts or circumstances exist that warrant the Commission deviating from that interpretation.[43] Commenters believed that the court decision did not invalidate the agency's position, but rather required the Commission to state its position and its reasoning in a formal way.[44] Other commenters disagreed with the Commission's position entirely and therefore opposed the longstanding interpretation and the proposed Rule text amendment.[45] Some commenters opposing the interpretation and Rule proposal believed that the Commission should withhold action until it has the opportunity to assess the impact of the *AFSCME* v. *AIG* decision.[46]

Many of the comments we received on the amendment that we are adopting today went beyond the limited issue the Proposing Release sought to address—namely, the Commission's interpretation of existing Rule 14a–8(i)(8) and proposed rule amendment—and instead focused on the broader range of matters implicated by a separate companion release (the ''Companion Release'') that proposed a comprehensive package of amendments to the proxy rules and related disclosure requirements.[47] We separately proposed the amendment that we are adopting today so that we could eliminate the uncertainty created by *AFSCME* v. *AIG*. As discussed throughout the Proposing Release, and in this release, we believe that a definitive codification of our longstanding interpretation is both needed and appropriate. We appreciate the thoughtful comments regarding the questions raised in the Companion Release but, because they go beyond the scope of the Proposing Release, they are more appropriately addressed in connection with the Companion Release. In this release, we are acting only on the matters that were the subject of the Proposing Release.

III. Amendment to Rule 14a–8(i)(8)

The amendment that we are adopting today is intended to clarify the meaning of Rule 14a–8(i)(8) by codifying the agency's longstanding interpretation of the Rule. The text of Rule 14a–8(i)(8) currently specifies that a proposal may be excluded ''[i]f the proposal relates to an election for membership on the company's board of directors or analogous governing body.'' To clarify the meaning of this provision, consistent with the Commission's longstanding interpretation, we proposed to amend the language of the rule to read:

> If the proposal relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election.

[42] *AFSCME* v. *AIG*, 462 F.3d at 128.

[43] *See* comment letters from U.S. Chamber of Commerce (''Chamber'') and Society of Corporate Governance Professionals (''SCSGP'').

[44] *See* comment letter from Citigroup Inc. (''Citigroup''). *See, e.g.*, comment letters from The Adams Express Company (''Adams'') and Chamber.

[45] *See, e.g.*, comment letters from AFL–CIO; American Federation of State, County and Municipal Employees, AFL–CIO (''AFSCME''); State Board of Administration of Florida (''FL Board''); Amalgamated Bank LongView Funds (''Amalgamated Bank''); Board of Fire and Police Pension Commissioners of the City of Los Angeles (''LA Fire & Police''); and Comptroller of the City of New York (''NYC Comptroller'').

[46] *See* Form Letter B.

[47] We received approximately 8800 comment letters addressing the rule proposal and accompanying interpretation. Approximately 8400 of these letters were form letters opposing both this release and the Companion Release published for comment on July 25. Of the 8800, approximately 400 were not form letters.

As discussed in more detail in the Companion Release, those proposals followed a long history of prior Commission consideration and examination of possible regulatory approaches to shareholder nominations of directors, including several prior proposals, hearings, and roundtables. *See* Release No. 34–56160 (July 27, 2007) [72 FR 43466].

The term ''procedures'' in the election exclusion relates to procedures that would result in a contested election either in the year in which the proposal is submitted or in any subsequent year.

Commenters that addressed whether further clarification of the meaning of the election exclusion was necessary thought an amendment to Rule 14a–8(i)(8) was appropriate.[48] Commenters that supported the amendment believed that it would eliminate the uncertainty caused by the decision in *AFSCME* v. *AIG*.[49] Many commenters opposing the amendments addressed the matters that are the subject of the Companion Release. Some, for example, argued that the Commission's proxy rules should facilitate shareholders' ability to nominate directors.[50] Several commenters, some opposing the interpretation and rule amendment altogether and others supporting the interpretation and rule amendment, believed that the proposed language was too broad.[51] They asserted that under the proxy rules shareholders have been allowed to include proposals that may make contested elections more likely, such as proposals to de-stagger the board or introduce cumulative voting.[52] One commenter stated that any final rule should not inadvertently overrule other positions on shareholder proposals that the staff has taken.[53] Several commenters recommended that the rule define the term ''procedure'' or contain a note that provides a list of circumstances that would constitute a proposal that may result in an election contest.[54] Other commenters believed that listing the procedures that the staff historically has found to fall under the exclusion is unnecessary and may result in confusion because it would be difficult to draft a comprehensive list that includes every possible permutation.[55]

As discussed above, we agree with those commenters that support amending Rule 14a–8(i)(8) in order to provide greater clarity to both shareholders and companies, and believe that the comments that address the broader issues in the Companion Release go beyond the scope of this release. We believe that the clarifying rule amendment is consistent with the agency's longstanding interpretation of the election exclusion and that the references to ''nomination'' and ''procedure'' in the rule text appropriately reflect the purpose of the exclusion. We have not included in the amended rule text a list of the specific types of proposals that may be excluded, as was suggested by some commenters, as we agree with commenters who asserted that inclusion of such a list is unnecessary and could be confusing. We therefore are adopting the change to the rule text as proposed. To meet some of the concerns expressed by commenters, however, we emphasize that the changes to the rule text relate only to procedures that would result in a contested election, either in the year in which the proposal is submitted or in subsequent years. The changes to the rule text do not affect or address any other aspect of the agency's prior interpretation of the exclusion.[56] Thus, under the Rule as amended, a shareholder proposal that would allow for shareholder use of the company's proxy materials to nominate director candidates, such as the proposal at issue in *AFSCME* v. *AIG*, would be excludable. We believe the actions we are taking today will provide certainty in the application of Rule 14a–8(i)(8) and will preserve our longstanding interpretation of the Rule.

We believe that the amendment we are adopting today, as well as the definitive interpretive guidance provided in this release, will provide certainty to shareholders and companies regarding the application of Rule 14a–8(i)(8).[57] The clarification provided will enable shareholders and companies to better understand the shareholder proposal process, and will facilitate the efforts of the Commission's staff in its review of future no-action requests.

IV. Paperwork Reduction Act

The proxy rules constitute a ''collection of information'' requirement within the meaning of the Paperwork Reduction Act of 1995, the PRA.[58] The amendment to Rule 14a–8(i)(8) described in this release relates to a previously approved collection of information, the title of which is ''Proxy Statements—Regulation 14A (Commission Rules 14a–1 through 14a–16 and Schedule 14A)'' (OMB Control No. 3235–0059). This regulation was adopted pursuant to the Exchange Act and sets forth the disclosure requirements for proxy statements filed by companies to help investors make informed voting decisions.

The Rule 14a–8(i)(8) amendment merely revises the text of Rule 14a–8(i)(8) in a manner that is consistent with the agency's longstanding interpretation of the rule. As such, the amendment does not affect the Schedule 14A collection of information for purposes of the PRA. Therefore, we are not submitting the amendment for OMB approval.

V. Cost-Benefit Analysis

The amendment to Rule 14a–8(i)(8) clarifies the Commission's existing

[48] *See, e.g.*, comment letters from Business Roundtable (''BRT'') and SCSGP.

[49] *See, e.g.*, comment letters from American Bar Association (''ABA''); Adams; Bank of America (''BOA''); The Boeing Company (''Boeing''); BRT; Burlington Northern Santa Fe Corporation (''Burlington Northern''); Caterpillar Inc. (''Caterpillar''); Chevron Corporation (''Chevron''); Peabody Energy Corporation (''Peabody''); and SCSGP.

[50] *See, e.g.*, Form Letter B and comment letters from Stephen R. Van Winthrop (''Van Winthrop'') and Group of Thirty-Nine Law Professors (''Thirty-Nine Law Professors'').

[51] *See, e.g.*, comment letters from ABA; Corporate Governance; theRacetotheBottom.org (''Race''); and Sullivan & Cromwell (''Sullivan'').

[52] *See, e.g.*, comment letters from Race and Sullivan.

[53] *See* comment letter from Amalgamated Bank.

[54] *See, e.g.*, comment letters from BRT and Peabody.

[55] *See, e.g.*, comment letters from ABA and SCSGP.

[56] For example, we note that, as stated in the Proposing Release, the staff has taken the position that a proposal relates to ''an election for membership on the company's board of directors or analogous governing body'' and, as such, is subject to exclusion under Rule 14a–8(i)(8) if it could have the effect of, or proposes a procedure that could have the effect of, any of the following:

- Disqualifying board nominees who are standing for election;
- Removing a director from office before his or her term expired;
- Questioning the competence or business judgment of one or more directors; or
- Requiring companies to include shareholder nominees for director in the companies' proxy materials or otherwise resulting in a solicitation on behalf of shareholder nominees in opposition to management-chosen nominees.

Conversely, the staff has taken the position that a proposal may not be excluded under Rule 14a–8(i)(8) if it relates to any of the following:

- Qualifications of directors or board structure (as long as the proposal will not remove current directors or disqualify current nominees);
- Voting procedures (such as majority or plurality voting standards or cumulative voting);
- Nominating procedures (other than those that would result in the inclusion of a shareholder nominee in company proxy materials); or
- Reimbursement of shareholder expenses in contested elections.

These lists represent non-exclusive examples of types of proposals that the staff has found to be excludable and non-excludable under the election exclusion.

[57] The approach we are taking today is similar to the Commission's response to the decision of the Third Circuit in *Levy* v. *Sterling Holding Co.*, 314 F.3d 106 (3d Cir. 2002), which also resulted in uncertainty and confusion about the interpretation of Commission rules. *See* 69 FR 35982 (June 25, 2004) (proposing release), 70 FR 46080 (August 9, 2005) (adopting release); *Bruh* v. *Bessemer Venture Partners III L.P.*, 464 F.3d 202 (2d Cir. 2006) (accepting Commission interpretation of rule before amendment based on Commission's amicus brief in the case and the rule amendments and observing that the amended rule was valid); *Levy* v. *Sterling Holding Co.*, 475 F. Supp. 2d 463 (D. Del. 2007) (upholding Commission's amended rules and applying them retroactively); *Tinney* v. *Geneseo Communications, Inc.*, 457 F. Supp. 2d 495 (D. Del. 2006) (same).

[58] 44 U.S.C. 3501 *et seq.*

proxy rules. The opinion in *AFSCME* v. *AIG* created uncertainty regarding the agency's longstanding interpretation of Rule 14a–8(i)(8), making it difficult for shareholders and companies to assess the operation of that rule. The amendment is intended to clarify the meaning of the exclusion in Rule 14a–8(i)(8), consistent with the agency's unwavering interpretation of the rule for the last decade. Without such clarification, shareholders and companies may need to resort to litigation to determine the range of shareholder proposals that are required to be included in company proxy materials. They may be uncertain as to the proper range of proposals that shareholders may submit to companies for inclusion in those proxy materials. For example, without clarification of the exclusion in Rule 14a–8(i)(8), shareholders may incur costs in preparing and submitting proposals that a company may properly exclude from its proxy materials.

The Commission solicited public comment on the benefits and costs of the proposed amendment to Rule 14a–8(i)(8). While not directly addressing the cost-benefit analysis, commenters that addressed whether further clarification of the meaning of the election exclusion was necessary generally thought that an amendment to Rule 14a–8(i)(8) was appropriate.[59] Commenters supporting the amendment agreed that it would eliminate the uncertainty caused by the decision in *AFSCME* v. *AIG*.[60] Several commenters opposing the amendment[61] argued that the Commission's proxy rules should facilitate a shareholder's ability to nominate directors.[62]

The amendment should assist shareholders in determining the precise meaning of Rule 14a–8(i)(8) in connection with their preparation and submission of proposals for inclusion in a company's proxy materials. To the extent that proposals are properly excluded from proxy materials in reliance on the amended rule, companies and their shareholders will not incur additional costs that would otherwise be incurred if the proposals were included. Without the clarification of the proper scope of the Rule 14a–8(i)(8) exclusion that will be provided by the amendment, shareholders and companies may incur substantial expense in litigating disputes regarding that basis for exclusion. Thus, the clarification of Rule 14a–8(i)(8) will save both shareholders and companies potentially substantial expense in litigating disputes regarding its application.

In addition, the amendment will prevent circumvention of provisions of the proxy rules outside of Rule 14a–8, such as Rules 14a–9 and 14a–12, which are designed to assure the integrity of director elections. Finally, the amendment will facilitate the ability of staff in the Division of Corporation Finance to respond to no-action requests by clarifying the scope of the Rule 14a–8(i)(8) exclusion.

As we stated in the Proposing Release, because the proposed amendment would clarify that the scope of the exclusion in Rule 14a–8(i)(8) is consistent with the Commission's longstanding interpretation of that exclusion, shareholders and companies would not incur additional costs to determine the appropriate scope of the exclusion.

The Second Circuit decision may have altered the expectations of some shareholders, both within and outside of the Second Circuit, regarding their ability to require a company to include in its proxy statement a shareholder proposal under Rule 14a–8 to amend the bylaws to establish procedures for shareholder-nominated candidates for director to be included in a company's proxy materials. Despite the fact that, since 1998, the Commission staff repeatedly has taken the position that shareholder proposals that may result in a contested election fall within an exclusion from the rule, some uncertainty regarding this position was created by the *AFSCME* v. *AIG* decision. In this regard, the Commission's restatement of the longstanding interpretation of Rule 14a–8(i)(8) could impose a cost on shareholders that may have already incurred expenses in connection with preparations for bylaw amendments in the upcoming proxy season. Because the Commission is persuaded that the unanimous decision of the U.S. Supreme Court in *Long Island Care at Home* has called the continuing validity of the Second Circuit's decision into question even within that judicial circuit, however, it is not clear that the reassertion of the agency's longstanding view of the scope of the election exclusion would itself be the sole reason that such costs would occur.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[63] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act[64] and Section 2(c) of the Investment Company Act of 1940[65] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

The *AFSCME* v. *AIG* opinion has created uncertainty regarding the Commission's longstanding interpretation of Rule 14a–8(i)(8), making it difficult for shareholders and companies to assess the operation of that rule. This has resulted in uncertainty regarding whether Rule 14a–8 requires companies to include in their proxy materials shareholder proposals that would establish procedures whereby shareholders could submit nominations for director to be included in the company's proxy materials, despite the exclusion provided by Rule 14a–8(i)(8). This uncertainty has made it difficult for shareholders and companies to assess the proper operation of the shareholder proposal rule and has generated economic inefficiency by introducing potential litigation costs and potential costs of preparing and responding to otherwise excludable shareholder proposals.

The amendment is intended to clarify the scope of the exclusion in Rule 14a–8(i)(8), consistent with the agency's longstanding interpretation of the Rule. This should improve shareholders' and companies' ability to assess shareholder proposals with a clear understanding whether Rule 14a–8 will require inclusion of the proposal. Informed decisions in this regard generally promote market efficiency and capital formation, but should not affect competition. We believe the amendment

[59] *See, e.g.*, comment letters from BRT and SCSGP.

[60] *See, e.g.*, comment letters from ABA; Adams; BOA; Boeing; BRT; Burlington Northern; Caterpillar; Chevron; Peabody; and SCSGP.

[61] As discussed above, this release addresses the limited issue of the Commission's interpretation of existing Rule 14a–8(i)(8) and corresponding rule amendment, and does not address the broader range of matters contemplated by the Companion Release. Accordingly, this release does not address the benefits and costs, and effects on efficiency, competition and capital formation, of the proposals in the Companion Release.

[62] *See, e.g.*, Form Letter B and comment letters from Van Winthrop and Thirty-Nine Law Professors.

[63] 15 U.S.C. 78w(a)(2).

[64] 15 U.S.C. 78c(f).

[65] 15 U.S.C. 80a–2(c).

to Rule 14a–8(i)(8), and the attendant clarity and reduction of litigation risk, expense, and uncertainty for all parties will not impose a burden on competition, but will promote efficiency and capital formation.

VII. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to an amendment to Rule 14a–8 that clarifies the application of the exclusion provided by paragraph (i)(8) of that Rule.

A. Need for the Rules and Rule Amendments

The purpose of the amendment is to clarify the scope of Rule 14a–8(i)(8), which permits the exclusion from a company's proxy materials of certain bylaw proposals relating to procedures for the election of directors. The final rule should improve shareholders' and companies' ability to assess such shareholder proposals with a clear understanding of whether Rule 14a–8 will require inclusion or permit exclusion of the proposal.

B. Significant Issues Raised by Public Comment

We did not receive comments specifically on the application of the interpretation to small entities. Several commenters supported the agency's longstanding interpretation of Rule 14a–8(i)(8). Some believed that the *AFSCME* v. *AIG* opinion did not invalidate the interpretation, but rather required the Commission to state its position and its reasoning in a formal way.[66] Other commenters disagreed with the Commission's position entirely and therefore opposed the longstanding interpretation and the related proposed rule text amendment.[67] Some commenters opposing the interpretation and rule proposal believed that the Commission should withhold action until it has the opportunity to assess the impact of the *AFSCME* v. *AIG* decision.[68]

C. Small Entities Subject to the Rule

The Regulatory Flexibility Act defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.''[69] The Commission's rules define ''small business'' and ''small organization'' for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.[70] A ''small business'' and ''small organization,'' when used with reference to a company other than an investment company, generally means a company with total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 companies, other than investment companies, that may be considered reporting small entities.[71] The final rules may affect each of the approximately 1,315 small entities that are subject to the Exchange Act reporting requirements.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The amendment imposes no new reporting, recordkeeping, or compliance requirements. The impact of the amendment relates to clarifying the scope of Rule 14a–8(i)(8), which permits companies to omit certain shareholder proposals from their proxy materials.

E. Agency Action To Minimize Effect on Small Entities

The amendment to Rule 14a–8(i)(8) is intended to provide certainty and consistency to shareholders and companies of all sizes regarding the application of the Rule. It would be contrary to this objective if we minimized the effect of the amendment on small entities.

VIII. Statutory Basis and Text of Amendment

We are adopting an amendment to the Rule pursuant to Sections 14 and 23(a) of the Exchange Act, as amended, and Sections 20(a) and 38 of the Investment Company Act of 1940, as amended.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

■ In accordance with the foregoing, the Securities and Exchange Commission proposes to amend Title 17, chapter II of the Code of Federal Regulations 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, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Amend § 240.14a–8 by revising paragraph (i)(8) to read as follows:

§ 240.14a–8 Shareholder proposals.

* * * * *

(i) * * *

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

* * * * *

Dated: December 6, 2007.

By the Commission.

Nancy M. Morris,

Secretary.

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[66] *See* comment letter from Citigroup. *See, e.g.*, comment letters from Adams and Chamber.

[67] *See, e.g.*, comment letters from AFL–CIO; AFSCME; FL Board; Amalgamated Bank; LA Fire & Police; and NYC Comptroller.

[68] *See* Form Letter B.

[69] 5 U.S.C. 601(6).

[70] Securities Act Rule 157 [17 CFR 230.157], Exchange Act Rule 0–10 [17 CFR 240.0–10], and Investment Company Act Rule 0–10 [17 CFR 270.0–10] contain the applicable definitions.

[71] The estimated number of reporting small entities is based on 2007 data, including the Commission's EDGAR database and Thomson Financial's Worldscope database. Approximately 215 investment companies meet this definition.