

FEDERAL TRADE COMMISSION

16 CFR Part 13

[Docket No. C-2754]

Sansui Electronics Corp.; Prohibited Trade Practices, and Affirmative Corrective Actions**AGENCY:** Federal Trade Commission.**ACTION:** Modifying order.

SUMMARY: This order reopens the proceeding in the Matter of Sansui Electronics Corporation and modifies the Commission's order issued on October 24, 1975 (40 FR 56656) by modifying Paragraph I(11), so as to allow the company to impose non-discriminatory standards on the kind of retailers its distributors and dealers can serve.

DATES: Consent Order issued Oct. 24, 1975. Modifying Order issued Aug. 1, 1983.

FOR FURTHER INFORMATION CONTACT: FTC/CC Selig S. Merber, Washington, D.C. 20580. (202) 634-4642.

SUPPLEMENTARY INFORMATION: In the Matter of Sansui Electronics Corporation, a corporation. Codification appearing at 40 FR 56656 remains unchanged.

List of Subjects in 16 CFR Part 13

Electronics products, Trade practices. (Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

United States of America—Before Federal Trade Commission

Commissioners: James C. Miller III, chairman, David A. Clanton, Michael Pertschuk, Patricia P. Bailey, George W. Douglas.

In the matter of Sansui Electronics Corp., a corporation; Docket No. C-2754.

Order Modifying Cease and Desist Order Issued on October 24, 1975

By a petition filed on March 23, 1983, Sansui Electronic Corporation ("Sansui") requests that the Commission reopen the proceeding in Docket No. C-2754 and modify Paragraph I(11) of the order issued by the Commission on October 24, 1975 so that the order would no longer prohibit Sansui from restricting transshipment by sellers of its products. Pursuant to Section 2.51 of the Commission's Rules of Practice, Sansui's request was placed on the public record for comments. One comment was received.

On March 8, 1983, the Commission issued a modified order in *U.S. Pioneer Electronics Corporation*, Docket No. C-2754, allowing Pioneer (one of Sansui's competitors) to prevent transshipment of its products to dealers who do not meet reasonable, non-discriminatory standards of promotion, service and display. The *Pioneer* and *Sansui* orders contain most favored respondent clauses pursuant to which the Commission may modify the respective orders to bring them into conformity with less stringent restrictions imposed on the respondent's competitors.

In view of the Commission's action in *Pioneer* and upon consideration of Sansui's request and supporting materials, the Commission now finds that Sansui would likely suffer significant competitive injury unless the order is modified to conform to the *Pioneer* order in accordance with Sansui's request. Such modification would be in the public interest.

Accordingly, It is ordered, that this matter be, and it hereby is reopened and that paragraph I (11) of the order in Docket No. C-2754 be modified to read as follows:

Preventing or prohibiting any independent dealer or distributor from reselling his products to any persons or group of persons, business or class of businesses, except as expressly provided herein. This order shall not prohibit respondent from establishing lawful, reasonable, and non-discriminatory minimum standards for its dealers, including standards that relate to promotion and store display, demonstration, inventory levels, service and repair, volume requirements and financial stability, nor shall this order prohibit respondent from requiring its dealers who sell respondent's products for resale to make such sales only to dealers who maintain such minimum standards.

By direction of the Commission.

Issued: August 1, 1983.

Michael A. Baggage,
Acting Secretary.

[FR Doc. 83-23159 Filed 8-22-83; 8:45 am]

BILLING CODE 6750-01-M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 5

Final Schedule of Fees for Contract Market Designations

AGENCY: Commodity Futures Trading Commission.

ACTION: Final schedule of fees.

SUMMARY: The Commission recently proposed to establish a fee for contract market designation applications. 48 FR 27411 (June 15, 1983). Initially, the fee would be set at \$10,000, a figure below the actual average cost of reviewing an application for contract market designation. The Commission is now adopting its proposed fee schedule in final form, with the following two changes: (1) Exchanges with pending applications will not have to pay the fee until the contract is designated or disapproved, or until one year has elapsed, and (2) the fee will not be reviewed until the beginning of fiscal year 1985 and will be reviewed at the beginning of each subsequent year to ensure that it reflects the actual costs of the designation process.

EFFECTIVE DATE: August 23, 1983.

FOR FURTHER INFORMATION CONTACT: Stacy Dean, Counsel to the Executive Director, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, D.C. 20581. Telephone (202) 254-7360.

SUPPLEMENTARY INFORMATION:**I. Contract Market Designation Fees**

On June 15, 1983, the Commission published for comment in the *Federal Register* a proposed fee schedule for applications for contract market designation. 48 FR 27411. The Commission proposed to establish a single fee for all futures and options contract market designation applications which would be based upon a moving average of the costs incurred by the Commission staff in reviewing the applications during the preceding three fiscal years. The nonrefundable fee would apply to all applications submitted on or after the effective date of the new fee schedule. It would also apply to any applications pending before the Commission as of the schedule's effective date, unless those applications were withdrawn by the submitting exchanges.

Having reviewed the comments submitted by seven commodity exchanges and one trade association, the Commission is now adopting the fee schedule with some modifications.¹ Initially, the nonrefundable fee for contract market designation applications will be set at \$10,000. This figure is based on the average costs incurred by the Commission staff in reviewing 91 applications for contract market designation during fiscal year ("FY") 1981, FY 1982, and the first six

¹ The Commission has decided to publish the fee schedule as Appendix B to 17 CFR Part 5, rather than as Appendix A to 17 CFR Part 1, as proposed.

months of FY 1983. As noted in the supplementary information accompanying the proposed fee schedule, the \$10,000 figure is well below the actual average cost to the Commission of reviewing a designation application, not only because the actual figure has been rounded down, but because the figure does not include the review costs and overhead incurred by Division Directors and Commissioners, the costs incurred by certain Commission support staff, or the review costs incurred before October 1, 1980 and after March 31, 1983 with respect to some of the 91 applications. Thus, the Commission believes that the \$10,000 fee is a fair and equitable assessment to each exchange seeking a contract market designation.²

Under the proposed fee schedule, the Commission would have adjusted its fee each year, based upon a moving average of the costs incurred in reviewing applications for contract market designation during the preceding three fiscal years. One commentator expressed the fear that "the level of future Commission fees would be virtually unbounded," and another agreed that the fees should not be "open-ended." A third commentator thought that it was unfair to base the present fee on the inefficiencies that may have existed in the designation process two or more years earlier and hypothesized that exchanges would engage in an annual game of timing applications "so as to avoid the higher of present or pending year fees." In light of these concerns, the Commission has decided that it will not necessarily base its annual review of the fee upon a moving average of the review costs incurred by the Commission staff during the preceding three fiscal years. The Commission, of course, reserves the right to use the moving average method or any other method that results in a fee that does not exceed actual costs. The Commission will examine its fee at the beginning of each fiscal year to ensure that it reflects the actual costs of the designation process. Since the beginning of FY 1984 is less than two months away, the Commission will not review the new fee schedule at that time. Rather, the \$10,000 fee will remain in effect throughout FY 1984, and the first review of the fee schedule will occur at the beginning of FY 1985.

Several commentators suggested that it would be inappropriate for the Commission to charge a single fee for all

applications, rather than charging a fee which varies according to the costs of reviewing each application. The Commission has taken into consideration the apparent concerns of such commentators but disagrees.³ First of all, as the commentators recognize, the Commission frequently will have pending before it several applications which pose similar analytical problems. It is not uncommon for the Commission to receive within a short period of time substantially similar applications for contract market designation from different exchanges.⁴ While the Commission generally reviews applications in the order of receipt, the staff does not perform its analysis in a vacuum and is cognizant of issues raised in one application which affect other similar applications. Once the Commission reviews one application, it often can more quickly analyze the remaining applications of similar nature and content. Indeed, the Division Directors purposely attempt to assign staff familiar with one contract application to review similar applications.

Thus, while the Commission could, as the commentators suggest, charge the first applicant a substantially higher fee than the subsequent applicants, the Commission believes that the first applicant would be unduly penalized, while later applicants would reap the benefits of the prior review. This result would not be "equitable," since each applicant would receive a service of approximately equal value. See H.R. Rep. 97-964, 97th Cong., 2d Sess. 57 (1982) (Conference Report) (recognizing that the Commission may seek to promulgate "a schedule of equitable fees"). Moreover, it has also been the Commission's experience that on occasion problems arise in a previously designated contract market which necessitate greater scrutiny of subsequent applications for designation in a similar contract market. Thus, it is not fair to conclude, as did one commentator, that the implementation of

a single fee will always "penalize" similar applications.

Imposing a single fee for all contract market designation applications has virtues in addition to the equitable considerations described above. As one commentator pointed out, a single fee "has the merit of simplicity." Another commentator noted, and the Commission concurs, that the single fee "can be implemented quickly, should have minimal administrative costs, and would be at least reasonably accurate." In this regard, the D.C. Circuit has stated that "[c]onsiderations of administrative convenience may certainly be taken into account" in devising a fee schedule. *National Cable Television Association v. FCC*, 554 F.2d 1094, 1108 (D.C. Cir. 1976). Finally, with a single fee, an applicant knows with certainty what its costs will be and does not risk having to pay additional fees before the Commission will consider approval of its application.

In contrast to the comments of two exchanges, the Commission does not believe that the adoption of a single fee for all applications is inconsistent with legal precedents interpreting the Independent Offices Appropriation Act of 1952 ("IOAA").⁵ Indeed, the Commission has taken into account the judicial guidelines provided under the IOAA. For example, the applicable case law does not require an exact apportionment of costs. In *National Cable Television Association v. FCC*, 554 F.2d at 1105-06, the D.C. Circuit stated:

It is sufficient for the Commission to identify the specific items of direct or indirect cost incurred in providing each service or benefit for which it seeks to assess a fee, and then to divide that cost among the members of the recipient class . . . in such a way as to assess each a fee which is roughly proportional to the "value" which that member has thereby received.

This the Commission has done.⁶

² In any event, the Commission has sufficient independent authority under Section 8a(5) of the Commodity Exchange Act, 7 U.S.C. 12a(5), and Section 26 of the Futures Trading Act of 1978, 92 Stat. 877, 7 U.S.C. 16a (Supp. V 1981), redesignated as Section 26(a) by Section 237 of the Futures Trading Act of 1982, Pub. L. 97-444, 96 Stat. 2326 (Jan. 11, 1983), to promulgate this rule.

³ In a companion case, the same court elaborated on the flexibility which agencies have in calculating fees under the IOAA:

The concurrence also states that it does not read NCTA as requiring "the proportion-of-cost basis" as the only acceptable method of determining a fee. That may well be so. It may be possible that a proper fee may be fashioned on other lines. We do not mean to circumscribe the ingenuity of the agencies in dealing with this problem.

National Association of Broadcasters v. FCC, 554 F.2d 1118, 1129 n.28 (D.C. Cir. 1976).

⁴ The Commission's use of average fees is hardly unique; other federal agencies have based their fee schedules on average costs. See, e.g., 48 FR 635 (Jan. 6, 1983) (Civil Aeronautics Board final rule) (methodology specified in greater detail in notice of proposed rulemaking, 47 FR 7840 (Feb. 23, 1982)); 48 FR 9853 (March 9, 1983) (Department of the Treasury final rule).

⁵ The Commission publishes the subject matter of an application for contract market designation in the *Federal Register* and makes the application available to the public, withholding only those provisions which contain privileged information. Thus, it is possible for one exchange to submit an application which contains significant features of an application previously submitted by another exchange.

⁶ This figure represents a fee equivalent to the cost (including overhead) of approximately one-quarter of one staff year to analyze each application for contract market designation.

A number of commentators felt that charging a fee based on the average cost of reviewing an application would provide the Commission staff with no incentive to utilize its resources efficiently. As noted above, however, there are equities inherent in an average fee. Moreover, the Commission does not believe that if the fee were to depend solely upon the costs it incurred in considering each application, there would be any greater incentive for it to minimize those costs. In any event, since the money collected will go to the United States Treasury, not to the Commission, the size and nature of the fee schedule should not influence staff performance.

A related concern expressed by one commentator was that by making the fee nonrefundable, the Commission would eliminate the incentive "for an exchange to pull back its application, no matter how improbable that the application will be approved, or if approved, traded." The Commission does not share this concern, since the nonrefundability of the fee should discourage, rather than encourage, the submission of applications which do not meet the Commission's standards mandated under the Commodity Exchange Act or which the exchange thinks have little prospect to become viable.

Two exchanges noted that they sometimes submit designation "packages" containing more than one contract market application. Under the Act, exchanges are designated to trade a given contract. Accordingly, each component of such a submission represents a distinct application for contract market designation. Furthermore, even closely related contracts often pose unique problems which require extensive analysis. Approval of one contract market designation would not necessarily mandate approval of the entire package. Consequently, the Commission has determined that each contract within such a package is subject to the new fee. Exchanges should not be able to avoid responsibility for the costs of individual analysis mandated under the Commodity Exchange Act by "packaging" their contract market designation applications.

A few commentators suggested that the Commission should specify in greater detail how the Commission arrived at its \$10,000 figure and what occurs during the application review process. As explained in the supplementary information accompanying the proposed fee schedule, the Commission staff spent a total of \$950,537 in FY 1981, FY 1982, and

the first six months of FY 1983 in reviewing a total of 91 applications for contract market designation. The \$950,537 figure is comprised of only those costs attributed to the application review process. This figure includes \$312,634 for FY 1981, \$449,345 for FY 1982, and \$188,558 for the first six months of FY 1983. The figures for each year were derived by adding the compensation and benefit costs and the travel costs for each Commission division which were directly attributable to the contract market designation process and applying an overhead figure of 32%.

When an application for contract market designation is received by the Office of the Secretariat, it is copied and distributed to the Commission's Division of Economics and Education and Division of Trading and Markets. The primary analysis of the application is performed in the Division of Economics and Education, which also ensures that a notice of proposed contract market designation is published in the *Federal Register*. That Division reviews the application to determine whether it conforms from an economic point of view to the relevant provisions of the Commodity Exchange Act, 7 USC 1 *et seq.*, and to the guidelines set forth in Appendix A to 17 CFR Part 5. In performing this review, the Division economists study the cash market for the underlying commodity, engage in library research, contact other Government agencies, conduct interviews with market participants, and consider public comments submitted in response to the *Federal Register* notice.

While the Division of Economics and Education is performing its economic analysis of the application, the Division of Trading and Markets conducts smaller-scale reviews of the contract's trading rules and the rule enforcement program of the submitting exchange. In addition, the Office of General Counsel, the Office of the Executive Director, and the Division of Enforcement review the application for contract market designation before the application package is submitted to the Commission. In short, the \$10,000 fee reflects the considerable effort of the numerous Commission staff professionals who review an application for contract market designation. The total average cost of this effort is in excess of \$10,000.

The Commission does not agree with those commentators who suggest that the \$10,000 fee cannot be imposed on applications pending as of the date this fee schedule becomes effective. The relevant case law clearly establishes that "the mere filing of an application"

does not create "a property right which is immune from modification." *Hannifin v. Morton*, 444 F.2d 200 (10th Cir. 1971).⁷ See also *Miller v. Udall*, 317 F.2d 573 (D.C. Cir. 1963). The Tenth Circuit recently affirmed this principle in considering a fee imposed on applications for rights-of-way pursuant to the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. 1701 *et seq.* (1976 & Supp. V 1981): "[W]e hold that Interior may charge applicants for rights-of-way pending at the date of FLPMA's enactment for 'reasonable' costs of processing incurred prior to the Act's passage." *Nevada Power Co. v. Watt*, No. 81-1944 (10th Cir. June 16, 1983).

It should be emphasized, however, that no exchange will be involuntarily subjected to the \$10,000 fee, since any pending application may be withdrawn without prejudice. In this regard, the Commission agrees with the commentator who reasoned, "To the extent any exchange is uncertain of its commitment to a contract which it has proposed but upon which the Commission has yet to make a determination, the proposed thirty-day withdrawal period would alleviate any 'unfairness' which might otherwise arguably have been created."

In addition, the Commission finds no legal impediment to its charging a fee for a pending application which was filed prior to January 11, 1983, the effective date of the Futures Trading Act of 1982 ("1982 Act"). The Commission wishes to emphasize that the 1982 Act did not create the Commission's authority to impose fees but merely acknowledged the authority contained in existing laws. See H.R. Rep. 97-984, 97th Cong., 2d Sess. 57 (1982) (Conference Report). Moreover, for the reasons stated above, even if the Commission's fee authority had been newly established as of January 11, 1983, the Commission could validly impose a fee on pending applications which were submitted prior to that date, particularly where, as here, an application may be withdrawn without prejudice and without incurring the fee.

The Commission is nevertheless sympathetic to the financial burden on those exchanges which, under the proposed fee schedule, would be required within a 30-day period to pay a \$10,000 fee for each of their pending applications. Accordingly, the Commission has decided to extend the

⁷ At issue in *Hannifin* was the validity of a rule published at 33 FR 15948 (Oct. 30, 1968), in which the Secretary of the Interior imposed an annual rental fee for sulphur prospecting permits on pending applications.

payment period for exchanges with pending applications. Within 30 days of the effective date of the final fee schedule, each exchange with one or more pending applications for contract market designation will be required to furnish the Commission with a written list of those pending applications with respect to which it wishes the Commission to take further action. Those applications will thereby become subject to the \$10,000 fee, which must be paid no later than the earlier of the following two dates: (1) three business days after the date on which the Commission takes final action with respect to the application (whether the Commission approves or disapproves the application),* or (2) August 23, 1984.

Any application not included on the list submitted by the exchange will be considered withdrawn at the end of the 30-day period and will not be subject to the \$10,000 fee. If an exchange does not submit the aforementioned list within 30 days, all of its pending applications for contract market designation will be considered withdrawn.* This relief measure applies only to pending applications, and, as specified below, all applications submitted after August 23, 1983 will have to be accompanied by a payment of \$10,000.

Under the new fee schedule, an application for contract market designation submitted after August 23, 1983, must be accompanied by a check or money order made payable to the Commodity Futures Trading Commission. The application and fee should be sent to the Office of the Secretariat in Washington, D.C. Applications received without fees will be returned to the submitting exchanges, and the one-year time limit for reviewing the applications will not begin to run. See Section 6 of the Commodity Exchange Act, as modified by Section 218 of the Futures Trading Act of 1982, Pub. L. 97-444, 96 Stat. 2308 (Jan. 11, 1983).

The Commission has determined that good cause exists for making the new contract market designation fees effective immediately, rather than 30 days after publication of the new fee schedule. See 5 U.S.C. 553(d)(3). This will enable the federal government to begin recovering, as quickly as possible, some of the costs associated with an expensive service which the government

has provided free of charge to the futures industry for many years. Moreover, at the time it approved the proposed fee schedule for publication, the Commission indicated that it would consider adopting a final rule prior to the end of FY 1983. An immediate effective date should not prejudice exchanges with pending applications, since the new fee schedule provides the exchanges with a 30-day period in which to decide whether to withdraw their applications and an opportunity to postpone payment. Nor should an immediate effective date significantly affect exchanges which file applications within 30 days of that date. Such applications would be subject to the fee even if the fee's effective date were delayed for 30 days.

II. Regulatory Flexibility Act

The Commission has previously determined that contract markets are not "small entities" for purposes of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* 47 FR 18618 (April 30, 1982). The requirements of the Regulatory Flexibility Act therefore do not apply to contract markets. Accordingly, the Acting Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the rule promulgated herein will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 17 CFR Part 5

Applications for contract markets designation, Fees, Commodity futures.

PART 5—DESIGNATION OF AND CONTINUING COMPLIANCE BY CONTRACT MARKETS

Adding Appendix B to Part 5 of Chapter 1 of Title 17 CFR

In consideration of the foregoing, and pursuant to the authority contained in the Commodity Exchange Act, and in particular in Sections 4(c), 5, 5a, and 8a (5), 7 U.S.C. 6(c), 7, 7a, and 12a(5); in Section 26 of the Futures Trading Act of 1978, 92 Stat. 877, 7 U.S.C. 16a (Supp. V 1981), as amended by Section 237 of the Futures Trading Act of 1982, Pub. L. 97-444, 96 Stat. 2326 (Jan. 11, 1983); and in the Independent Offices Appropriation Act of 1952, as amended by Pub. L. 97-258, 96 Stat. 1051 (Sept. 13, 1982) (see 31 USCA 9701), the Commission hereby amends Part 5 of Chapter 1 of Title 17 of the Code of Federal Regulations by adding Appendix B. In taking this action, the Commission has considered the public interest to be protected by the antitrust laws and has endeavored to take the least anticompetitive means of

achieving the regulatory objectives of the Commodity Exchange Act.

Appendix B—Schedule of Fees

(a) Applications for Contract Market Designation. Each application for designation as a contract market must be accompanied by a check or money order in the amount of \$10,000 made payable to the Commodity Futures Trading Commission.

(b) Checks and applications should be sent to the attention of the Office of the Secretariat, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, D.C. 20581. No checks or money orders may be accepted by personnel other than those in the Office of the Secretariat.

(c) Failure to submit the fee with an application for designation as a contract market will result in return of the application. Fees will not be returned after receipt.

(d) An exchange with one or more applications for designation pending before the Commission on the effective date of this section may elect to pay the \$10,000 fee for any such application by remitting the fee in the manner provided by paragraph (b) of this section within 30 days of such effective date. With respect to all such applications for which such \$10,000 fee has not been paid, the exchange shall, within 30 days of the effective date of this section, send written notice to the Commission, at the address provided in paragraph (b) of this section, which notice shall specify which of its pending applications the exchange requests the Commission to continue to process. With respect to each application for which such request is made, including any application that the exchange withdraws from Commission consideration subsequent to the end of such 30-day period but prior to final Commission action thereon, the exchange shall pay the \$10,000 fee no later than the earlier of (1) three business days after the date on which the Commission takes final action on the application or (2) one year after the effective date of this section. If, as to any pending application, the exchange fails either to pay the fee or to provide the Commission with written notice as provided in this paragraph within 30 days of the effective date of this section, such application shall be deemed withdrawn by the exchange at the end of such 30-day period, and no fee shall be payable with respect to such application. The withdrawal of any application as herein provided shall be without prejudice to the exchange resubmitting the application subsequent to the end of such 30-day period. Any such resubmission shall be subject to payment of the fee provided in paragraph (a) of this section as then in effect.

Issued in Washington, D.C., on August 16, 1983, by the Commission.

Jane K. Stuckey,

Secretary of the Commission.

[FR Doc. 83-22860 Filed 8-22-83; 8:45 am]

BILLING CODE 6351-01-M

* Since the Commission's designation will be subject to the requirement that the fee has been paid, the Secretariat will not issue a formal letter of designation until the \$10,000 fee is received.

* As an alternative to submitting a list of applications, an exchange may submit the \$10,000 fee for any particular application within 30 days, and the Commission will consider that application.

SECURITIES AND EXCHANGE
COMMISSION

17 CFR PART 240

[Release No. 34-20091]

**Amendments to Rule 14a-8 Under the
Securities Exchange Act of 1934
Relating to Proposals by Security
Holders****AGENCY:** Securities and Exchange
Commission.**ACTION:** Final rule.

SUMMARY: The Commission announces the adoption of amended Rule 14a-8, which provides security holders a right to have their proposals included in the proxy statement of issuers subject to the proxy rules under the Securities Exchange Act of 1934. This action completes the second project in the Commission's Proxy Review Program.

DATE: Effective date: All of the amendments to Rule 14a-8 adopted August 16, 1983 with the exception of the changes to the timeliness provisions of paragraphs (a)(3) and (d) are applicable to proposals submitted for inclusion in proxy material to be filed preliminarily with the Commission on or after January 1, 1984. The new timeliness requirements in paragraphs (a)(3) and (d) apply to proposals submitted for inclusion in proxy material to be filed preliminarily with the Commission on or after July 1, 1984.

FOR FURTHER INFORMATION CONTACT: William E. Morley or John J. Gorman, (202) 272-2573, Office of the Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington D.C. 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission today announced the adoption of amendments to Rule 14a-8 [17 CFR 240.14a-8] under the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. 78a et seq. (1976 and Supp. IV 1980)] and certain interpretations thereunder. The amendments adopted today were the subject of Release No. 34-19135 (October 14, 1982) 47 FR 47420 (the "Proposing Release") in which the Commission undertook a comprehensive re-examination of the security holder proposal process.

I. Executive Summary

In the Proposing Release, the Commission requested comment on the basic issues as to whether security holders' access to issuers' proxy statements should be provided under the

Exchange Act, the nature of such access and the Commission's role in administering the process, however defined. The Proposing Release included three specific alternative proposals in the event the Commission were to conclude that continued federal regulation of the security holder proposal process is appropriate.

Proposal I retained the current framework of Rule 14a-8 but incorporated certain revisions to specific provisions, several interpretations thereunder and staff practices in administering the rule. The proposed revisions were designed principally to remove those procedural provisions not required to further the purpose of the rule and to clarify and to simplify the application of the rule.

Proposal II would have permitted issuers and their security holders to adopt their own procedures governing access to the issuer's proxy statement, subject to certain minimum standards prescribed by the Commission. Administration of such procedures would have been left essentially to issuers and their shareholders, and ultimately the courts.

The third proposal based on the premise that security holders should have relatively unfettered access to an issuer's proxy statement. Proposal III would have required the inclusion of any proposal proper under state law except those involving the election of directors. Proposal III would have limited the maximum number of proposals required to be included, and where necessary, would have had proposals to be included selected by lot.

The Proposing Release elicited a substantial number of comment letters.¹ The commentators included representatives from all segments of the public that are concerned with the security holder proposal process: Issuers, attorneys, shareholders (including those who have been proponents and those who have not), proponents' representatives and public interest organizations. While the comments ranged from statements that the existing rule works well and should not be changed to suggestions that issuers be given unrestricted rights to establish their own procedures for security holder proposals, there was extensive support for continued security holder access to the issuer's proxy statement under the Exchange Act and

for continued Commission, rather than judicial, administration of the process.

A substantial majority of the commentators favored Proposal I or a continuation of the current rule with no change.²

While there was some limited support, mostly from issuers, for the approach proposed in Proposal II,³ most commentators were concerned that Proposal II would create serious problems of administration as there would be no uniformity or consistency in determining the inclusion of security holder proposals. Exacerbating the problem generated by provisions individual to each issuer would be the effect of the fifty state judicial systems administering the process.

Only a few commentators supported Proposal III.⁴ A number of commentators expressed concern that the proposal would result in costly and time consuming litigation. Many took issue with the basic assumption underlying the lottery selection of proposals *i.e.*, that all proposals are of equal merit.

After review of the constructive and detailed views of the commentators and after consideration of the issues presented in the Proposing Release, the Commission has determined that shareholder access to issuers' proxy materials is appropriate and that federal provision of that access is in the best interests of shareholders and issuers alike.

Moreover, based on the overwhelming support of the commentators and the Commission's own experience, the Commission has determined that the basic framework of current Rule 14a-8 provides a fair and efficient mechanism for the security holder proposal process, and that with the modifications to the rule and interpretations thereunder discussed in this Release, Proposal I should serve the interests of shareholders and issuers well. There follows a discussion of the highlights of the revisions to Rule 14a-8 adopted today. Interested persons are directed to the text of amended Rule 14a-8 and the

¹One hundred and fifteen commentators generally supported Proposal I, although a number did propose various modifications. An additional one hundred and forty-five commentators suggested that there should be no change in the existing rule. Fifty-nine commentators addressed some aspect of the proposals without expressing support for one of the three approaches proposed by the Commission.

²There were only twenty-four commentators who expressed support for Proposal II, although there were an additional eighteen letters which indicated some support for the concept underlying Proposal II.

³Six commentators favored the adoption of the proposal, with an additional sixteen letters indicating support for the theory underlying the principles advanced.

⁴Three hundred and ninety-seven letters of comment were received from three hundred and eighty-three commentators. A copy of the Summary of Comments, as well as the letters of comment, is available for public inspection and copying at the Commission's Public Reference Room. (See File No. S7-946.)

Proposing Release for a more complete understanding.

II. Discussion of Specific Provisions of Amended Rule 14a-8

A. Procedural Requirements for Proponents

1. Rule 14a-8(a)(1) [17 CFR 240.14a-8(a)(1)]—Eligibility. The Commission proposed a revision to Rule 14a-8(a)(1) that would provide that to be eligible to submit a proposal, a proponent must own at least 1% or \$1000² in market value of a security entitled to be voted at the meeting on the proposal and have held such securities for no less than one year prior to the date on which he submits the proposal.

A majority of the commentators specifically addressing this issue supported the concept of a minimum investment and/or a holding period as a condition to eligibility under Rule 14a-8. Many of those commentators expressed the view that abuse of the security holder proposal rule could be curtailed by requiring shareholders who put the company and other shareholders to the expense of including a proposal in a proxy statement to have some measured economic stake or investment interest in the corporation. The Commission believes that there is merit to those views and is adopting the eligibility requirement as proposed.

A number of commentators did, however, point out that changing market values for an issuer's securities could create problems in determining whether a proponent met the requirement that he own \$1,000 of an issuer's securities for at least one year at the time that the proposal is submitted. In order to alleviate the questions the Commission is establishing the following test for determining whether a proponent has held \$1,000 worth of the issuer's securities: The securities have been held for at least one year and are valued at \$1,000 computed by use of the average of the bid and asked prices of such securities, as of a date within 60 days prior to the date of submission of the proposal.

The Proposing Release also included a revision of the second sentence of Rule 14a-8(a)(1) that would change the time limit for a proponent to provide documentation of his beneficial ownership of the issuer's securities from 10 business days to 14 calendar days. There was no specific opposition to the change and it is being adopted as proposed. 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.

Finally, the Commission proposed that persons who solicited an issuer's security holders through a "general proxy solicitation" with respect to the same shareholders' meeting would be ineligible to include a proposal in the issuer's proxy materials pursuant to Rule 14a-8. A number of commentators raised concerns with respect to the term "general proxy solicitation". The Commission has revised the provision to delete all references to "general proxy solicitation." Rather than relying on the concept of a "general proxy solicitation," the provision simply provides that proponents who deliver written proxy materials to holders of more than 25% of a class of the issuer's outstanding securities entitled to vote on the proposal are ineligible to submit any security holder proposals for inclusion in the issuer's proxy soliciting material.

2. Rule 14a-8(a)(2) [17 CFR 240.14a-8(a)(2)]—Notice. The Commission proposed the elimination of the requirement that the proponent notify the issuer of his intention to appear personally at the meeting. Commentators were split fairly evenly on whether or not to eliminate this requirement. The Commission believes that the requirement serves little purpose and only encumbers proponents and therefore has deleted such requirement from the rule.

The Commission also proposed a change in the existing rule which would permit a proponent to arrange, from the outset, to have any person who is permitted under applicable state law to present the proposal for action at the meeting. A majority of the commentators that addressed this point supported the change. Those opposing the change argued that the annual meeting is a shareholders' meeting and that any representative selected to present the proposal should be a shareholder. The Commission continues to believe, however, that where state law permits a person other than a shareholder to act as proxy for a shareholder, such person should be permitted to present the proposal. Accordingly, the Commission has adopted the proposed change to Rule 14a-8(a)(2).

There was general support for the proposed requirement that a proponent notify the issuer at the time he submits the proposal of his name, address, the number of the issuer's securities that he holds of record or beneficially and the dates upon which he acquired such

securities. The Commission is adopting that provision with one addition. As discussed earlier in connection with the eligibility requirements under Rule 14a-8(a)(1), the rule as adopted also requires that the proponent provide the issuer with documentary support for any claim of beneficial ownership at the time that the proponent submits his proposal.

Finally, the Commission also has adopted the proposed change in a staff interpretation of Rule 14a-8(a)(2) to the effect that attendance at another shareholders' meeting will no longer be good cause for failure to present a proposal at an issuer's shareholders meeting.

3. Rule 14a-8(a)(3) [17 CFR 240.14a-8(a)(3)]—Timeliness. The Commission has adopted the proposed extension of the deadline for submission of proposals to be included in annual meeting proxy material from 90 to 120 days to give issuers and the Commission's staff adequate time to process proposals.

In adopting the new timeliness deadlines in Rules 14a-8(a)(3) and 14a-8(d), the Commission realizes that many proponents and issuers may be adversely affected unless there is a reasonably lengthy transition period prior to the effectiveness that will allow all interested persons adequate time to familiarize themselves with the requirements and to comply with those requirements. In addition, issuers will need additional time to supply the notice required by Rule 14a-5(f) [17 CFR 240.14a-5(f)] in their proxy statements. Accordingly, while all of the other amendments to Rule 14a-8 adopted today will be applicable to proposals submitted to issuers who file their preliminary proxy materials with the Commission on or after January 1, 1984, the effectiveness of the new timeliness deadlines set forth in paragraphs (a)(3) and (d) of the amended rule are deferred an additional six months. Thus, the new timeliness requirements will apply only to those proposals submitted to issuers filing their preliminary proxy material with the Commission on or after July 1, 1984.

B. Rule 14a-8(a)(4) [17 CFR 240.14a-8(a)(4)]—Number of Proposals

The Commission is adopting the proposed reduction in the number of proposals that a proponent may submit to an issuer in any one year from two to one. The majority of the commentators addressing this issue were in favor of the change. The Commission believes that this change is one way to reduce issuer costs and to improve the readability of proxy statements without substantially limiting the ability of

² Holdings of coproponents will be aggregated in determining the includability of a proposal.

proponents to bring important issues to the shareholder body at large.

The Commission also proposed a second change to Rule 14a-8(a)(4) which would give a proponent 14 calendar days rather than 10 business days "to reduce the number of words or the number of proposals" after being notified by the issuer that he had exceeded the limits set forth in the rule. There was no specific opposition to the change and it is being adopted as proposed.

In the Proposing Release, the Commission requested comment on the possibility of requiring proponents to pay a fee in connection with the submission of their proposals. A majority of the commentators addressing this question, almost exclusively issuers, supported the idea of a fee. Those comments, however, raised a great many questions as to the appropriate amount of such a fee and the manner in which the fee should be collected. In light of the significant questions as to the practicality and the feasibility of such an assessment, the Commission has determined not to adopt a fee requirement at this time.

C. Rule 14a-8(b)(1)—Supporting Statements for Proposals

The Proposing Release included a revision to Rule 14a-8(b) [17 CFR 240.14a-8(b)] to permit proponents to include a supporting statement for their proposals when management does not oppose the proposal. The Commission believes such supporting statements can provide shareholders with background information that may be helpful in considering the proposal and has adopted such revision.

The Commission also has amended the rule to permit a proponent an aggregate of 500 words for his proposal and supporting statement to be allocated at his discretion.

D. Rule 14a-8(b)(2)—Identification of Proponent

The Commission is adopting Rule 14a-8(b)(2) as proposed. Under the rule, the Commission will no longer provide the name and address of a proponent who is not identified in the proxy statement. Such information will have to be obtained from the issuer.

In response to a request made by a number of commentators, the Commission wishes to make it clear that an issuer is not required under the rule to include the name and address of the proponent in its proxy materials, but may do so at its sole discretion. Where the issuer chooses to exclude such information, it is required only to

indicate that it will provide such information on request.

E. Substantive Grounds for Omission of Security Holder Proposals

1. Rule 14a-8(c)(1) [17 CFR 240.14a-8(c)(1)]—Not a Proper Subject for Action by Security Holders Under State Law. While no change was proposed to Rule 14a-8(c)(1), a number of commentators argued that the Note to paragraph (c)(1) should be deleted, since the Note elevated form over substance in considering whether a proposal would be a proper subject for action by security holders under applicable state law. The Note was first added to Rule 14a-8 in 1976⁶ to explain the staff's interpretive approach in considering the application of paragraph (c)(1). That interpretation was based on the experience of the staff that generally under state corporation law a request for the board of directors to consider certain actions was deemed proper for shareholder action as it did not infringe upon the directors' statutory authority to manage the corporation.

To reiterate what the Commission said in 1976.

[I]t is the Commission's understanding that the laws of most states do not, for the most part, explicitly indicate those matters which are proper for security holders to act upon but instead provide only that "the business and affairs of every corporation organized under this law shall be managed by its board of directors," or words to that effect. Under such a statute, the board may be considered to have exclusive discretion in corporate matters, absent a specific provision to the contrary in the statute itself, or the corporation's charter or by-laws. Accordingly, proposals by security holders that mandate or direct the board to take certain action may constitute an unlawful intrusion on the board's discretionary authority under the typical statute. On the other hand, however, proposals that merely recommend or request that the board take certain action would not appear to be contrary to the typical state statute, since such proposals are merely advisory in nature and would not be binding on the board even if adopted by a majority of the security holders.⁷

The Commission believes, on the basis of opinions submitted to it by issuers and proponents, that this view continues to reflect general state corporate law. The Note, however, has been revised to make it clear that whether the nature of the proposal, mandatory or precatory, affects its includability is solely a matter of state law, and to dispel any mistaken impression that the Commission's

application of paragraph (c)(1) is based on the form of the proposal.

2. Rule 14a-8(c)(3) [17 CFR 240.14a-8(c)(3)]—Proposals that Are Contrary to the Commission's Proxy Rules, Including Rule 14a-9. Although the Commission did not propose any changes to Rule 14a-8(c)(3), the Proposing Release discussed certain staff practices in administering this provision. The Commission indicated that it believed it appropriate for the staff to give proponents the opportunity to amend portions of proposals or supporting statements which might be violative of Rule 14a-9 at the time they were submitted, since issuers are accorded the same opportunities with respect to their soliciting materials. While some commentators were critical of the latitude given to proponents to make such modifications, the Commission has determined not to change its administration of paragraph (c)(3).

3. Rule 14a-8(c)(4) [17 CFR 240.14a-8(c)(4)]—Personal Claim or Grievance. The proposed change to Rule 14a-8(c)(4) was intended to clarify the scope of the exclusionary paragraph and to insure that the security holder proposal process would not be abused by proponents attempting to achieve personal ends that are not necessarily in the common interest of the issuers shareholders generally. Some commentators expressed concern that, as proposed, the "personal interest" grounds for exclusion could be applied to exclude a proposal relating to an issue in which a proponent was personally committed or intellectually and emotionally interested. This is not the Commission's intent. In order to allay such concerns and clarify the intended scope of revised paragraph (c)(4), the Commission has incorporated such commentators' suggested revision. As so revised the rule now refers to a "proposal . . . designed to result in a benefit to the proponent or to further a personal interest, which benefit or interest is not shared with the other security holders at large."

4. Rule 14a-8(c)(5) [17 CFR 240.14a-8(c)(5)]—Not Significantly Related to the Issuer's Business. The Commission is adopting Rule 14a-8(c)(5) as proposed. Paragraph (c)(5) relates to proposals concerning the functioning of the economic business of an issuer and not to such matters as shareholders' rights, e.g., cumulative voting.

5. Rule 14a-8(c)(7) [17 CFR 240.14a-8(c)(7)]—Ordinary Business. The Commission did not propose any change to existing Rule 14a-8(c)(7), but did propose a significant change in the

⁶ Release 34-12999, [Nov. 22, 1976] [41 FR 52994].

⁷ *Id.* at p. 18.

staff's interpretation of that rule. In the past, the staff has taken the position that proposals requesting issuers to prepare reports on specific aspects of their business or to form special committees to study a segment of their business would not be excludable under Rule 14a-8(c)(7). Because this interpretation raises form over substance and renders the provisions of paragraph (c)(7) largely a nullity, the Commission has determined to adopt the interpretative change set forth in the Proposing Release. Henceforth, the staff will consider whether the subject matter of the special report or the committee involves a matter of ordinary business; where it does, the proposal will be excludable under Rule 14a-8(c)(7).

6. *Rule 14a-8(c)(10)* [17 CFR 240.14a-8(c)(10)]—*Moot*. As with Rule 14a-8(c)(7), the Commission did not propose to change Rule 14a-8(c)(10), but did propose a change in the staff interpretation of the provision. In the past, the staff has permitted the exclusion of proposals under Rule 14a-8(c)(10) only in those cases where the action requested by the proposal has been fully effected. The Commission proposed an interpretative change to permit the omission of proposals that have been "substantially implemented by the issuer". While the new interpretative position will add more subjectivity to the application of the provision, the Commission has determined that the previous formalistic application of this provision defeated its purpose. Accordingly, the Commission is adopting the proposed interpretative change.

The Commission also requested comment on the adoption of a new interpretation of Rule 14a-8(c)(10) which would have permitted the omission of precatory proposals where the board of directors has considered the request in good faith and determined not to act. The Commission has determined that because of the administrative difficulties in administering the "good faith" test, it will not undertake the proposed interpretation at this time.

7. *Rule 14a-8(c)(12)* [17 CFR 240.14a-8(c)(12)]—*Repeat Proposals*. Existing Rule 14a-8(c)(12) permits the exclusion of a proposal if substantially the same proposal has been included in the issuer's proxy statement in prior years and the proposal failed to obtain a specified percentage of votes cast. The Commission proposed a change which would permit the exclusion of proposals dealing with substantially the same subject matter as proposals submitted in prior years, but which failed to receive the requisite percentage of votes.

The commentators supporting the proposed amendment felt that it was an appropriate response to counter the abuse of the security holder proposal process by certain proponents who make minor changes in proposals each year so that they can keep raising the same issue despite the fact that other shareholders have indicated by their votes that they are not interested in that issue.

Commentators who opposed the change argued that the revision was too broad and that it could be used to exclude proposals that had only a vague relation to an earlier proposal. Many of those commentators suggested that such a broad change was not necessary if the staff changed its interpretation of the existing provision.

The Commission has determined to adopt the proposed change to Rule 14a-8(c)(12). The Commission believes that this change is necessary to signal a clean break from the strict interpretive position applied to the existing provision. The Commission is aware that the interpretation of the new provision will continue to involve difficult subjective judgments, but anticipates that those judgments will be based upon a consideration of the substantive concerns raised by a proposal rather than the specific language or actions proposed to deal with those concerns. The Commission believes that by focusing on substantive concerns addressed in a series of proposals, an improperly broad interpretation of the new rule will be avoided.

The Commission also requested comment on the advisability of raising the percentage tests for resubmission of proposals under Rule 14a-8(c)(12). Currently the rule requires a 3% vote the first time a proposal is included, 6% the second time the proposal is voted upon, and 10% every year thereafter. Issuers who commented upon this question strongly supported an increase in the percentage tests. Proponents were opposed to any increase.

The Commission believes that given the increased voting activities of institutional investors with respect to security holder proposals and the greater potential support for such proposals, it is appropriate to raise the thresholds for resubmission. The Commission believes, however, that the upper limit should remain at 10%. A proposal that receives 10% of the votes cast, particularly in the face of management opposition, appears to have sufficient shareholder interest to warrant reconsideration. Accordingly, the Commission has raised the

thresholds to 5% and 8% in the first and second years, respectively, with the final test remaining at 10%.

F. Procedural Requirements for Issuers

Rule 14a-8(d) [17 CFR 240.14a-8(d)]. The Commission is adopting the one change proposed in paragraph (d) that would require an issuer to notify the Commission of the issuer's intention to omit a proposal 60 rather than 50 days in advance of the filing of its preliminary proxy material. As earlier noted in the discussion of Rule 14a-8(a)(3), the effectiveness of this provision will be delayed for one year until July 1, 1984.

G. No-Action Procedures

The Commission also requested comment on the advisability of eliminating the Commission staff's administrative role in the current security holder proposal process and either generally discontinuing the issuance of no-action letters under Rule 14a-8 or discontinuing such letters with respect to paragraphs (a)(4), (c)(1), (c)(2) and (c)(4). Almost without exception, the commentators opposed the discontinuation of the staff's involvement in the process, citing problems of costs, confusion, complexity and delay. No change to the staff's role in the administration of the rule therefore will be effected.

IV. Statutory Authority and Findings

The Commission hereby adopts Rule 14a-8 and the interpretation thereunder pursuant to its statutory authority under Sections 14(a) and 23(a) of the Exchange Act, Sections 12(e) and 20(a) of the Public Utility Holding Company Act of 1935, and Sections 20(a) and 38(a) of the Investment Company Act of 1940. As required by Section 23(a) of the Exchange Act, the Commission has considered the impact that this rulemaking action would have on competition and has concluded that they would impose no significant burden on competition not necessary or appropriate in furtherance of the purpose of the Exchange Act.

List of Subjects in 17 CFR Part 240

Reporting requirements, Securities.

V. 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. By revising Rule 14a-8, § 240.14a-8, to read as follows:

§ 240.14a-8 Proposals of security holders.

(a) If any security holder of an issuer notifies the issuer of his intention to present a proposal for action at a forthcoming meeting of the issuer's security holders, the issuer shall set forth the proposal in its proxy statement and identify it in its form of proxy and provide means by which security holders can make the specification required by Rule 14a-4(b) [17 CFR 240.14a-4(b)]. Notwithstanding the foregoing, the issuer shall not be required to include the proposal in its proxy statement or form of proxy unless the security holder (hereinafter, the "proponent") has complied with the requirements of this paragraph and paragraphs (b) and (c) of this section:

(1) *Eligibility.* (i) At the time he submits 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 he shall continue to own such securities through the date on which the meeting is held. If the issuer requests documentary support for a proponent's claim that he is the beneficial owner of at least \$1000 in market value of such voting securities of the issuer or that he has been a beneficial owner of the securities for one or more years, the proponent shall furnish appropriate documentation within 14 calendar days after receiving the request. In the event the issuer includes the proponent's proposal in its proxy soliciting material for the meeting and the proponent fails to comply with the requirement that he continuously hold such securities through the meeting date, the issuer shall not be required to include any proposals submitted by the proponent in its proxy material for any meeting held in the following two calendar years.

(ii) Proponents who deliver written proxy materials to holders of more than 25 percent of a class of the issuer's outstanding securities entitled to vote with respect to the same meeting of security holders will be ineligible to use the provisions of Rule 14a-8 for the inclusion of a proposal in the issuer's proxy materials. In the event the issuer includes a proponent's proposal in its proxy material and the proponent thereafter delivers written proxy materials to the holders of more than 25 percent of a class of the issuer's outstanding securities entitled to vote with respect to such meeting, the issuer shall not be required to include any proposals submitted by that proponent in its proxy soliciting materials for any

meeting held in the following two calendar years.

(2) *Notice and Attendance at the Meeting.* At the time he submits a proposal, a proponent shall provide the issuer in writing with his name, address, the number of the issuer's voting securities that he holds of record or beneficially, the dates upon which he acquired such securities, and documentary support for a claim of beneficial ownership. A proposal may be presented at the meeting either by the proponent or his representative who is qualified under state law to present the proposal on the proponent's behalf at the meeting. In the event that the proponent or his representative fails, without good cause, to present the proposal for action at the meeting, the issuer shall not be required to include any proposals submitted by the proponent in its proxy soliciting material for any meeting held in the following two calendar years.

(3) *Timeliness.* The proponent shall submit his proposal sufficiently far in advance of the meeting so that it is received by the issuer within the following time periods:

(i) *Annual Meetings.* A proposal to be presented at an annual meeting shall be received at the issuer's principal executive offices not less than 120 days in advance of the date of the issuer's proxy statement released to security holders in connection with the previous year's annual meeting of security holders, except that if no annual meeting was held in the previous year or the date of the annual meeting has been changed by more than 30 calendar days from the date contemplated at the time of the previous year's proxy statement, a proposal shall be received by the issuer a reasonable time before the solicitation is made.

(ii) *Other Meetings.* A proposal to be presented at any meeting other than an annual meeting specified in paragraph (a)(3)(i) of this section shall be received a reasonable time before the solicitation is made.

Note.—In order to curtail controversy as to the date on which a proposal was received by the issuer, it is suggested that proponents submit their proposals by Certified Mail—Return Receipt Requested.

(4) *Number of Proposals.* The proponent may submit no more than one proposal and an accompanying supporting statement for inclusion in the issuer's proxy materials for a meeting of security holders. If the proponent submits more than one proposal, or if he fails to comply with the 500 word limit mentioned in paragraph (b)(1) of this section, he shall be provided the

opportunity to reduce the items submitted by him to the limits required by this rule, within 14 calendar days of notification of such limitations by the issuer.

(b)(1) *Supporting Statement.* The issuer, at the request of the proponent, shall include in its proxy statement a statement of the proponent in support of the proposal, which statement shall not include the name and address of the proponent. A proposal and its supporting statement in the aggregate shall not exceed 500 words. The supporting statement shall be furnished to the issuer at the time that the proposal is furnished, and the issuer shall not be responsible for such statement and the proposal to which it relates.

(b)(2) *Identification of Proponent.* The proxy statement shall also include either the name and address of the proponent and the number of shares of the voting security held by the proponent or a statement that such information will be furnished by the issuer to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor.

(c) The issuer may omit a proposal and any statement in support thereof from its proxy statement and form of proxy under any of the following circumstances:

(1) If the proposal is, under the laws of the issuer's domicile, not a proper subject for action by security holders.

Note.—Whether a proposal is a proper subject for action by security holders will depend on the applicable state law. Under certain states' laws, a proposal that mandates certain action by the issuer's board of directors may not be a proper subject matter for shareholder action, while a proposal recommending or requesting such action of the board may be proper under such state laws.

(2) If the proposal, if implemented, would require the issuer to violate any state law or federal law of the United States, or any law of any foreign jurisdiction to which the issuer is subject, except that this provision shall not apply with respect to any foreign law compliance with which would be violative of any state law or federal law of the United States.

(3) If the proposal or the supporting statement is contrary to any of the Commission's proxy rules and regulations, including Rule 14a-9 [17 CFR 240.14a-9], which prohibits false or misleading statements in proxy soliciting materials;

(4) If the proposal relates to the redress of a personal claim or grievance against the issuer or any other person.

or if it is designed to result in a benefit to the proponent or to further a personal interest, which benefit or interest is not shared with the other security holders at large;

(5) If the proposal relates to operations which account for less than 5 percent of the issuer'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 issuer's business;

(6) If the proposal deals with a matter beyond the issuer's power to effectuate;

(7) If the proposal deals with a matter relating to the conduct of the ordinary business operations of the issuer;

(8) If the proposal relates to an election to office;

(9) If the proposal is counter to a proposal to be submitted by the issuer at the meeting;

(10) If the proposal has been rendered moot;

(11) If the proposal is substantially duplicative of a proposal previously submitted to the issuer by another proponent, which proposal will be included in the issuer's proxy material for the meeting;

(12) If the proposal deals with substantially the same subject matter as a prior proposal submitted to security holders in the issuer's proxy statement and form of proxy relating to any annual or special meeting of security holders held within the preceding five calendar years, it may be omitted from the issuer's proxy materials relating to any meeting of security holders held within three calendar years after the latest such previous submission: *Provided*, That (i) if the proposal was submitted at only one meeting during such preceding period, it received less than five percent of the total number of votes cast in regard thereto; or

(ii) If the proposal was submitted at only two meetings during such preceding period, it received at the time of its second submission less than eight percent of the total number of votes cast in regard thereto; or

(iii) If the prior proposal was submitted at three or more meetings during such preceding period, it received at the time of its latest submission less than 10 percent of the total number of votes cast in regard thereto; or

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

(d) Whenever the issuer asserts, for any reason, that a proposal and any statement in support thereof received from a proponent may properly be omitted from its proxy statement and

form of proxy, it shall file with the Commission, not later than 60 days prior to the date the preliminary copies of the proxy statement and form of proxy are filed pursuant to Rule 14a-6(a) [17 CFR 240.14a-6(a)], or such shorter period prior to such date as the Commission or its staff may permit, five copies of the following items: (1) The proposal; (2) any statement in support thereof as received from the proponent; (3) a statement of the reasons why the issuer deems such omission to be proper in the particular case; and (4) where such reasons are based on matters of law, a supporting opinion of counsel. The issuer shall at the same time, if it has not already done so, notify the proponent of its intention to omit the proposal from its proxy statement and form of proxy and shall forward to him a copy of the statement of reasons why the issuer deems the omission of the proposal to be proper and a copy of such supporting opinion of counsel.

(e) If the issuer intends to include in the proxy statement a statement in opposition to a proposal received from a proponent, it shall, not later than 10 calendar days prior to the date the preliminary copies of the proxy statement and form of proxy are filed pursuant to Rule 14a-6(a), or, in the event that the proposal must be revised to be includable, not later than five calendar days after receipt by the issuer of the revised proposal promptly forward to the proponent a copy of the statement in opposition to the proposal.

In the event the proponent believes that the statement in opposition contains materially false or misleading statements within the meaning of Rule 14a-9 and the proponent wishes to bring this matter to the attention of the Commission, the proponent promptly should provide the staff with a letter setting forth the reasons for this view and at the same time promptly provide the issuer with a copy of such letter.

(Secs. 14(a) and 23(a), 48 Stat. 895 and 901; sec. 12(e) and 20(a), 49 Stat. 823 and 833; sec. 20(a) and 38(a), 57 Stat. 822 and 841; 15 U.S.C. 78n(a); 78w(a), 79(e), 794(a), 800.20(a), 80a-37(a))

By the Commission, Commissioner Longstreth dissenting.¹

George A. Fitzsimmons,
Secretary.

August 16, 1983.

Dissent by Commissioner Longstreth

I respectfully dissent from the

¹ Dissenting opinion of Commissioner Longstreth follows.

adoption of Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders.

The responses to our proposing release (Release No. 34-19135 (October 14, 1982)), totaling 397, provide overwhelming support for three major conclusions:

1. Shareholders should continue to be accorded access to management proxy statements under the Securities Exchange Act of 1934.

2. The Securities and Exchange Commission should continue to be actively involved in administering the process by which that access is afforded.

3. The present system for according access to shareholders is strongly preferred to the more radical schemes suggested in the proposing release or any other scheme yet devised.

My dissent from adoption of the proposed amendments rests upon a belief that these amendments, in the aggregate, tilt significantly and unnecessarily against shareholders seeking access to the proxy machinery. The tilt, in my opinion, goes well beyond that which is necessary to deal with recognized abuses. I do not believe the active use of the proxy machinery by shareholders is, of itself, an abuse; therefore, I do not favor changes the effect of which will be to reduce that usage by responsible shareholders.

If we are going to support shareholder access in theory, we should support it in practice as well, and not just for highly sophisticated investors who can afford to develop or retain the skills necessary to master the labyrinth that Rule 14a-8 sets before them.

With minor exceptions, Rule 14a-8 in its present form has been in effect since 1976. The seven year record provides a strong case for continuing the Rule essentially as it is. Indeed, of those commenting, 145 would have us do just that. Moreover, each time we change a rule, we impose on the community of affected businessmen, investors and professionals the cost of having to master the changes.

For the foregoing reasons, I favor retaining Rule 14a-8 in its present form and adjusting our interpretations where necessary to deal with the abuses our staff has identified.

[FR Doc. 83-23104 Filed 8-22-83; 8:45 am]

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