INSIGHTS

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To Litigate or Not to Litigate over Shareholder Proposals

In the past few years, more companies have sought relief in federal courts to exclude shareholder proposals—some successful and some not. Nevertheless, it is not likely that these cases will result in a meaningful increase in shareholder proposal litigation

By Keir D. Gumbs and Daniel S. Alterbaum

As the Staff of the Division of Corporation Finance of the SEC recognizes in its "Informal Procedures" statement that accompanies every shareholder proposal no-action response, "[o]nly a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials."[1] In practice, companies have generally eschewed litigation in favor of the no-action letter process. However, the last several years have brought an uptick in shareholder proposal litigation to resolve shareholder proposal disputes, prompting questions about whether the rise in litigation foreshadows a long-term trend.[2] These questions have become more pronounced in 2014, as there have already been five cases involving shareholder proposals. As discussed in greater detail below, recent decisions involving shareholder proposals provide some clarity for companies and shareholders that are considering litigation to resolve shareholder proposal disputes. These cases, however, will not likely result in a meaningful increase in shareholder proposal litigation.

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History of Shareholder Proposals Litigation

Litigation involving shareholder proposals is not new. Not long after the shareholder proposal rule was first adopted, the SEC sued Transamerica Corporation in connection with Transamerica's decision to omit from its proxy materials three shareholder proposals submitted by the well-known gadfly John Gilbert.[3] Since that decision, litigation involving shareholder proposals has been relatively rare but not unheard of. In fact, many of the most significant changes to Rule 14a-8, the shareholder proposal rule, were the result of litigation involving the rule.

For example, the last major overhaul of Rule 14a-8 in 1998 was a direct response to a lawsuit brought by the New York City Employees' Retirement System (NYCERS) challenging the position of the SEC Staff that shareholder proposals relating to employment matters would be categorically excludable under Rule 14a-8(i)(7) as relating to ordinary business matters—even if such proposals focused on matters such as employment discrimination.[4] Similarly, the development of the "significant social policy" consideration exception to the ordinary business exclusion was developed following the development of the theory in *Medical Committee for Human Rights v. SEC*,[5] and was explicated at greater length in 2008 in litigation between Apache Corporation and NYCER.[6] More recently, the SEC's reconsideration and eventual adoption of a shareholder access rule was the result of shareholder proposal litigation involving the issue.[7]

Notwithstanding the fact that litigation has played a major role in Rule 14a-8's evolution, challenges of no-action letters remain infrequent.

That is because no-action letters rarely provide ammunition for the kind of Administrative Procedures Act-based claim involved in the NYCERS litigation or involve Commission action, a necessary predicate for a claim based on Section 25 of the Securities Exchange Act of 1934 (Exchange Act), which provided the basis for the *Medical Committee for Human Rights* litigation.[8] For example, a typical no-action letter does not involve a change that is significant enough to be considered a rule change, while a typical no-action letter also would not provide a basis for a challenge under Section 25 of the Exchange Act because no-action letters are issued without Commission action.[9] Consequently, unless a no-action letter is reviewed by the SEC Commissioners, a no-action letter generally may not be challenged under Section 25 of the Exchange Act.

What is new about the recent rash of litigation, if anything, is the fact that these cases largely have involved companies and shareholders litigating against each other directly and not the SEC. Moreover, shareholders and companies increasingly are using litigation to bypass or circumvent the no-action letter process. None of this should come as a surprise—the Staff of the Division of Corporation Finance seems to encourage litigation in its "Informal Procedures" statement that accompanies every no-action response. Nevertheless, it is interesting to note that companies and shareholders are bypassing the option of challenging SEC no-action letters and are instead choosing to go after each other in court. Under Rule 14a-8(j), a company is required to notify the SEC of its plans to exclude a shareholder proposal from its proxy materials. While this notification is typically done through the submission of a no-action letter, a company may satisfy this requirement through a simple notification, which is the approach typically used by companies that intend to litigate to exclude shareholder proposals.[10]

Over the last several years, the blueprint for shareholder proposal litigation has become increasing clear: a shareholder will seek a temporary restraining order or preliminary injunction under Rule 14a-8 to prevent the company from distributing its proxy materials if it omits the shareholder's proposal from its proxy materials.[11] To make a case for judicial action, the shareholder must first establish as a threshold matter that it owns stock in the company.[12] The shareholder must then demonstrate that it will suffer irreparable harm if a proposal is excluded from a company's proxy materials and a likelihood of success on the merits with respect to Rule 14a-8.

Shareholders and companies increasingly are using litigation to bypass or circumvent the no-action letter process.

The blueprint for litigation instigated by a company is similarly clear. As first demonstrated by Apache with respect to a shareholder proposal submitted by NYCERS in 2008, a company pursuing Rule 14a-8 litigation typically seeks a declaratory judgment that the company can properly exclude the proposal from its proxy materials.[13] To support a declaratory judgment action, a company must demonstrate that an actual controversy exists, such as the possibility of an action brought by a shareholder or the SEC in connection with the company's decision to exclude a shareholder proposal from its proxy materials. These kinds of cases have historically been dismissed as moot based on the fact that they often are not resolved until after the shareholder meeting at issue has already taken place or because the company has already decided to distribute the proposal.[14]

Recent Decisions

There have been five cases involving Rule 14a-8 decided in 2014, two of which were decidedly

favorably for companies, and three that were not. The two cases that were decided favorably were *Express Scripts Holding Co. v. Chevedden* and *Waste Connections, Inc. v. Chevedden*;[15] the three that were decided unfavorably were *Omnicom Group, Inc. v. Chevedden*, *EMC Corporation v. Chevedden*, and *Chipotle Mexican Grill, Inc. v. Chevedden*.[16]

Express Scripts and *Waste Connections* Litigation

Express Scripts and *Waste Connections* have only two things in common: both cases involved companies challenging shareholder proposals submitted by John Chevedden and both cases were decided on the merits. In the *Express Scripts* litigation, Express Scripts sought a declaratory judgment that it could exclude from its proxy materials a shareholder proposal from activist investor John Chevedden on the basis that the supporting statement for the proposal included statements that were demonstrably false and misleading in violation of Rule 14a-8(i)(3).[17] For example, the proposal stated that the company's CEO received $51 million in total compensation even though the company's public disclosures indicated that his total compensation was $12.8 million in 2012 and $31.6 million for 2010 through 2012 *combined*.[18] In response to a motion for summary judgment, the court ruled in favor of Express Scripts on the basis that the proposal was materially misleading in violation of Rule 14a-8(i)(3).[19]

In the *Waste Connections* litigation, Waste Connections sought a declaratory judgment that it could exclude from its proxy materials a shareholder proposal submitted by John Chevedden on the basis that the proposal violated various provisions of Rule 14a-8, including the minimum ownership requirements of the rule.[20] Chevedden sought to dismiss the litigation on the basis that his irrevocable and unconditional covenant not to sue Waste Connections if it excluded the proposal from its proxy materials deprived Waste Connections of standing to seek declaratory relief. The district court rejected these arguments and granted the company's request for a declaratory judgment, thereby reaching a decision (albeit without a published opinion) on the merits that Chevedden's proposal could be excluded on the basis of Rule 14a-8. Chevedden appealed only the district court's determination that Waste Connections had standing to bring the declaratory action suit. The Fifth Circuit concluded that Waste Connections had standing because "Chevedden's request to include his proposal placed [Waste Connections] in the position of spending a significant sum to revise its proxy statement, or excluding Chevedden's proposal and exposing itself to potential litigation." As a result, the Fifth Circuit concluded that Waste Connections had standing "because its decision whether to exclude the shareholder proposal would implicate [Waste Connections'] duties to all of its shareholders … [and] could expose [the company] to an SEC enforcement action."[21]

Omnicom Group, EMC and *Chipotle Mexican Grill* Litigation

In the *Omnicom Group*, *EMC*, and *Chipotle* litigations, Omnicom, EMC, and Chipotle sought to exclude from their proxy materials shareholder proposals submitted by John Chevedden on a number of bases under Rule 14a-8. In all three cases, as was the case in *Waste Connections*, Chevedden indicated that he would not sue if the companies did not include his proposal in their proxy materials. Unlike *Waste Connections*, however, the courts in all three cases concluded that these companies did not have standing.

In *Omnicom*, the court found that "any speculative future legal consequences" that might result from Omnicom's omission of Chevedden's proposal from its proxy were "not certainly actual or imminent."[22] In so ruling, the court discounted the threat of SEC action, finding that "the possibility of SEC investigation or action is remote."[23]

The *EMC* court reached a similar conclusion, although it portrayed the likelihood of SEC

action as even more remote, noting that the SEC had not brought an enforcement action under Rule 14a-8 or its predecessors since the 1940s.[24] *Chipotle*, the most recent of these cases to be decided, also reached this conclusion.

However it went the extra step of questioning the reasoning of the *Waste Connections* opinion, noting that, in light of Chevedden's promise not to sue, "the prospect of a lawsuit by another shareholder or an SEC enforcement action [was nothing] more than pure speculation."[25]

The resolution of the *Express Scripts*, *Waste Connections*, *Omnicom Group*, *EMC*, and *Chipotle Mexican Grill* cases have raised a number questions under Rule 14a-8, but they raise two questions in particular: Will more companies pursue Rule 14a-8 litigation? Further, will these decisions impact future interpretations of Rule 14a-8?

Will These Cases Result in an Increase in Rule 14a-8 Litigation?

As discussed below, we are doubtful that—with the possible exception of companies based in the Fifth Circuit—the recent decisions involving Rule 14a-8 are likely to result in an increase in shareholder proposal litigation. We believe this to be the case for several reasons, including the timing associated with shareholder proposal litigation, the cost of such litigation, the uncertainty associated with such litigation, and the fact that the *Omnicom*, *EMC,* and *Chipotle* decisions have provided shareholders with an easy way to defend such litigation.

Litigation Can Take Longer to Resolve Than Pursuing No-Action Relief

Timing should be a major consideration for companies considering pursuing litigation regarding Rule 14a-8 matters. One of the great advantages of the no-action letter process is that the SEC can process Rule 14a-8 requests fairly quickly—typically between 30 and 60 days following the submission of a no-action request. In contrast, litigation can take months, sometimes years to resolve. As reflected by some of the recent cases involving shareholder proposal litigation, including those discussed in this article, courts have demonstrated a willingness to try Rule 14a-8 cases on an expedited basis, sometimes having oral arguments only weeks after the initial filing.[26] This, however, is not a certainty, and a company that is considering litigation should not assume that the litigation will be resolved before its annual meeting.

Litigation Can Be Significantly More Expensive Than Pursuing No-Action Relief

Cost is a major consideration for Rule 14a-8 litigation. The cost of seeking a no-action letter can vary, but the SEC has estimated that evaluating a shareholder proposal, consulting with counsel, drafting a no-action request, and monitoring the SEC's response can cost an issuer $37,000.[27] Of course, this number can be meaningfully more or less, depending on how complicated the proposal is, whether a company makes multiple arguments for exclusion, and other considerations. In contrast, litigation can be significantly more expensive. For example, in a Rule 14a-8 dispute in which the authors were involved, the no-action letter at issue cost approximately $15,000 to prepare, while the related litigation cost in excess of $300,000. Consequently, companies should consider the costs seriously before choosing to pursue litigation over Rule 14a-8 matters.

The No-Action Letter Process Is Significantly More Predictable Than Litigation

Notwithstanding the fact that there has been an increasing number of cases brought under Rule 14a-8 in the last few years, it will be some time before a sufficient body of case law develops to give companies comfort that they can reliably predict the outcome of a judicial challenge. For example, even after the cases discussed in this article, there will still only be a handful of cases to

have dealt with shareholder proposals on the merits, which does not compare favorably to the literally thousands of no-action letters that have been issued since the shareholder proposal rule was adopted. In addition, many courts are unfamiliar with Rule 14a-8 matters, making the outcome of judicial Rule 14a-8 challenges less predictable. By contrast, the SEC has developed considerable expertise with respect to Rule 14a-8 matters, which increases the predictability of Rule 14a-8 no-action letter responses. The predictability of no-action letters is important—it helps companies evaluate whether there is a basis for excluding a shareholder proposal and allows companies and shareholders to negotiate regarding Rule 14a-8 matters based on a reasonable understanding of whether the proposal would have to be included in the company's proxy materials.

Shareholders' Pathways for Fighting Rule 14a-8 Challenges Vary by Jurisdiction

The decisions in *Omnicom*, *EMC*, and *Chipotle* demonstrate the "easy come/easy go" principle in action. Just as companies were ready to celebrate the *Express Scripts* and *Waste Connections* decisions and seemingly growing momentum for judicial challenges to Rule 14a-8, district courts elsewhere have closed the door on future challenges. In short, courts have signalled varying degrees of receptiveness to hearing challenges by companies to shareholder proposals under Rule 14a-8: the Fifth Circuit has now held twice (albeit in non-precedential unpublished opinions) that companies have standing to seek declaratory judgments against shareholders, even if the shareholder covenants not to sue the company for excluding his/her proposal, while district courts in the First, Second, and Tenth Circuits have reached the opposite conclusion. (The *Express Scripts* Court, which is based in the Eighth Circuit did not explicitly address the issue of standing, but appeared to endorse implicitly the reasoning of the Fifth Circuit opinions.[28]) As a result, in jurisdictions outside the Fifth Circuit, it appears that a shareholder can defeat a declaratory judgment action under Rule 14a-8 simply by following path created by John Chevedden—specifically, by agreeing not to sue the company if the company excludes the shareholder's proposal from its proxy materials. By contrast, companies based in the Fifth Circuit (Texas, Louisiana, and Mississippi) may be able to seek declaratory judgments in shareholder proposal disputes more easily.

Will These Decisions Will Impact Future Interpretations of Rule 14a-8?

Even if it is some time before a substantial body of case law develops with respect to Rule 14a-8 more generally, the decisions in the *Express Scripts* and *EMC* cases could have far reaching consequences with respect to Rule 14a-8(i)(3) arguments for exclusion. *Express Scripts* calls into question the position of the Staff of the Division of Corporation Finance since 2004 that it will not engage in micro-editing of shareholder proposals. Specifically, the Staff has stated that it will not allow a company to exclude a supporting statement or proposal—even if it contains unsupported factual assertions, is disputed or countered, impugns the company or its management, or relies upon unidentified sources—unless the company can demonstrate "objectively that the proposal or statement is *materially* false or misleading."[29] The ruling in the *Express Scripts* case calls this approach into question and suggests that the Staff's approach to Rule 14a-8(i)(3) may be too narrow. Furthermore, in *EMC*, the court suggested—contrary to advice given by the SEC in its informal procedures regarding shareholder proposals—that the proper role of the SEC is to provide its own substantive views with respect to a shareholder proposal dispute *before* a court intervenes.[30] While it is impossible to predict what the Staff will do in the future, it is not unreasonable to expect that the SEC could re-evaluate its approach to arguments under Rule 14a-8(i)(3).

There is at least some precedent for a district court decision significantly influencing Staff

interpretations under Rule 14a-8. One of the most prominent examples of this may be found in the SEC's administration of Rule 14a-8(i)(5), which allows a company to exclude any shareholder proposal that "relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business." Notwithstanding the language in the rule, the SEC takes the position that a proposal that is economically insignificant to a company's operations may not be excluded under Rule 14a-8(i)(5) where the proposal is of *any* ethical or social significance and is meaningfully related to the issuer's business. This interpretation of the "significance" exclusion in Rule 14a-8(i)(5) is the direct result of *Lovenheim v. Iroquois Brands, Ltd.*, which expressed this formulation in ruling that a proposal requesting a committee to study the methods by which its French supplier produced pate de foie gras could not be excluded from Iroquois Brands' proxy materials even though its foie gras sales did not contribute to the company's net income and represented less than 0.05 percent of its assets.[31]

Conclusion

The decisions discussed above are recent developments in a continuing trend that reflect an increasingly aggressive approach by companies with respect to shareholder proposals that they do not believe comply with Rule 14a-8. While it remains to be seen how many other companies will follow suit, companies and shareholders alike should pay attention to this trend, which has the potential to meaningfully impact Rule 14a-8 for years to come.

Notes

1. SEC, Div. of Corp. Fin., *Informal Procedures Regarding Shareholder Proposals*, Nov. 2, 2011.

2. *See, e.g., Bebchuk v. Electronic Arts, Inc.*, No. 1:08-cv-3716, 2013 WL 1777222, at *4 (S.D.N.Y. Apr. 25, 2013) (ruling that a proposal was contrary to the proxy rules because it would have allowed a shareholder to circumvent the provisions of Rule 14a-8).

3. *See SEC v. TransAmerica Corp.*, 163 F.2d 511 (3d Cir. 1947) (rejecting Transamerica's argument that it could exclude three proposals from its proxy materials on the basis that the proposals did not concern a proper subject for shareholder action due to a bylaw provision under which the board could prevent shareholders from considering any shareholder proposal that would require a bylaw amendment by omitting the proposal from the notice of the annual meeting).

4. *See N.Y.C. Emps. Ret. Sys. v. SEC*, 45 F.3d 7 (2d Cir. 1995). The adoption of this position effectively eliminated the significant policy consideration exception to Rule 14a-8(i)(7) with respect to employment-related proposals. Although the U.S. Court of Appeals for the Second Circuit ultimately ruled in favor of the SEC, this case prompted a review of Rule 14a-8(i)(7) in 1997. *See* Amendments to Rules on Shareholder Proposals, Release No. 34-40018, 1998 WL 254809, at *5 & n.45 (May 21, 1998) (citing *N.Y.C. Emps. Ret. Sys.*, 45 F.3d 7).

5. Adoption of Amendments Relating to Proposals by Security Holders, Release No. 34-12999, 1976 WL 160347 (Nov. 22, 1976); *see Med. Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir.), *vacated as moot*, 404 U.S. 403 (1970). *In Medical Committee for Human Rights*, the Supreme Court ultimately vacated a decision by the U.S. Court of Appeals for the D.C. Circuit that directed the SEC to reconsider its conclusion that Dow Chemical Company could rely on the ordinary business exclusion to omit from its proxy materials a shareholder proposal calling for Dow to cease its production of napalm for use in the war raging in Vietnam. In concluding that the Commission's position was in error, the Court of Appeals had noted that Section 14(a)'s overriding purpose was to assure to corporate shareholders the ability to exercise their right to control the important decisions that affect them in their capacity as stockholders and owners of the company. This language that would set the stage for the development of the significant social policy consideration exception to Rule 14a-8(i)(7).

6. *Apache Corp. v. N.Y.C. Emps. Ret. Sys.*, 621 F. Supp. 2d 444, 449-53 (S.D. Tex. 2008).

7. *See, e.g.*, Facilitating Shareholder Director Nominations, Release No. 34-60089, 2009 WL 1953653, at *9 (June 10, 2009) ("In 2006, the U.S. Court of Appeals for the Second Circuit, in *American Federation of State, County and Municipal Employees, Employees Pension Plan v. American International Group, Inc*., held that AIG could not rely on Rule 14a-8(i)(8) to exclude a shareholder proposal that, if adopted, would have amended AIG's bylaws to require the company, under specified circumstances, to include shareholder nominees for director in the company's proxy materials at subsequent meetings. … The Commission was concerned that the Second Circuit's decision resulted in uncertainty and confusion with respect to the appropriate application of Rule 14a-8(i)(8),

and that it could lead to contested elections for directors without the disclosure otherwise required under the proxy rules for contested elections. This concern led the Commission to reopen the issue of shareholder involvement in the nomination and election process.").

8. *See* Securities Exchange Act of 1934 § 25(a)(1), 15 U.S.C. § 78y(a)(1). That provision allows an aggrieved party to challenge a "final order of the Commission" in the U.S. Court of Appeals for the circuit in which the aggrieved party resides or has his principal place of business, or in the U.S. Court of Appeals for the D.C. Circuit. *See, e.g.*, *Kixmiller v. SEC*, 492 F.2d 641, 646 (D.C. Cir. 1974) (per curiam) ("It is for the Commission to initially draw the line on administrative review of staff decisions in this area, and we cannot say that its regulation has done so unreasonably. And finding no legal fault in the Commission's discretionary exercise here, we are powerless to upset it."). Not all circuits follow the precedent set by the D.C. Circuit. *See, e.g.*, *Amalgamated Clothing & Textile Workers Union v. SEC*, 15 F.3d 254, 257 & n.3 (2d Cir. 1994).

9. *See, e.g.*, *Kixmiller*, 492 F.2d at 646.

10. To date, the SEC has not intervened in any of the recent cases involving Rule 14a-8 disputes, although that remains a possibility. As a matter of policy, however, the Staff will not comment on matters that are the subject of pending litigation. *See* SEC Div. of Corp. Fin., *Staff Legal Bulletin No. 14* (July 13, 2001).

11. *See, e.g.*, Order at 1, *People for the Ethical Treatment of Animals, Inc. v. Merck & Co.*, No. 11-cv-765 (D.D.C. Aug. 4, 2011), ECF No. 19 (dismissing preliminary injunction action brought by PETA to force Merck to include PETA proposal in its proxy materials notwithstanding the fact that the SEC had granted Merck no-action relief; dismissal based on the fact that PETA had failed to timely act to obtain injunctive relief in advance of the date that Merck held its annual meeting of shareholders).

12. *See Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723 (S.D. Tex. 2010) (holding that a shareholder did not present the requisite level of proof of stock ownership to submit a shareholder proposal for inclusion in the company's proxy).

13. *See, e.g.*, *Apache Corp. v. N.Y.C. Emps. Ret. Sys.*, 621 F. Supp. 2d 444 (S.D. Tex. 2008) (analyzing an action brought by Apache seeking a declaratory judgment that Apache could exclude an anti-discrimination shareholder proposal from its proxy materials where the proposal improperly implicated ordinary business matters).

14. *See, e.g.*, *N.Y.C. Emps. Ret. Sys. v. Dole Food Co.*, 969 F.2d 1430 (2d Cir. 1992) (holding that an injunction requiring a company to include a shareholder's proposal in its proxy materials was moot on appeal when the company had already complied with the injunction and mailed the proxy to shareholders).

15. *Waste Connections, Inc. v. Chevedden*, No. 4:13-CV-00176 (S.D. Tex. June 3, 2013), *aff'd*, No. 13-20336, 2014 WL 554566 (5th Cir. 2014) (per curiam) (unpublished opinion); *Express Scripts Holding Co. v. Chevedden*, No. 4:13-CV-2520, 2014 WL 631538 (E.D. Mo. Feb. 18, 2014).

16. *EMC Corp. v. Chevedden*, No. 14-10233, 2014 WL 1004111 (D. Mass. Mar. 16, 2014); *Chipotle Mexican Grill, Inc. v. Chevedden*, No. 1:14-CV-0018, 2014 WL 1004529 (D. Colo. Mar. 14, 2014); *Omnicom Grp., Inc. v. Chevedden*, No. 14-CV-0386, 2014 WL 969801 (S.D.N.Y. Mar. 11, 2014).

17. *Express Scripts Holding Co.*, 2014 WL 631538. The proposal sought a policy requiring that the company's chairman be an independent director. Rule 14a-8(i)(3) provides that a company may exclude a shareholder proposal from its proxy materials if the proposal or its supporting statement is contrary to any of the SEC's proxy rules—including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials. 17 C.F.R. § 240.14a-8(i)(3).

18. Other statements that the company alleged were demonstrably false and misleading included statements that (i) the company did not have a clawback policy, which the company alleged was false because it did have such a policy, (ii) a particular director had received the most negative votes among the company's directors, which the company alleged was false because three other directors had higher numbers of negative votes, and (iii) the company had a plurality voting standard for the election of directors, which the company alleged was false because it had adopted a majority voting standard for the election of directors. 2014 WL 631538, at *1.

19. *Id.* at *7.

20. *Waste Connections, Inc.*, 2014 WL 554566, at *1.

21. *Id.* at *2 (quoting *KBR Inc. v. Chevedden*, 478 Fed. App'x 213, 215 (5th Cir. 2012) (per curiam) (unpublished opinion)) (internal citations omitted).

22. *Omnicom Grp., Inc.*, 2014 WL 969801, at *1 (internal citations omitted).

23. *Id.*

24. *EMC Corp.*, 2014 WL 1004111, at *6 ("EMC has submitted no evidence that persuades the court that there would be a substantial risk of an enforcement action by the SEC or any shareholder. Indeed, they have not provided evidence that there is any real risk at all.").

25. *Chipotle Mexican Grill, Inc.*, 2014 WL 1004529, at *2.

26. *KBR, Inc. v. Chevedden*, No. H-11-0196, 2011 WL 146311, at *3 (S.D. Tex. Apr. 4, 2011) (holding, four months after the filing of the complaint, that the shareholder at issue had not complied with the minimum ownership requirements of Rule 14a-8: "Apache found that RTS was not a 'record holder' of Apache shares under Rule 14a-8(b) because the summary judgment evidence did not show that RTS appeared on either the NOBO list or on any 'Cede breakdown,' nor was RTS a DTC participant. … In this case, Chevedden has submitted a letter from RTS that has the same deficiencies as the letter in Apache"), *aff'd*, 478 Fed. App'x 213; *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723 (S.D. Tex.

2010) (holding, two months after the filing of the complaint, that the shareholder at issue had not complied with the minimum ownership requirements of Rule 14a-8).

27. For example, in 1997, the SEC asked companies how much money they spent on average each year determining whether to include or exclude shareholder proposals and following Commission procedures in connection with any proposal that they wish to exclude (including internal costs as well as any outside legal and other fees). According to the responses, the costs of making a determination whether to include a proposal reported by 80 companies averaged approximately $37,000, while the median cost was $10,000. *See* Amendments to Rules on Shareholder Proposals, *supra* note 4, at *14.

28. *Express Scripts Holding Co. v. Chevedden*, No. 4:13-CV-2520, 2014 WL 631538, at *3 (E.D. Mo. Feb. 18, 2014).

29. SEC Div. of Corp. Fin., *Staff Legal Bulletin No. 14B*, at B(4) (Sept. 15, 2004).

30. *EMC Corp. v. Chevedden*, No. 14-10233, 2014 WL 1004111, at *7-8 (D. Mass. Mar. 16, 2014).

31. *Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554 (D.D.C. 1985); *see* Richard Y. Roberts, Comm'r, SEC, Remarks at the American Society of Corporate Secretaries—New York Chapter: Shareholder Proposals—Rule 14a-8, at 9-10 (Oct. 5, 1991) (discussing the effect of the *Lovenheim* decision on SEC's interpretation of Rule 14a-8), available at *https://www.sec.gov/news/speech/1991/100591roberts.pdf*.