

James E. Buck
Secretary

March 9, 1983

Mr. George A. Fitzsimmons
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Re: File No. S7-946

Dear Mr. Fitzsimmons:

The New York Stock Exchange, Inc. (the Exchange) welcomes this opportunity to comment on the proposals of the Commission as set forth in Release No. 34-19135 (October 14, 1982) (the Release) relating to security holders' access to their issuer's proxy statement. Access to the issuer's proxy material is an important right of security holders and is strongly supported by the Exchange. The difficult task, of course, is in providing a regulatory framework which avoids significant abuse of the access machinery without unreasonably or unfairly inhibiting the shareholder's right of access to his company's proxy material.

Before discussing specific proposals for the revision of Rule 14a-8, the Commission first asks:

"the fundamental question of whether security holders' access to the issuer's proxy statement should be provided under the Securities Exchange Act of 1934 or left to regulation under state law."
(Release, p. 2)

The Exchange believes that this important matter should not be left to regulation under the various laws of the several states, but should be governed by federal law. A uniform approach, consistently administered, should be applicable to all publicly held companies. The Exchange believes that uncertainty and confusion resulting in excessive costs and prolonged litigation would likely be the result if this important subject were left entirely to regulation under state law.

Moving to the question of how security holders' access to the issuer's proxy statement should be regulated, assuming the Commission determines that such regulation should be provided by federal law, the Release invites comment on three specific proposals. Proposal I would continue the present framework of regulation under Rule 14a-8, but suggests certain revisions, primarily for the purpose of clarifying and simplifying the present rule. Proposal II would permit an issuer to adopt its own plan for

the purpose of regulating its security holders' access to its proxy statements. Such a plan would be required to be approved by security holders and would supersede the Commission's general rule, but the general rule would apply to those issuers which did not adopt their own plans. An issuer's plan might be more or less restrictive than the Commission's general rule, but would be required to satisfy certain minimum standards established by the Commission. Proposal III is the most radical of the three specific proposals. Under it, there would be very few restrictions placed on security holders' proposals. So long as a proposal was proper under state law and did not involve the election of directors, the proposal would be eligible for inclusion in the issuer's proxy statement, except that there would be a numerical limitation on the aggregate number of proposals that would be required to be included in the statement. The numerical limitation would be a function of the number of record holders of the issuer's securities entitled to vote at the meeting.

The Exchange has given careful consideration to each of the three proposals and urges the adoption of Proposal I with the further revisions suggested below. The

Exchange does not support either Proposal II or Proposal III.

Proposal I

As noted, Proposal I would continue the regulation of security holders' access to the issuer's proxy statement based on concepts which underlie current Rule 14a-8, except that certain changes to the current rule and to some of the interpretations and staff procedures thereunder are proposed. The major revisions under Proposal I are:

1. In order to be eligible to submit a proposal for inclusion in the issuer's proxy statement, a proponent would have to own, either of record or beneficially, at least 1% or \$1,000 in market value of the issuer's securities entitled to vote at the meeting. At least the minimum amount of voting securities would have to have been owned by the proponent throughout the period of one year ending on the date of the meeting.

2. Proponents who engage in a general, written solicitation of proxies with respect to a given meeting of security holders would not be eligible to submit a proposal for inclusion in the issuer's proxy statement for the same meeting.

3. Each proponent would be limited to one proposal per issuer per meeting.

4. The deadline for submission of proposals to the issuer would be revised from 90 days to 120 days.

5. Issuers would be required to submit materials to the Commission at least 60 days (rather than 50 days) before they file their preliminary proxy statement.

6. The definition of "personal grievance" as included in Rule 14a-8(c)(4) would be revised in line with existing Commission staff interpretations.

7. Rule 14a-8(c)(5) would be revised so as to permit the issuer to exclude from its proxy statement a security holder's proposal which does not meet certain economic criteria or is not otherwise significantly related to the issuer's business.

8. Rule 14a-8(c)(12) would be broadened so that an issuer would be permitted to exclude a proposal which "deals with substantially the same subject matter as a proposal previously submitted to security holders".

9. Proposal I would also reverse the current interpretation under Rule 14a-8(c)(7) to the effect that a proposal which requests an issuer to prepare and disseminate a special report to shareholders or recommends the formation of a special committee to examine a particular matter, may not be excluded on the ground that it relates to the issuer's ordinary business.

10. A new interpretation under Rule 14a-8(c)(10) would be adopted which would permit an issuer to exclude a proposal as "moot" if the issuer has substantially implemented the action requested by the proposal.

11. Under Proposal I, the Commission is also considering the discontinuance of all no-action letters under Rule 14a-8, or the discontinuance of such letters under certain provisions of the rule.

In general, the Exchange is of the view that the changes proposed in Rule 14a-8 under Proposal I, and in the interpretations thereof and procedures thereunder, would be beneficial and should be adopted. The Exchange does, however, have a few suggestions as to Proposal I.

With respect to eligibility standards for shareholders to offer a proposal to be included in the proxy statement, the Exchange is sympathetic to the view that every shareholder, regardless of the number of shares he or she owns, should have access to the issuer's proxy statement. On the other hand, a single shareholder holding a small amount of shares can easily abuse the right of access to the proxy statement. Thus, a single shareholder, holding a small amount of shares, can cause the issuer and the majority of shareholders to incur costs and consume valuable time on a proposal which the vast majority of shareholders have no interest in and will reject.

For this reason, the Exchange agrees that some meaningful eligibility standard would be helpful and should be included in Rule 14a-8. As noted above, the eligibility standard suggested in Proposal I would require the security holder to own of record or beneficially, for a period of at least one year, 1% or \$1,000 in market value of the issuer's securities entitled to voting at the meeting. In order to avoid the charge that the eligibility standard may discriminate against small stockholders, the Exchange suggests a different approach -- one which is analogous to the petition which, in the political realm, is required to

be supported by a number of signatures. The Exchange suggests that Rule 14a-8(a)(1) should be amended to require that in order for a proposal to be eligible for inclusion in the issuer's proxy statement, it would have to be made either by 25 or more persons who hold of record or beneficially the issuer's securities entitled to vote at the meeting or by 1% of all such persons or by a person who holds 1% or more of the outstanding shares.

In its proposed revision of Rule 14a-8(a)(2), the Commission is considering a change which would permit the proponent of a proposal to arrange to have any person who is permitted under applicable state law present the proposal for action at the meeting. The Exchange agrees with the Commission's desire to increase the likelihood that the proposal will be presented at the meeting by a well-informed person, but believes that it is reasonable to require that the proposal be presented by a security holder. After all, the meeting is intended to be a meeting of security holders. Even though it may not be convenient for the proponent to present his proposal personally, it seems reasonable to expect that he should be able to find a fellow security holder willing to do so. The Exchange believes that the

provisions of the existing rule which require that the matter be presented by a security holder should be retained.

Under Proposal I, the Commission has requested comment on the suggestion that proponents, like others who file material with the Commission, should be required to pay a fee to the Commission for processing the proposal. The Exchange does not believe this suggestion has merit. Any fee that might be imposed would simply discriminate against the smaller stockholder and could not possibly produce a meaningful amount of revenue for the Commission. The Exchange urges that no filing fee be imposed.

The Commission is also considering a change to Rule 14a-8(b) which would permit the proponent to include a statement in support of his proposal in the issuer's proxy material even though the issuer supports the proposal as well. The Exchange sees no need to include the proponent's supporting statement if the issuer supports the proposal and urges the Commission to reconsider this point.

Under Proposal I, the Commission reconsiders the existing thirteen substantive grounds on the basis of which security holder proposals may be omitted from the issuer's proxy statement. The Exchange agrees that some of these thirteen, and some of the existing interpretations of them,

warrant revision. For the most part, the revisions suggested in the Release seem reasonable and should prove helpful. Specifically, the Exchange:

- * agrees with the Release's discussion of Rule 14a-8(c)(3).
- * supports the suggested revisions of paragraphs (c)(4) and (c)(5) of Rule 14a-8 and believes that a 5% test is appropriate in paragraph (c)(5).*
- * urges the Commission to change its existing interpretation under paragraph (c)(7) whether or not the proponent requests the dissemination of a report or the formation of a special committee. If the information sought by the proponent involves the ordinary business operations of the issuer, the proposal should be able to be excluded.
- * urges the Commission to change its present interpretation under paragraph (c)(10) and allow a proposal to be excluded on the grounds of "mootness" if the issuer has "substantially", although not "fully", implemented the action requested by the proposal.
- * supports the Commission's proposal to amend paragraph (c)(12) by deleting the reference to "substantially the same proposal" and substituting "substantially the same subject matter as a prior proposal".

* The Exchange suggests that the terms "gross assets", "gross earnings" and "gross sales" in paragraph (c)(5) should be defined.

Also in paragraph (c)(12), the Exchange urges the Commission to increase the minimum percentages specified in that paragraph. Under the current rule, and under the Commission's proposed revision of the paragraph, a security holder's proposal which has been submitted to three annual meetings of stockholders during the past five years and, at the most recent meeting, received only 10% of the votes cast in regard to it, is nevertheless eligible to be included in the issuer's proxy materials for the sixth annual meeting. The issuer may not exclude it notwithstanding the little interest it has generated over the years among security holders. A rule which requires the issuer (and the other stockholders) to bear the cost of including the same shareholder proposal in its proxy material four times over a six year period even though it receives no more than 10% of the votes cast, appears to be too lenient. The Exchange believes that the 3%, 6% and 10% criteria included in paragraph (c)(12) should be increased and suggests they be changed to 5%, 10% and 15%.

Finally, under Proposal I, the Commission requests comment on the advisability of discontinuing the issuance of no-action letters under Rule 14a-8, either entirely or as to certain of its provisions. The Exchange does not believe

any such change would be wise. Present procedures have worked quite well in practice over the years. They have come to be accepted, by and large, by both sides and have provided an efficient and economical alternative to court proceedings. In addition, the Exchange does not understand that the present practice has placed a truly serious burden on the Commission staff. For these reasons, the Exchange does not believe the Commission should discontinue its present practice of issuing no-action letters under Rule 14a-8.

Proposal II

Proposal II has a good deal of merit. It would be purely voluntary; any issuer which preferred to stay on familiar ground could continue to be subject to Rule 14a-8. However, if Proposal II were implemented, an issuer would be free, with the approval of its shareholders, to adopt its own plan governing access by its shareholders to its proxy statements, subject, however, to certain limitations that would be provided by Commission rule. While the Exchange is attracted by the flexibility and freedom of action that would be provided if Proposal II were implemented, on balance the Exchange is not inclined to support the proposal. We think the attractions of Proposal II are

outweighed by the loss of uniformity and predictability that would result if a significant number of registered companies were to adopt their own shareholder plans. One of the most attractive features of the present regulatory approach is the fact that registered companies generally are all subject to the same rule, a rule that is fair and reasonable and is administered in a uniform and even-handed way by the Commission's staff. This is an extremely valuable attribute of the present approach but would be lost under Proposal II. Furthermore, since the Commission's staff presumably would not be issuing no-action letters with respect to the variety of provisions of individual shareholder plans, the result could easily be extensive, costly, and time consuming litigation at the state court level. This could often result in conflicting decisions. On balance, the Exchange believes that Proposal II should not be implemented and registered companies generally should be subject to Rule 14a-8.

Proposal III.

While Proposal III would greatly simplify the regulation of security holders' access to the issuer's proxy material, the Exchange does not support it. In the Exchange's view, the fatal defect in Proposal III is its

arbitrary nature. Under it, a proposal wholly lacking in merit -- even a frivolous or capricious proposal -- would have the same chance of being included in the issuer's proxy statement as one which enjoys substantial stockholder support and relates to an important matter of substance. Indeed, under Proposal III, the former might enjoy the best chance of being included because, as proposed in the Release, "preference would be given to the proposals submitted by proponents who have not had a proposal included in any of the issuer's proxy statements sent to security holders in the previous three years". (Release, p. 75) This could easily mean some ill-considered proposal submitted on impulse would have the best chance of being included in the issuer's proxy material. In sum, the Exchange does not believe Proposal III represents a sound approach to the problem of selecting shareholder proposals for inclusion in the issuer's proxy statement.

The Exchange hopes these comments may be helpful to the Commission and looks forward to reviewing future releases as the Commission's Proxy Review Program continues.

Very truly yours,