

# No. 05-2825

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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AMERICAN FEDERATION OF STATE,  
COUNTY & MUNICIPAL EMPLOYEES,  
EMPLOYEES PENSION PLAN,

*Appellant,*

-against-

AMERICAN INTERNATIONAL GROUP, INC.

*Appellee.*

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*On Appeal from an Order of the  
United States District Court for the Southern District of New York*

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## **BRIEF OF APPELLANT**

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## PRELIMINARY STATEMENT

Appellant American Federation of State, County & Municipal Employees, Employees Pension Plan (“AFSCME”), appeals from the final Order of the Honorable Louis L. Stanton of the United States District Court for the Southern District of New York dismissing AFSCME’s complaint with prejudice. *American Federation of State, County and Municipal Employees, Employees Pension Plan v. American International Group, Inc.*, No. 05 Civ. 2390 (S.D.N.Y. Mar. 22, 2005) (Stanton, J.)(order denying AFSCME’s motion for preliminary injunction) (A-2) and *American Federation of State, County and Municipal Employees, Employees Pension Plan v. American International Group, Inc.*, No. 05 Civ. 2390 (S.D.N.Y. May 12, 2005)(stipulation and order deeming the District Court’s March 22, 2005 Order denying AFSCME’s motion for preliminary injunction to be a final order) (A-9).

## JURISDICTIONAL STATEMENT

This Court’s jurisdiction is predicated upon 28 U.S.C. § 1291, which provides for immediate appeals from final orders of the district courts. The district court’s final order was entered on May 17, 2005 and this appeal was filed on May 19, 2005. The district court had jurisdiction over the underlying action pursuant to 28 U.S.C. §§ 1331 and 1337 and Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

## STATEMENT OF ISSUES PRESENTED ON APPEAL

SEC Rule 14a-8(i)(8), 17 C.F.R. § 14a-8(i)(8), permits a corporation to exclude from its proxy statement a shareholder proposal “if the proposal relates to an election for membership on the company’s board of directors or analogous governing body.” The sole issue presented on this appeal is as follows:

Did the district court commit an error of law in holding that a company is permitted, pursuant to Rule 14a-8(i)(8), to exclude a shareholder proposal that advocates the adoption of a bylaw requiring the corporation, under certain circumstances, to publish the names of director candidates nominated by shareholders?

This Court’s standard of review over this issue of law is *de novo*. *See, e.g., St. Johnsbury Academy v. D.H.*, 240 F.3d 163, 168 (2d Cir. 2001)(holding that questions of law are reviewed *de novo*).

## STATEMENT OF THE CASE

On February 25, 2005, AFSCME filed a Complaint seeking declaratory and injunctive relief to prevent American International Group, Inc. (“AIG” or the “Company”) from omitting AFSCME’s shareholder proposal from its proxy materials for the Company’s 2005 annual meeting of shareholders. (A-12). AFSCME moved the District Court for a preliminary injunction (A-26), which was denied on March 22, 2005. (A-2). On March 23, 2005, AFSCME appealed that decision (A-28) and moved this Court for expedited consideration of its appeal. (A-29). That appeal was docketed at No. 05-1308. On April 7, 2005, this Court denied AFSCME’s motion for an expedited appeal. (A-29).

On May 12, 2005, the parties signed a Stipulation and Order pursuant to which AFSCME agreed to voluntarily withdraw its appeal docketed at No. 05-1308, and the parties stipulated that the District Court's "Opinion and Order dated March 22, 2005, shall be deemed to contain the Court's complete findings of fact and conclusions of law with respect to all claims asserted by plaintiff in this action," and that "[t]he Court's Opinion and Order dated March 22, 2005, shall be deemed a final judgment on the merits with respect to all claims asserted by plaintiff in this action." (A-9 – A-10). On May 12, 2005, the District Court "So Ordered" the Stipulation and Order. (A-10). A final judgment was entered by the District Court against AFSCME on May 17, 2005. (A-11).

AFSCME filed a notice of appeal from the District Court's final order on May 19, 2005. (A-1).

## STATEMENT OF FACTS

### A. AFSCME's Proposal

AFSCME is the beneficial owner of 26,965 shares of voting common stock of AIG, and has owned those shares continuously for more than one year prior to December 1, 2004. (A-30, 55). On December 1, 2004, AFSCME submitted to AIG for inclusion in the Company's 2005 proxy statement and for consideration by the shareholders at AIG's 2005 annual meeting, a proposal to amend the Company's bylaws to establish a procedure by which AIG, under certain

circumstances, would be required to publish the names of candidates for director positions nominated by shareholders together with any candidates nominated by AIG's incumbent Board. (A-58).<sup>1</sup> AFSCME's proposal (the "Proposal") states as follows:

RESOLVED, pursuant to Section 6.9 of the By-laws (the "Bylaws") of American International Group Inc. ("AIG") and section 109(a) of the Delaware General Corporation Law, stockholders hereby amend the Bylaws to add section 6.10:

The Corporation shall include in its proxy materials for a meeting of stockholders the name, together with the Disclosure and Statement (both defined below), of any person nominated for election to the Board of Directors by a stockholder or group thereof that satisfies the requirements of this section 6.10 (the 'Nominator'), and allow stockholders to vote with respect to such nominee on the Corporation's proxy card. Each Nominator may nominate one candidate for election at a meeting.

To be eligible to make a nomination, a Nominator must:

(a) have beneficially owned 3% or more of the Corporation's outstanding common stock (the 'Required Shares') for at least one year;

(b) provide written notice received by the Corporation's Secretary within the time period specified in section 1.11 of the Bylaws containing (i) with respect to the nominee, (A) the information required by Items 7(a), (b) and (c) of SEC Schedule 14A (such information is referred to herein as the 'Disclosure') and (B) such nominee's consent to being named in the proxy statement and to serving as a director if elected; and (ii) with

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<sup>1</sup> AIG's shareholders have the power to amend the Company's bylaws by majority vote. *See* 8 Del. C. § 109(a) (A-15).

respect to the Nominator, proof of ownership of the Required Shares; and

(c) execute an undertaking that it agrees to (i) assume all liability of any violation of law or regulation arising out of the Nominator's communications with stockholders, including the Disclosure (ii) to the extent it uses soliciting material other than the Corporation's proxy materials, comply with all laws and regulations relating thereto.

The Nominator shall have the option to furnish a statement, not to exceed 500 words, in support of the nominee's candidacy (the "Statement"), at the time the Disclosure is submitted to the Corporation's Secretary. The Board of Directors shall adopt a procedure for timely resolving disputes over whether notice of a nomination was timely given and whether the Disclosure and Statement comply with this section 6.10 and SEC Rules.

(A-59). In addition, the Proposal included the following "Supporting Statement":

#### SUPPORTING STATEMENT

Stockholders of U.S. public companies currently have no meaningful control over the process by which director candidates are nominated. Stockholders whose suggested nominees are rejected by a nominating committee have no recourse other than sponsoring a dissident election campaign, which is so expensive that it rarely occurs outside the takeover context.

We believe that access to the proxy for purposes of electing a director nominated by stockholders is the most effective mechanism for ensuring accountability. The need for such accountability is acute now in light of the challenges AIG faces, including probes by the Justice Department and SEC into AIG's sale of policies allegedly designed to conceal two companies' losses, which AIG paid \$126 million to settle, as well as an investigation by New York State Attorney General Eliot Spitzer into illegal practices by insurance brokers.

We urge stockholders to vote for this proposal.

(A-59 - A-60).

In response, AIG stated its intention to omit the Proposal from the Company's 2005 proxy materials (A-62) and, on February 14, 2005, it obtained a letter from the SEC's Division of Corporation Finance (the "Division") stating that the Division would not recommend an enforcement action against the Company if AIG omitted the Proposal from its proxy materials. (A-103). Specifically, in its response – commonly referred to as a “no-action letter” – the Division stated as follows:

There appears to be some basis for your [AIG's] view that AIG may exclude the proposal under Rule 14a-8(i)(8), as relating to an election for membership on its board of directors. Accordingly, we will not recommend enforcement action to the Commission if AIG omits the proposal from its proxy materials in reliance on rule 14a-8(i)(8). In reaching this position, we have not found it necessary to address the alternative basis for omission upon which AIG relies.

(A-103).

When AFSCME commenced this lawsuit, AIG stated that it intended to distribute its proxy materials on or about April 5, 2005 and to hold its annual meeting in May 2005. (A-33). Thereafter, due to ongoing investigations into accounting irregularities, AIG announced that it would delay publication of its annual report and its proxy materials until sometime after April 30, 2005, and in fact has acknowledged that its problems are far greater than was apparent when the

Proposal was submitted.<sup>2</sup> AIG filed its annual report on May 31, 2005, and on June 27, 2005 published its proxy materials for the Company's 2005 annual meeting of shareholders.<sup>3</sup> AIG conducted its 2005 annual meeting on August 11, 2005. AFSCME's proposal was not considered.

**B. Background: The SEC's "No-Action" Process and The History Of Shareholders' Efforts to Advance "Proxy Access" Bylaws**

The Proposal AFSCME submitted to AIG is not novel. Indeed, shareholders' efforts to require the companies they own to publish the names of all director candidates, regardless of whether they have been nominated by the incumbent board or by the shareholders, have gained increased attention over the past several years. As discussed below, from at least 1976 through 1997, staff at

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<sup>2</sup> This Court can take judicial notice of information disclosed in documents publicly filed with the SEC. *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991). AIG has acknowledged that its outside auditors, PricewaterhouseCoopers LLP, will "issue an adverse opinion with respect to AIG's internal control over financial reporting," and twice delayed issuing its financial results for 2004. AIG 8-K dated May 1, 2005. On May 31, 2005, AIG filed its annual report on Form 10-K, and restated its financial statements for the years ended December 31, 2000, 2001, 2002 and 2003, the quarters ended March 31, June 30 and September 30, 2003 and 2004 and the quarter ended December 31, 2003.

<sup>3</sup> Now that AIG has published its 2005 proxy materials and has wrongfully excluded AFSCME's Proposal, the proper remedy in this case would be the issuance of a permanent injunction precluding AIG from omitting AFSCME's Proposal in the future. In addition, the prospect of monetary damages resulting from AIG's wrongful exclusion of the Proposal, including the costs of hiring an independent proxy solicitation firm, appropriately could be considered by the District Court upon remand.

the SEC's Division of Corporation Finance (the "Division") routinely required companies to include the kind of "proxy access" proposals submitted by AFSCME to AIG here. Beginning in 1998, however, the Division began to permit companies to exclude such proposals on the grounds that they might lead to "contested elections of directors." Then, from 2002 to 2004, the Division required companies to include "proxy access" proposals so long as they tracked the language of a proposed rule being considered by the full Securities and Exchange Commission (the "Commission"). In December of 2004, however, the Division reversed course again, and permitted companies to once again exclude "proxy access" proposals. AFSCME's proposal to AIG was excluded under the Division's post-December-2004 interpretation of Rule 14a-8(i)(8).

**1. Rule 14a-8(i)(8)**

SEC Rule 14a-8, 17 C.F.R. § 240.14a-8, sets forth the procedures for submitting shareholder proposals, prescribes when a company must include a shareholder's proposal in the company's proxy statement, and lists the circumstances under which a shareholder proposal may be excluded by the company. 17 C.F.R. § 240.14a-8(a)-(m). If a shareholder satisfies the eligibility and procedural requirements<sup>4</sup> (and there is no dispute that AFSCME satisfied such

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<sup>4</sup> Rule 14a-8(b)(1) requires, among other things, that to be eligible to submit a proposal, the shareholder "must have continuously held at least \$2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the

requirements in this case), Rule 14a-8 only permits the company to exclude an offered proposal if the proposal falls within thirteen specifically enumerated categories. 17 C.F.R. § 240.14a-8(i)(1)–(13). Subsection (i)(8) provides that a company need not include in its proxy materials any shareholder proposal that relates to “an election” to the board of directors. It states (in “plain English question format”) as follows:

(i) Question 9: If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal?

...

(8) Relates to election: If the proposal relates to an election for membership on the company’s board of directors or analogous governing body;

...

17 C.F.R. § 240.14a-8(i).

This exclusion, regarded in common parlance as the “election exclusion,” has been part of the SEC Rules since at least the 1950’s, yet there is very little early guidance about the scope of this exclusion. The early versions of the election exclusion stated: “This rule does not apply, however, to elections to office.” Notice of Proposal to Revise Proxy Rules, SEC Exchange Act Release No. 3998, 1947 WL 25504 (Oct. 10, 1947) (Rule X-14A-8(a)). *See also* Adoption of

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meeting for at least one year [prior to] the date [on which the shareholder] submit[ed] the proposal.” 17 C.F.R. § 240.14a-8(b)(1). Procedurally, the rule requires that shareholder proposals be limited to 500 words (17 C.F.R. § 240.14a-8(d)), and must be submitted to the Company no later than 120 days before the publication of the company’s proxy statement. 17 C.F.R. § 240.14a-8(e)(2).

Amendments to Proxy Rules, SEC Exchange Act Release No. 4979, 1954 WL 5772 (Jan. 6, 1954) (same); Adoption of Amendments to Proxy Rules and Information Rules, SEC Exchange Act Release No. 8206, 1967 WL 88215 (Dec. 14, 1967) (Rule 14a-9 “does not apply, however to elections for office or to counter proposals to matters to be submitted by management.”).

In 1976, the Commission revised Rule 14a-8. With regard to the election exclusion specifically, the Commission circulated a *draft* rule which proposed that companies be allowed to omit proposals that relate to a “corporate, political, or other election to office.” The *final* rule, however, deleted the words “corporate, political or other” and adopted the current phrasing, which permits exclusion “[i]f the proposal relates to an election for membership on the company’s board of directors or analogous governing body.” 17 C.F.R. § 240.14a-8(i)(8). In comments that accompanied the publication of the final rule, the Commission explained that it chose that language to dispel a misunderstanding among commentators that the Commission “intended to expand the scope of the existing exclusion to cover proposals dealing with matters previously held not excludable by the Commission, such as cumulative voting rights, general qualifications for directors, and political contributions by the issuer.” Adoption of Amendments Relating to Proposals by Security Holders, SEC Exchange Act Release No. 12999, 1976 WL 160347 (Nov. 22, 1976). The election exclusion was not changed in

either the 1982 or 1998 rulemaking proceedings that revised other portions of the Rule.

**2. The Division's Various Interpretations of Rule 14a-8(i)(8) and the Rise In Interest in "Proxy Access" Proposals**

A company that intends to omit a shareholder proposal from its proxy statement can ask the staff of the SEC's Division of Corporation Finance for informal advice on whether they would recommend an enforcement action against the company if it omitted the proposal. *See* 240 C.F.R. § 14a-8(j). The Division's opinion, which it provides in a letter typically referred to as a "no-action letter," however, states on its face that it is informal advice and does not represent the official position of the SEC or of the Division of Corporation Finance. "No action" letters typically contain the following disclaimer:

It is important to note that the staff's and Commission's no-action response to Rule 14a-8(j) submissions reflect only informal views. The determination reached in these no-action letters do not and cannot adjudicate the merits of a company's position with respect to a proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include a shareholder proposal in its proxy materials. Accordingly, a discretionary determination not to recommend or take Commission enforcement action does not preclude a proponent, or a shareholder of a company, from pursuing any rights he or she may have against the company in court, should the management omit the proposal from the company's proxy material.

(A-294).

Prior to 1998, the Division consistently refused to issue no-action letters when asked to omit shareholder proposals that related to the process by which

corporate elections were conducted. Instead, the Division interpreted the election exclusion to only prohibit proposals that addressed a particular candidate or affected a particular election. For example, in *Union Oil Co. of Calif.*, SEC No-Action Letter, 1981 WL 24701 (Jan. 29, 1981), a shareholder submitted a proposal to amend the company's bylaws to require the company to publish the names of any director candidates nominated by a group of more than 500 shareholders.<sup>5</sup> The Division expressly rejected the argument that this proposal "relates to an election to office" within the meaning of Rule 14a-8:

This Division does not concur in your opinion that the proposal may be excluded under Rule 14a-8(c)(8). In this regard, we do not agree that the proposal 'relates to an election to office' as contemplated by subparagraph (c)(8), since the proposal does not relate to the election of directors at the next annual meeting, but rather to procedures to be allowed in the selection of nominees for election at subsequent annual meetings.

*Id.* 1981 WL 24701, at \*7.

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<sup>5</sup> The proposal at issue in *Union Oil*, 1981 WL 24701, at \*21 stated, in pertinent part, as follows (emphasis supplied):

In addition, a nominee or nominees for Director may be presented for election by any group of 500 or more individual shareholders, notwithstanding the number of shares they individually or collectively represent. *When nominations presented in this manner are received on or prior to the deadline set for shareholder resolutions, the name or names of the nominees shall be included on the proxy statement and information about such nominee or nominees shall be included in the Notice of Annual Meeting to shareholders in the same manner as any and all other nominees presented for election.*

Two years later, the Division rejected another request from Union Oil to exclude a proposal that would have required the company to publish the names of director candidates nominated by shareholders holding over 125,000 shares. The Division explained:

The proposal, the text of which is set forth in an enclosure to your letter of January 13, 1983, relates to amending the Company's by-laws so that a nominee or nominees for the Board of Directors may be presented for election by any shareholder who owns, controls or represents by proxy at least 125,000 shares of stock. In your letter you have expressed the opinion that the proposal is excludable from the Company's proxy material under paragraphs (c)(3), (c)(8) and (c)(10) of Rule 14a-8, and certain reasons are cited in support of that opinion.

The Division does not concur in your opinion that the proposal may be excluded under Rule 14a-8(c)(3), which allows the omission of a proposal that is contrary to any of the Commission's proxy rules. It is your opinion that the proposal is inconsistent with Rule 14a-11 and therefore it may properly be omitted from management's proxy material. It appears to the staff that the proposal relates to the selection in subsequent years of nominees for election to the Board of Directors and not to a solicitation in opposition to management's nominees. Accordingly, we do not believe that the management may rely on Rule 14a-8(c)(3) as a basis for omitting this proposal.

In addition, this Division does not concur in your opinion that the proposal may be omitted under Rule 14a-8(c)(8). That provision provides for the omission of a proposal that relates to an election to office. In our view, this proposal does not relate to the election of directors at a particular meeting, but rather to the procedure to be followed to select nominees in general. Accordingly, we do not believe that the management may rely on Rule 14a-8(c)(8) as a basis for omitting the proposal.

This Division does not concur in your opinion that the proposal may be excluded under Rule 14a-8(c)(10). In this regard, it does not appear that the Company's existing nominating procedures are those requested by the proposal. Accordingly, we do not believe that management may rely on Rule 14a-8(c)(10) for omission of the proposal.

*Union Oil Co. of Calif.*, SEC No-Action Letter, 1983 WL 30873, at \*4-5 (Feb. 24, 1983).

The Division reached a similar result in 1993 in response to a request from Pinnacle West Capital Corporation for permission to exclude from its proxy materials a shareholder proposal that would have required that "all persons nominated as candidates for the board of directors of the Company be included in the Company's proxy materials." *Pinnacle West Capital Corp.*, SEC No-Action Letter, 1993 WL 93599, at \*1 (Mar. 26, 1993). Rejecting the argument that this proxy access proposal could be excluded under the "election exclusion," the SEC stated: "The Division is unable to conclude that the proposal may be excluded under rule 14a8(c)(8). In the staff's view, the proposal will involve the procedures for nominating director candidates. Under the circumstances, we do not believe that rule 14a-(c)(8) [sic] may be relied on as a basis to omit the proposal from the Company's proxy materials." *Id.*, at \*6. And again, two years later, the SEC reached a similar conclusion in response to a request from Dravo Corporation. The shareholder proposal before Dravo would have required that all nominees for director to be "presented equally to the shareholders in the Proxy Material and all

other methods of communication for due consideration and voting.” *Dravo Corp.*, SEC No-Action Letter, 1995 WL 73549, at \*1 (Feb. 21, 1995). The Staff opined that such a proposal would not run afoul of Rule 14a-8: “In the staff’s view, the proposal relates to qualifications of directors and procedures for their election. Under the circumstances, we do not believe that rule 14a-8(c) may be relied upon as a basis to omit the proposal from the Company’s proxy materials.” *Id.*, at \*5.

Despite this history, the Division reversed course in 1998, and began to issue no-action letters when the proposals, in the Division’s opinion, might result in “contested elections of directors.” In other words, rather than continuing to recognize a distinction between shareholder proposals that related to *specific elections* (and thus could be barred under the election exclusion), and proposals that related merely to rules governing the *procedures* for conducting elections generally (which historically had been considered to be *not* within the ambit of the election exclusion), the Division decided that “proxy access” proposals could be barred merely because they might result in “contested elections,” *even though such a requirement appears nowhere in the Rule*. For example, regarding a “proxy access” proposal submitted to BellSouth Corporation, the Division opined that the proposal, “rather than establishing procedures for nomination or qualification generally, would establish a procedure that may result in contested elections of directors, which is a matter more appropriately addressed under rule 14a-11.”

*BellSouth Corp.*, SEC No-Action Letter, 1998 WL 56565, at \*7 (Feb. 4, 1998).

The Division staff did not elaborate on why a rule permitting the exclusion of shareholder proposals that “relat[e] to an election,” and which for at least 20 years prior had been interpreted so as *not* to bar proposals that would require companies to publish the names of director candidates, suddenly prohibited “proxy access” proposals on the grounds that they “may result in contested elections of directors.”

From 1998 through 2002, the Division continued to issue no-action letters where a company sought to exclude shareholder proposals that would require a company to publish the names of candidates for the board who had been nominated by other shareholders. The shareholders’ interest in “proxy access” proposals, however, did not abate, and in fact increased.<sup>6</sup>

In 2002, however, in the wake of numerous corporate scandals, the SEC itself, as opposed to the Division, proposed to adopt a new rule – Proposed Rule 14a-11 – that would provide specifically for shareholder access to corporate proxy materials for purposes of nominating directors in certain circumstances. Proposed Rule: Security Holder Director Nominations, SEC Exchange Act Release No. 34-48626, 2003 WL 22350515 (Oct. 14, 2003).

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<sup>6</sup> Before the court below, for example, AIG pointed to some thirty instances during the four year period from 1998 through 2002 where the Division permitted the exclusion of “proxy access” proposals pursuant to the “election exclusion.”

In response to this proposed rule, the Division changed its mind, yet again, and refused to issue no-action letters with respect to shareholder proposals that would require the inclusion of shareholder candidates in corporate proxy statements. So long as the proposal tracked the language of Proposed Rule 14a-11, the Division opined, the company could *not* exclude the proposal in reliance on the “election exclusion” of Rule 14a-8(i)(8). *Compare Qwest Communications, Int’l, Inc.*, SEC No-Action Letter, 2004 WL 385734 (Feb. 23, 2004) (proposal could not be excluded because it tracked Proposed Rule 14a-11), *with Verizon Corp.*, SEC No-Action Letter, 2004 WL 235190 (Jan. 28, 2004) (proposal could be excluded because it was different from Proposed Rule 14a-11), and *Qwest Communications Int’l, Inc.*, SEC No-Action Letter, 2004 WL 584603 (Mar. 22, 2004) (same).

In December of 2004, however, noting that the SEC has not yet adopted Proposed Rule 14a-11, the Division reversed course, one more time, and began once again to issue no-action letters with respect to “proxy access” bylaw shareholder proposals. *See The Walt Disney Co.*, SEC No-Action Letter, 2004 WL 3091960 (Dec. 28, 2004). In response to requests for no-action letters from several companies in early 2005, the Division explained its latest change of heart:

Given the passage of time since the proposal of Rule 14a-11 in Release No. 34-48626 without Commission action on that proposal, we have concluded that the position that the staff intended to take, as referred to in that release, regarding the application of rule 14a-8 to proposals providing that the company become subject to the security holder nomination procedure in proposed rule 14a-11 is no longer

necessary or appropriate. In light of that conclusion, there appears to be some basis for your view that [the Company] may exclude the proposal under Rule 14a-8(i)(8).

*Qwest Communications Int'l, Inc.*, SEC No-Action Letter, 2005 WL 283288, at \*17 (Feb. 7, 2005); *Verizon Communications, Inc.*, SEC No-Action Letter, 2005 WL 283289, at \*17 (Feb. 7, 2005); *Halliburton Co.*, SEC No-Action Letter, 2005 WL 283290, at \*12 (Feb. 7, 2005).

Despite the Division of Corporation Finance's most recent interpretation of the election exclusion, some companies recently have agreed to adopt such procedures voluntarily. *See* Ashland Inc., 8-K dated January 27, 2005 (announcing that Ashland would solicit nominees for director candidates from its major shareholders) (A-605); Broadcom Corp., 8-K dated November 1, 2004 (announcing that shareholders who hold greater than 1% but less than 20% of common stock for at least nine months could nominate a new director) (A-610); Hanover Compressor Co., 8-K dated May 13, 2003 (announcing that shareholders holding more than 1% of stock could nominate two new directors) (A-616). There has been no suggestion that these provisions are illegal, or that these companies violated any SEC Rules by adopting these provisions or publishing the names of shareholder-sponsored candidates.

## SUMMARY OF THE ARGUMENT

This case is about shareholder democracy and issues of corporate disclosure. The basic question presented in this appeal is really quite simple: Should the rules promulgated by the SEC be used to deny AIG's shareholders' freedom to vote and decide for themselves whether their company – AIG – should adopt a proxy access bylaw. What is equally important is what this case is *not* about. It is not about whether proxy access is a good idea. Should AFSCME prevail, its proxy access bylaw simply will be presented to AIG shareholders. Thus, AIG, by its interpretation of the SEC's rules, seeks to block the ability of AIG's shareholders to consider and vote on this important issue.

AFSCME's Proposal seeks to amend AIG's bylaws to provide a procedure by which the Company, under certain circumstances, would be required to publish the names of director candidates nominated by shareholders. It does not, however, purport to nominate a candidate, contest a director's election, or provide any mechanism by which shareholders could use their rights to submit proposals under Rule 14a-8 to nominate director candidates for election.

The District Court committed a clear error of law by holding that the Proposal properly may be excluded from AIG's proxy materials under the "election exclusion" of Rule 14a-8(i)(8). According to the District Court, "Plaintiff's proposal on its face 'relates to an election.' Indeed, it relates to nothing

else.” (A-5). In doing so, the District Court misinterpreted the “election exclusion” to prohibit both shareholder resolutions that address a *specific election*, as well as those that address the *process* by which directors are elected. The District Court also ignored the Division of Corporation Finance’s historically inconsistent interpretation of the “election exclusion,” and as discussed below actually relied on legislative history dating to 1976 regarding a version of Rule 14a-8(i)(8) that ultimately was *rejected* by the Commission.

There are three reasons why the District Court’s broad reading of the election exclusion is in error as a matter of law. First, the election exclusion may be properly applied only to efforts to promote, or campaign against, a specific directoral candidate. By its terms, the rule provides that a company may omit a shareholder proposal if it “relates to *an* election” (emphasis supplied). The Rule simply does not purport to bar shareholder proposals that relate to “elections” generally. In other words, by its use of the article “an,” Rule 14a-8(i)(8) necessarily only applies to bar shareholder proposals that relate to specific elections, and *does not* by its terms bar every shareholder proposal that addresses the subject matter of elections in general. AFSCME’s Proposal relates to AIG’s election procedures generally, is indisputably candidate neutral, and thus does not relate to *an* election. The District Court’s interpretation of Rule 14a-8(i)(8) to bar AFSCME’s proposal thus renders the article “an” in the election exclusion mere

surplusage – a result wholly at odds with well established rules of statutory construction. While the District Court correctly notes that AFSCME has stated that the current crisis at AIG reflects why shareholders should adopt election procedures that make directors accountable, the Proposal at issue relates to the *process* of how the names of nominated director candidates are published, not whether particular individuals should be directors or not.

Second, a narrow reading of the election exclusion is consistent with the legislative purposes of the proxy rules and shareholder proposals. Courts have long recognized that the proxy rules are designed to ensure that shareholders are aware of important matters of policy that will be voted on at the annual meeting, and to foster shareholders' democratic control of the company they own. The District Court's adoption of an overly broad interpretation of Rule 14a-8(i)(8), in contrast, is at odds with the interpretation of every other court to address the scope of the election exclusion.

Third, the District Court was incorrect in determining that Rule 14a-8(i)(8) was intended by the SEC to bar shareholder proposals advocating access for shareholder-sponsored candidates in the company's proxy materials. In dismissing AFSCME's Complaint, the District Court relied on an explanatory statement published by the SEC in 1976 that related to a preliminary draft of the "election exclusion" that ultimately *was rejected* by the Commission in the final version of

the Rule. The draft version that was the subject of the SEC's 1976 comment relied upon by the District Court would have barred shareholder proposals that related to any "corporate, political, or other election to office." The final rule, however, rejected this expansive language and opted instead for a more restrictive version that only permits the exclusion of a proposal if it "relates to *an* election for membership on the company's board of directors or analogous governing body" (emphasis supplied).

Indeed, the fact that the SEC, in adopting the final version of Rule 14a-8(i)(8) did *not* intend the Rule to bar proposals advocating access for shareholder-nominated candidates is confirmed by the fact that for over twenty years after the Rule was adopted, the SEC's Division of Corporation Finance *refused to permit the exclusion of such proposals under the "election exclusion."* Rather, the Division staff only began permitting companies to exclude proposals advocating "shareholder access" under the election exclusion in 1998, when it began to interpret the Rule as barring proposals that might result in "contested elections of directors," even though no such language is found anywhere in Rule 14a-8 or in any other source of federal law.

For these reasons, as more fully set forth below, the District Court's holding that AFSCME's Proposal may be excluded from AIG's 2005 proxy materials under Rule 14a-8(i)(8) should be reversed.

## ARGUMENT

### I. Standard of Review

The District Court held: “The language of the rule, and consistent staff and Commission expressions, confirm that the current federal regulations do not require AIG to include plaintiff’s proposal in its proxy statement. Rather, they permit its exclusion.” (A-6). As discussed below, however, the District Court’s holding in this regard was the product of a clear error of law, subject to *de novo* review. See, e.g., *St. Johnsbury Academy v. D.H.*, 240 F.3d 163, 168 (2d Cir. 2001) (“We ‘may overturn an order granting a permanent injunction if the district court relied upon a clearly erroneous finding of fact or incorrectly applied the law.’ Thus, we review *de novo* questions of law. . . .”) (quoting *Rodriguez v. City of New York*, 197 F.3d 611, 614 (2d Cir.1999)).

### II. AFSCME’s Right To Have Its Shareholder Proposal Included In AIG’s Proxy Materials Is Secured By Federal Law.

SEC Rule 14a-8, 17 C.F.R. § 240.14a-8, gives shareholders “[a]ccess to management proxy solicitations to sound out management views and to communicate with other shareholders on matters of major import . . . .” *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877, 882 (S.D.N.Y. 1993), *aff’d*, 54 F.3d 69 (2d Cir. 1995) (quoting *Roosevelt v. E.I. DuPont de Nemours & Co.*, 958 F.2d 416, 421 (D.C. Cir. 1992)). See also *Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554, 561 (D.D.C. 1985).

A company is *required* to include in its proxy statement any proposal submitted by a shareholder who satisfies the eligibility and procedural requirements of Rule 14a-8 *unless* the company can prove that the proposal falls within one of thirteen enumerated exceptions in Rule 14a-8(i). 17 C.F.R. § 240.14a-8(i)(1)-(13); *Amalgamated*, 821 F. Supp. at 882 (company bears burden of demonstrating that shareholder's proposal can be excluded); Adoption of Amendments to Proxy Rules, SEC Exchange Act Release No. 4979, 1954 WL 5772 (Jan. 6, 1954) (company bears the burden of proof of showing that proposal is not proper for inclusion in the company's proxy materials).

The District Court's seven page opinion incorrectly states that AFSCME argued that its right to require AIG to include the Proposal in the Company's 2005 proxy materials was secured by state law. (A-6). It is clear, however, that AFSCME's right is secured by *federal* law. If a company wrongfully refuses to include a shareholder proposal in its proxy statement, the shareholder may assert a cause of action directly under Section 14(a) and Rule 14a-8 to compel the inclusion of the proposal. *See, e.g., Roosevelt v. E.I. DuPont de Nemours & Co.*, 958 F.2d 416, 419-25 (D.C. Cir. 1992) ("In sum, in view of Congress' intent that section 14(a) have real force, relevant judicial precedent, and the agency's view of the private right, we hold that shareholders may seek appropriate declaratory and injunctive relief when management refuses to distribute their proposals."); *New*

*York City Employees' Ret. Sys. v. American Brands, Inc.*, 634 F. Supp. 1382, 1386 (S.D.N.Y. 1986) (same).

**III. The District Court Erred In Holding That AFSCME's Proposal May Be Excluded Under The Plain Language of Rule 14a-8(i)(8)**

**A. The District Court's Decision Is Contrary to Well-Established Principles of Statutory Construction**

Principles of statutory construction counsel against an application that would render statutory language as mere surplusage. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotes omitted); *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing rule against rendering statutory language superfluous as "cardinal principle of statutory construction"); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 698 (1995) (applying canon of interpretation disfavoring readings of statutes that render statutory language surplusage) (*cited in Filler v. Hanvit Bank*, 378 F.3d 213, 220 (2d Cir. 2004) (statutes should be construed to avoid redundancy)); *Cole v. U.S. Capital*, 389 F.3d 719, 725 (7th Cir. 2004) (noting that courts must "construe statutes in the context of the entire statutory scheme and avoid rendering statutory provisions ambiguous, extraneous, or redundant") (quoting *In re Merchants' Grain, Inc.*, 93 F.3d 1347, 1353-54 (7th Cir. 1996)).

The District Court's decision is based on a misapplication of these basic principles for it will render an important part of SEC Rule 14a-8(i)(8) mere surplusage. Rule 14a-8(i)(8) provides that a company may exclude a proposal "[i]f the proposal relates to an election for membership on the company's board of directors or analogous governing body." 17 C.F.R. § 240.14a-8(i). Rule 14a-8(i)(8)'s use of the article "an" necessarily implies that the phrase "relates to *an* election" (emphasis supplied) is intended to relate to proposals that address *particular elections*, instead of simply "elections" generally. Otherwise, the article "an" would be extraneous, and the SEC could have promulgated a rule that excluded any shareholder proposal that simply "relates to elections."

In its Opinion and Order, the District Court held that "Plaintiff's proposal on its face 'relates to an election.' Indeed, it relates to nothing else." (A-5). The District Court is incorrect. AFSCME's proposal is process-related. If adopted, it would create a bylaw that would establish a *process* by which the Company would be required to submit to the shareholders for consideration at the annual meeting, the names of director candidates nominated by the shareholders under certain circumstances. This is consistent with the Division's treatment of "proxy access" proposals prior to 1998. *See supra* Section III.D. AFSCME's Proposal does not advocate a particular candidate, and does not oppose any incumbent director's re-election to the board. Rather, it deals exclusively with procedural matters, and thus

although it deals with elections generally, it does not concern “an election” within the meaning of Rule 14a-8(i)(8).<sup>7</sup>

Both by its terms and in the supporting statement that was to accompany the proposal in AIG’s proxy, AFSCME’s proposal addresses the process of elections and would not disqualify a particular board candidate. AFSCME’s proposal, if adopted, would increase the information the Company disclosed about who was running for a seat on the board, and would not disqualify or otherwise challenge the election of a particular candidate.<sup>8</sup> As such, AFSCME’s proposal does not

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<sup>7</sup> In this regard, it is important to note that AIG *already has bylaws* that relate specifically to how shareholders may nominate candidates for election to the Company’s Board of Directors. Sections 1.11 and 1.12 of AIG’s bylaws, for example, provide rules regarding how individual shareholders can submit nominees, including deadlines by which a shareholder must submit a nomination, and procedural requirements a shareholder must satisfy in order to demonstrate his or her eligibility to make such a nomination. (A-42 - A-44). Thus, the Proposal merely seeks to exercise the rights of AIG’s shareholders to amend the Company’s bylaws with regard to an area that *already is regulated* in the bylaws of the Company.

<sup>8</sup> The District Court noted that AFSCME stated in a press release that accompanied the filing of this litigation that it had lost faith in AIG Chairman Hank Greenberg. From this, the District Court concluded that the Proposal “relates to an election,” even though the Proposal itself would have no effect on Hank Greenberg or any other candidate’s election in 2005 or any other year beyond making the process of director elections more transparent and fair. In fact, as has been well-publicized since the filing of this appeal AIG removed Mr. Greenberg from his position as Chairman and CEO of AIG (*See* 8-K dated Mar. 30, 2005), and he has resigned his seat on the board. Despite the departure of Mr. Greenberg from AIG, AFSCME continues to believe that AIG should be required to include a resolution that would alter the process of elections to give the shareholders a greater choice of candidates, for it does not “relate to an election” it does not relate to the election of

relate to “an election” within the meaning of Rule 14a-8(i)(8).

**B. A Narrow Reading of the “Election Exclusion” Is Consistent With The Purposes of the Proxy Rules.**

When Congress granted the SEC the power to regulate the proxies of securities holders, its purpose was to ensure shareholders were fully informed of the questions on which management sought authority to cast their vote. In *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), for example, the Court observed:

The purpose of §14 is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section [section 14] stemmed from the congressional belief that “[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.” H.R. Rep. No. 1383, 73d Cong, 2d Sess., 13. It was intended to ‘control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which ... [had] frustrated the free exercise of the voting *rights* of stockholders.” *Id.* at 14. “Too often proxies are solicited without explanation to the stockholders of the real nature of the questions for which authority to cast his vote is sought.” S. Rep. No. 792, 73d Cong. 2d Sess. 12.

*Id.* at 431. In implementing a policy to “prevent[] the recurrence of abuses” that previously had “frustrated the free exercise of the voting rights of stockholders” (*id.*), the SEC promulgated Rule 14a-8 (17 C.F.R. § 240.14a-8) to insure that shareholders had “[a]ccess to management proxy solicitations to sound out management views and to communicate with other shareholders on matters of

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any particular candidates, for it, most certainly does *not* mean that the Proposal “relates to an election” within the meaning of Rule 14a-8(i)(8).

major import . . .” *Roosevelt*, 958 F.2d at 421. See also *Amalgamated*, 821 F. Supp. at 882; *Lovenheim*, 618 F. Supp. at 561.

Indeed, Section 14a-8 was intended to give “true vitality” to corporate democracy, and to permit shareholders to “communicate with each other”:

Congress, however, did not narrowly train section 14(a) on the interest of stockholders in receiving information necessary to the intelligent exercise of their approval rights under state law. Beyond that limited frame, section 14(a) shelters use of the proxy solicitation process as a means by which stockholders may become informed about management policies and may communicate with each other. Referring to the House Report cited in support of the *Borak* cause of action, this court once commented: “*It is obvious to the point of banality . . . that Congress intended by its enactment of section 14 . . . to give true vitality to the concept of corporate democracy.*” *Medical Comm.*, 432 F.2d at 676. The Senate Report similarly indicates this broader purpose: “*In order that the stockholders may have adequate knowledge as to the manner in which his interests are being served, it is essential that he be enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy, which are decided at stockholders’ meetings.*” S. Rep. No. 792, 73d Cong., 2d Sess. 12 (1934), See also *Business Roundtable v. SEC*, 905 F.2d 406, 410 (D.C. Cir. 1990)(quoting Senate Report).

*Roosevelt*, 958 F.2d at 421-2 (emphasis added).

At its core, Rule 14a-8 also ensures that shareholders control the company that they own. Thus, as one court explained, the “*overriding purpose [of Rule 14(a)] is to assure to corporate shareholders the ability to exercise their right – some would say their duty – to control the important decisions which affect them in their capacity as stockholders and owners of the corporation.*” Thus, the Third Circuit has cogently summarized the philosophy of section 14(a) in the statement

that “[a] corporation is run for the benefit of its stockholders and not for that of its managers.” *Medical Comm. For Human Rights v. SEC*, 432 F.2d 659, 681 (D.C. Cir. 1970) (quoting *SEC v. Transamerica Corp.*, 163 F.2d 511, 517 (3d Cir. 1947))(emphasis added).

AIG’s position is in stark conflict with these principles. Rather than interpreting Rule 14a-8(i)(8) narrowly to permit only the exclusion of shareholder proposals that expressly “relate to *an* election,” AIG seeks instead to rely on a post-1997 interpretation by the Division of Corporation Finance that Rule 14a-8(i)(8) may be applied to bar any shareholder proposal that “might” result in “contested elections,” even though no such provision appears anywhere in the Rule.

Indeed, the fact that the type of proxy-access proposal advanced by AFSCME is not barred under the “express provisions” of Rule 14a-8(i)(8) actually counsels strongly *against* the broad interpretation advocated by AIG and accepted by the District Court. In *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), the United States Supreme Court recognized that except where federal law “expressly requires” otherwise, the internal governance of corporations is to be left to state law. *Id.* at 479; *see also The Business Roundtable v. SEC*, 905 F.2d 406, 408 (D.C. Cir. 1990) (“We find that the Exchange Act cannot be understood to include regulation of an issue that is so far beyond matters of disclosure (such as are

regulated under § 14 of the Act), . . . and that is concededly a part of corporate governance traditionally left to the states.”). The procedure by which shareholders can nominate directors is a matter of internal corporate governance that traditionally has been left for resolution under state law principles. *See In re Gaylord Container Corp. S’holders Litig.*, 753 A.2d 462, 469, 482-88 (Del. Ch. 2000) (approving bylaw amendments that changed procedures by which shareholders could nominate director candidates). Accordingly, in the absence of “express language” in Rule 14a-8(i)(8) requiring the exclusion of proposals such as the one advanced by AFSCME, the Rule should not be interpreted in such a manner as to bar AFSCME’s Proposal. *Santa Fe*, 430 U.S. at 479.

**C. The Interpretation of Rule 14a-8(i)(8) Adopted By the District Court Stands In Stark Contrast to That Adopted By Every Other Court to Address The “Election Exclusion”**

With the exception of the decision below, courts addressing Rule 14a-8(i)(8) have read the “election exclusion” to apply only to shareholder resolutions *that promote the removal of particular directors from office*. For example, in *Jansky v. Miller*, 474 F.2d 365 (9th Cir. 1973), the court held that a corporation was justified in refusing to include in its proxy materials a shareholder resolution that would have removed a director and barred him from re-election. Similarly, in *Dyer v. SEC*, 289 F.2d 242 (8th Cir. 1961) (“*Dyer P*”), the court upheld the SEC’s decision not to require a corporation to include in its proxy materials a proposed resolution

by a shareholder to “censure” the board of directors and to disqualify them from re-election. In doing so, the court distinguished shareholder proposals that “lay down general qualification standards for the office of director” from proposals “naming all the existing directors personally and seeking to have each of them censured and declared to be disqualified for reelection.” *Id.* at 247. The *Dyer I* court found that the company could only exclude the latter proposals under the election exclusion. *Id.*<sup>9</sup>

Likewise, in *Rauchman v. Mobil Corp.*, 739 F.2d 205 (6th Cir. 1984), Mobil’s management nominated a director from Saudi Arabia. In an effort to oppose this director’s candidacy, a shareholder proposed amending the company’s bylaws to preclude individuals from OPEC-member countries from serving on the board. *Id.* at 206. Thus, the shareholder’s proposal would have forced the shareholders to choose between (a) re-electing this particular director to the board, or (b) ratifying the proposal. Finding the proposal was “a form of electioneering,” against this particular candidate, the court held that it properly could be excluded under the election exclusion. *Id.* at 208.

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<sup>9</sup> See also *Dyer v. SEC*, 290 F.2d 541, 546 (8th Cir. 1961) (“*Dyer II*”) (“We have previously upheld the Commission’s exclusions of such proposals and statements from management’s proxy material as representing campaign material on the part of petitioners against such directors’ reelection to office and therefore not being within the privilege of Rule 14a-8, 17 C.F.R. § 240.14a-8, under the express provision that ‘This section shall not apply, however, to elections to office.’”).

The distinction these courts have drawn is between shareholder proposals that seek to influence the outcome of a particular election by advocating a particular candidate, or opposing a particular candidate's election (*i.e.*, proposals that relate to "an election") and proposals that relate to the process of elections generally. *See Dyer I*, 289 F.2d at 247. In contrast, there is no case law supporting the District Court's decision to adopt the Division's current broad interpretation that Rule 14a-8(i)(8) may be applied to bar shareholder proposals that may result in a contested election of directors. In truth, there is *nothing* in the text of Rule 14a-8(i)(8), or any other source of federal law for that matter, for the proposition that the "election exclusion" is designed to block shareholder proposals that might result in "contested elections of directors" at some point in the future.

**D. The District Court Erred In Holding That The Exclusion Of AFSCME's Proposal Is Supported By The SEC's Historical Application Of The Election Exclusion**

In addition to ignoring the plain terms of and the purposes behind Rule 14a-8(i)(8), the District Court's finding that the Rule was intended to block proposals seeking to require corporations to publish the names of shareholder-sponsored candidates is also incorrect. As explained below, the District Court was clearly mistaken when it stated: "The language of the rule, and consistent staff and Commission expressions, confirm that the current federal regulations do not require AIG to include plaintiff's proposal in its proxy statement." (A-6).

**1. The Division's Historical Inconsistency In Interpreting The "Election Exclusion" Demonstrates that Proxy Access Proposals Are Not Barred By The Terms Of The Rule.**

As an initial matter, and as the District Court acknowledged, "no action" letters are informal advice, and in and of themselves, are not entitled to deference. (A-6); *see also Amalgamated Clothing and Textile Workers Union v. SEC*, 15 F.3d 254, 257 n.3 (2d Cir. 1994); *New York City Employees' Ret. Sys. v. SEC*, 45 F.3d 7, 13-14 (2d Cir. 1995); *Roosevelt*, 958 F.2d at 427 n.19. In fact, this Court has noted that "SEC no-action letters constitute neither agency rule-making nor adjudication and thus are entitled to no deference beyond whatever persuasive value they might have." *Gryl ex rel. Shire Pharms. Group PLC v. Shire Pharms. Group PLC*, 298 F.3d 136, 145 (2d Cir. 2002); *see also Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 129 (2d Cir. 2001); *New York City Employees'*, 45 F.3d at 13; *Amalgamated*, 15 F.3d at 257. Regardless, however, the District Court's representation that the "consistent staff and Commission expressions" support the Division's current interpretation of Rule 14a-8(i)(8) (A-6) is simply incorrect. To the contrary, the SEC's Division of Corporation Finance, in fact, has been historically *inconsistent* in its application of Rule 14a-8(i)(8). Thus, far from supporting the proposition that "proxy access" proposals are barred under the plain language of Rule 14a-8(i)(8), the Division's varying interpretations demonstrates that *nothing* in the Rule expressly bars such proposals.

Even given the informal nature of “no-action” letters, the Division of Corporation Finance has hardly been a model of consistency in its interpretation of the “election exclusion” of Rule 14a-8(i)(8). For over twenty years – from at least 1976 until 1998 – the Division interpreted the “election exclusion” in a manner that is consistent with the views of AFSCME here, *i.e.*, that corporations could not rely on the “election exclusion” to exclude shareholder proposals advocating “proxy access” for shareholder-sponsored director candidates. Indeed, on a number of occasions, the Division expressly determined that these proposals related to the *procedures* for conducting elections and not to a particular candidate’s election, and thus *were not barred* by Rule 14a-8(i)(8). *See, e.g., Union Oil Co. of Calif.*, SEC No-Action Letter, 1981 WL 24701, at \*7 (Jan. 29, 1981); *Union Oil Co. of Calif.*, SEC No-Action Letter, 1983 WL 30873 (Feb. 24, 1983); *Pinnacle West Capital Corp.*, SEC No-Action Letter, 1993 WL 93599, at \*1 (Mar. 26, 1993); *Dravo Corp.*, SEC No-Action Letter, 1995 WL 73549, at \*5 (Feb. 21, 1995). This is precisely the interpretation advocated by AFSCME.

In fact, the Division’s recent practice of permitting the exclusion of “proxy access” proposals under the election exclusion only began in 1998. Importantly, this complete reversal in policy was not prompted by any change to the language of the Rule itself, but was created by the Division’s own novel interpretation that Rule 14a-8(i)(8) was somehow designed to prevent “contested elections of

directors,” even though no such language appears anywhere in the Rule and was contrary to the Division’s previous interpretations. *See BellSouth Corp.*, SEC No-Action Letter, 1998 WL 56565, at \*2 (Feb. 4, 1998) (“rather than establishing procedures for nomination or qualification generally, [the proposal] would establish a procedure that may result in contested elections of directors”). At no time since the Division first adopted this stance in 1998 have they published any guidance explaining where or under what authority they added this “contested election” gloss to Rule 14a-8(i)(8). Similarly, the Commission itself has been silent on the issue.

Moreover, the Division has not even applied this “contested election” rationale consistently. For example, the Division has refused to permit companies to exclude shareholder proposals that would require the board of directors to nominate two candidates for every seat, even though such proposals certainly “would establish a procedure that may result in contested elections of directors.” *See General Electric Co.*, SEC No-Action Letter, 2001 WL 47254, at \*1-3 (Jan. 12, 2001); *Bank of America Corp.*, SEC No-Action Letter, 2001 WL 185207 (Feb. 16, 2001); *SBC Communications, Inc.*, SEC No-Action Letter, 2001 WL 125054, at \*2 (Jan. 31, 2001); *see also Peregrine Pharms., Inc.*, SEC No-Action Letter, 2005 WL 1661100 (July 11, 2005) (requiring the inclusion of a proposal urging board to

nominate two candidates for each director seat without even addressing Rule 14a-8(i)(8)).

Further, the Division has *refused* to permit companies to exclude shareholder proposals on a wide range of subjects that deal with “elections” in the general sense, and which also “may result in contested elections of directors.” For example, the Division has declined to issue “no action” letters regarding resolutions advocating or requiring majority voting<sup>10</sup> or annual elections of directors,<sup>11</sup> resolutions limiting terms of directors,<sup>12</sup> and resolutions establishing

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<sup>10</sup> *BEA Sys., Inc.*, SEC No-Action Letter, 2005 WL 723848 (Mar. 28, 2005) (rejecting argument that proposal that advocated majority voting for director elections related to “an election” within the meaning of Rule 14a-8(i)(8)); *Dillard’s, Inc.*, SEC No-Action Letter, 2005 WL 678886 (Mar. 21, 2005) (same); *The TJX Cos.*, SEC No-Action Letter, 2005 WL 544215 (Feb. 26, 2005) (same).

<sup>11</sup> *Tidewater Inc.*, SEC No-Action Letter, 2005 WL 678123 (Mar. 23, 2005) (requiring inclusion of proposal advocating annual election of directors and declassification of the board); *Baxter Int’l Inc.*, SEC No-Action Letter, 2005 WL 267911 (Jan. 31, 2005) (expressly finding that proposal advocating annual elections for directors did *not* “relate to an election” under Rule 14a-8(i)(8)).

<sup>12</sup> *American Elec. Power Co.*, SEC No-Action Letter, 2004 WL 187658 (Jan. 19, 2004) (requiring inclusion of a proposal to establish term limits for directors); *J.C. Penny Co.*, SEC No-Action Letter, 2002 WL 664043 (Mar. 27, 2002) (same); *see also American Elec. Power Co.*, SEC No-Action Letter, 2002 WL 171251 (Jan. 16, 2002) (rejecting argument that proposal to establish term limits for directors could be excluded under Rule 14a-8(i)(8) if the proposal was recast to apply only to future elections and not the *specific* election of the year the proposal was made).

director qualifications<sup>13</sup> or setting requirements for board composition.<sup>14</sup> Each of these resolutions relates to elections generally and could result in “contested elections.” And like the kind of “proxy access” proposal advocated by AFSCME here, none of these proposals relate to any *specific* elections of directors, and thus cannot be said to relate to “*an* election” within the meaning of Rule 14a-8(i)(8). Yet the division has chosen to single out “proxy access” proposals for exclusion by suggesting that such resolutions are somehow improper as encouraging “contested elections.” This does not make any sense.

In any event, the Division has not been consistent even since adopting its “contested election” rationale in 1998 in its application of the “election exclusion” to proxy access proposals specifically. For a period in 2004, the Division refused to permit companies to exclude “proxy access” proposals under the election exclusion, so long as the proposals tracked the language of a proposed rule (“Proposed Rule 14a-11”) pending before the Commission. *See, e.g., Qwest*

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<sup>13</sup> *See American Int’l Group*, SEC No-Action Letter, 2005 WL 1523365 (June 20, 2005) (requiring inclusion of proposal that would require independent chairperson and that two-thirds of board be comprised of independent directors); *Duke Energy Corp.*, SEC No-Action Letter, 2000 WL 254034 (Feb. 24, 2000) (requiring inclusion of proposal requesting that the board limit future director nominations to persons serving on no more than four boards of other companies, organizations or entities).

<sup>14</sup> *See Peabody Energy Corp.*, SEC No-Action Letter 2004 WL 33447 (Feb. 19, 2004) (requiring inclusion of proposal requesting that the board adopt a policy of nominating independent directors so that independent directors would constitute two-thirds of the board).

*Communications, Int'l, Inc.*, SEC No-Action Letter, 2004 WL 385734 (Feb. 23, 2004) (proposal could not be excluded because it tracked Proposed Rule 14a-11).

Throughout this entire time, however, and while the Division has waffled back and forth, permitting resolutions that addressed procedures for elections but not resolutions addressing specific candidates for election, then excluding any proposals that might result in contested elections, then permitting resolutions requiring access for shareholder sponsored candidates so long as the proposals tracked the language of proposed Rule 14a-11, and then finally reverting its position of excluding any proposals that might result in contested elections, the language of Rule 14a-8(i)(8) has remained unchanged.

If shareholder proposals similar to that advocated by AFSCME were, in fact, barred by the "plain language" of Rule 14a-8(i)(8), there would have been no room for such contradictory interpretations. Indeed, if the language of Rule 14a-8(i)(8) were so clear, a proposal seeking to amend corporate bylaws to require disclosure of shareholder-nominated candidates, regardless of the conditions attached to such disclosure in the proposal, either would be excludable, or it would not. The fact that the Division has been so historically inconsistent in its interpretation of Rule 14a-8(i)(8) demonstrates that the "plain language" of the Rule does not "expressly" bar the type of shareholder proposal advanced by AFSCME here. Further, the fact that the Division consistently has *refused* to permit the exclusion of shareholder

resolutions on a host of matters that relate to “elections” generally renders the Division’s decision to permit the exclusion of “proxy access” proposals completely arbitrary. Because the Division’s “contested election” gloss does not appear anywhere in Rule 14a-8(i)(8), and because the Division has consistently *permitted* shareholder proposals on a variety of other election-related subjects that also potentially could result in “contested elections,” the Division’s recent decision to permit the exclusion of “proxy access” proposals on the grounds that such proposals “may result in contested elections of directors” cannot be justified.

Before the court below, AIG devoted considerable effort to recounting the 30 post-1998 no-action letters interpreting the election exclusion, and suggested that those letters demonstrate the “plain meaning” of the exclusion. However, the better interpretation of the existence of these letters is that significant stakeholders recognize the error of the Staff’s rulings and repeatedly have sought to challenge it. Thus, far from demonstrating the purported “plain meaning” of the election exclusion, the volume of the requests which prompted these no-action letters, all on a single point, speaks to the complete opposite conclusion: That the interpretation of the “election exclusion” to bar shareholder proposals advocating proxy access for shareholder-nominated candidates is a hotly contested issue fueled by the Division’s current arbitrary interpretation of Rule 14a-8(i)(8).

2. **The Exclusion Of Proxy Access Proposals Is Not Supported By "Consistent" Expressions Of The Commission Itself.**

The District Court's finding that the exclusion of "proxy access" proposals such as the one advanced by AFSCME is supported by "consistent . . . Commission expressions" (A-6) is also incorrect. In point of fact, the District Court's holding is flatly *inconsistent* with the Commission's official pronouncements regarding the SEC's intent in promulgating the Rule.

As explained above, when the election exclusion was last substantively revised in 1976, the SEC circulated a *proposed* version that that would have permitted companies to exclude proposals that relate to a "corporate, political, or other election to office." The *final* rule, however, deleted the words "corporate, political or other" from the election exclusion. This District Court, however, completely *ignored* this difference, and instead erroneously relied on statements made by the SEC that related to the *draft* version of Rule 14a-8(i)(8) that ultimately was *rejected* in the final rule. (A-6).

To explain, the District Court observed: "When the subsection later re-numbered as the present 8(i)(8) of the SEC was last substantively amended, the Commission stated 'with respect to corporate elections, that Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature.'" (A-5 - A-6) (quoting Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals By Security Holders,

Exchange Act Release No. 34-12598, 1976 WL 160410 (July 7, 1976) (“Exchange Act Release No. 34-12598”). The problem with the District Court’s statement in this regard, however, is that it quoted and relied upon comments from the SEC regarding the *draft* version of Rule 14a-8(i)(8) that ultimately was *rejected* by the Commission.

The version of the Rule that the Commission was referring to when it made the statement that “Rule 14a-8 is not the proper means for conduction campaigns or effecting reforms in elections of that nature” was the version that would have permitted the omission of proposals related to “corporate, political, or other election[s] to office.” The *final* rule, however, deleted the words “corporate, political or other” and the Commission explained that it did so to dispel a misunderstanding among commentators that the Commission “intended to expand the scope of the existing exclusion to cover proposals dealing with matters previously held not excludable by the Commission, such as cumulative voting rights, general qualifications for directors, and political contributions by the issuer.” Adoption of Amendments Relating to Proposals by Security Holders, SEC Exchange Act Release No. 12999, 1976 WL 160347 (Nov. 22, 1976). Given this statement, ignored by the District Court, and because the SEC’s Division of Corporation Finance refused to permit the exclusion of “proxy access” proposals for over twenty years after the adoption of Rule 14a-8(i)(8), it simply cannot be

said that the exclusion of proposals similar to the one advanced by AFSCME is supported by the Commission's statements interpreting the Rule.

In any event, the District Court misapprehended the purpose of Rule 14a-8(i)(8). Rule 14a-8(i)(8) is designed to prevent shareholders from soliciting votes for or against particular candidates up for election at particular elections. Rather, SEC Rule 14a-4, 17 C.F.R. § 240.14a-4, contains detailed disclosure requirements for the solicitation of proxies. A proposal to amend a company's bylaws to require the *company* to publish names of candidates nominated by shareholders would not run afoul of the disclosure requirements of Rule 14a-4 because the company itself would remain bound by Rule 14a-4. In other words, a "proxy access" proposal such as that advanced by AFSCME would not avoid compliance with the disclosure requirements of Rule 14a-4 because, if adopted, shareholders would *not* be using their rights to introduce proposals under Rule 14a-8 for purposes of soliciting votes for or against a particular candidate. Rather, if a "proxy access" proposal were implemented, the company itself would be required, under certain circumstances, to publish the names of director candidates nominated by the shareholders, and would be subject to the same disclosure requirements of Rule 14a-4 as it would be had the company itself chosen to nominate multiple candidates. *See General Electric Company*, SEC No-Action Letter, 2001 WL 47254 (Jan. 12, 2001) ("The proposal urges the board to take the necessary steps to

nominate at least two candidates for each open board position, and provides that the names, biographical sketches, required disclosures and photographs of these candidates shall appear in GE's proxy materials to the extent that is required by law and GE's current practice. We are unable to concur in your view that GE may exclude the proposal under rule 14a-8(i)(8). Accordingly, we do not believe that GE may omit the proposal from its proxy materials in reliance on rule 14a-8(i)(8).” Far from supporting the District Court’s interpretation of Rule 14a-8(i)(8), therefore, Exchange Act Release No. 34-12598 actually supports the distinction advocated by AFSCME, *i.e.*, that Rule 14a-8(i)(8) “is not the proper means for conducting campaigns,” but does not preclude shareholder proposals that establish procedures by which the companies they own conduct elections in general.

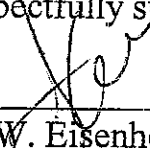
In sum, therefore, the District Court’s decision that AFSCME’s Proposal may be excluded under Rule 14a-8(i)(8) is supported by neither “consistent” decisions of the SEC’s Division of Corporation Finance, nor by the official pronouncements of the SEC itself regarding the scope and intent of the Rule.

## CONCLUSION

For the foregoing reasons, AFSCME respectfully submits that the District Court's decision that AIG was entitled to exclude AFSCME's Proposal under SEC Rule 14a-8(i)(8) was the product of a clear error of law and should be reversed, and requests that the Court remand this case to the District Court with instructions to enter final judgment declaring that AIG violated SEC Rule 14a-8 by wrongfully omitting AFSCME's Proposal from the Company's 2005 proxy materials, and to provide such other relief as the District Court may deem appropriate.

Dated: August 16, 2005

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

I hereby certify that the foregoing Brief of Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because it contains 12,540 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the "word count" function of Microsoft Office Word 2003.

Dated: August 16, 2005

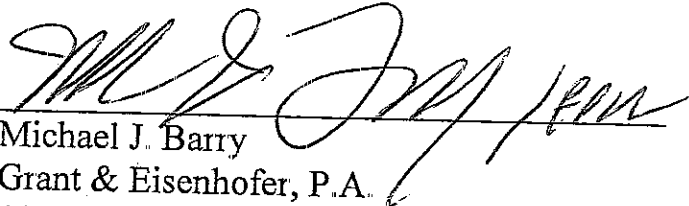
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**CERTIFICATE OF SERVICE**

I, Michael J. Barry, hereby certify that on this 16<sup>th</sup> day of August, 2005, I caused a true and correct copy of the foregoing Brief of Appellant to be served by first class mail, postage prepaid, upon the following:

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