No. 08-5842-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUCIAN BEBCHUK,

Appellant,

-v.-

ELECTRONIC ARTS, INCORPORATED

Appellee.

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

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BRIEF OF CORPORATE AND SECURITIES LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING APPELLANT

DATED: February 20, 2009

Professor Jeffrey N. Gordon, Esq.
435 West 116th Street
New York, NY 10027
Tel. (212)-854-2316
Fax (212)-854-7946
jgordon@law.columbia.edu

Counsel for Amici Curiae

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LIST OF THE AMICI CURIAE

The corporate and securities law professors joining this brief as *amici*, listed alphabetically, are:

Jennifer Arlen
Norma Z. Paige Professor of Law
Director, NYU Center for Law, Economics and Organization
NYU School of Law

Robert Ashford
Professor of Law
Syracuse University College of Law

Ian Ayres
William K. Townsend Professor
Yale Law School

Michal Barzuza
Associate Professor of Law
University of Virginia School of Law

Laura N. Beny
Professor of Law
University of Michigan Law School

Lisa E. Bernstein
Wilson-Dickinson Professor of Law and
Co-Director, Institute for Civil Justice
University of Chicago Law School

Bernard S. Black
Professor of Law
University of Texas Law School
Professor of Finance
McCombs School of Business

J. Robert Brown, Jr.
Professor of Law
University of Denver Sturm College of Law

Victor Brudney
Robert B. and Candice J. Haas Professor in Corporate Finance
Law, Emeritus
Harvard Law School

Richard Buxbaum
J.D. Program and Jackson H. Ralston
Professor of International Law
Boalt Hall
University of California at Berkeley

William Carney
Charles Howard Candler Professor
Emory Law School

Stephen Choi
Murray and Kathleen Bring Professor of Law
New York University School of Law

John C. Coffee
Adolf A. Berle Professor of Law
Columbia Law School

James D. Cox
Brainerd Currie Professor of Law
Duke University School of Law

Lawrence A. Cunningham
Henry St. George Tucker III Research Professor of Law
The George Washington University Law School

Lynne L. Dallas
Professor of Law
University of San Diego School of Law

Steven Davidoff
Associate Professor of Law
University of Connecticut School of Law

George W. Dent, Jr.
Schott-van den Eynden Professor of Business Organizations Law
Case Western Reserve University School of Law

John J. Donohue
Leighton Homer Surbeck Professor of Law
Yale Law School

Melvin A. Eisenberg
Koret Professor of Law
Boalt Hall
University of California at Berkeley

Charles M. Elson
Edgar S. Woolard, Jr., Chair
Professor of Law
Director of the John L. Weinberg
Center for Corporate Governance
Lerner College of Business & Economics
University of Delaware

Lisa M. Fairfax
Professor of Law and Director, Business Law Program
University of Maryland School of Law

James A. Fanto
Professor of Law
Brooklyn Law School

Allen Ferrell
Greenfield Professor of Securities Law
Harvard Law School

Jill E. Fisch
Professor of Law
University of Pennsylvania Law School

Merritt B. Fox
Michael E. Patterson Professor of Law
NASDAQ Professor for the Law
and Economics of Capital Markets
Columbia Law School

Tamar Frankel
Professor of Law
Michaels Faculty Research Scholar
Boston University School of Law

Jesse M. Fried
Professor of Law and Co-Director
of the Berkeley Center for Law, Business and the Economy
Boalt Hall
University of California at Berkeley

Jon D. Hanson
Alfred Smart Professor in Law
Harvard Law School

Claire Hill
Professor and Director, Institute for Law and Rationality
Associate Director, Institute for Law and Economics
Vance K. Opperman Research Scholar
University of Minnesota Law School

Peter H. Huang
Harold E. Kohn Chair Professor of Law
Temple University James Beasley School of Law

Lyman Johnson
Robert O. Bentley Professor of Law,
Washington and Lee University School of Law
LeJeune Distinguished Chair in Law,
University of St. Thomas School of Law

Marcel Kahan
George T. Lowy Professor of Law
New York University School of Law

Vikramaditya S. Khanna
Professor of Law
University of Michigan Law School

Reinier H. Kraakman
Ezra Ripley Thayer Professor of Law
Harvard Law School

Donald C. Langevoort
Thomas Aquinas Reynolds Professor of Law
Georgetown University Law Center

Katherine V. Litvak
Assistant Professor
The University of Texas School of Law

Stephen Marks
Professor of Law
Boston University School of Law

Brett McDonnell
Professor of Law
Associate Dean for Academic Affairs
University of Minnesota Law School

Curtis J. Milhaupt
Fuyo Professor of Japanese Law
Prof. of Comparative Corporate Law
Director, Japanese Legal Studies Center
Columbia Law School

Dale A. Oesterle
J. Gilbert Reese Chair in Contract Law
The Ohio State University, Michael E. Moritz College of Law

Richard W. Painter
S. Walter Richey Professor of Corporate Law
University of Minnesota Law School

Frank Partnoy
Professor of Law
University of San Diego School of Law

Arthur R. Pinto
Professor of Law and Co-Director of the Dennis J. Block Center
for the Study of International Business Law
Brooklyn School of Law

Katharina Pistor
Michael I. Sovern Professor of Law
Columbia Law School

Norman S. Poser
Professor of Law Emeritus
Brooklyn Law School

Robert A. Ragazzo
University of Houston Law Foundation Professor of Law
University of Houston Law Center

Hillary A. Sale
F. Arnold Daum Chair in Corporate Finance and Law and
Professor of Law
University of Iowa College of Law

D. Gordon Smith
Glen L. Farr Professor of Law
J. Reuben Clark Law School
Brigham Young University

James C. Spindler
Associate Professor of Law and Business
University of Southern California - Gould School of Law

Marc I. Steinberg
Rupert and Lillian Radford Professor of Law and
Senior Associate Dean for Research
Dedman School of Law
Southern Methodist University

Guhan Subramanian
Joseph Flom Professor of Law and Business
Harvard Law School
Douglas Weaver Professor of Business Law
Harvard Business School

Eric Talley
Professor of Law and Faculty Co-Director of the
Berkeley Center for Law, Business and the Economy
Boalt Hall
University of California at Berkeley

Randall S. Thomas
John S. Beasley II Professor of Law and Business
Vanderbilt University Law School

Samuel C. Thompson
Professor of Law,
Arthur Weiss Distinguished Faculty Scholar, and Director
Center for the Study of Mergers and Acquisitions
The Pennsylvania State University
Dickinson School of Law

Frederick Tung
Professor of Law
Emory University School of Law

J.W. Verret
Assistant Professor of Law
George Mason University School of Law

David I. Walker
Professor of Law
Boston University School of Law

William K.S. Wang
Professor of Law
University of California, Hastings College of Law

Elliott J. Weiss
Charles E. Ares Professor Emeritus
Rogers College of Law
University of Arizona

CONSENT FOR FILING

Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a). Counsel Appellant Lucian Bebchuk and counsel for Appellee Electronics Arts, Inc., have consented to the filing of this brief.

INTEREST OF THE *AMICI CURIAE*

Amici are sixty professors from thirty eight law schools around the country. They file this brief in their individual, not institutional capacities; their institutional affiliations are listed above for identification purposes only. The teaching and research interests of the *amici* lie in the areas of corporate and securities law. *Amici* have devoted significant parts of their professional careers to teaching and writing about the country's corporate and securities laws.

Amici do not generally hold the same views as to whether EA and its shareholders would benefit from the passage of the proposal submitted by Professor Lucian Bebchuk ("the Proposal") to Electronic Arts ("EA"). *Amici* also differ on many issues concerning corporate governance and corporate law policy. *Amici* all share, however, the view that EA may not exclude the Proposal from its proxy materials and deny EA's shareholders the opportunity to vote on it. While the brief reflects this consensus view of the *amici*, all of whom believe that it is impermissible for EA to exclude the Proposal, each individual *amicus* may not endorse each and every statement in this brief.

Amici focus in their brief on the District's Court's ruling that Rule 14a-8, as promulgated by the Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.14a-8 ("Rule 14a-8") mandates that a company's board of directors must have unrestricted discretion to decide whether to exercise the company's freedom under

the Rule to omit certain proposals. An affirmation of this ruling would have far-reaching consequences beyond the current case, would be inconsistent with Rule 14a-8, and would undermine the accepted and long-standing division of labor between the securities laws and state law under which the former leave the regulation of companies' internal affairs to the latter.

Amici also consider in their brief EA's argument in its no-action request that EA may omit the proposal because of certain indirect consequences it might have. Acceptance of this argument, which we show is unwarranted in light of the clear language and design of Rule 14a-8, would also have far-reaching consequences and bring about considerable expansion in companies' freedom to exclude shareholder proposals.

ARGUMENT

I. The Proposal

The Proposal recommends that EA's board submit to a shareholder vote a charter or a by-law amendment ("the Recommended Amendment") that would require the company, to the extent permitted by law, to include in the company's proxy materials proposals for by-law amendments that meet certain requirements (including, among other things, submission by a shareholder(s) owning more than 5% of the company's stock). Specifically, the Proposal reads as follows:

> RESOLVED that stockholders of Electronic Arts, Incorporated recommend that the Board of Directors, to the extent consistent with its fiduciary duties, submit to a stockholder vote an amendment to the

Corporation's Certificate of Incorporation or the Corporation's Bylaws that states that the Corporation (1) shall, to the extent permitted by law, submit to a vote of the stockholders at an annual meeting any Qualified Proposal to amend the Corporation's Bylaws; (2) shall, to the extent permitted by law, include any such Qualified Proposal in the Corporation's notice of an annual meeting of the stockholders delivered to stockholders; and (3) shall, to the extent permitted by law, allow stockholders to vote with respect to any such Qualified Proposal on the Corporation's proxy card for an annual meeting of stockholders. "Qualified Proposals" refer in this resolution to proposals satisfying the following requirements:

(a) The proposal was submitted to the Corporation no later than 120 days following the Corporation's preceding annual meeting by one or more stockholders (the "Initiator(s)") that (i) singly or together beneficially owned at the time of submission no less than 5% of the Corporation's outstanding common shares, (ii) represented in writing an intention to hold such shares through the date of the Corporation's annual meeting, and (iii) each beneficially owned continuously for at least one year prior to the submission common shares of the Corporation worth at least $2,000.00;

(b) If adopted, the proposal would effect only an amendment to the Corporation's Bylaws, and would be valid under applicable law;

(c) The proposal is a proper action for stockholders under state law and does not deal with a matter relating to the Corporation's ordinary business operations;

(d) The proposal does not exceed 500 words; and

(e) The Initiator(s) furnished the Corporation within 21 days of the Corporation's request any information that was reasonably requested by the Corporation for determining eligibility of the Initiator(s) to submit a Qualified Proposal or to enable the Corporation to comply with applicable law.

Two aspects of the Proposal are worth noting. First, the Proposal is precatory. Thus, if the Proposal passes and the board decides to move in the direction urged by the Proposal, the board may design and bring to a shareholder vote an amendment that differs from the Recommended Amendment in some minor or major ways.

Second, the Recommended Amendment would require the taking of any corporate actions only to the extent permitted by law. Accordingly, the Recommended Amendment could not lead to the inclusion of false and misleading statements in proxy materials or to outcomes that would otherwise violate the proxy rules.

II. The Far-Reaching Implications of the District Court's Ruling

In an opinion from the bench, the District Court concluded that the Proposal is inconsistent with and "contradicts" Rule 14a-8. The District Court viewed *any* provision in the certificate of incorporation or the bylaws that would limit the discretion of EA's directors to control access to the issuer's proxy statement as inconsistent with Rule 14a-8. The District Court held that Rule 14a-8 mandates that the discretion it provides to companies whether to omit certain proposals be exercised fully and solely by the company's board of directors without any restrictions on the board's discretion. The District Court stated that "it is clear… that the SEC understand[s] the company to be those who act for the company …

And that is a small, relatively small group of people, like the board of directors, who have management discretion to run the business and affairs of the company. And it is they that must have his discretion." (Transcript, Nov. 12, 2008, at 47-48). Because the Recommended Amendment would regulate how directors exercise the discretion to omit proposals provided to the company by Rule 14a-8, the District Court reasoned, it would amount to a limitation on the company's discretion that contradict rule 14a-8 and is therefore impermissible as a matter of federal law.

As a threshold matter, the District Court's interpretation of the text of Rule 14a-8 expands the Rule beyond its stated scope. Rule 14a-8 empowers "the company" to exercise discretion over the inclusion of shareholder proposals otherwise excludible under the Rule. Directors act on behalf of the company subject to internal governance arrangements permitted or required by applicable state law. Indeed, the "internal affairs" question of how the company exercises its discretion is clearly a state law issue on which the SEC rules do not, and possibly even may not, take a position.[1]

Rule 14a-8 on its face evidences the SEC's deference to state law and the principles of corporate federalism. The very first ground for permissible exclusion of a shareholder proposal is its being "not a proper subject for action by

[1] *See Business Roundtable v. SEC*, 905 F. 2d 406 (D.C. Cir. 1990) (holding that the distribution of power among the various players in the process of corporate governance is part of corporate governance traditionally left to the states).

shareholders under the laws of the jurisdiction of the company's organization." Rule 14a-8(i)(1). A proposal is also excludible if it would violate state law. Rule 14a-8(i)(2). Those are not the grounds asserted by EA or sustained by the District Court. The anomalous result is that in the name of fulfilling the SEC's intent with respect to Rule 14a-8, the District Court has permitted EA to block a shareholder precatory proposal that would be inoffensive under state law endorsing an internal governance rule that would be permissible under state law.

The District Court's ruling apparently accepted the arguments initially advanced in briefs by EA and the Chamber of Commerce of the United States of America (the "Chamber") (but which EA, as discussed in section IV below, withdrew in its reply brief and in the oral argument). According to these arguments, any state law arrangements that attempt to regulate what companies do with the freedom left to them by Rule 14a-8, are "contrary to the proxy rules" and "a nullity."[2]

Acceptance of the District Court's conclusion, or the arguments of EA and the Chamber leading to it, would have important consequences that go far beyond the current case. To begin, it would imply the invalidity under federal law not only

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[2] Electronic Arts Inc.'s Memorandum of Law In Support Of Its Motion To Dismiss (filed May 30, 2008) at 11; *see also* Brief For The Chamber Of Commerce Of The United States Of America As *Amicus Curiae* Supporting Defendant (filed July 18, 2008) at 8.

of charter and by-law provisions that require the company to include shareholder proposals for by-law amendments in proxy materials but also charter and by-law provisions that apply to the inclusion of other shareholder proposals. In particular, this argument implies the invalidity under federal law of any charter or by-law provisions that require companies to include the names of director candidates proposed by shareholders in proxy materials. While Rule 14a-8(i)(8) prevents shareholders from using Rule 14a-8 itself to place proposals relating to such provisions in proxy materials, it has long been accepted that the adoption of such shareholder access provisions as a matter of internal governance, as Comverse Technology, Inc., did recently,[3] would not be itself contrary to federal law.

Indeed, the permissibility of by-law provisions requiring the boards to follow shareholder requests for inclusion of matters in proxy materials is clearly stated in the Second Circuit's most recent opinion addressing Rule 14a-8, *Am. Fed'n of State, County & Mun. Employees v. Am. Int'l Group, Inc.*, 462 F.3d 121 (2d Cir. 2006) ("*AFSCME*"). The case focused on whether American International Group could use the election exclusion of Rule 14a-8(i)(8) to exclude from its proxy materials a proposal submitted by AFSCME to adopt a by-law provision

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[3] *See* Comverse Bylaws, Art IV. Sec. 3(b), filed as Exhibit 3.1 to the Comverse Form 8-K, filed April 23, 2007, *available at* http://sec.gov/Archives/edgar/data/803014/000090951807000351/0000909518-07-000351.txt.

providing shareholders with the right to place director candidates on the company's proxy. In the course of its analysis, the Court took as settled law that a bylaw expanding shareholder access to the company's proxy beyond Rule 14a-8's minimum requirements is permissible and consistent with the securities laws, stating as follows:

> *"The question, however, is not really whether proposals like AFSCME's are allowed – they are certainly allowed, at least under the federal securities laws* -- the question is whether corporations can exclude such proposals if they wish to do so. Even if proxy access bylaw proposals were excludable under Rule 14a-8(i)(8), a company could nevertheless decide to include the proposal in its proxy statement; if the proposal were subsequently adopted by the requisite number of shareholder votes, then, subject to the specifics of the adopted proxy access bylaw, shareholders would be able to wage election contests without conducting a separate proxy solicitation and without providing the disclosures required by the rules governing such solicitations."

462 F.3d at 130 n.9 (emphasis added).

In other words, says the Court in the above opinion, nothing in Rule 14a-8, or elsewhere in the securities laws, forbids the company adopting such a by-law provision and such a provision would be valid and consistent with the securities laws if adopted.

Indeed, acceptance of the District Court's conclusion, or the arguments of EA and the Chamber leading to it, would imply that Rule 14a-8 is inconsistent not only with (i) charter and by-law provisions adopted under state law that attempt to regulate how companies exercise the discretion left to them under the Rule to omit

certain proposals, but also (ii) any provisions in state corporation codes that would attempt to regulate this matter. This corollary highlights how far-reaching and unacceptable are the consequences of the District Court's conclusion (and the arguments by EA and the Chamber leading to it).

We assume that even the District Court's reasoning would not permit exclusion of the Proposal if the Recommended Amendment left the decision to omit proposals fully in the hands of directors but made it more difficult for such decisions to pass by requiring a supermajority or even unanimity on the board of directors for passage of such decisions. In such a case, the Proposal would leave the decisions in the hands of the "small group" that has management discretion, which, according to the District Court, is mandated by Rule 14a-8. But if so, what in the Rule (or elsewhere in the SEC rules) would draw lines between such variants on "full board" decision-making and other mechanisms of "internal governance"? This hypothetical illustrates again the inconsistency of the District Court's ruling with the long-standing approach under which the securities law look to state law arrangement for regulation of internal affairs.

At the general level, going beyond implications for state law arrangements related to inclusion in proxy materials, acceptance of the Distrct Court's conclusion would go against the long-standing acceptance of the role of state law in governing the internal affairs of companies. Courts have long protected this

long-standing role of state law alongside and in co-existence with the requirements of federal law.[4]

Under the accepted and long-standing understanding, the securities laws do not purport to regulate the internal affairs of corporations. Consistent with the long-term role of state law, the Recommended Amendment would govern EA's actions within the zone of freedom left to it by Rule 14a-8 to include or exclude certain proposals, and it would do so without weakening in any way EA's obligations under Rule 14a-8 to include certain proposals in proxy materials. The District Court's decision to interpret Rule 14a-8 as imposing a substantive federal rule regarding how a company must make a decision is completely contrary to long-standing and accepted division of labor between state law and federal law.

Professor Bebchuk's proposal seeks to use this flexible environment in which corporate governance requirements can be adopted in addition to the one-size-fit all mandatory minimum requirements imposed by some federal rules such as Rule 14a-8. The District Court's holding not only read into Rule 14a-8 a

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[4] *See, e.g., Santa Fe Industries v. Green*, 430 U.S. 462 (1977) (no expansion of reach of federal antifraud rule to address matters of fiduciary duty under state law); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987) (no preemption by Williams Act of state shareholder voting rules that affect making of tender offers). As the U.S. Supreme Court said in rejecting a claim that the Williams Act preempted state corporate governance rules that could affect the making of tender offers, "if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly." *CTS Corp.*, 481 U.S. at 86.

mandatory requirement that exists nowhere in the text of the Rule itself, but also ruled that this presumed requirement acts to preempt state law relating to the internal governance of corporations. Acceptance of the District Court's preemption holding would dramatically alter the long-standing and established system of co-existence of state law and federal law requirements.

III. Additional Problems with the Ruling that the Proposal is Inconsistent with Rule 14a-8

The District Court's decision fails to take into account, and does not give adequate consideration, to the following aspects of Rule 14a-8 and its relationship with state law.

1. *Rule 14a-8 necessarily depends on the existence of state law to govern issuer discretion:* Not only is Rule 14a-8 not inconsistent with state law arrangements that regulate how an issuer exercises the discretion left to it by the Rule (including what organs of the issuer make decisions with respect to this issue), but Rule 14a-8 fully presumes, accepts, and relies on state law to govern the discretion the Rule leaves to issuers.

Indeed, it would be difficult to apply the Rule if that were not the case. The Rule provides issuers with certain discretion but does not speak at all to the internal decision-making that would produce the corporate action or inaction within the zone of discretion. Companies are legal entities whose decision-making is necessarily defined by legal rules -- and in our legal system by the rules of state

law. Rule 14a-8 does not speak in any way to the question of who has authority to take an action on behalf of a company; it fully leaves the matter to state law.

2. *The Proposal would not deprive EA of discretion afforded the Company under Rule 14a-8:* The District Court improperly conflated the discretion of a "company" under Rule 14a-8 with the managerial authority of corporate "directors," which is defined by state law. The District Court held that "it is clear... that the SEC understand[s] the company to be those who act for the company ... And that is a small, relatively small group of people, like the board of directors, who have management discretion to run the business and affairs of the company. And it is they that must have his discretion." (Transcript, Nov. 12, 2008, at 47-48).

This argument ignores the difference between arrangements outside the company that restrict its freedom to act, irrespective of its internal decision-making process, and internal arrangements that the company puts in place to govern how it will operate within the zone of freedom it has under the law.

If EA adopts the Recommended Amendment, then the Recommended Amendment would not be depriving EA of its rights to act within the zone of freedom set by Rule 14a-8, but rather would represent the way in which EA itself, under the state law rules governing its internal affairs, chose to operate within this zone. Furthermore, EA would always be free to replace the Recommended

Amendment (following the process set by state law) with another arrangement that would regulate differently EA's actions within this zone of freedom.

3. *The authority of the Boards of Directors upon which the District Court, EA, and the Chamber rely is a Product of State Law Arrangements that State Law is Free to Alter*: While the District Court took for granted that EA's board now has the power to decide how EA would act within the zone of discretion left by Rule 14a-8, it failed to take into account that this state of affairs is a product of state law. In particular, it is Section 141(a) of the Delaware corporate code that establishes that the "business and affairs of every corporation … shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." 8 Del. C. § 141(a). This provision explicitly subjects the authority of directors to the provisions of the company's charter. In addition, Section 109 of the Delaware code subjects the board to the provisions of the company's bylaws. 8 Del. C. § 109. Thus, the Recommended Amendment would merely replace the prevailing set of state law arrangements that now govern how EA acts within this zone of discretion with a set of state law arrangements that includes the Recommended Amendment.

4. *The Recommended Amendment would complement Rule 14a-8, not replace or amend it:* The Recommended Amendment, if adopted, would not opt out of Rule 14a-8 or replace it with a different regime. Rule 14a-8 sets some

mandatory minimum requirements for the inclusion of certain proposals, and EA would fully remain subject to these requirements; the Recommended Amendment would not allow EA to exclude any proposal that Rule 14a-8 would require including. The Recommended Amendment would only govern how EA would act within the zone of discretion left by Rule 14a-8.

5. *Rule 14a-8 sets a floor, not a cap, with respect to the inclusion of proposals in proxy materials:* Rule 14a-8 requires the inclusion of some materials but does not prohibit a company from publishing proposals it might otherwise be permitted to exclude under the Rule. Rule 14a-8 does not stand in the way of a company that *chooses* "through the procedures of corporate democracy," *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978), to give its shareholders greater access to the company's proxy statement than the Rule *requires* for all public companies. *See AFSCME*, 462 F.3d at 130 n.9. Thus, to the extent that the adoption of the Recommended Amendment would lead to the inclusion of a proposal that Rule 14a-8 permitted the company to exclude or include, such an outcome would not violate Rule 14a-8 and would not be contrary to it.

This floor/cap distinction on the operation of Rule 14a-8 is clear from the earliest cases that construed the SEC's shareholder initiative rule through today's cases. The grant of authority to the SEC under section 14(a) of the 1934 Securities Exchange Act was prompted by concerns about the freedom of corporate managers

"to engage in abusive solicitation practices by virtue of their domination of the proxy voting machinery." Aranow & Einhorn on Proxy Contests for Corporate Control (Randall S. Thomas & Catherine T. Dixon, eds. (3d ed., 2001 Supp.) at 1-5. In an early seminal case on Rule 14a-8's precursor, *SEC v. Transamerica Corp.*, 163 F.2d 511 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948), the Court rejected an assertion of management prerogative to exclude a shareholder proposal whose inclusion was required by the rule but contravened a company by-law. Allowing such exclusion, the Court held, "will serve to circumvent the intent of Congress in enacting the [statute]. It was the intent of Congress to require fair opportunity for the operation of corporate suffrage. The control of great corporations by a very few persons was [t]he abuse at which Congress struck in enacting Section 14(a)." 163 F.2d at 518 (footnote omitted). Thus, the claim that a corporate charter or by-law provision that *expands* shareholder rights to present proposals to fellow shareholders would in some way offend the regulatory scheme is inconsistent with the recognized view of the scheme's intention.[5]

[5] To be sure, while the inclusion of an additional shareholder proposal would not be inconsistent with Rule 14a-8, such inclusion could be inconsistent with other proxy rules to the extent that the proposal includes false and misleading statements. However, the Recommended Amendment would not produce such an outcome because it would require that any inclusion of proposals be done only to the extent permitted by law.

IV. EA's Concession and Revised Argument

While EA took the position that the Recommended Amendment is by its terms inconsistent with Rule 14a-8 in the opening brief it submitted to the District Court, it abandoned this position in its reply brief and in the oral argument. It conceded that the Recommended Amendment, by itself, would not be inconsistent with Rule 14a-8. According to EA's revised position, EA's board may itself adopt a bylaw prescribing the Recommended Amendment, or EA's shareholders may adopt such a bylaw through an independent proxy solicitation, and in such cases the adopted bylaw would not contradict Rule 14a-8.[6] While the Recommended Amendment would be by itself consistent with Rule 14a-8 if adopted in a board-initiated bylaw or through a shareholder proxy solicitation (and presumably also through a charter amendment initiated by the board and approved by a shareholder vote), EA argued, Professor Bebchuk's Proposal to recommend that the board submit the Recommended Amendment to a vote would be inconsistent with Rule 14a-8 and thus can be omitted on the basis of Rule 14a-(8)(i)(3).

It is hard to see the logic underlying this position. If the Recommended Amendment is fully consistent with Rule 14a-8, as EA conceded in its reply brief

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[6] *See* EA's Reply Memorandum of Law In Further Support Of Its Motion To Dismiss (Filed October 13, 2008) at 11. *See also* Transcript at 6-7 (EA counsel admitting that a bylaw provision establishing the Recommended Arrangement would be permissible if the board decides to adopt it or if a stockholders conducted a proxy solicitation and collected a sufficient number of proxies to pass it).

and in the oral argument, what makes the Proposal inconsistent with Rule 14a-8? EA failed to provide a reason for such a conclusion, and it is clear to us that from (i) the Recommended Amendment is consistent with Rule 14a-8, it follows that (ii) the Proposal is consistent with Rule 14a-8.

In the oral argument, the District Court expressed puzzlement as to why EA accepted (i) but not (ii). The District Court saw no reason for the distinction EA was seeking to draw. Transcript at 15. This was not ultimately decisive for the District Court's conclusion, as the District Court rejected (i), ruling that the Recommended Amendment would contradict Rule 14a-8 regardless of how it came about. While this ruling is incorrect for the reasons discussed earlier, the District Court's unwillingness to accept the distinction EA was trying to draw was on the mark.

V. EA's Far-Reaching Indirect Consequences Argument

We now turn to an argument that was not used by the District Court as a basis for its ruling but that EA put forward in its no-action request and in its briefs. Because this Court's standard of review is *de novo* (*see Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 113 (2d Cir. 2005)), we raise this issue out of an abundance of caution because acceptance of this argument, as articulated by EA before the District Court, would also have far-reaching consequences.

Before the District Court, EA argued that the Proposal may be excluded because adoption of the Recommended Amendment might one day, after a long sequences of steps, lead to the inclusion of proposals that, but for the Recommended Amendment, EA would be free to include or exclude under eight provisions of Rule 14a-8 – Rule 14a-8(i)(4), Rule 14a-8(i)(5), Rule 14a-8(i)(8), Rule 14a-8(i)(9), Rule 14a-8(i)(10), Rule 14a-8(i)(11), Rule 14a-8(i)(12), and Rule 14a-8(i)(13).[7]

EA is asking to have these provisions read as allowing (or indeed to rewrite these provisions to allow) not only the exclusion of the proposals specified in these sections but also all proposals whose adoption may in some circumstances down the road lead to the inclusion of proposals specified in these provisions. Clearly, acceptance of this argument would lead to a very large and unwarranted increase in the power of companies to exclude shareholder proposals. Using EA's logic, companies would be able to exclude various proposals for governance reform on grounds that their passage might make directors more responsive to shareholders and therefore, following some sequence of events over time, lead directors to include a proposal which under one or more of the eight provisions of Rule 14a-8 the company would be free to include or exclude.

[7] Electronic Arts Inc.'s Memorandum of Law In Support Of Its Motion To Dismiss (filed May 30, 2008) at 15-20.

To illustrate, acceptance of EA's argument would enable companies to exclude proposals to de-stagger the board, adopt majority voting, reimburse the expenses of shareholders initiating a change in the company's by-laws, or require a super-majority of directors to approve the exclusion of certain types of shareholder proposals – all proposals that might increase the likelihood that the board will down the road decide to include in the company's proxy materials a proposal that the company has discretion to include or exclude.

The problems with EA's indirect consequences argument may be illustrated by examining its application to the provision to which EA devoted most attention in its brief -- Rule 14a-8(i)(8), which allows exclusion of proposals that relate to "an election for membership on the company's board of directors" or "a procedure for such nomination or election." Although Professor Bebchuk's proposal does not relate to a procedure for director nomination or election but to a procedure for by-law amendments, EA argues that the proposal may still be excluded because it might lead one day to, and thus might make more likely, the inclusion of a proposal relating to a procedure for director nomination or election in EA's proxy materials. Note that, as was stressed earlier, such inclusion would not be a violation of Rule 14a-8 and EA could choose to include such a proposal even without the Recommended Amendment.

Essentially, EA is seeking to have Rule 14a-8(i)(8) interpreted as allowing exclusion not only of proposals that relate to "an election for membership on the company's board of directors" or "a procedure for such nomination or election" but also of any proposals that relate to "a procedure for amendments to a company's certificate of incorporation or bylaws." This is a considerable and unjustified expansion. Procedures for certificate and bylaw amendments represent a significant and distinct subject from procedures for the election and nomination of directors. The SEC could have adopted such a rule (and perhaps relabeled the provision "the Election and By-laws Exclusion" rather than the "Election Exclusion" as it was referred to in the SEC's Release) when it adopted Rule 14a-8(i)(8) last year, but it did not. Indeed, the SEC did not even consider or invite comments about expanding the election exclusion to make it the election and bylaws exclusion as EA now proposes. EA's argument which asks for a different and much broader exclusion, ignoring the language of the election exclusion and its history, should not be accepted.

CONCLUSION

For the reasons explained above, the Court should reverse the judgment of the District Court.

Dated: New York, New York
February 20, 2009

Professor Jeffrey N. Gordon, Esquire

435 West 116th Street
New York, NY 10027
Tel. (212)-854-2316
Fax (212)-854-7946

jgordon@law.columbia.edu

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionally spaced, has a typeface (New Times Roman) of 14 points, and contains 4,958 words, as counted by the Microsoft Word processing system used to produce this brief.

Dated: February 20, 2009

Professor Jeffrey N. Gordon, Esquire

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Lucian Bebchuck *Appellant,*	)	08-5842-cv
-against-	)	
Electronic Arts, Incorporated *Appellee*	)	

CERTIFICATE OF SERVICE

I, Michael J. Barry, do hereby certify that, on February 13, 2009, I caused a true and correct copy of the Brief of Corporate and Securities Law Professors as *Amici Curiae* Supporting Appellant to be served by overnight mail postage pre-paid on the following:

Jonathan Rosenberg
William J. Sushon
Brendan J. Dowd
O'Melveny & Myers LLP
7 Times Square
New York, NY 10036

Dated: February 20, 2009

Michael Barry
Michael J. Barry (05-176558)