Council of Institutional Investors
The Voice of Corporate Governance

Everything you ever wanted to know about

Filing a Shareowner Proposal

but were afraid to ask

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The Council of Institutional Investors (CII) is a nonprofit association of public, union and corporate employee benefit funds and endowments and foundations with combined assets that exceed $3 trillion. The Council is leading voice for good corporate governance and strong shareowner rights.

The Council strives to educate its members, policymakers and the public about good corporate governance, shareowner rights and related investment issues, and to advocate on its members' behalf. Corporate governance involves the structure of relationships between shareowners, directors and managers of a company. Good corporate governance is a system of checks and balances that fosters transparency, responsibility, accountability and market integrity.

Acknowledgments

This primer was prepared by Con Hitchcock of the Hitchcock Law Firm for the Council of Institutional Investors.

Disclaimer

This primer is designed to provide a general introduction on how to submit shareowner proposals and is not a comprehensive discussion of all aspects of this topic. While the Council exercised due care in preparing this primer, it does not guarantee the accuracy of the information. This primer is being provided for educational purposes and should not be considered as legal advice.

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Table of Contents

Overview

Investors can engage with the companies in their portfolios in many ways, but submitting shareowner resolutions for action at a company's annual meeting can be one of the most effective avenues.

The reason is that companies prefer to avoid including shareowner proposals (the terms shareowner resolution and shareowner proposal are used interchangeably and mean the same thing) in their annual meeting proxy statements. Many company officials are more than happy to pick up the phone and say "Can we talk? What's your concern? Is there something we can do to address it?"

Council members have found that shareowner proposals can be catalysts for constructive dialogue between investors and companies. More importantly, these dialogues can help pave the way for improvements in a company's governance that reduce investment risk and potentially strengthen long-term shareowner value. For example, thanks in part to a concerted effort by shareowners who filed reams of proposals asking companies to elect directors in uncontested elections by a majority of the votes cast, instead of a plurality, majority voting is now standard at more than 75 percent of S&P 500 companies.

For many investors, however, the shareowner proposal process is something of a mystery. Or maybe they perceive shareowner resolutions as largely the preserve of gadflies who hold only a small number of shares, yet who want to use the annual meeting as a platform to air their views on a narrow agenda.

This primer aims to de-mystify the shareowner resolution process by providing an overview of how the process works and by offering some useful tips.

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Basics

Long-term investors want to make sure that the companies in their portfolios are performing as well as possible. They can't dictate day-to-day operations at a given company. But they can try to see that portfolio companies use "best practices" in the area of corporate governance, as part of an effort to ensure that corporate decisions are made in the best interests of shareowners and long-term shareowner value. And that's where the shareowner resolution process can be particularly helpful.

The conventional wisdom for many years was that if you don't like the company's performance, just sell your shares – the so-called "Wall Street Walk." But for most Council member funds and other long-term institutional investors, that approach isn't viable because a significant portion of their assets are invested in index funds. Hence the need for engagement.

Shareowner resolutions have one huge advantage over simply calling a company's investor relations manager: A company ignores the proponent of a shareowner resolution at its peril. Doing so guarantees that the proposal will have to be published in the proxy statement, and every shareowner will get a chance to weigh in.

The company's initial reaction when a proponent files a proposal will probably be to explain why it already has considered his or her point of view and why, therefore, the proposal should be withdrawn. If the arguments are persuasive, the proponent can withdraw. It is also possible that a compromise solution can be reached. For example, if the proposal asks that the positions of CEO and board chair be split, the company may offer to amend its corporate governance guidelines to be neutral on that point, rather than tilt in favor of combining the two positions in one person. The proponent may decide that that is sufficient progress and withdraw the proposal. If the proponent finds the arguments unpersuasive, he or she can always say, "Let's see what the shareowners as a whole have to say. Let's vote it."

Q. Where did shareowner resolutions come from?

A. When it passed the Securities Exchange Act of 1934, Congress was concerned that companies were soliciting proxies without giving shareowners an adequate idea of what items would be raised at annual meetings and how management would vote the proxies it was soliciting at those meetings. To address that problem, section 14 of the 1934 Act gave the Securities and Exchange Commission (SEC) authority to write regulations about what must be disclosed in proxy statements.

The SEC soon realized that shareowners, as well as management, might be bringing matters for votes at annual meetings. Thus, the SEC decided that if management knew in advance that shareowners were intending to bring matters before annual meetings – recommendations that companies follow this policy or that policy – shareowners should be informed of that and have an opportunity to vote on those resolutions. To assure that type of disclosure, the SEC decided that a company would have to print those agenda items (called "shareholder resolutions") in the company-prepared proxy and give shareowners the opportunity to vote on them.

Q. Does anything a shareowner wants to bring up for a vote have to be disclosed in the proxy?

A. No. The SEC adopted criteria limiting the types of resolutions that can be submitted for inclusion in companies' proxy materials and detailing what a shareowner must do from a procedural standpoint. That's all spelled out in Rule 14a-8. It appears in volume 17 of the Code of Federal Regulations as section 240.14a-8.

Getting Started

Q. What's the best way to determine which companies would be good targets for shareowner resolutions?

A. The companies in a proponent's portfolio with the worst performance, not just in the last year, but over a period of time, are a good place to start. How the company did over, say, the last three years and last five years (if not longer) and if the company is lagging behind its industry peers should be considered. Consulting the various "focus lists" of companies with governance issues that some large funds and governance research services compile annually might be helpful. Also useful: reports by proxy advisory services detailing the governance of individual companies, as well as companies' SEC filings, which are available on the SEC's EDGAR system (the Electronic Data-Gathering, Analysis, and Retrieval system, which performs automated collection, validation, indexing, acceptance, and forwarding of submissions by companies that are required by law to file forms with the SEC.)

Q. What kind of topics can a shareowner proposal raise?

A. The proposal must recommend that the company take some kind of action (more on what kind of action below). A shareowner resolution cannot simply state a position and seek a vote to see how many shareowners agree. Nor, unless it is proposing to amend the company's bylaws (and that has its own limitations), can a shareowner resolution compel the board to do something.

A proposal typically contains a "resolved clause" reading "Resolved: The shareowners hereby request that the board of directors do X," or "Resolved: The shareowners hereby request that the board of directors prepare a report on Y," followed by a supporting statement in which the proponent explains the reasons why shareowners favor that recommended action. The resolved clause and the supporting statement collectively are what is generally known as a shareowner resolution or shareowner proposal.

Q. Is there a limit on the length of a proposal, or on how many proposals a shareowner may submit?

A. Yes. The resolved clause and supporting statement cannot exceed 500 words, including headings. A shareowner may file only one resolution per meeting.

Q. Can any shareowner submit a proposal?

A. No. Until the early 1980s, any shareowner had the right to submit a proposal, even if he or she owned only one share and had purchased that share the day before the deadline for submitting proposals. The SEC later tightened the rules. Now shareowner proposals may be filed only by an investor who has held at least $2,000 worth of the company's stock (or 1 percent of the shares eligible to vote, whichever figure is smaller) continuously for at least one year before the date the proposal is submitted to the company. (Note that the proponent must hold at least $2,000 worth of voting shares until the date of the annual meeting, not just the next record date. The company needs to be advised of that fact in a cover letter accompanying the proposal. See Appendix B for an example.)

The thresholds apply to shares of stock with voting rights. Some companies have two or more classes of stock, so if only the Class A shares have voting rights, and a proponent owns Class B shares, he or she cannot submit a shareowner resolution. Few companies fall into that category.

Q. If the value of a proponent’s shares drops below $2,000 on a single day during the preceding year, is the proponent still eligible to file?

A. Maybe. The $2,000 minimum holding requirement can be met if, on any date within the 60 days prior to submission, the holding is valued at $2,000, based on the average of the bid and ask price of the principal exchange where the company's shares are traded. If bid and ask prices are not available, proponents can multiply the highest selling price during the year preceding submission of their proposals and multiply that price by the number of shares that they have held for at least a year; if that figure equals or exceeds $2,000, they’re safe.

Q. How does an investor submit a proposal and what should it contain?

A. The company's proxy statement from the most recent annual meeting will provide the name and address for where to mail a proposal, along with the submission deadline. The responsible official is usually the corporate secretary, who is often the general counsel or someone in the general counsel's office.

The submission should contain the text of the proposal and a cover letter (see Appendix A for an example) explaining that the proposal is being filed for the next meeting, that the proponent has continuously held more than $2,000 worth of shares for longer than a year and that he or she plans to continue holding at least that amount through the date of the annual meeting. The submission should also contain proof of ownership.

One caution: The company must actually receive the proposal by the deadline stated in its last proxy. Thus, while it's OK to drop the proposal in the mail, it may be safer to consider using a shipping service (such as UPS or FedEx) or a courier service that provides proof of delivery.

A proposal can be faxed in but if it is faxed to the company's main fax number on the last day, the paperwork may not reach the corporate secretary by the deadline. The company may try to reject the proposal on the grounds that it was not timely. Better to call the corporate secretary's office, ask for his or her fax number (or email address) and send it in that way.

Q. What proof of ownership is required?

A. If a proponent is a "registered holder" of shares, then his or her name will appear in the company's books, and the company will able to verify that fact easily.

But most shareowners do not show up on a company's books in their own names because most hold shares through a bank or broker; it is the bank's name or broker's name that appears in the company's books. The bank or broker is thus known as the "record holder," and the proponent is known as the "beneficial owner." In that case, to prove ownership, a proponent needs to get a letter from a bank or broker confirming that he or she owned the requisite number of shares on the date the proposal was sent to the company. Ideally, the broker letter should be submitted along with the shareowner proposal.

This can get tricky. As a practical matter, however, the broker may prepare the broker letter a day or two in advance of the date the proponent submits it. Thus, when it is sent in, it will have a different date than the date of the letter. The company may argue that the submission is insufficient because the broker letter is dated November 15, whereas the submission is dated November 17 and it is conceivable that all of the proponent’s were sold on November 16.

If that happens, the company is obliged to explain that in writing and give the proponent a chance to correct the situation. This means that the proponent will have to get a second letter from a broker stating that yes, he or she held more than $2,000 worth of shares on November 17 and that these shares were held continuously for at least a year prior to that date.

One way to avoid a runaround: The proponent should call the broker on the day the proposal is sent, ask the broker to prepare a letter (as of that date), and send in the broker letter to the company a few days later.

Q. Is there any other way to prove eligibility, such as a monthly brokerage statement or letter from an investment adviser?

A. Not really. A statement dated October 31 does not prove that the proponent held shares continuously for a year as of November 17, if that's the submission date. Even if the proponent submitted the proposal on November 1, a statement dated October 31 would not suffice because theoretically the shares could have been sold between the time the statement was prepared and the time the proposal was sent. A letter from an investment adviser also is insufficient unless the investment adviser is also the record holder of the shares.

The rules on proof of ownership as of the submission date are interpreted strictly. The good news is that if the company does perceive a problem with a submission, it is required to write a letter and explain what the proponent needs to do to correct the problem. We'll talk about that process below. Suffice it to say that if a proponent does get such a letter, it is important to follow the instructions carefully.

Q. What is the deadline for sending in a proposal?

A. Every company is required to give notice of the deadline for proposals for its next annual meeting, and this notice usually appears in each year's proxy statement. As a rough rule of thumb, the deadline is generally about five or six months before the annual meeting. (The rule says that the deadline must be at least 120 calendar days prior to the date that last year's proxy statement was mailed, which is usually 30 days or so before the meeting). As many companies hold annual meetings in the spring, the deadline for these companies is usually some time in November or December of the preceding year.

If the company did not have a meeting the past year, or if the company changed the date by more than 30 days from last year's meeting, the deadline may be in a Form 10-Q filed by the company. The rule says that when dealing with a company in this category, the deadline is "a reasonable time before the company begins to print and send its proxy materials." This latter deadline also applies to proposals submitted for something other than a regular annual meeting.

Proponents who miss the deadline will have to refile the following year.

Q. What other submission problems might crop up?

A. If the company thinks there's a procedural glitch that can be corrected, it must notify the proponent of the problem. The proponent has 14 calendar days from receiving the company's letter to mail or electronically transmit a response. For example, if a broker letter says a proponent held shares for one year prior to November 15, yet the cover letter is dated November 17, this is when the proponent would submit a letter from the broker stating that he or she continuously held the shares for one year prior to November 17.

Another common problem is that the company calculates that the proposal is more than 500 words. Proponents can trim a few words and send it back. More serious is a proponent failing to hold the requisite number of shares through the meeting date. In that case, the company is entitled to exclude all proposals submitted by the proponent for any meeting in the next two calendar years.

Permissible Topics for Proposals

Q. What can a proposal ask the company to do?

A. As mentioned before, shareowner resolutions generally recommend that the company or board of directors adopt a certain policy. Such non-binding proposals are called "precatory" proposals because they recommend, but do not require, certain action.

As a general principle of corporate law, shareowner proposals cannot mandate or require that the board of directors do something because state law usually bars such binding resolutions.

The exception is a shareowner proposal that would, if adopted, amend the company's bylaws. Shareowners and the board of directors generally share the power to amend the bylaws. Thus, a shareowner resolution may ask the board to change the bylaws in a particular way, or the resolution may directly propose to delete an existing bylaw and/or replace it with a new bylaw.

Submitting a bylaw change has several practical limitations, however. The company's charter or bylaws may specify that a bylaw proposed by a shareowner will be adopted only if the proposed bylaw receives two-thirds or more of the voted shares or outstanding shares. In addition, there may be limitations under state law in terms of what a bylaw can say or require.

Q. What kinds of topics can a shareowner proposal raise?

A. At risk of oversimplifying, topics tend to fall into three general categories: a company's governance (including executive compensation), environmental or social issues. Overall, the number of proposals submitted each year has declined. This can be attributed at least in part to the fact that with mandated say-on-pay votes at U.S. public companies, shareowners can now demonstrate their discontent by voting against CEO pay packages.

Just as the overall number of proposals declined, the number of proposals addressing environmental and social issues has climbed steadily. The SEC acknowledged the importance of environmental issues when in January 2010 it issued an interpretive release providing guidance on existing rules that could require a company to disclose the impact that business or legal developments related to climate change may have on its operations.

Year	Total SPs submitted	Environmental and Social SPs	Other SPs
2011*	829	347 (41.9%)	482 (58.1%)
2010	998	377 (37.8%)	621 (62.2%)
2009	1,101	374 (34.0%)	727 (66.0%)
2008	1,093	384 (35.1%)	709 (64.9%)
2007	1,069	350 (32.7%)	719 ((67.3%)

**data available through 8/23/11   Source: ISS Checklist*

Governance resolutions that are popular with investors include proposals that all directors be elected annually to one-year terms, rather than elect one-third of the board each year to three-year terms. Boards elected in the latter fashion are known as "classified" boards, because directors are elected in separate "classes" (similar to the U.S. Senate, for example). Boards that are elected annually are known as "declassified" boards. Declassified boards give shareowners the opportunity to unseat all of the directors on a board at a single meeting.

Also a hit with U.S. investors: Proposals that ask companies to adopt a policy that directors in uncontested elections must be elected by a majority of the shares cast for or against, without counting abstentions. More than three-quarters of S&P 500 companies have adopted a majority voting policy in recent years. Majority voting ensures that shareowners' votes count and makes directors more accountable to shareowners than plurality voting, the norm at most U.S. companies.

Proposals dealing with executive compensation, including limits on "golden parachute" severance packages for senior executives often find favor, too. Note that SEC rules limit compensation-related proposals to "senior executives," i.e., the five most highly compensated executives. Proposals that affect additional executives or employees are viewed as not involving "executive compensation," but more general employee compensation.

Environmental and social proposals can run the gamut. The former sometimes ask companies for reports on climate change issues, sustainability or environmental consequences of certain corporate policies. The paradigmatic "social" issue for many years involved corporate practices when doing business in South Africa during the apartheid era.

Topics change over time. Shareowner proposals asking companies to have at least half the board composed of independent directors were once common. After the Enron scandal in 2001, U.S. stock exchanges tightened their listing standards to require greater board independence. Other popular topics from earlier days include asking companies to expense stock options (now required by law) or to limit the repricing of stock options if the share price has declined to a point where the options have no value and are "under water." That practice also has changed. To keep shareowners apprised of any changes in how it views topics for proposals, the SEC occasionally issues Staff Legal Bulletins that answer questions about shareowner proposals under SEC Rule 14a-8. (See Appendix C for a list of SEC Staff Legal Bulletins.)

Q. Are any topics off-limits?

A. Yes, and these are spelled out in subsection (i) of Rule 14a-8. Before going through them, here is some helpful background.

In Rule 14a-8, the SEC recognized that some shareowner proposals are significant enough that shareowners should be apprised of these proposals in the company-prepared proxy statement and be given a chance to vote on those matters on the company-prepared proxy card.

To prevent the company-prepared proxy statement and proxy card from becoming a bulletin board, however, the rule tries to limit shareowner proposals to issues of sufficient policy importance. The guiding notion is that the board of directors and management are responsible for running the company, and the shareowners' role is more appropriately limited to advising on policy.

But the SEC adopted certain exceptions that fall into several categories.

Q. What is the argument companies use most often to exclude a proposal?

A. That the proposal relates to the "ordinary business" of the company. This exclusion is cited as the basis to omit many proposals. Rule 14a-8(i)(7) allows exclusion if "the proposal deals with a matter relating to the company's ordinary business operations." The idea is to respect the proper boundary between issues best left to management and the board, on the one hand, and policy issues on which shareowners have a right to be heard.

Where the line is drawn isn’t always clear. The SEC has tried several formulations over the years. In a 1976 rewrite of the rule, the SEC stated that a proposal would be viewed as involving a company's "ordinary business" if it involved "business matters that are mundane in nature and do not implicate any substantial policy or other considerations."

During a 1998 re-examination of Rule 14a-8, the SEC refined its analysis, explaining that the "ordinary business" exclusion rested on two core considerations. First, certain tasks "are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." Examples cited included employee hiring, promotion and termination decisions, decisions on production quality or quantity, or the retention of suppliers. Even so, some proposals "focusing on sufficiently significant social policy issues" (such as employment discrimination policies) transcend day-to-day operational matters and raise issues "so

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significant" that shareowners may voice their views.

The second consideration relates to "the degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which, shareowners, as a group, would not be in a position to make an informed judgment." Examples cited were proposals involving "intricate detail" or seeking to impose "specific time-frames or methods for implementing complex policies."

Sometimes, the exclusion is easy to apply. For example, a proposal asking a company to offer specific health benefits for retired employees would be viewed as "ordinary business." The distinction is often blurred and depends on how a proposal is viewed or pigeonholed. For example, is a proposal asking a utility not to build a nuclear power plant a matter of "ordinary business" because it tries to limit management's ability to choose a specific fuel source? Or does the proposal transcend "ordinary business" issues because of the cost of nuclear plants and the safety concerns? The SEC decided on the latter in its 1976 discussion of this rule, which explained that such a proposal would not be considered as involving ordinary business.

More recently, the commission used the example of proposals asking a company to adopt certain affirmative action or non-discrimination hiring policies as examples of significant policy issues that could not be excluded.

The distinctions can be finely nuanced. A proposal asking a company to take a position in favor of national health care legislation may be omitted on the grounds that it asks the company to engage in lobbying activities, and decisions about how and when to lobby are entrusted to management. On the other hand, a proposal asking the board of directors to adopt certain principles developed by the Institute of Medicine (a unit of the National Academy of Sciences) regarding the scope of health care reform was deemed allowable because it dealt with the issue at a policy level without getting into specific pieces of legislation.

As the last example illustrates, the "ordinary business" issue often arises with respect to emerging issues in the public policy arena. There may thus be a lag between the time that an issue surfaces in the political or regulatory arena and the time that the SEC may recognize the topic as transcending "ordinary business." For example, it was not until about 1990 that the SEC viewed executive compensation as more than an "ordinary business" matter. Before, questions about how much executives should be paid were deemed a matter exclusively at the board's discretion. Even today, executive compensation proposals may be knocked out if they are drafted to affect the compensation of any employees below senior management.

A more recent topic involves proposals to telecommunications companies asking them to adopt "net neutrality" principles, i.e., to operate a neutral network that does not privilege, prioritize or degrade any packet of information transmitted over the company's wireless infrastructure, based on the source, ownership or destination of the packet. Although the topic has become the subject of congressional debate and regulatory action, as of mid-2011, the SEC staff has taken the position that "net neutrality" proposals relate to a company's ordinary business, in particular, its "network management practices." The staff went on to explain that although the issue has attracted increasing public attention, it does not appear that net neutrality had yet "emerged as a consistent topic of widespread public debate."

Q. What other grounds for exclusion are there?

A. There are several:

- If the proposal is improper under state law or would, if implemented, cause the company to violate state law (Rule 14a-8(i) (1) and (2)). These exclusions are the reason why mandatory proposals are excluded when state law prohibits such proposals (other than bylaw proposals). The SEC will let a proponent amend a proposal to make it a "precatory" recommendation if the company objects to the mandatory nature of the proposal.
- If the “resolved” clause or supporting statement violates SEC rules, in particular, the SEC rule against materially false or misleading statements (Rule 14a-8(3)). This can cover a lot of ground, including predictions about specific future value, attacks on someone's character, integrity or personal reputation, charges of improper, illegal or immoral conduct without factual foundation and statements of opinion that are not qualified as such. It also covers objections that the proposal is too vague in terms of what it asks the company to do, so much so that shareowners will not be able to understand what they are voting on. Here again, if there are specific, limited objections that can be changed easily, the SEC will let a proponent alter

the proposal accordingly. However, a wholesale rewrite will not be allowed.

- If a proposal asks the board to do something that it lacks the power or authority to implement (Rule 14a-8(i)(6)). The concept behind this exclusion is unobjectionable, but there can be technical issues to consider in drafting. For example, if a proposal asks that the board chair always be an independent director, the company may argue that this cannot be put into effect. For example, the chair position could become vacant yet there might be not be an independent director available to serve as chair. This problem is easily addressed, however. The proposal could ask the company to adopt an "independent chair" policy "to the extent possible" or similar wording.
- If a proposal deals with a personal grievance or special interest (Rule 14a-8(i)(4)). Such proposals are deemed not to rise to the level that shareowners as a whole should vote on a matter. For example, if a proponent is involved in litigation with the company, and the proposal deals with a matter being litigated, that could be grounds to exclude, on the theory that the proponent is pursuing a separate agenda.
- If the proposal relates to election for membership on the board of directors (Rule 14a-8(i)(8)). This exclusion has been a matter of debate in recent years. It seems clear that the proposal does not permit the exclusion of general policy proposals regarding the composition of the board, e.g., a proposal dealing with diversity on the board of directors, a proposal to declassify the board in future elections (provided the proposal is worded so as not to affect the remainder of the terms of incumbent directors).
- If a proposal relates to "specific amounts of cash or stock dividends" (Rule 14a-8(i)(13). This is viewed as a function of the board of directors, not shareowners.
- If a proposal relates to “operations which account for less than 5 percent of a company's total assets," provided that that the issue is "not otherwise significantly related to the company's business." This is referred to as the “relevance rule” (Rule 14a-8(i)(5). The latter part is key. As a practical matter, this exclusion has not been raised successfully in recent years because advocates have been able to frame issues in a way that establishes the significance of an issue, even if the dollars-and-cents impact may be minimal.
- If the topic is being, or has been, presented to shareowners. A proposal may be excluded if:
  - it directly conflicts with a management proposal that will be presented at the upcoming meeting (Rule 14a-8(i)(9))
  - the company has "substantially implemented" the proposal (Rule 14a-8(i)(10))
  - it "substantially duplicates" a shareowner proposal that was received before your proposal and that the company intends to print the other proposal in the proxy (Rule 14a-8(i)(11))
  - it deals with "substantially the same subject matter" that has been voted in previous years and either (a) captured less than 3 percent of the "yes" and "no" vote once during the previous five calendar years, (b) captured less than 6 percent of that vote twice during the preceding five calendar years, or (c) captured less than 10 percent of that vote when offered at least three times during the preceding five calendar years (Rule 14a-8(i)(12).

Q. How can a proponent find out what's allowed and what's not allowed?

A. It may be useful to consult with an attorney who has experience in this area. In addition, the SEC's Web site contains a page where the Division of Corporation Finance staff explains how the staff is interpreting these exclusions in specific cases. These interpretations are also available on legal databases such as Westlaw. There are some, but not many, court decisions construing Rule 14a-8. Disputes over shareowner resolutions rarely go to court. (Key court decisions are highlighted in Appendix D.)

Next Steps

Q. What happens after a shareowner proposal has been submitted?

A. This can go in one of several directions. First, the company may call the proponent to confirm it has received the proposal and may offer to discuss the proponent's concerns. The company's goal is to persuade the proponent to withdraw the proposal or to find some middle ground to respond to concerns.

But it doesn't always work that way. In most instances, the corporate secretary will first look over a filing, and if he or she spots a technical flaw (e.g., a broker letter doesn't say the right thing, or a proposal that uses too many words), the company must notify the proponent and give him or her an opportunity to correct the deficiency within 14 days from the date of receipt of the "deficiency letter."

If the proponent fails to respond to the correct problem, the company will then be able to exclude the proposal. To exclude a shareowner proposal, a company must send the SEC a letter expressing this intent at least 80 days before the date it plans to mail its proxy statement to shareowners.

That letter to the SEC will explain why the company believes that it is entitled to omit the proposal, either because there are procedural problems or because the company believes that the proposal may be excluded under one or more of the exclusions in Rule 14a-8. These letters are directed to the SEC staff and generally ask the staff to issue what's called a "no-action letter," i.e., a letter in which the staff states that if a proposal is excluded, the staff will not recommend an enforcement action against the company for violating Rule 14a-8.

The company is obliged to send a copy of the letter to the proponent. In turn, the proponent or the proponent's counsel may submit a response explaining why the company's objections lack merit. The company may then submit a reply, and the proponent may (or may not) choose to respond to that.

Q. What does the SEC do after a no-action request has been filed?

A. The SEC staff will then consider all the arguments and decide the issue. The "no-action letter" will typically tell the company whether there appears to be some basis for the company's view that the proposal can be omitted, or whether the staff cannot concur with the company's assessment.

There also may be times when the staff will say that there appears to be some basis for the company's objection, but the problem can be cured if the shareowner makes a mandatory proposal into a non-binding proposal or deletes certain words or sentences to avoid vagueness. In that situation, the shareowner must advise the company within the specified time frame if the shareowner is willing to make the suggested changes.

Technically, the staff letter is an informal opinion, not a binding legal order. As a practical matter, however, companies are unlikely to ignore these staff determinations.

The proponent has very few options if he or she disagrees with the SEC ruling. There is no automatic right of review within the agency, but a proponent can write to the secretary of the SEC and ask the five commissioners to exercise their discretion to review the staff determination and reverse the decision. However, the proponent has to persuade the commission that the issue is significant enough to warrant such review. The commissioners have no obligation to grant review, however, and they rarely do.

The only other option is to file suit against the company, alleging that the company's decision to omit the proposal is a violation of federal securities law. This option may be of limited use, however, if the staff issues its no-action letter very close to the company's printing deadline. If this is the case, the proponent would need to file suit and ask a judge to issue a temporary restraining order or preliminary injunction to block the company from printing its proxy materials without the proposal.

If the SEC decides that the proposal may not be omitted from the proxy statement, the company is entitled to print in the proxy an explanation of the reasons why the board opposes the proposal. It also can urge shareowners to vote against the proposal. The company is required to send the proponent a draft of its opposition statement at least 30 days before it mails the proxy.

If a proponent believes that there are any materially false or misleading statements in the draft opposition statement, the best course is to contact the company promptly, specify the troubling language and see if the company is willing to make changes.

Rule 14a-8 does give proponents the option of raising these objections with the SEC staff. However, they may or may not respond to a letter, so it is better to resolve any matters informally with the company.

Q. Can proponents contact shareowners to rally support for a resolution?

A. Yes, but any such contacts are viewed as "solicitations" that are subject to separate SEC rules, and the proponent may be required to file "Dear Shareholder" letters or press releases on EDGAR. Proponents who are trying to build support should contact an attorney who can guide them through those regulations.

A proponent also may want to contact proxy advisers, such as Institutional Shareholder Services (ISS) or Glass Lewis. If the proponent's proposal deals with a topic that has been voted on in previous years, then these advisers may already have a policy on the issue, which they will urge clients to vote. If the proposal addresses a new topic, the proponent should try to meet with ISS or Glass Lewis sooner in the year to let the firms know what is being proposed. This way, the proxy advisers will have as much time as possible to consider what to recommend to clients.

Q. Is a proponent required to attend the annual meeting?

A. The proponent (or a representative) will need to attend and present the proposal, unless the company is willing to have the proposal voted on without the proponent there.

To prepare for the meeting, the proponent should carefully review the company's proxy statement, which will specify what is needed to get into the meeting (some companies issue admission cards that must be presented, sometimes a company will require a broker statement showing that the proponent still owns the shares, and most often companies will require a photo ID). A representative must present all of the same paperwork and a proxy authorizing him or her to represent the proponent.

It is a good idea for the proponent to call the company's corporate secretary at least a week or two in advance of the meeting to discuss the ground rules. That way, if a problem comes up, the proponent will have enough time to address it. In fact, the proponent should contact the corporate secretary about any logistical or other questions. This will help ensure easy admittance and a smooth annual meeting.

The company is entitled to ignore a proposal and any votes if the proponent, or a representative, fails to properly present the proposal by attending the meeting. In addition, failing to appear allows the company to omit any proposal submitted by the proponent for the next two calendar years.

The proponent (or a representative) will need to attend and present the proposal, unless the company is willing to have the proposal voted on without the proponent there.

Q. What happens at the meeting itself?

A. Generally each proponent will have two or three minutes to make a presentation, but procedures vary. The corporate secretary can provide information in advance about exactly how things will progress. (The conduct of annual meetings is the subject of a separate Council primer, Everything You Ever Wanted to Know About the Annual Meeting of Shareowners.)

Q. When does a company announce the vote tally for a proposal?

A. As a practical matter, all (or virtually all) of the shares will have been voted by proxy in advance of the meeting, and the chair will generally make an announcement at the meeting as to whether the various items have passed or failed. He or she may also read out the preliminary voting results, or the "inspector of elections" can provide the preliminary numbers.

Within a few days after the meeting, SEC rules require the company to file on EDGAR a Form 8-K announcing the final vote totals.

Q. Can a company ignore a winning proposal?

A. Yes, assuming it's a non-binding precatory proposal. Because such a proposal simply recommends certain action, the board is legally entitled to ignore the recommendation, even if it passes. As a practical matter, the board does so at some risk. The proponent can always re-file the proposal the following year, and if a board ignores a majority vote for several years running, proxy advisers may recommend that directors running for re-election not be elected.

Q. How much does submitting a shareowner proposal cost?

A. The costs associated with submitting a shareowner proposal vary widely depending on the law firm hired to assist and whether the proposal prompts a no-action request. If the company does file such a request, that could add another $3,000-$4,000 to the tab, more if negotiations with the company ensue. Investors interested in submitting proposals may want to consult a lawyer or several law firms about a fee schedule that best suits their needs.

APPENDIX A

Sample cover letter for submitting a shareowner proposal

[date]

Mr./Ms. ___________________
Corporate Secretary
XYZ Corporation
[address]
[city, state and zip]
Re: Shareholder proposal for 20xx annual meeting

Dear Mr./Ms. _______:

I/on behalf of [shareholder], I submit the enclosed shareowner proposal for inclusion in the proxy statement that XYZ Corporation plans to circulate to shareowners in anticipation of the 20xx annual meeting. The proposal is being submitted under SEC Rule 14a-8 and relates to ______________________ policies.

[Shareowner] is located at the address shown above/ at the following address. [Shareowner] has beneficially owned more than $2,000 worth of XYZ common stock for longer than a year. A letter from [your bank or broker] the record holder, confirming that ownership is enclosed/is being sent by separate cover. [Shareowner] intends to continue ownership of at least $2,000 worth of XYZ common stock through the date of the 20xx annual meeting, which a representative is prepared to attend.

We would be pleased to discuss the issues presented by this proposal with you. If you require any additional information, please let me know.

Very truly yours,

APPENDIX B

Sample proof of ownership letter

[date]

Mr./Ms. _________________
Corporate Secretary
XYZ Corporation
[address]
[city, state, zip]

Re: Shareowner proposal for 20xx annual meeting

Dear Mr./Ms. __________:

I write in connection with the shareowner proposal recently submitted by [shareowner]. This will confirm that on the date [shareowner] submitted that proposal, [shareowner] beneficially held [insert number] shares of XYZ common stock which were held of record by this company [through name of agent - CEDE or other – or account]. This will confirm as well that [shareowner] continuously has held more than $2,000 worth of XYZ common stock for more than one year prior to that date.

Very truly yours,

IMPORTANT NOTE: The date cited by the broker must match the date you mailed, faxed or emailed your letter to the company. If the two dates do not match, the company is entitled to exclude your proposal unless the broker sends in a second letter, which must report your holdings for one year as of the date you filed your proposal. See the discussion in the text.

APPENDIX C

SEC Guidance on Shareowner Proposals Under Rule 14a-8

The Securities and Exchange Commission's Division on Corporation Finance has issued a series of Staff Legal Bulletins that answer questions about shareowner proposals under SEC Rule 14a-8. These Bulletins are available online as follows:

Staff Legal Bulletin 14 (July 2001)
Staff Legal Bulletin 14A (July 2002)
Staff Legal Bulletin 14B (Sept. 2004)
Staff Legal Bulletin 14C (June 2005)
Staff Legal Bulletin 14D (Nov. 2007)
Staff Legal Bulletin 14E (Oct. 2009)

APPENDIX D

Leading court cases involving shareowner proposals

Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877 (S.D.N.Y. 1993)

The court ruled in favor of shareowners proposing a resolution for greater disclosure of Wal-Mart's EEO policies, overruling the company's objections that the proposal involved "ordinary business" operations. The decision contains a useful history and description of the shareowner resolution process.

Apache Corp. v. Chevedden, 696 F. Supp. 2d 723 (S.D. Tex. 2010)

Everything you wanted to know about how to prove ownership of shares – and then some; a scholarly discussion of the various types of banks and brokers and what sort of showing is sufficient. The court held that the stockholder has not adequately established ownership, despite being given the opportunity to do so under Rule 14a-8.

CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227 (Del. 2008)

An important case for any shareowner who contemplates filing a proposed bylaw amendment, as the case discusses what kinds of bylaw proposals are permissible under Delaware law, where many large public companies are incorporated. At issue was the legality of a proposed bylaw amendment to reimburse candidates for a company's board of directors for their proxy campaign expenses, using certain criteria. The court held that the proposal, as drafted, could be omitted, explaining that the shareowners' power to amend the bylaws was not co-extensive with the board's power to amend the bylaws. The court noted that the subject matter in question could be the subject of a proper bylaw amendment, but as drafted, it interfered with the board of directors' fiduciary power to decide in a given case whether to reimburse expenses.

Grimes v. Ohio Edison Co., 992 F.2d 455 (2d Cir. 1993)

A proposed amendment to the articles of incorporation to require shareowner approval of capital and construction expenditures may be omitted as relating to "ordinary business."

Lovenheim v. Iroquois Brands, Inc., 618 F. Supp. 2d 554 (D.D.C. 1985)

The court upheld a proposal asking the company's board to study alternatives to the force-feeding of geese used to make paté de foie gras and to consider suspending the process until a more humane process was identified. The court rejected the company's claim that the proposal could be omitted under the "relevance" exclusion in what is now Rule 14a-8(i)(5), noting that while paté accounted for only a small part of the company's operations, the proposal had ethical and social significance.

Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416 (D.C. Cir. 1992)

The shareowner resolution asked Du Pont to phase out chlorofluorocarbons promptly, whereas Du Pont was in the process of phasing them out over a period of years. The court, in a decision by future Justice Ruth Bader Ginsburg, affirmed that shareowners have the right to file suit against a company that intends to omit a proposal. The court held that the company could omit the proposal under the "ordinary business" exclusion because the issue was not whether to phase out CFCs, but how quickly to do so, a matter for management to decide.