



Shareholder Proposals: Trends, Strategies and Tactics

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Introduction



CAM HOANG

Cam, a partner in our Corporate Group, advises clients on governance and SEC compliance matters, equity plans and executive compensation, securities offerings, and mergers and acquisitions. In 2017, she was voted a Partner of the Year. Prior to her return to Dorsey, Cam was Senior Counsel and Assistant Secretary at General Mills, Inc., where she helped the company achieve its corporate governance and SEC compliance objectives, worked on securities offerings and M&A transactions, risk management, foundation governance, and general corporate and commercial matters. Before joining General Mills in 2005, Cam was an associate in the Dorsey Corporate Group in Minneapolis. hoang.cam@dorsey.com



GARY TYGESSON

Gary is a partner in the Capital Markets and Corporate Compliance Group with extensive experience advising public companies on a wide range of securities financing, reporting and compliance matters. Gary also regularly advises clients and their Boards of Directors with respect to corporate governance, SEC compliance, public company disclosure, shareholder activism and executive compensation. Gary served as Co-Chair of the firm-wide Corporate Group from 1997 to 2002 and as a member of the Firm's Management Committee from 1997 to 2002. tygesson.gary@dorsey.com



NICOLE STRYDOM

Nicole focuses on providing service-oriented and effective counsel to her clients. She assists public companies with respect to their capital markets activities, including equity and debt offerings, and ongoing disclosure and compliance issues, including periodic and current reporting and proxy statement requirements. Nicole has also served clients on stock and asset deals in a broad range of sizes, as well as on a variety of general corporate matters. With a prior career as a professional cellist in a symphony, Nicole brings a unique perspective to her practice. strydom.nicole@dorsey.com



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Overview

- **2018 Proxy Season Trends and Developments**
- **Expectations for 2019 Proxy Season**
- **Responding to a Shareholder Proposal**
 - Shareholder Proposal Basics
 - Process for Developing a Response
- **Process for Including a Shareholder Proposal in the Proxy Statement**
- **Bases and Process for Excluding a Shareholder Proposal**

Except as otherwise stated, statistics in this presentation are derived from ISS reporting for the period between October 1, 2017 and June 1, 2018.



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2018 Proxy Season Trends and Developments

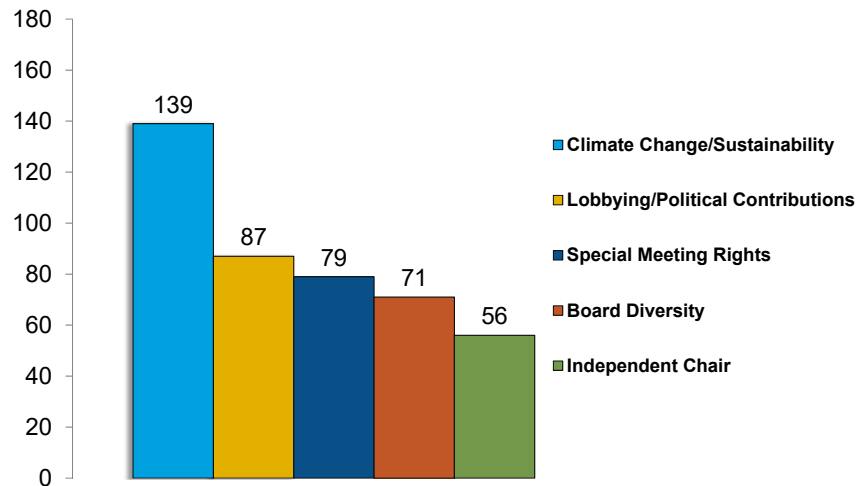
- **Fewer proposals submitted:** Overall, the total number of shareholder proposals submitted (788) continued its downward trend from 2017 (827), 2016 (916) and the all-time high in 2015 (943).
- **Higher levels of overall support.** Average votes cast for proposals voted on increased to 32.7%.
- **Many proposals withdrawn or excluded:** As in prior years, many submitted proposals were not voted on because they were withdrawn following discussions with the company (15%) or excluded pursuant to the SEC's no-action letter process (16%).
- **Less no-action relief granted:** The Staff granted 125 (64%) of the no-action requests submitted during the 2018 proxy season, compared to 189 (78%) during the 2017 proxy season, and 143 (68%) during the 2016 proxy season.



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Most Commonly Submitted Proposals



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2018 Proxy Season Trends and Developments

- **Proposals receiving at least 30% votes cast on average:**
Eliminate/reduce supermajority voting, majority voting for directors, shareholder written consent, right to call special meetings and climate change.
- **The following issues received majority support for certain proposals:**
See issues above, board declassification, sustainability reporting, adopt proxy access, report on opioids, and report on gun violence.



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2018 Proxy Season Trends and Developments

Governance Proposals

- **281 proposals in 2018 vs 288 in 2017**
- **Types of proposals receiving majority support:**
 - Declassifying board terms
 - Adopting proxy access
 - Adopting majority voting in uncontested director elections
 - Eliminating/reducing supermajority voting provisions
 - Allowing shareholders to act by written consent
 - Giving shareholders the right to call special meetings
- **Big decline in proxy access proposals:**
 - 48 proposals in 2018 vs 112 in 2017
 - More than 70% of the S&P 500 have adopted proxy access



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2018 Proxy Season Trends and Development

Environmental and Social Proposals

- **433 proposals in 2018 vs 453 in 2017**
- **Climate change proposals**
 - 72 proposals filed but only 20 voted on
 - Reports on business impact of the Paris Accord on global warming, methane emissions management, adoption of GHG reduction goals
 - Support averaged 32.8% of votes cast, like in 2017
 - Passed at Anadarko Petroleum, Kinder Morgan, Range Resources and Genesee & Wyoming
 - Support from major institutional investors (BlackRock, State Street, Vanguard, Fidelity) and from ISS (90% of proposals)



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2018 Proxy Season Trends and Developments

Environmental and Social Proposals

- **Board diversity proposals**
 - 30 proposals filed but only three voted on
 - Adoption of a board diversity policy or a report on board diversity
 - Support averaged 25% of votes cast, a decline from 28% of votes cast in 2017; none passed
 - Withdrawals were negotiated based on adoption of new or revised policies, including the Rooney Rule, which commits the company to including diverse candidates
 - Significant support from major institutional investors (BlackRock, State Street, NYSCRF, Legal & General) and from ISS (100% of proposals)



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2018 Proxy Season Trends and Developments

- **Workforce diversity proposals**
 - 23 proposals filed (up from 17 in 2017) but only seven voted on
 - Typically request a breakdown of employees by race and gender across job categories, and disclosure of policies and programs for increasing diversity in the workplace
 - Support averaged 38% of votes cast, up from 29% of votes cast in 2017
- **Gender pay equity proposals**
 - 24 proposals filed (up from 19 in 2017) and only one voted on
 - Typically request a report on the pay gap between male and female employees and plans to close that gap
 - 15% of votes cast for the one proposal
 - Targets were tech and financial services companies



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2018 Proxy Season Trends and Developments

Social Issue Proposals Packaged as Compensation Proposals

- Pharmaceutical pricing proposals: report annually on the extent to which risks related to public concern over pricing strategies are integrated into incentive compensation programs for senior executives. *Eg, Biogen (March 16, 2018)*
- Cybersecurity proposal: report on feasibility of integrating cybersecurity and data privacy metrics into performance measures for senior executives. *Verizon (March 7, 2018)*
- Legal compliance proposal: adopt a policy that no financial performance metric shall be adjusted to exclude legal or compliance costs when evaluating performance of senior executives. *Johnson & Johnson (February 2, 2018)*

Lower Say on Pay Support and Higher Failure Rates

- Average support through May 2018 (91.2%) vs through May 2017 (92.6%)
- Failure rate more than doubled to 2%, including many in the S&P 500

Alliance Advisors



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2018 Proxy Season Trends and Developments

The Role of Proxy Advisory Firms

- Ahead of the upcoming Roundtable on the Proxy Process, which is scheduled for November 2018, the SEC staff has withdrawn two no action letters that provided comfort to investment advisers in relying on proxy advisory firm recommendations:
 - In *Egan-Jones Proxy Services (May 27, 2004)*, the staff had confirmed that by voting based on the recommendations of an independent proxy advisory firm, an investment adviser could “cleanse” its vote, demonstrate the absence of a conflict of interest, and the fulfillment of fiduciary duties.
 - In *Institutional Shareholder Services, Inc. (September 15, 2004)*, the staff had confirmed that investment advisers should evaluate the independence of proxy advisory firms based on the facts and circumstances.



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Expectations for 2019 Proxy Season

Shareholder proposals will continue to demand significant time and attention.

- Overall number of shareholder proposals declining, but average support increasing
- Number of proponents increasing and more diverse
- Greater traction among institutional shareholders
- Scope of subject matter for proposals expanding, especially in environmental and social areas, in line with cultural and social movements and trends
- Formation of coalitions of investors, including different investor types, focused on a narrow issue (e.g., opioids, impact of TV on children)
- Reform of shareholder proposal rules is not likely in the short term



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Expectations for 2019 Proxy Season

Ability to exclude shareholder proposals will be challenging.

- Strong exclusion success rates based on several grounds, including *substantial implementation* and micromanagement-focused *ordinary business*
- New life for *conflicting proposal* exclusion
- **BUT**, overall success rate on no-action requests declining
- Proposals more artfully crafted and technically compliant
- Shareholders reframing proposals previously excluded as *ordinary business* into executive compensation proposals
- Exclusion based on SEC's new Board analysis guidance in SLB 14I for certain *ordinary business* and *economic relevance* no-action requests generally failed, but Staff left the door open for coming year
- *Vague* and *false and misleading* exclusions are all but dead (See *Boeing*; reference to directors as "lap dogs" not excludable)



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Expectations for 2019 Proxy Season

Prepare strategies for potential engagement and negotiation with proponents.

- Investors increasingly view shareholder proposals as an invitation for dialogue.
- Engagement with proponents may reveal common ground.
- Proposal withdrawal rates showing marked increase, even following the submission of a no-action request.
- High rate of withdrawals on environmental and social issues likely to continue if companies are willing to engage with proponent.



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Expectations for 2019 Proxy Season

Environmental and sustainability issues will continue to emerge as mainstream investor concerns.

- More proposals on a wide range of topics related to climate change, including climate change reporting, greenhouse gas emissions goals, the 2-degree global warming standard and climate change risks
- More proposals on other environmental issues, including recycling, renewable energy, hydraulic fracturing and sustainability reporting
- Continued increase in shareholder support
- State Street, Blackrock, Vanguard, Fidelity and UBS have publicly announced voting policies in support of climate change resolutions



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Expectations for 2019 Proxy Season

Increased investor focus will continue on Board diversity.

- NYC Comptroller Boardroom Accountability Project 2.0 focuses on Board diversity; letters to 151 companies in 2018 to disclose race/gender diversity of Board and skills matrix and engage in discussion regarding Board refreshment process.
- BlackRock amended its proxy voting guidelines in 2018 to require 2 female directors; letters going to 300 Russell 1000 companies that do not meet this standard; threaten to withhold vote against directors of such companies in 2019.
- CalSTRS may withhold votes against entire board for lack of progress on Board diversity.
- CalPERS has threatened withhold votes over lack of Board diversity; wrote over 500 letters in 2017.
- Glass Lewis will recommend against the nominating committee chairs of Russell 3000 companies with no female directors unless they disclose a significant rationale or plan to address the issue.
- Recently passed California legislation mandates gender Board diversity for publicly held domestic or foreign corporations whose principal executive offices are located in California.



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Expectations for 2019 Proxy Season

Investor focus will continue to increase on other “social” issues, including proposals on:

- Workplace diversity and discrimination
- Gender/ethnicity pay gap
- Using social or environmental performance measures in executive compensation
- Social and environmental qualifications for director nominees
- Reporting on societal concerns specific to the company, such as dissemination of misinformation (“fake news”), gun safety and drug price increases
- Continued increase in level of shareholder support



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Expectations for 2019 Proxy Season

Proposals relating to governance, political and lobbying activities, and executive compensation will continue at similar levels experienced in 2018, with generally low success rates.

- Governance proposals will continue to be a major category of proposals, second to social and environmental issues
- A new governance issue *du jour* may yet emerge to take the place of the leading governance proposals in recent years (proxy access in 2015-2017 and shareholder special meeting rights in 2018)
- Independent Board chair proposals will likely continue to be in the top 10
- Watch for executive compensation proposals to continue to evolve as a vehicle for advancing social and environmental issues



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Expectations for 2019 Proxy Season

Proxy access proposals will continue to wane.

- **Proposal to adopt proxy access bylaws:**
 - Over 70% of S&P 500 have adopted proxy access bylaws
 - Most follow the market standard “3/3/20/20”
 - NYC Comptroller has shifted focus of Boardroom Accountability Project to Board refreshment and composition
- **Proposals to amend proxy access bylaw provisions:**
 - Shareholder support continues to be relatively low
 - Many investors and Glass Lewis generally oppose fix-it proposals for market-standard bylaws
 - Provisions that vary significantly from the market standard at greater risk



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Expectations for 2019 Proxy Season

Shareholders will increase use of exempt solicitation filings to publicize shareholder proposals that are up for vote.

- Rule 14a-6(g) requires a holder owning more than \$5 million of a company's securities and who solicits shareholders on a topic but does not seek a proxy to file a Notice of Exemption which appears on the company's EDGAR page as PX14A6G filing.
- Public pension funds and institutional holders increasingly file these notices in response to a company's statement in opposition to a shareholder proposal, to sway say-on-pay votes or to conduct a "vote no" campaign against directors.
- PX14A6G filings by John Chevedden and other proponents owning less than \$5 million in shares increased in 2018 and often contained questionable content.
- C&DIs issued on July 31, 2018 require voluntary filers to indicate that they own \$5 million or less of the company's stock and all filers must include a Rule 14a-103 cover page that identifies the party making the exempt solicitation.
- Companies should actively monitor these filings for potential abuses.



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Expectations for 2019 Proxy Season

Changes in legal requirements for shareholder proposals under consideration, but unlikely to be adopted prior to 2019 proxy season.

- Financial CHOICE Act 2.0 adopted by the House in June 2017 would have amended Rule 14a-8 to increase share ownership thresholds for submitting shareholder proposals (1% of outstanding for 3 years), increase resubmission thresholds and prohibit proposals by a proxy other than a shareholder.
- Senate version passed in May 2018 and signed into law did not include the proposed amendments to Rule 14a-8.
- In June 2018, the House Financial Services Committee passed HR 5756 reviving the resubmission thresholds to allow exclusion of proposals that were previously voted on in past 5 years and most recently received support of less than 6% (currently 3%) if voted on once, 15% (currently 6%) if voted on twice and 30% (currently 10%) if voted on 3 times.
- SEC Chairman Clayton, the NACD and the U.S. Chamber of Commerce support reform.



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Expectations for 2019 Proxy Season

Department of Labor provides guidance on ESG proposals in *ERISA Field Advisory Bulletin 2018-01* (April 2018).

- ERISA requires that fiduciaries of ERISA plans “not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals.”
- April guidance clarifies that fiduciaries “must not too readily treat ESG factors as economically relevant to the particular investment choice at issue when making a decision.”
- Further, fiduciaries should not “routinely incur significant expenses to engage in direct negotiations with the board or management of publicly held companies.”
- Will DOL guidance dampen investor activity on ESG matters?



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Responding to a Proposal: The Basics

- **What laws and rules control shareholder proposals?**
 - Proposals **outside of** a company’s proxy statement must be submitted in accordance with state corporation laws and a company’s organizational documents (advance notice bylaws).
 - Proposals **included** in the company’s proxy statement must comply with Rule 14a-8 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”).
- **When can shareholder proposals bind the company?**
 - Proposals are typically non-binding (precatory), because under most state corporation laws, shareholders do not have the power to require the board to take action on the basis that it would interfere with the board’s ability to govern the affairs of the corporation.
 - Shareholders may invoke their power under state law to adopt bylaws in order to make binding proposals (e.g., Delaware permits adoption of majority voting for directors through bylaw amendment).



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Responding to a Proposal: The Basics

- **Who is eligible to submit proposals for inclusion in company proxy statements?**
 - Shareholder 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. (*Rule 14a-8(b)*)
 - Proof of ownership must be registered on the company's records, a written statement from a record holder (DTC participant) or a 13D/G or Form 4/5 filing.
 - Proof must be as of the date that the proposal is submitted.
 - What about proponents who do not own shares but act on behalf of a shareholder? SEC has refused to grant no-action relief when companies have sought to exclude proposals on this basis.
 - The proponent must pledge to continue to hold the securities through the date of the annual meeting, not just the record date for the meeting.
 - Eligibility requirements would change if the Financial CHOICE Act 2.0 is adopted.



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Responding to a Proposal: The Basics

- **When must the proposal be submitted?**
 - Typically, shareholders must submit the proposal by the deadline disclosed in last year's proxy statement (at least 120 days before the date of the company's proxy statement for the previous year's annual meeting). (*Rule 14a-8(e)*)
- **Must a company accept a revised proposal?**
 - Only if the revised proposal is submitted before the deadline for shareholder proposals.



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Responding to a Proposal: The Basics

- **Do website addresses count against Rule 14a-8(d)'s 500-word limit on shareholder proposals?**

A reference to a website address counts as one word, but the information contained in that website does not count against the word limit. The website may, however, be excluded under Rule 14a-8(i)(3) "if the information contained on the website is materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the proxy rules, including Rule 14a-9." (SLB 14G)

- **Do graphics count against a proposal's word limit?**

On November 1, 2017, the SEC Division of Corporation Finance issued a Staff Legal Bulletin No. 14I (SLB 14I) addressing, among other topics:

- the **use of graphs and images** consistent with Rule 14a-8(d), and
- the **eligibility** of proposals submitted on behalf of shareholders.



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Responding to a Proposal: The Basics

- **SLB 14I stated that the inclusion of graphs and/or images in proposals outside of the 500-word limit is not prohibited, but words in graphics count towards limit.**

- **Nevertheless, Rule 14a-8(i)(3) permits exclusion of graphs and/or images where they:**

- make the proposal materially false or misleading;
- render the proposal so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing it, would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires;
- directly or indirectly impugn character, integrity or personal reputation, or directly or indirectly make charges concerning improper, illegal, or immoral conduct or association, without factual foundation; or
- are irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote.



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Responding to a Proposal: The Process

- **Establish key deadlines for responding to the proposal**
 - (See sample timeline).
- **Confirm the proponent's eligibility and procedural compliance with proxy rules:**
 - Compliance with ownership and timeliness requirements discussed above.
 - One proposal per shareholder for a particular shareholders' meeting. (*Rule 14a-8(c)*)
 - Proposal (plus accompanying supporting statement) may not exceed 500 words. (*Rule 14a-8(d)*)
 - The company must notify the proponent of any deficiencies and a timeframe for response within 14 days of receipt of the proposal. (*Rule 14a-8(f)*)
 - If the proponent fails to respond within 14 days of receiving the company's notice, the company may then submit a no-action letter requesting the right to exclude the proposal.
 - Notice does not need to be given for deficiencies that cannot be remedied, such as failure to meet the proposal deadline.



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Responding to a Proposal: The Process

SLB 14I on eligibility:

- **Submission of proposals through a representative is consistent with Rule 14a-8.**
- **In light of concerns about eligibility to submit proposals, going forward, the Staff will look for documentation to:**
 - Identify the shareholder proponent and the person or entity selected as proxy;
 - Identify the company to which the proposal is directed;
 - Identify the annual or special meeting for which the proposal is submitted;
 - Identify the specific proposal to be submitted; and
 - Be signed and dated by the shareholder.
- **Not a “new foot fault:” materials that allow a reasonable conclusion of eligibility are sufficient**



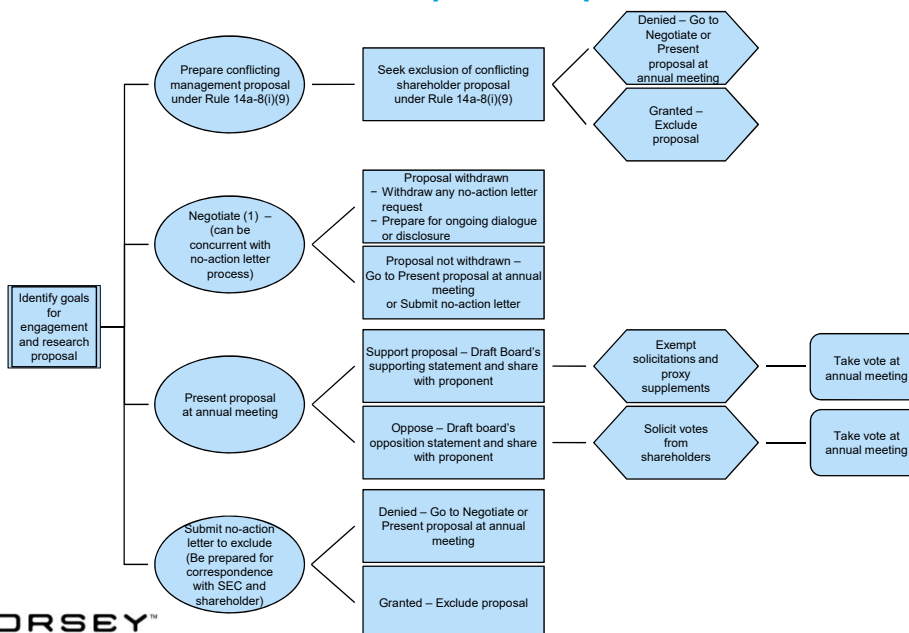
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Responding to a Proposal: The Process

- **Identify goals for the shareholder engagement**
 - Advance the company’s position on the issue
 - Strengthen relationship and reputation with shareholders
 - Collaborate with shareholders on further study of the proposal
 - Discourage future proposals
 - Minimize disruption to board and management processes

Shareholder Proposal Response Plan



Including a Shareholder Proposal

If the company includes the shareholder proposal in its proxy statement:

- Company must send a proponent a copy of its opposition statement no later than 30 days before it files its definitive proxy statement (or no later than 5 days after the company receives a revised proposal), and the proponent may challenge any false or misleading statements. *(Rule 14a-8(m)(3))*
- The proxy statement must include the shareholder's name and address, as well as the number of the company's shares held. The company may instead include a statement that it will provide the information to shareholders promptly upon request. *(Rule 14a-8(l))*
- If the proponent or a qualified representative fails to appear and present the proposal, without good cause, the company will be permitted to exclude all of the proponents proposals for any meetings held in the following two calendar years. *(Rule 14a-8(i)(2))*



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Including a Shareholder Proposal

Exempt solicitations:

- After a proxy has been filed, proponents are using exempt solicitation filings (PX14A6G filings) to broadcast their response to company opposition statements
- Companies face a decision to respond or not to respond.
- For companies that respond with a communication to shareholders:
 - An amended or supplemental filing is likely required; the SEC has taken the position that even websites, email correspondence and scripts used for oral solicitations may be considered proxy soliciting materials to be filed
 - Post the materials on the same website as the original proxy materials, no later than the day that the supplemental material is first sent or made public
 - Decide what further steps should be taken to disseminate the information to shareholders



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Excluding a Shareholder Proposal

- To exclude a proposal, a company may submit a request for a no-action letter to the Staff of the SEC's Division of Corporation Finance (the "Staff"). More than one basis for exclusion may be, and often is, cited.
- A no-action letter from the Staff provides its informal view regarding whether it would recommend enforcement action to the SEC if the company takes the course of action described in the no-action letter request.
- A company must send the SEC a no-action letter request at least 80 days before the date it plans to mail its proxy statement to shareholders, and simultaneously provide a copy to the proponent. (*Rule 14a-8(j)*)
- The proponent may submit its own statement to the SEC. (*Rule 14a-8(k)*)
- The Staff will then consider all the arguments and issue a decision, typically within 30-60 days of receipt.



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Excluding a Shareholder Proposal

- **Shareholder proposals may be excluded for eligibility or procedural deficiencies discussed above. There are also 13 substantive bases for exclusion under Rule 14a-8.**
- **Some commonly cited grounds for exclusion are:**
 - **Violation of proxy rules** (*Rule 14a-8(i)(3)*): e.g., The company demonstrates objectively that a factual statement is materially false or misleading, or the resolution is so inherently vague or indefinite that neither the shareholders voting on the proposal, nor the company implementing the proposal (if adopted) would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.
 - **Ordinary business operations** (*Rule 14a-8(i)(7)*): The proposal deals with a matter relating to the company's ordinary business operations.
 - **Substantial implementation** (*Rule 14a-8(i)(10)*): The company has already substantially implemented the proposal.



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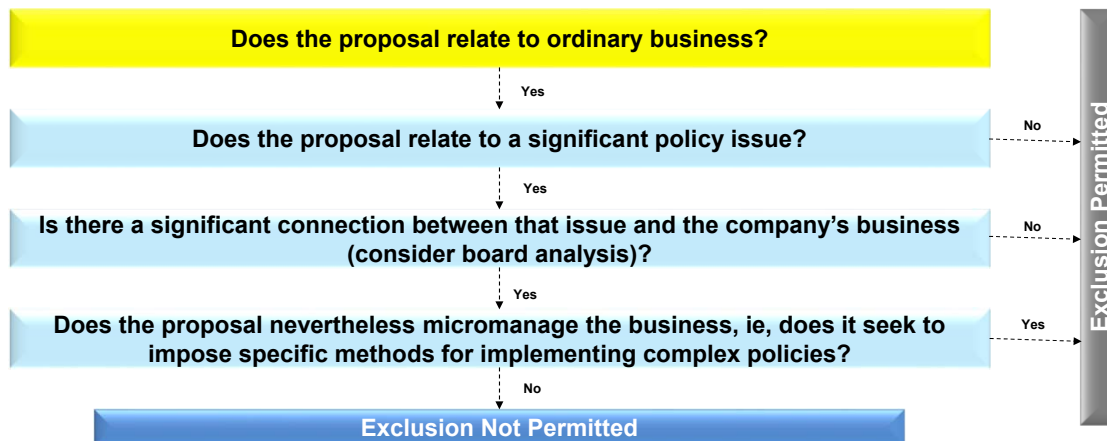
Excluding a Shareholder Proposal

- **The other grounds for excluding proposals:**
 - Improper subject for action by shareholders under state law (*Rule 14a-8(i)(1)*)
 - Violation of law (*Rule 14a-8(i)(2)*)
 - Relates to a personal grievance or special interest (*Rule 14a-8(i)(4)*)
 - Insignificant relationship to company's business (*Rule 14a-8(i)(5)*)
 - Lack of power or authority of the company to implement the proposal (*Rule 14a-8(i)(6)*)
 - Affects the outcome of upcoming director election (*Rule 14a-8(i)(8)*)
 - Conflicts with the company's proposal (*Rule 14a-8(i)(9)*)
 - Substantially duplicates another proposal submitted by another shareholder (*Rule 14a-8(i)(11)*)
 - Resubmissions of certain prior proposals (*Rule 14a-8(i)(12)*)
 - Relates to specific amount of dividends (*Rule 14a-8(i)(13)*)



Rule 14a-8(i)(7): Ordinary Business

- **Framework for thinking through the ordinary business exception:**



Rule 14a-8(i)(7): Ordinary Business

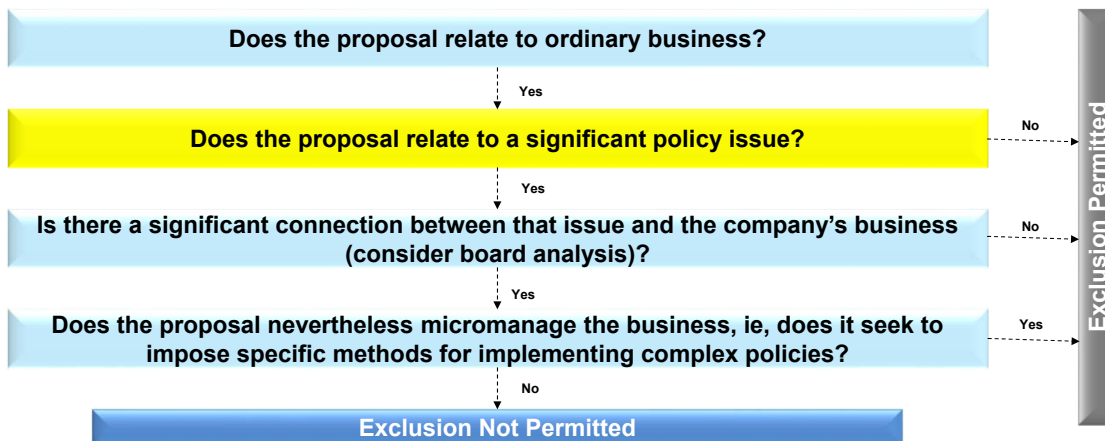
There are two frequently cited considerations for evaluating whether an activity is “ordinary business”:

- Whether the 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,” and
- Whether the proposals seek to “micro-manage” the company by “probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.”

(Exchange Act Release No. 34-40018) (May 21, 1998)

Rule 14a-8(i)(7): Ordinary Business

- Framework for thinking through the ordinary business exception:



Rule 14a-8(i)(7): Ordinary Business

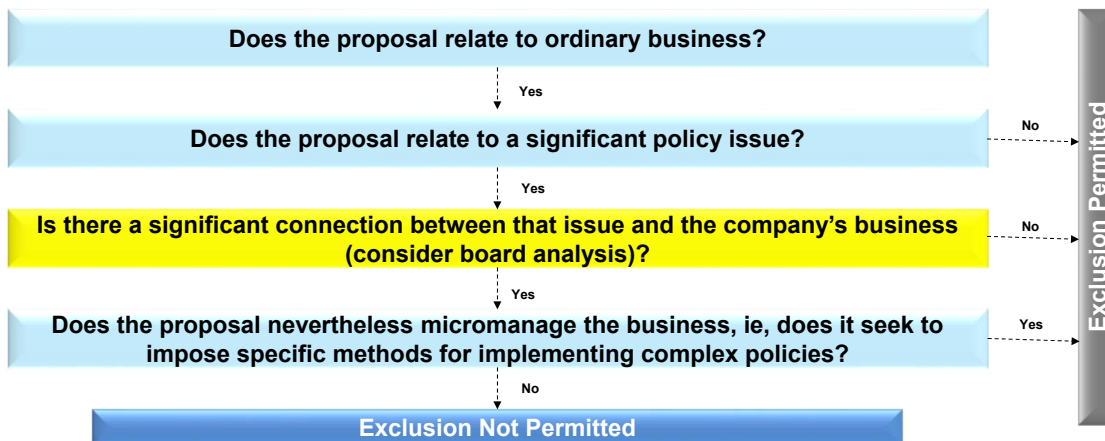
Rule 14a-8(i)(7) – Ordinary Business Basis for Exclusion

- **What constitutes a significant policy issue?**
 - A matter of widespread public debate,
 - That includes legislative and executive attention, and
 - Press attention

(Staff's June 30, 2016 Rule 14a-8 Stakeholder Meeting)

Rule 14a-8(i)(7): Ordinary Business

- **Framework for thinking through the ordinary business exception:**



Rule 14a-8(i)(7): Ordinary Business

Staff Legal Bulletin No. 14I (SLB 14I) addresses the following bases for exclusion:

- the scope and application of the “ordinary business” exception under Rule 14a-8(i)(7) and
- the scope and application of the “economic relevance” exception under Rule 14a-8(i)(5).



Rule 14a-8(i)(7): Ordinary Business

SLB 14I Guidance:

- **The board is well situated to analyze, determine and explain whether a particular issue is sufficiently significant** because the matter transcends ordinary business and would be appropriate for a shareholder vote.
- Accordingly, the Staff would expect a company’s no-action request to **include a discussion that reflects the board’s analysis** of the particular policy issue raised and its significance.

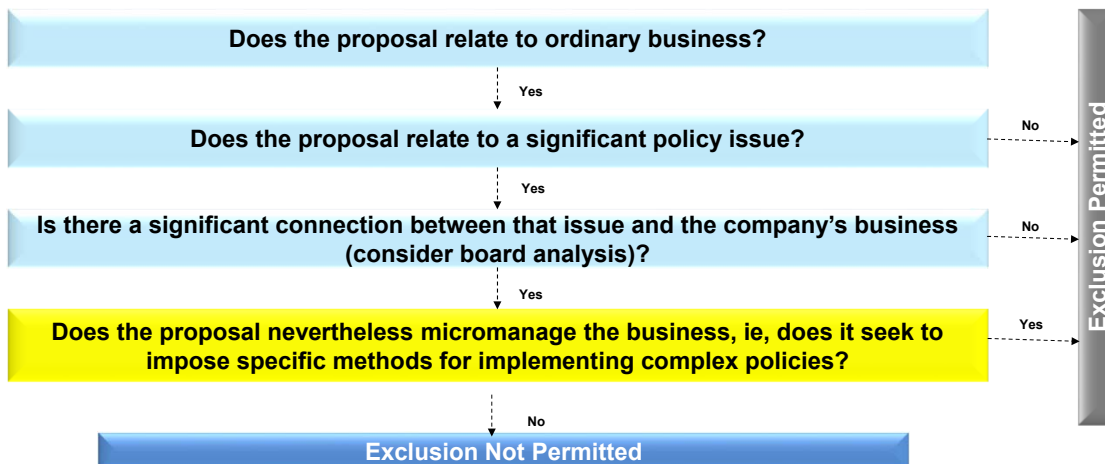


Rule 14a-8(i)(7): Ordinary Business

- Staff will give greater weight to a **“more developed” analysis approved by the full board** versus a committee-only approved analysis
- **Describe the specific board processes** to ensure that its conclusions are well-informed and well-reasoned
 - Details may include board meetings and discussions with consultants
 - Board engagement with shareholders will be an important factor in determining the level of shareholder interest in a given policy, and whether shareholders care because the proposal relates to the company’s business operations. Shareholder engagement will demonstrate that the board has an informed understanding
- **Board materials not expected to be included** with no-action request, which is part of the public record
- **Staff is not likely to give much weight to the outcome of a previous vote.**

Rule 14a-8(i)(7): Ordinary Business

- Framework for thinking through the ordinary business exception:



Exclusion Permitted

- **Micromanagement: Proposal seeks to impose specific methods for implementing complex policies.** *RH (May 11, 2018), SeaWorld Entertainment, Inc. (April 23, 2018), JPMorgan Chase & Co. (March 30, 2018).*
 - Proposal requesting that the company prepare a report that evaluates the feasibility of achieving by 2030 “net-zero” GHG emissions and reducing other emissions. *Amazon.com, Inc. (March 6, 2018), PayPal Holdings, Inc. (March 6, 2018)*
 - Proposal requesting that the company issue a report assessing the feasibility of adopting time-bound, quantitative, company-wide goals for increasing energy efficiency and use of renewable energy. *Gilead Sciences, Inc. (February 15, 2018)*
- **Emerging analysis: Does the level of micromanagement outweigh the significance?**



SHAREHOLDER PROPOSALS: TRENDS, STRATEGIES AND TACTICS

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Exclusion Permitted

- **Relates to sale or distribution of products.** *The TJX Companies, Inc. (April 16, 2018), Cardinal Health (August 4, 2017), McKesson Corporation (June 1, 2017)*
- **Relates to the manner in which the company advertises its products and services.** *Amazon.com, Inc. (March 23, 2018)*
- **Would affect the conduct of ongoing litigation relating to the subject matter of the proposal.** *Wal-Mart Stores, Inc. (April 13, 2018)*
- **Relates to determination of whether or not to hold an in-person annual meeting.** *ComCast Corporation (February 28, 2018)*
- **Relates to charitable contributions to specific types of organizations.** *JPMorgan Chase & Co. (February 28, 2018), Home Depot, Inc. (February 13, 2018), J&J (January 31, 2018)*



SHAREHOLDER PROPOSALS: TRENDS, STRATEGIES AND TACTICS

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Exclusion Permitted

- **Relates to the legal compliance program.** *DTE Energy Company (February 8, 2018)*
- **Relates to compensation that may be paid to employees generally vs compensation to senior executive officers and directors.** *3M Company (January 8, 2018)*
- **Relates to discount pricing policies.** *Empire State Realty Trust (September 14, 2017)*



Exclusion Not Permitted

- **Report on environmental/sustainability issues, eg, actions to minimize methane emissions from hydraulic fracturing operations.** *Chevron Corporation (March 28, 2018)*
- **Absent or insufficient board analysis on nexus of proposal to company's business.** *General Motors Company (April 18, 2018)(report on GHG emissions), Verizon (March 7, 2018)(report on integrating cybersecurity metrics into performance measures for executives), AmeriSource Bergen (January 11, 2018)(report on distribution of opioids)*
- **Report on racial or ethnic pay gaps.** *Walmart Inc. (April 11, 2018)*
- **Report on political contributions and expenditures.** *NextEra Energy, Inc. (March 30, 2018)*



Exclusion Not Permitted

- **Report on the extent to which risks related to public concern over drug pricing strategies are integrated in incentive compensation program for senior executives.** *Biogen Inc. (March 16, 2018), Bristol-Myers Squibb (March 16, 2018), Eli Lilly (March 2, 2018)*
- **Report on cyber risk and actions taken to mitigate that risk.** *Express Scripts (March 7, 2018)*
- **Recommendation to establish human rights committee.** *Apple, Inc. (December 21, 2017)*

Rule 14a-8(i)(5): Economic Relevance

Rule 14a-8(i)(5), the “economic relevance” exception, permits a company to exclude a proposal that:

- relates to operations which account for less than 5% of the company’s total assets at the end of its most recent fiscal year, and for less than 5% of its net earnings and gross sales for its most recent fiscal year, and
- is not otherwise significantly related to the company’s business

Exception had limited application, because historically, relevance was found where a company conducted any amount of business related to the issue in the proposal, and the issue had significant social impact.

Rule 14a-8(i)(5): Economic Relevance

SLB 14I Guidance:

- **Focus will be on second prong**, whether a proposal is “otherwise significantly related to the company’s business.”
- The significance analysis will be **dependent upon the particular circumstances** of the company.
- However, **substantive governance matters** will be viewed as significantly related to almost all companies.
- **Proponents bear the burden** of demonstrating that a proposal is “otherwise significantly related to the company’s business.”
- **The mere possibility of reputational or economic harm will not preclude no-action relief.** In evaluating significance, the Staff will consider the proposal in light of the “total mix” of information about the issuer.



Rule 14a-8(i)(5): Economic Relevance

- **Like the “ordinary business” exception:**
 - include a discussion that reflects the board’s analysis of the proposal’s significance to the company, and
 - detail the specific processes employed by the board to ensure that its conclusions are well-informed and well-reasoned.
- **Evaluated independently from the “ordinary business” exception,** though the analysis has been historically been informed by this exception.
- **Only one successful no-action request based on SLB 14I guidance:** Relates to environmental impact of licensed K-Cups, which the company demonstrated was <5% of total assets, net earnings and gross sales.
Dunkin’ Brands Group, Inc. (February 22, 2018)



Rule 14a-8(i)(9): Conflicting Proposals

- Rule 14a-8(i)(9) allows a company to exclude a shareholder proposal “if the proposal directly conflicts with one of the company’s own proposals to be submitted to shareholders at the same meeting.”
- The Staff redefined its approach under Rule 14a-8(i)(9) in SLB 14H (October 22, 2015) and now focuses on the narrow question of whether there is a direct conflict between the management and shareholder proposals.
- A direct conflict would exist if a reasonable shareholder could not logically vote in favor of both proposals (*i.e.*, a vote for one proposal is tantamount to a vote against the other proposal).



Rule 14a-8(i)(9): Conflicting Proposals

Examples of proposals that may not be excluded:

Proxy Access

- A shareholder proposal that would permit a shareholder or group of shareholders holding at least 3% of the company’s outstanding stock for at least 3 years to nominate up to 20% of the directors
- A management proposal would allow shareholders holding at least 5% of the company’s stock for at least 5 years to nominate for inclusion in the company’s proxy statement 10% of the directors

Compensation

- A shareholder proposal asking the compensation committee to implement a policy that equity awards would have no less than four-year annual vesting
- A management proposal to approve an incentive plan that gives the compensation committee discretion to set the vesting provisions for equity awards



Rule 14a-8(i)(9): Conflicting Proposals

Examples of direct conflicts that may be excluded:

- A company seeks shareholder approval of a merger, and a shareholder proposal asks shareholders to vote against the merger.
- A shareholder proposal that asks for the separation of the company's chairman and CEO, and a management proposal seeking approval of a bylaw provision requiring the CEO to be the chair at all times.
- *Illumina, Inc. (March 18, 2016)*: A shareholder proposal that greater-than-simple-majority voting standards be eliminated, and a management proposal seeking approval of existing supermajority voting standards.



Rule 14a-8(i)(9): Conflicting Proposals

Examples of direct conflicts that may be excluded:

- In 2018, the staff granted no-action relief for 7 proposals to reduce the threshold for calling a special meeting where the company sought ratification of the *existing* threshold. No-action relief denied in one proposal where the company did not have an existing provision.
- Consistent with *Illumina, Inc.* and SLB 14H, but cries of “gamesmanship” expressed by CII and some shareholder proponents.
- SEC responded in *Capital One Financial Corp.* by requiring disclosures in proxy statement:
 - Company omitted a shareholder proposal to lower the ownership threshold
 - Company believes a vote in favor of ratification of the existing threshold is equivalent to a vote against a proposal lowering the threshold
 - If ratification is not received, the impact on the special meeting threshold, if any and the company's course of action



Rule 14a-8(i)(10) – Substantial Implementation

- Rule 14a-8(i)(10) permits a company to exclude a shareholder proposal from its proxy materials if the company has “substantially implemented” the proposal.
- The rule was “designed to avoid the possibility of shareholders having to consider matters which have already been favorably acted upon by the management.” (*Release No. 34-12598, July 7, 1976*)



Rule 14a-8(i)(10) – Substantial Implementation

Substantial Implementation and Proxy Access

- Continues to be one of the most used and successful bases for exclusion, accounting for 33% of all exclusions granted and a 66% success rate in 2018; half of successful requests related to governance proposals.
- Staff continues to allow companies to exclude proxy access proposals if the company has already adopted proxy access bylaws that fulfill the “essential objective” of the shareholder proposal, even where the certain details differ.
- Staff rejected exclusion requests in proxy access “fix-it” proposals where the proposal focused on one change (e.g., size of nominating group; number of access candidates).



Shareholder Proposal Deadlines					
Action	Relevant Resources	Required Timing	Date	Responsible Party	Complete
Deadline to receive shareholder proposals for inclusion in proxy statement	Rule 14a-8(e)	120 days prior to Mailing Date			
Deadline to receive shareholder proposals outside of proxy statement	Bylaws				
Send notice of procedural defects to the proponent, if needed	Rule 14a-8(f)(1)	Within 14 days of the date the proposal was received			
Deadline for response to notification of procedural defects	Rule 14a-8(f)(1)	Within 14 days of the date the proponent received the notice			
Draft no-action request and/or competing management proposal		After deadline to cure procedural defects has passed			
Deadline to file no-action request with SEC; simultaneously notify proponent of filing	Rule 14a-8(j)	No later than 80 days prior to filing definitive proxy statement			
If SEC does not grant no-action relief:					
Draft statement in opposition to shareholder proposal					
Board meeting - approve statement in opposition, as applicable					
Provide proponent with copy of statement in opposition	Rule 14a-8(m)	No later than 30 calendar days before filing definitive proxy			
Deadline for proponent to submit revised proposal to the Company, if allowed by SEC staff	Division of Corporation Finance Staff Legal Bulletin No. 14 (July 13, 2001) at B.3 and B.12	Within 7 days after the date the proponent receives the staff's response			
If the proponent revises its proposal as required by SEC staff, provide proponent with copy of revised statement in opposition	Rule 14a-8(m)	Within 5 days after receiving the proponent's revised proposal			
Mail definitive proxy to shareholders	Rule 14a-16	No less than 40 days prior to annual meeting, assuming notice and access			