SHOULD LABOR BE ALLOWED TO MAKE SHAREHOLDER PROPOSALS?

Randall S. Thomas*
Kenneth J. Martin**

Abstract: In this Article, we investigate whether labor unions and related entities should be permitted to continue to make shareholder proposals using Rule 14a-8 of the federal securities laws. We focus on the claim that labor is using the shareholder proposal mechanism to further the interests of workers at the expense of other shareholders. In particular, corporate management groups have suggested that when labor is involved in collective bargaining negotiations with management, it should be barred from submitting shareholder proposals because labor proposals seek to further interests not shared by other security holders of the company. Using data on shareholder proposals from the 1994 proxy season, we find that labor union proposals as a whole get as much or more support than do similar proposals made by other shareholder groups. Furthermore, when we examine a subset of labor union proposals that have been identified by management groups as instances where labor was acting in its own self-interest, we find no significant differences between shareholder support for these proposals and for other shareholders' proposals of a similar nature. We conclude that regulatory reform is unnecessary.

I. INTRODUCTION

In recent years, organized labor has become one of the most aggressive proponents of corporate governance reforms at major American corporations. Unions, union pension funds, individual union members, and union-oriented investment funds[1] have seized on the shareholder proposal rule, Rule 14a-8 of the federal securities laws,[2] as their weapon of choice to push for reforms ranging from redemption of Rights Plans[3] to implementation of confidential shareholder voting and

* Professor of Law, University of Iowa College of Law.

** Associate Professor of Finance, College of Business and Economics, New Mexico State University. The authors thank Stephen M. Bainbridge, David Baldus, Jonathan C. Carlson, Charles Elson, Robert W. Hamilton, Michael D. Green, Robert M. Lawless, Chris Marquette, Paul Neuhauser, Michael Saks, David Skeel, and the participants of the 1996 annual meeting of the Financial Management Association for helpful comments on this draft of the paper. We also wish to thank Jay Byers, Charles Luh, Jesse Lynn, Susan Schwochau, James Smith, and Daniel Bernstein for their assistance in researching parts of this Article.

1. We will refer to these entities collectively as "labor" groups.

2. 17 C.F.R. § 240.14a-8 (1997).

3. Rights Plans are one of the most powerful antitakeover defenses available to a target company. *See generally* Randall S. Thomas, *Judicial Review of Defensive Tactics in Proxy Contests: When Is Using a Rights Plan Right?*, 46 Vand. L. Rev. 503 (1993). They were originally developed to deter two-tiered front-end-loaded tender offers that coerced shareholders into tendering into the offer for

caps on executive pay.[4] Much of labor's activism has been aimed at improving the financial performance of its massive securities portfolios for the benefit of pensioners and future retirees.[5] More controversially, however, labor has targeted some of its shareholder proposals at companies where it is concurrently engaged in collective bargaining negotiations or union organizing campaigns.[6]

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fear of receiving a poor price for their shares in the back end of the transaction. *See* Moran v. Household Int'l, Inc., 500 A.2d 1346, 1356 (Del. 1985). Subsequently, their use has spread to precluding shareholders from accepting all-cash, all-shares premium-priced tender offers. From the viewpoint of target management, one very important advantage of Rights Plans is that they can be adopted without shareholder approval.

4. For recent reports on labor's activism in its role as a shareholder, see Aaron Bernstein, *Labor Flexes Its Muscles—As a Stockholder*, Bus. Wk., July 18, 1994, at 79 (stating that union-mounted proxy fights have quadrupled since 1992); David Cay Johnston, *Teamsters Are Challenging GE Chief's Compensation*, N.Y. Times, Mar. 3, 1997, at D2 (discussing Teamster's pension fund's placement of shareholder resolutions in GE proxy statement for 1997 annual meeting to cap executive base salaries of top five GE executives at one million dollars); Paul Sweeney, *Clash By Proxy*, Across The Board, May 1996, at 21 (discussing labor union activism during 1996 proxy season); Frank Swoboda, *AFL-CIO Changing Its Tactics; Union To Expand Advertising, Corporate Campaigns Against Employers*, Wash. Post, Feb. 20, 1997, at C2 (announcing AFL-CIO plans to increase stockholder campaigns against range of employers in 1997 proxy season).

These labor groups also occasionally have launched their own solicitations to force change more directly. *See, e.g.*, United Mine Workers of Am. v. Pittston Co., Fed. Sec. L. Rep. (CCH) ¶ 94,946 (D.D.C. Nov. 24, 1989) (discussing labor union solicitation of proxies to obtain shareholder approval of its proposals without using Rule 14a-8).

For a more complete discussion of labor's current shareholder initiatives, see Stewart J. Schwab & Randall S. Thomas, *Reinventing Corporate Governance: Shareholder Activism By Labor Unions*, 96 Mich. L. Rev. (forthcoming Feb. 1998). One startling characteristic of the current labor actions is the number of labor-sponsored independent solicitations of shareholders seeking shareholder approval of actions without resort to the company's proxy statement. A number of difficult legal issues are raised by these solicitations and the company's opposition to them. For example, if the company knows that labor groups are going to solicit shareholders before the annual meeting, but the labor groups have not done so at the time the company issues its annual meeting proxy materials to shareholders, can the company send out the materials without mentioning the impending labor solicitation and then exercise discretionary authority to vote the proxy it receives back from shareholders against any labor proposals that are made at the meeting? *See* Randall S. Thomas & Catherine T. Dixon, *Aranow & Einhorn on Proxy Contests for Corporate Control* § 9.01[E][3] (3d ed. 1998) (discussing SEC rulings on scope of discretionary authority); Schwab & Thomas, *supra*; Idaho Power Co., SEC No-Action Letter, Mar. 13, 1996, *available in* 1996 WL 114545.

5. *See, e.g.*, Judith H. Dobrzynski, *Teamsters Hit a Nerve on Directors*, N.Y. Times, Mar. 22, 1996, at D1 (discussing Teamsters pension fund list of 23 least valuable directors and its implications for corporate governance reform).

One important question that we do not address in this Article is whether labor's shareholder proposals have a positive (or negative) effect on the target companies' performance. In research currently in progress, we are examining the impact of different sponsors' shareholder proposals on various measures of economic performance. We are also examining what factors lead shareholders to target certain companies and not others.

6. Schwab & Thomas, *supra* note 4.

Corporate management has protested vehemently against this use of the shareholder proposal rule, claiming that labor groups are engaged in "corporate campaigns" to win concessions that have nothing to do with their shareholdings and everything to do with their role as representatives of workers.[7] Business groups have asked Congress to curb labor's use of the shareholder proposal mechanism, proposing changes in the Securities and Exchange Commission's (SEC) regulations that would allow companies to exclude labor-sponsored resolutions from annual proxy statements.[8] In particular, the American Trucking Association (ATA) has petitioned the SEC to change its interpretation of Rule 14a-8 so that corporations can exclude shareholder proposals by labor representatives at companies that are involved in collective bargaining negotiations or union organizing campaigns.[9]

In this Article, we examine whether labor groups should be allowed to use Rule 14a-8 as a mechanism for pursuing their interests as shareholders.[10] We focus on the questions raised by the ATA and corporate management about labor's potential conflicting roles as shareholders and representatives of workers. Using data from the 1994 proxy season, we conducted an empirical examination of the differences between shareholder resolutions proposed by labor groups and those sponsored by other investors.

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7. Corporate campaigns have been described as multi-tactic pressure campaigns directed at a company (or companies) by a union engaged in collective bargaining, wage disputes, or the protest of workplace grievances. *Id. See infra* Part IV.A (further discussing corporate campaigns).

8. *See* Stephen Baker, *The Yelping over Labor's New Tactics*, Bus. Wk., Oct. 23, 1995, at 75; *see also* Elizabeth Walpole-Hofmeister, *Corporate Campaigns: Business Leaders Blast Union Tactics; House Hearings Planned for November*, Daily Lab. Rep. (BNA), Sept. 22, 1995, *available in* Westlaw, BNA-DLR Database (reporting that American Trucking Association had sent letter to SEC asking that it change its rules to permit companies to refuse to include union-sponsored resolutions in proxy statements that are submitted in midst of corporate campaign).

9. *See* Letter from Daniel R. Barney, Senior Vice President & General Counsel, American Trucking Associations, to Arthur Levitt, SEC Chairman, & Steven M.N. Wallman, SEC Commissioner 1 (Sept. 21, 1995) (on file with author) [hereinafter ATA Letter]. The ATA proposes that the SEC permit companies to exclude shareholder proposals when:

> (a) during or within a defined period in advance of the planned start of collective bargaining at the company or of the expiration of a collective bargaining agreement (as well as during the pendency of any administrative or judicial proceedings with respect to either) or when a union organizing campaign is ongoing, imminent, or threatened; *and*
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> (b) the proponent is the union or a member or retiree of the union that is engaged in such organizing or collective bargaining activities.

Id.

10. We do not address specifically the merits of Rule 14a-8 itself, only its application to labor shareholder proposals.

Our analysis focuses on *shareholders'* perceptions of these proposals and in particular on the proposals' success in the ballot box. The question we seek to answer is whether shareholders treat labor proposals differently from proposals submitted by other shareholders.

Our data set contains 192 shareholder proposals submitted by labor groups, public institutions, private institutions, and individuals. We included proposals covering internal and external corporate governance, compensation, and miscellaneous issues. We estimated regressions for the fraction of votes cast for a shareholder-sponsored corporate governance proposal, including independent variables for sponsor, proposal type, and ownership.[11]

Controlling for the type of proposal and ownership structure, we found that: (1) labor-sponsored proposals received a statistically significant higher percentage of favorable votes than did similar proposals sponsored by private institutions and individuals; and (2) labor-sponsored proposals obtained approximately the same percentage of votes as proposals sponsored by public institutions. We interpret these results to mean that labor's proposals taken as a whole are viewed by shareholders as being no different from proposals submitted by other groups of shareholders.

To further explore these findings, we focused on a subsample of proposals identified by the ATA as specific instances where labor has used the proposal mechanism as part of a "corporate campaign." We found no significant difference between the average percentage of votes cast for these allegedly "abusive" proposals and the average percentage of votes cast for all other corporate governance proposals. We did find that these proposals received an insignificantly lower percentage of favorable votes than other labor proposals.

Our basic hypothesis is that shareholders will vote in their own self-interest, and, if they believe that labor is acting against their interests, they will vote against labor's proposals. We recognize that companies do not have to disclose the identity of the shareholders who submitted a proposal unless they wish to do so or are asked by a stockholder to do so later.[12] If a company does not make this disclosure, then some shareholders may be unaware of the identity of the proponent, and therefore may not perceive that the proposal is adverse to their own self-interest.

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11. The ownership variables include the fraction of shares owned by institutional holders and the fraction of shares owned by insiders.

12. Rule 14a-8(b)(2), 17 C.F.R. § 240.14a-8(b)(2) (1997).

However, we believe that there are three reasons to think that this is not a significant problem for our study. First, the company always has the option of disclosing the shareholder proponent's identity. If management is opposed to the proposal, and believes that shareholders would be less inclined to vote in favor of it if they knew labor was sponsoring the proposal, then they could disclose that the proposal is being made by labor interests and emphasize this point in the company's statement in opposition to the proposal.[13]

Of course, some shareholders may choose not to read such materials because they are rationally apathetic. While it seems that truly rational apathetic shareholders are those who choose not to vote at all, and hence do not show up in our data (which only measure actual votes received), it is possible that some shareholders will choose to vote, but avoid reading the proxy materials (and any other materials) they receive from the company. Although there is to our knowledge no conclusive evidence on this point, the more logical conclusion in our eyes is that most shareholders that vote have decided to become informed, and while they may not read the entire proxy statement, they are likely to read those materials that the company highlights as the most important and that bear on the issues listed on the proxy card, such as a shareholder proposal. This would certainly be true for institutional shareholders that have fiduciary obligations to act in an informed manner to benefit their beneficial participants.

Second, even if management chooses not to make these disclosures, many shareholders will be aware of the identity of the proponent. This is especially true in high-profile instances where the press is actively reporting on a corporate campaign or a contested collective bargaining situation. As noted previously, the press has become increasingly interested in covering labor's shareholder initiatives.[14] Even in situations not widely reported by the press, many institutional investors are informed about the identity of the proponent through shareholder

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13. *See* Questar Corp., Preliminary Proxy Statement, Mar. 18, 1996, at *34, *available in* Westlaw, EDGAR Database, Filing 96535686 (setting forth corporation's statement in opposition to United Food and Commercial Workers Union shareholder proposal seeking to get company to adopt confidential shareholder voting, in which company tells shareholders that company believes that this particular shareholder proposal is part of corporate campaign against Albertson's and all other corporations with links to Albertson's through its directors and officers); *see also* Union Pacific Corp., Supplemental Proxy Materials, Apr. 4, 1996, at *2–3, *available in* Westlaw, EDGAR Database, Filing 96544406 (corporation's letter to its shareholders urging them not to sign any proxy card from Teamsters labor union that might be sent to them as part of solicitation effort by union).

14. See Schwab & Thomas, *supra* note 4, for many other examples of press coverage of these contests.

organizations, such as the Council of Institutional Shareholder Services or the Investor Responsibility Research Center.[15]

Finally, it may be the case that many institutional shareholders are indifferent to who sponsors corporate governance proposals because they have adopted voting policies that dictate they will vote in a certain manner on all corporate governance proposals of a particular type. In other words, these shareholders do not care about the identity of the sponsor of the proposal. All they are interested in is the type of proposal being made. While this is plainly true for some investors, if these types of shareholders are uniformly distributed across the companies in our sample, so that on average relatively equal percentages of shares are held by these types of shareholders in the companies in our sample, then it should equally increase support levels for all corporate governance proposals of these types. It should not affect our results, however, which show that labor and public institution proposals receive higher levels of shareholders' support, even after controlling for proposal type.

We interpret these results to suggest that, even in situations in which labor is battling management over other issues, such as collective bargaining negotiations, shareholders continue to treat labor proposals as being no different from those submitted by others. These results suggest that management's concerns with labor's use of the shareholder proposal mechanism are overstated and that regulatory reform is unnecessary.

This Article proceeds as follows. In Part II, we trace the development of labor shareholder activism in the United States during the 1980s and 1990s. Part III analyzes Rule 14a-8's application to labor shareholder proposals. It includes separate discussions on the mechanics of the rule itself and how the rule is currently being applied by the SEC to labor proposals. In the latter, we focus primarily on the personal grievance and ordinary business exclusions. Part IV evaluates current proposals by corporate management groups to block labor groups from using the shareholder proposal rule to place issues on the corporate proxy card. After describing corporate campaigns, we look at a recent management proposal and some criticisms that have been leveled at it. Finally, in Part V, we present our empirical analysis of the voting data on shareholder proposals in 1994.

15. *Id.*

II. THE DEVELOPMENT OF LABOR'S SHAREHOLDER ACTIVISM

Labor's shareholder activism grew out of the wave of corporate takeovers in the 1980s.[16] During this period, unions generally supported corporate management in resisting hostile acquisitions by, among other things, pushing for stronger state antitakeover laws and accepting defensive employee stock ownership plans (ESOPs).[17] Employee shareholders also supported a host of other antitakeover devices that insulated management from the consequences of poor performance.[18]

By the end of the 1980s, many companies that had been through mergers and acquisitions were left with heavy debt loads.[19] Other companies faced increased competition, both domestic and foreign. As a result of these and other forces, corporate America went through (and to some extent is still going through) a series of restructurings with many companies dramatically downsizing their work forces.[20] Corporations shifted toward using more temporary and part-time workers.[21]

As corporations changed their structures, locations, and owners, millions of workers lost their jobs, eroding unions' membership and strength.[22] Union membership further declined as workers perceived that the unions were unable to protect their members from layoffs. Union

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16. *See* William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self-Regulation*, 73 N.C. L. Rev. 1861, 1906 (1995); Patrick S. McGurn, *Growth of Union Activism Is Byproduct of 1980s*, IRRC Corp. Governance Bull., Jan./Feb. 1994, at 5, 5. This was not the first time that labor groups had used Rule 14a-8. In the early 1980s, the American Airlines pilots' union (and some other labor groups) had used it for some very specialized purposes. Telephone Interview with William Morley, Senior SEC Official (1997).

17. *See, e.g.*, Allen Michel & Israel Shaked, *Takeover Madness: Corporate America Fights Back* 244–55 (1986) (explaining "Employee Benefit Plan Defense" in context of Dan River's 1982 battle with Carl Icahn); *see also* Vineeta Anand, *Employee-Shareholders an Angry New Voice*, Pensions & Investments, Apr. 4, 1994, at 26. Anand notes:

> [T]he surge in shareholder activism by employees and labor unions is coming back to haunt corporations that have put millions of shares in the hands of workers through employee stock ownership plans, pension funds, or stock option programs since the mid-1980s, reckoning they could count on employees as allies in hostile takeover bids.

Id.

18. McGurn, *supra* note 16, at 5 (quoting Teamsters President Ron Carey).

19. *Id.*

20. *See id.*; *see also Is Recovery in Sight? Don't Look at Payrolls*, N.Y. Times, Apr. 15, 1991, at D1 (stating that foreign and domestic competition and "huge" debt contributed to rising unemployment).

21. McGurn, *supra* note 16, at 5.

22. Katherine Van Wezel Stone, *Labor and Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. Chi. L. Rev. 73 (1988).

membership fell from twenty percent of the total public and private workforce in 1983 to roughly sixteen percent by 1992.[23]

In the early 1990s, the fear of corporate takeovers had temporarily receded. Labor perceived that managers, now insulated from the consequences of bad policies and poor performance by antitakeover devices, which labor had supported, were using their power to close plants, hire permanent replacement workers for striking employees, and pay themselves exorbitant salaries and benefits. From labor's perspective, management simultaneously failed to focus on long-term investments in training, technology, and improved products. Labor grew increasingly dissatisfied with management's corporate vision.[24]

Yet, even as the unions' membership declined, its pension funds' assets increased. During the 1980s and 1990s, there was an extraordinary rise in union pension assets and employee stockholdings. The number of jointly-trusteed national and local union plans holding more than one million dollars in assets reached 1580 in 1993. Together, these funds' combined assets grew from a total of $55 billion in 1983 to about $216 billion in 1993.[25]

During the same time period, ESOPs' stockholdings also increased markedly. By the end of 1993, approximately one out of every five stock exchange-listed corporations had average employee ownership of about fifteen percent.[26] Originally created by companies for their tax and antitakeover features, these ESOPs have become increasingly activist about corporate governance issues.[27]

Unions started using their position as shareholders to gain greater input into the corporate decisionmaking process. In the mid-1980s, union pension funds began building alliances with other pension funds through shareholder groups.[28] These shareholder groups began pushing for

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23. McGurn, *supra* note 16, at 5.

24. *Id.*

25. *Id.*

26. *Id.* at 6. *See generally* Joseph Raphael Blasi & Douglas Lynn Kruse, *The New Owners: The Mass Emergence of Employee Ownership in Public Companies and What It Means to American Business* (1991) (documenting rapid growth of, and forecasting continued increases in, employee ownership of public corporations); Elana Ruth Hollo, *The Quiet Revolution: Employee Stock Ownership Plans and Their Influence on Corporate Governance, Labor Unions, and Future American Policy*, 23 Rutgers L.J. 561 (1992) (reporting statistics on ESOP stock ownership in significant number of large American corporations).

27. Hollo, *supra* note 26, at 588–89.

28. Thus, the pension funds of the Sheet Metal Workers, the International Brotherhood of Electrical Workers, and the United Food and Commercial Workers Union were founding members

corporate changes using, among other things, the shareholder proposal rule.

The first generation of corporate governance shareholder proposals was largely sponsored by public pension funds such as the California Public Employees Retirement System (CalPERS). Commencing in 1987, these proposals were made to large groups of companies where shareholders were dissatisfied with the expanding legal constraints on takeover activity and urged management to redeem Rights Plans (often called "poison pills") or submit them to shareholder approval.[29]

Over the next few years, shareholder activists began to attack other antitakeover defenses with proposals suggesting that companies prohibit greenmail payments, that companies opt out of state antitakeover statutes, and that companies be required to let shareholders approve placements of large blocks of stock with management-friendly parties.[30] Shareholder activists also began to focus on the voting process by proposing changes such as confidential voting in corporate elections.[31] Thereafter, shareholders began including proposals seeking broader structural reforms regarding issues such as executive pay, golden parachutes, staggered boards, board independence, and supermajority vote requirements.[32]

Labor frequently supported the public pension funds' corporate governance shareholder proposals. The United Brotherhood of Carpenters and Joiners of America filed proposals jointly with the State of Wisconsin Investment Board and CalPERS as early as the mid-1980s.[33] Other union funds gradually became more activist shareholders. In 1989, the United Mine Workers used shareholder proposals as part of a multi-tactic corporate campaign.[34] The Electrical Workers and United

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of the Council of Institutional Investors (CII). By 1993, one-quarter of the CII's membership was union funds. McGurn, *supra* note 16, at 6.

29. *See* Bratton & McCahery, *supra* note 16, at 1906. For further discussion of poison pills and other antitakeover devices, see Thomas & Dixon, *supra* note 4, ch. 20.

30. *See* Bratton & McCahery, *supra* note 16, at 1908 n.166.

31. Ted Jaenicke, *Shareholder Proposals Gain Higher Votes But Fewer Victories*, IRRC Corp. Governance Bull., May/June 1991, at 1, 1.

32. *See, e.g., id.* at 3–4 (summarizing voting results on proposals regarding golden parachutes, classified (staggered) boards, independent directors, nominating committees, director stock holdings, cumulative voting, supermajority requirements, executive compensation, and limits on director terms).

33. *See* McGurn, *supra* note 16, at 6.

34. *See infra* notes 95–96 and accompanying text.

Paperworkers offered corporate governance shareholder proposals in 1990, and the Textile Workers joined in sponsoring proposals in 1991.[35]

Labor's involvement with shareholder proposals really took off in the early 1990s. In 1991, the American Federation of Labor–Congress of Industrial Organizations (AFL-CIO) issued model proxy voting and investment guidelines in which it encouraged its members to push more activist agendas.[36] This was followed in 1992 by the Industrial Union Department (IUD) of the AFL-CIO passing a resolution urging "'workers and their representatives to take a more active role in the governance of their corporations and in responsible investing and proxy voting by pension plans.'"[37] A similar resolution called for the use of "'coordinated campaigns in demanding corporate accountability.'"[38]

The rise in labor shareholder activism was further encouraged by the SEC's simplification of the federal proxy solicitation rules in 1992 and the U.S. Department of Labor's (DOL) issuance of proxy voting guidelines in July 1994.[39] The 1992 amendments to the proxy rules did not directly affect Rule 14a-8, although they were tailored in part to benefit shareholder proponents.[40] Two new exemptions expressly protected communications calculated to garner support for Rule 14a-8 proposals: the unqualified carve-out from the definition of "solicitation" set forth in new Rule 14a-1(l)(2) permitting unilateral announcements by proponents of why they intend to vote in favor of their own proposals,[41]

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35. *See* McGurn, *supra* note 16, at 6.

36. Jayne Elizabeth Zanglein, *Pensions, Proxies and Power: Recent Developments in the Use of Proxy Voting To Influence Corporate Governance*, 7 Lab. Law. 771, 787 (1991).

37. McGurn, *supra* note 16, at 6 (quoting resolutions from IUD's Constitutional Convention in 1992).

38. *Id.* (quoting resolutions from IUD's Constitutional Convention).

39. *See* Patricia B. Limbacher, *DOL Peeking Over Proxy Shoulders*, Pensions & Investments, Mar. 6, 1995, at 1; Patrick S. McGurn, *DOL Issues New Guidelines on Proxy Voting, Active Investing*, IRRC Corp. Governance Bull., July/Aug. 1994, at 1.

40. For further discussion of the impact of the 1992 amendments to the proxy rules, see generally Thomas & Dixon, *supra* note 4, § 6.02, and Thomas W. Briggs, *Shareholder Activism and Insurgency Under the New Proxy Rules*, 50 Bus. Law. 99 (1994).

41. Rule 14a-1(l)(2), 17 C.F.R. § 240.14a-1(l)(2) (1997). Under this new rule, in most circumstances a security holder who does not otherwise engage in a proxy solicitation can state how it intends to vote and its reasons for its vote, provided that the security holder makes the communication in a published or broadcast opinion, a speech in a public forum, a press release, a statement, or an advertisement. Assuming compliance with the prescribed conditions, Rule 14a-8 proponents therefore may avail themselves of this provision for exempt voting announcements to influence the vote of their fellow shareholders without risking even proxy antifraud liability.

and the qualified exemption provided by Rule 14a-2(b)(1) for inter-shareholder solicitations that extends to Rule 14a-8 proponents.[42]

The new rules permit shareholders who are not seeking proxy authority to communicate freely with each other without fear of triggering the federal filing requirements. Shareholders can discuss potential proposals amongst themselves to determine whether other shareholders will support them. Even after a proposal has appeared on the corporate ballot, Rule 14a-2(b)(1) permits shareholders to discuss it with other shareholders and ask them to support it without triggering the proxy rules coverage subject to some limitations, such as not soliciting proxies from other shareholders.[43] This enables shareholders to solicit support for their proposals from other shareholders without spending large sums of money to make the SEC filings that are necessary under the proxy rules.

In its 1994 interpretative bulletin on proxy voting, the DOL advocated a corporate activist role for private pension funds.[44] Investors were urged to monitor or influence corporate management when such activities would be likely to enhance the value of investments. The DOL suggested issues to be raised in shareholder proposals, including the independence and expertise of candidates for boards of directors, executive compensation, the nature of long-term business plans, and corporate policies regarding mergers and acquisitions.[45]

All of these forces came together in the 1994 proxy season, when labor interests collectively filed more proposals concerning corporate governance (80) and obtained majority support on more of them (7) than the combined efforts of all other institutional investors.[46] This trend

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42. Rule 14a-2(b)(1), 17 C.F.R. § 240.14a-2(b)(1). There are several important restrictions attached to this qualified exemption, including the conditions that the shareholder cannot seek "directly or indirectly, either on its own or another's behalf, the power to act as proxy for a security holder," and that the shareholder cannot be a member of any Rule 13D group that has not disclosed it will not engage in a control transaction. *Id.*

43. *Id.* For further discussion of the effect of the new proxy rules on shareholder voting, see Thomas & Dixon, *supra* note 4, § 6.02.

44. For the full text of this bulletin, see 59 Fed. Reg. 38,860 (July 29, 1994) (codified at 29 C.F.R. pt. 2509).

45. Interpretive Bull., 29 C.F.R. § 2509.94-2 (1996).

46. Patrick S. McGurn, *Labor Again Takes Lead Role in Activism*, IRRC Corp. Governance Bull., Nov./Dec. 1994, at 3, 3 [hereinafter McGurn, *Labor Takes Lead*]; *see also* Bernstein, *supra* note 4, at 79 (reporting that unions accounted for 70 proxy battles and 7 of the 11 victories registered by shareholders during 1994); Patrick S. McGurn, *Controversy Swirls Around Labor Unions' Shareholder Activism*, IRRC Corp. Governance Bull., Jan./Feb. 1994, at 1, 3 [hereinafter McGurn, *Controversy Swirls*] (discussing proposals filed before actual votes taken).

seemed to continue in 1995 and 1996. By the end of 1994, labor organizations had filed for the 1995 proxy season almost as many proposals as the year before, with more expected as the season continued.[47] A group of fourteen labor groups, including unions, union pension funds, individual union members, and a labor-oriented investment fund, filed seventy-five out of the 265 shareholder proposals on corporate governance issues that were tracked by an independent shareholder organization.[48] These labor-related proponents filed more shareholder proposals than any other group of investors for the 1995 proxy season.[49]

This rise in labor's shareholder activism has focused national attention on labor's use of the shareholder proposal rule. To better understand the issues surrounding labor's use of the shareholder proposal mechanism, we next examine Rule 14a-8 and the SEC's current application of the rule to labor union proposals.

III. THE SEC'S CURRENT APPLICATION OF RULE 14a-8 TO LABOR'S SHAREHOLDER PROPOSALS

A. The Mechanics of Rule 14a-8

Shareholders of public companies have the ability, subject to certain limitations and restrictions, to put proposals on the company's ballot at its annual meeting through the use of Rule 14a-8, the shareholder proposal rule.[50] This rule states that if a security holder of a corporation notifies the company of its intention to present a proposal for action at a forthcoming shareholders' meeting, the company is required to include the proposal in its own proxy material and to provide a means by which the security holders can vote with respect to the proposal.[51] However, the issuer can exclude a proposal if the proponent fails to meet certain procedural eligibility requirements[52] or substantive content restrictions.[53]

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47. Patrick S. McGurn, *Labor, IRAA Spark Active 1995 Shareholder Campaign*, IRRC Corp. Governance Bull., Nov./Dec. 1994, at 1, 1.

48. *Id.* at 1; McGurn, *Labor Takes Lead*, *supra* note 46, at 3.

49. McGurn, *supra* note 47, at 1.

50. *See* Rule 14a-8, 17 C.F.R. § 240.14a-8 (1997). For a more complete description of the mechanics of Rule 14a-8, see Thomas & Dixon, *supra* note 4, ch. 16.

51. Rule 14a-8(a), 17 C.F.R. § 240.14a-8(a).

52. Rule 14a-8(a) establishes four threshold eligibility requirements for shareholders seeking to make proposals. These requirements specify: the number of proposals a shareholder can submit; the minimum number of securities a shareholder must own to make a proposal; the latest date by which

If the company includes the proposal on the ballot, the proponent is entitled to print a short supporting statement of the reasons that it believes shareholders should vote for the proposal.[54] The company may respond with an opposing statement of unlimited length.[55] The company has the option of printing the name and address of the proponent and the number of shares that the proponent holds or a statement that this information is available from the company upon request.[56]

If the company chooses to exclude a proposal,[57] management has the burden of demonstrating to the SEC that its position is justified.[58] If the SEC issues a "no-action" letter, stating that it will not take any legal action against the company if it omits the proposal, and the company omits the proposal, the proponent has a private right of action to force the issuer to include the proposal in proxy materials.[59]

B. Applying Rule 14a-8 to Labor's Shareholder Proposals

Some corporations have resisted labor's efforts to use the shareholder proposal rule by seeking to exclude labor's proposals under various provisions of subsection (c) of Rule 14a-8. The usual grounds for exclusion proffered by companies faced with labor-shareholder

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a shareholder can submit proposals; and the shareholder's attendance at the meeting to present the proposal.

53. Rules 14a-8(c)(1)–(13), 17 C.F.R. § 240.14a-8(c)(1)–(13), set forth 13 circumstances under which companies may omit proposals from their proxy materials. Management has the burden of demonstrating the validity of its view that a proposal may properly be omitted. Rule 14a-8(d), 17 C.F.R. § 240.14a-8(d).

54. Rule 14a-8(b)(1), 17 C.F.R. § 240.14a-8(b)(1).

55. Rule 14a-8(e) states that if the issuer includes a proposal and the issuer plans to also include a statement in opposition, the issuer must, no later than 30 days prior to the date when the issuer files preliminary copies of the proxy statement with the SEC, forward to the proponent a copy of the statement in opposition. If the proponent believes that the statement in opposition is false or misleading, it must promptly appeal to the SEC in writing and must provide the issuer with a copy of the appeal. Rule 14a-8(e), 17 C.F.R. § 240.14a-8(e).

56. Rule 14a-8(b)(2), 17 C.F.R. § 240.14a-8(b)(2).

57. Under Rule 14a-8(d), if management intends to omit a proposal it must submit a letter to the SEC stating its reasons at least 80 days before it files its preliminary proxy material. Submissions to the SEC must include copies of the proposal, any supporting statement received from the proponent, a statement of reasons as to why the issuer deems the omission to be proper, and, if the issuer has based its reasons for omission upon matters of law, a supporting opinion of counsel. The issuer must also forward to the proponent a copy of the statement of reasons why the issuer deems the omission of the proposal to be proper.

58. Thomas & Dixon, *supra* note 4, § 16.02.

59. Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416 (D.C. Cir. 1992) (holding that private cause of action exists to enforce Rule 14a-8).

proposals[60] are that the proposal either: (1) relates to the redress of a personal claim or grievance against the company or is designed to further a personal interest of the proponent that is not shared with the other security holders at large (the "personal grievance" exclusion);[61] or (2) deals with a matter relating to the conduct of the ordinary business operations of the company (the "ordinary business" exclusion).[62]

The SEC acts as the initial arbiter of these disputes.[63] Through its interpretation of Rule 14a-8's exemptions, the SEC can slow, or even stop, labor's use of the shareholder proposal mechanism.[64]

1. Rule 14a-8(c)(4): The Personal Grievance Exclusion

One exclusion commonly cited by management in its attempts to exclude labor proposals is Rule 14a-8(c)(4), the "personal grievance" exclusion.[65] Rule 14a-8 was adopted in part to serve as a vehicle for shareholder communication on matters of common interest to the entire shareholder body.[66] Thus, the SEC has allowed companies to omit proposals submitted to redress a personal claim or grievance against the issuer or any other person, or to further a personal interest. This exclusion was intended to prevent shareholder proposals from being used to harass issuers into giving the proponent some particular benefit or to

60. Thomas & Dixon, *supra* note 4, § 16.04.

61. Rule 14a-8(c)(4), 17 C.F.R. § 240.14a-8(c)(4).

62. Rule 14a-8(c)(7), 17 C.F.R. § 240.14a-8(c)(7). We should also mention that there are other grounds on which the company can seek no-action relief from the SEC. In particular, companies have sometimes been successful using Rule 14a-8(a)(4) as a grounds for excluding a labor shareholder proposal. *See* Thomas & Dixon, *supra* note 4, § 16.04.

63. *See* 17 C.F.R. § 240.14a-8(d) (requiring company seeking to exclude shareholder proposal to file proposal, proponent's supporting statement, and company's statement of reasons supporting exclusion with SEC); Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals, Exchange Act Release No. 12,599, [1976–1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,635, at 86,604 (July 7, 1976) (describing SEC staff procedures with respect to reviewing and commenting on company statements regarding proposal exclusion).

64. Patrick S. McGurn, *SEC Holds Key to Labor Union Shareholder Proposals*, IRRC Corp. Governance Bull., Jan./Feb. 1994, at 9.

65. Schwab & Thomas, *supra* note 4.

66. As now-Justice Ginsburg has described shareholders' informational rights: "Access to management proxy solicitations to sound out management views and to communicate with other shareholders on matters of major import is a right informational in character, properly derived from section 14(a)...." Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 421 (D.C. Cir. 1992). Congress recognized the need to provide not only for disclosure of matters management intended to present to a vote, but also for shareholders to be given a "reasonable opportunity to present their own proposals and views to their fellow security holders." S. Rep. No. 85-700, at 3 (1957).

accomplish objectives particular to the proponent and not to other shareholders.[67]

The basis for this exclusion is an administrative concern that the costs of vindicating an individual shareholder's interest not be shifted to the issuer and hence to all other shareholders.[68] In many cases, the personalized nature of a shareholder-proponent's complaint against an issuer may be obvious from the content of the proposal or supporting statement. As currently construed by the SEC, however, the (c)(4) analysis permits the SEC's staff to look beyond the substance of the proposal and statement in considering whether a Rule 14a-8 submission that appears on its face to be relevant to the entire shareholder body nevertheless relates to a personal claim or grievance of the proponent and therefore can be omitted.[69]

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67. This exclusion was confined to personal claims or grievances against the issuer or its management prior to its amendment in 1972. The 1972 amendment extended it to cover personal claims or grievances against any person. *See* Adoption of Amendments to Rules 14a-5 and 14a-8 Under the Exchange Act, Exchange Act Release No. 9784, [1972–1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 78,997, at 82,149 (Sept. 22, 1972).

In 1983, the Commission amended subsection (c)(3) (now (c)(4)) to add the following clause: "or if it [the proposal] is designed to result in a benefit to the proponent or to further a personal interest, which benefit or interest is not shared with the other security holders at large . . . ." Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 20,091, [1983–1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,417, at 86,205 (Aug. 16, 1983). Modified from the version initially proposed in 1982 to avoid disqualification of a shareholder proposal based on the proponent's personal commitment to, or intellectual or emotional interest in, the subject-matter, this amendment was "intended to clarify the scope of the exclusionary paragraph and to insure that the security holder proposal process would not be abused by proponents attempting to achieve personal ends that are not necessarily in the common interest of the issuer's shareholders generally." *Id.* at 86,205.

68. In codifying this exclusionary ground in 1948, the SEC noted:

> [I]n a few cases security holders have abused this privilege [the right to submit shareholder proposals] by using the rule to achieve personal ends which are not necessarily in the common interest of the issuer's security holders generally. In order to prevent such abuse of the rule, but without unduly restricting the privilege which it grants to security holders, the amendment places reasonable limitations upon the submission of such proposals.

Adoption of Amendments to Proxy Rules, Exchange Act Release No. 4185, 13 Fed. Reg. 6678, 6679 (Nov. 5, 1948).

69. *See* Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 19,135, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,262, at 85,352 (Oct. 14, 1982). Tracing the evolution of this interpretive approach, the SEC explained that the staff originally had sought to reduce the subjectivity of the (c)(4) analysis by interpreting it narrowly to compel issuers to demonstrate a "direct relationship between the subject matter of a proposal and the proponent's personal claim or grievance." *Id.* at 83,351. Such a relationship was apparent where the proposal, or its supporting statement, revealed on its face the existence of a personal grievance. *Id.* at 85,351–52.

While acknowledging the difficulties inherent in SEC staff assessments of a proponent's subjective motivations, the SEC has found this analytical approach preferable to the staff's previous, unsuccessful efforts to develop a narrower, more objective test based primarily on the subject matter of a proposal.[70] The SEC has generally limited its use of (c)(4) analysis to instances where a proposal is one of many tactics used to redress a grievance against an issuer.[71]

One common justification advanced by corporations for omitting labor proposals has been that these proposals would further personal grievances of the employees or offer benefits to employee shareholders that are not available to all shareholders. Thus, corporations often argue to the SEC that labor shareholder proposals are simply another tactic used by labor to further interests that labor has sought to achieve by various other means over the years.[72]

The SEC's present position with regard to labor shareholder proposals is that employees and shareholders have the same rights to offer proposals.[73] Proposals may not be excluded "based only on the contention that the proponent is acting in the interests of union

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In the release, the staff found the following:

> [I]ncreasingly sophisticated proponents and their counsel began to draft proposals in broad terms so that they might be of general interest to all security holders, rather than in narrow terms reflecting the personal interests that motivated their submission. A contemporaneous development was the increased use of the security holder proposal process as a tool to bring pressure upon issuers to serve some personal interest of the proponent. These developments limited the efficacy of the staff's efforts to establish an objective test for determining the applicability of the rule and, consequently, a more subjective analysis has resulted. This more subjective analysis has been reflected in letters which indicated that a proposal, despite its being drafted in such a way that it might relate to matters which may be of general interest to all security holders, properly may be excluded under paragraph (c)(4), if it is clear from the facts presented by the issuer that the proponent is using the proposal as a tactic designed to redress a personal grievance or further a personal interest.

Id. at 85,352.

70. *See id.* at 85,351.

71. Louis Loss & Joel Seligman, 4 *Securities Regulation* 2020 (1990).

72. *See, e.g.*, Phillips-Van Heusen Corp., SEC No-Action Letter, Mar. 11, 1997, at *12, *available in* LEXIS, Fedsec Library, Noact File (alleging that union's proposal was motivated by desire to foster organizing campaign of its affiliate); Dow Jones & Co., SEC No-Action Letter, Feb. 10, 1997, at *12, *available in* LEXIS, Fedsec Library, Noact File (alleging union's proposal was submitted to pressure management to concede in contract negotiations); Frontier Corp., SEC No-Action Letter, Jan. 23, 1997, at *3, *available in* LEXIS, Fedsec Library, Noact File (same).

73. *See Securities: SEC Streamlining Its Handling of No-Action Letters, Quinn Says*, Daily Rep. for Executives (BNA), June 15, 1995, *available in* LEXIS, News Library, Drexec File [hereinafter *SEC Streamlining*] (reporting remarks of Linda C. Quinn, director of SEC's Division of Corporation Finance, at 7th Annual General Counsel Conference, June 13, 1995).

members."[74] To exclude a labor shareholder proposal, the company must present concrete, non-circumstantial evidence that the proposal is merely another tactic in the union's corporate campaign. The burden is on the company to show that the proposal qualifies for exclusion.[75]

The SEC's reaction to company challenges to labor shareholder proposals has been far from uniform, however, leaving uncertain any predictions as to which proposals may actually be included in proxy materials.[76] The mere contention that there are disputed issues between the company and the union proponent is insufficient to warrant exclusion of a facially neutral proposal. The company must satisfy the added burden of producing concrete evidence demonstrating that the proposal was motivated by a labor grievance.[77] Although SEC policy dictates that union shareholder proposals may be excludable if a company provides documentation that the proposals are part of a union's corporate campaign,[78] the SEC has responded to this assertion in varying ways.[79] In

74. *Id.* (reporting remarks of Quinn).

75. *See id.* (reporting remarks of Quinn).

76. *See* McGurn, *supra* note 64, at 9; Anand, *supra* note 17, at 26; Leslie Scism, *Labor Unions Increasingly Initiate Proxy Proposals*, Wall St. J., Mar. 1, 1994, at C1.

77. *See* Daniel M. Taitz & Lance J. Gotko, *Shareholder Communications*, 976 PLI/Corp. 133, 168 (1997) (reporting SEC's intent to require "smoking gun" physical evidence to show abuse of proposal process); Dow Jones & Co., SEC No-Action Letter, Feb. 8, 1995, at *2, *available in* LEXIS, Fedsec Library, Noact File (noting absence of documented evidence from union proponent, "acknowledging that [its] proposal was intended to enhance the union's bargaining power" as reason for staff belief that (c)(4) could not be relied upon to exclude proposal).

78. *See* McGurn, *supra* note 64, at 10 (quoting William E. Morley, senior associate director of SEC's Division of Corporation Finance).

79. McGurn, *supra* note 64, at 9 (comparing opposite SEC responses to similar arguments for omission presented by Dow Jones and Consolidated Freightways respectively); Anand, *supra* note 17, at 27 (comparing opposite fates of similar requests for no-action relief made by Motorola and Southwestern Bell respectively).

In some cases, the SEC's approach seems easily defensible. For example, the SEC refused to concur that Consolidated Freightways, Inc. could exclude from its proxy materials a labor shareholder proposal requesting that the board of directors take any necessary steps to remove the requirement that 80% of the outstanding shares be voted to change the structure of the board. Consolidated Freightways, Inc., SEC No-Action Letter, Jan. 25, 1995, at *32, *available in* 1995 WL 28836. The company contended that the union was actively pursuing a corporate campaign designed to "harass and pressure" the company in connection with the union's efforts to organize at the company's non-union operating subsidiaries, and in order to achieve other labor-related goals. *Id.* at *1.

The proponent countered that there was no possible connection between the elimination of a super-majority requirement and the advancement of the union's interests in organizing or collective bargaining. The proponent emphasized that, by insisting that the employee-shareholders did not truly care about corporate governance issues, the company was refusing to acknowledge that the proponents had a stake in the financial future of the company equal to that of other shareholders. *Id.* at *21.

recent no-action letters, the SEC has tended to permit labor shareholder proposals that relate to facially-neutral corporate governance issues.[80]

The SEC concluded that the company had not met its burden of establishing that the proposal was submitted by the union to redress a personal claim or grievance. The proposal was thus not excludable under Rule 14a-8(c)(4). *Id.* at *32.

In another situation, Merck & Co. was permitted to omit from its proxy materials a shareholder proposal that the company implement a policy of using construction companies whose work force is unionized. Merck & Co., Inc., SEC No-Action Letter, Feb. 7, 1994, at *7, *available in* 1994 WL 33556. The company argued that the proposal was designed to further the union's personal interest and was thus excludable under Rule 14a-8(c)(4). *Id.* at *4. Specifically, the company argued that the proposal was "designed to result in the hiring of members of the Proponent union and its affiliates . . . to the exclusion of non-union members," and that this benefit would not be shared with the company's other security holders. *Id.* at *5. In addition, the company contended that the union had used a variety of other tactics in the past to achieve the goal set out in the proposal. *Id.*

The SEC concurred in the company's view that the proposal dealt with a personal interest of the labor union proponent that was not shared with the securities holders at large and thus could be omitted under the personal grievance exception. *Id.* at *7; *see also Staff Rules on Shareholder Proposals on Labor Unions, Communications, Pay*, 26 Sec. Reg. & L. Rep. (BNA) 240 (Feb. 18, 1994); Dow Jones & Co., SEC No-Action Letter, Jan. 24, 1994, *available in* LEXIS, Fedsec Library, Noact File (allowing omission of proposal submitted by shareholder union officials).

80. For instance, in two 1995 no-action requests the SEC did not issue a no-action letter to companies seeking to exclude these types of proposals. In the first instance, the SEC rejected Caterpillar, Inc.'s claim that it should be able to exclude two corporate governance shareholder proposals made by a labor pension fund. Caterpillar, Inc., SEC No-Action Letter, Jan. 13, 1995, at *14, *available in* LEXIS, Fedsec Library, Noact File. The company asserted that the proposals were excludable under Rule 14a-8(c)(4). *Id.* at *3. The company noted that a union related to the proponent had been on strike at several U.S. company facilities and that the union had used company stockholder meetings to air labor grievances in the past. *Id.* at *5.

The proponent, however, argued that there was absolutely no connection between the submission of the shareholder proposals and the other matters at issue between the company and the union. *Id.* at *2. The SEC refused to allow the company to rely on Rule 14a-8(c)(4) as a basis for omitting the proposals, noting that the company had not met its burden of establishing that the proposals were submitted by the union to redress a personal claim or grievance. *Id.* at *14; *see also Staff Refuses To Concur in Omission of Shareholder Proposals on Directors*, 27 Sec. Reg. & L. Rep. (BNA) 197 (Jan. 27, 1995).

Similarly, the SEC refused to concur that Avondale Industries could exclude from its proxy materials shareholder proposals requesting that the board of directors be declassified, that a compensation committee be created, that confidential voting be implemented, that the company redeem its Rights Plan, and that shareholders be granted greater control over changes in the company's bylaws. Avondale Indus., SEC No-Action Letter, Feb. 28, 1995, at *3, *available in* LEXIS, Fedsec Library, Noact File. The company argued that the proposals were not intended to advance the interests of the company's shareholders but rather to advance the union's efforts to unionize the company. *Id.* at *57. The company further contended that the union proponents were in fact "using the shareholder proposal process as a tool to bring pressure on the Company in connection with the Union's organization efforts." *Id.* at *59.

The union countered that the proposals were designed to provide a general benefit to all shareholders in that they related to "empowering shareholders and holding management more accountable to the owners." *Id.* at *20. The union further argued that the exercise of the employees' rights of association under the National Labor Relations Act should not lead to the forfeiture of their ownership rights under the securities laws, and that employee-owners have the same rights as non-

2. *Rule 14a-8(c)(7): The Ordinary Business Exclusion*

The second reason frequently proffered by corporations in support of the omission of labor shareholder proposals has been that the proposals relate to the ordinary business of the company.[81] The (c)(7) "ordinary business" exclusion had its genesis in state corporation law statutes that allocate to the board of directors and corporate management exclusive power with respect to day-to-day affairs of the business. Matters that fall within this category can be excluded by a company from its shareholder ballot.[82] The rationale for the exclusion is that management's exercise of its specialized talents should be protected from investors attempting to dictate the minutiae of daily business decisions.

Challenges to social and public policy proposals usually assert that the proposals may be omitted because they deal with matters relating to the conduct of the company's ordinary business operations. Under the previous interpretation of (c)(7), shareholder proposals involving substantial policy considerations could not be omitted from proxy materials pursuant to the ordinary business exception. In a letter to Cracker Barrel Old Country Store, Inc., the SEC reversed its previous interpretation, advising that the company could omit a proposal addressing discrimination on the basis of sexual orientation as relating to its ordinary business, even though the proposal raised social policy

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employee owners. *Id.* at *20–21. Finally, the union pointed out that the company's claim that the "true intention" of the union proponents was "to harass management as opposed to protect[ing] . . . the economic interests" of the company's shareholders lacked factual support. *Id.* at *21–22.

The SEC found that the company had not met its burden of demonstrating that the proposals were submitted with the intent of redressing a personal claim or grievance of the union proponents and refused to conclude that the proposals were designed to result in a benefit to the union proponents uniquely. The proposals were thus not excludable under the personal grievance exception. *Id.* at *3.

The SEC recently proposed to alter the approach it takes in applying the personal grievance exception. Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-39,093, Sept. 18, 1997, *available in* 1997 WL 578696. Under the proposed approach, if the proposal (including its supporting statement) is "neutral on its face," the Division will "automatically express 'no view,' rather than concur or decline to concur in [the proposal's] exclusion." *Id.* at *8. Thus, the Division would no longer seek to determine the motivation of the shareholder proponent in submitting a proposal neutral on its face. A company receiving a response of "no view" would be able to omit the proposal from its proxy materials if it believes it has sufficient evidence to support its contention that the neutral proposal reflects a personal grievance or special interest. This change in the administration of 14a-8(c)(4) would not affect a proposal that relates to a personal grievance or special interest on its face (i.e., is not neutral). *Id.*

81. Rule 14a-8(c)(7), 17 C.F.R. § 240.14a-8(c)(7) (1997).

82. *See* Thomas & Dixon, *supra* note 4, § 16.04[G].

concerns.[83] The proponent of the proposal challenged this change in federal district court and won, only to be reversed on appeal by the Second Circuit. [84]

In light of this recent decision, the SEC recommenced issuing no-action advice[85] to companies, stating that shareholder proposals that relate to the corporation's ordinary business, but that also raise substantial social policy considerations, can be omitted from proxy materials pursuant to the ordinary business exception.[86] Thus, it appears that employment-related shareholder proposals may be omitted from proxy statements if the proposals deal with ordinary business issues, even when these proposals raise important social policy issues.[87]

The ordinary business exemption has also been used to exclude some labor shareholder proposals. For example, in 1990, Humana, Inc. was permitted to exclude from its proxy materials a shareholder proposal that would have required the company's board of directors to recognize a specific union and to bargain collectively with that union because the proposal related to the conduct of ordinary business operations.[88] The company argued that the proposal could be excluded under Rule 14a-8(c)(7) since it dealt with a matter relating to the conduct of the company's ordinary business.[89] The SEC found that questions involving a company's relations with its employees—including collective bargaining agreements on conditions of employment—were matters relating to the conduct of ordinary business operations. The proposal was thus excludable under the ordinary business exception.[90]

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83. Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, Oct. 13, 1992, at *18, *available in* 1992 WL 289095.

84. New York City Employees' Retirement Sys. v. SEC, 843 F. Supp. 858 (S.D.N.Y. 1994), *rev'd in part*, 45 F.3d 7 (2d Cir. 1995).

85. Due to an injunction, the SEC had suspended issuing any advice with regard to the ordinary business exclusion pending the outcome of this lawsuit. *See, e.g.*, Ken Bertsch, *Court Reverses Cracker Barrel Decision; Equal Employment Resolutions in Doubt*, IRRC News for Investors, Jan. 1995, at 1, 1.

86. *See SEC Streamlining*, *supra* note 73 (reporting remarks of Linda C. Quinn, director of SEC's Division of Corporation Finance, at 7th Annual General Counsel Conference, June 13, 1995).

87. *See* Bertsch, *supra* note 85, at 1.

88. Humana, Inc., SEC No-Action Letter, Oct. 17, 1990, at *7, *available in* 1990 WL 286980; *see also Company May Omit Proposal that Would Require It To Recognize Specific Union*, 22 Sec. Reg. & L. Rep. (BNA) 1561 (Nov. 2, 1990).

89. Humana, Inc., SEC No-Action Letter, at *1, *available in* 1990 WL 286980.

90. *Id.* at *7.

IV. EVALUATING MANAGEMENT'S PROPOSALS TO BLOCK LABOR'S USE OF THE SHAREHOLDER PROPOSAL RULE

Many of labor's shareholder proposals are of the traditional corporate governance variety, raising issues such as the implementation of confidential shareholder voting, redemption of poison pills, golden parachutes, staggered boards, and increased numbers of independent directors on boards or key committees of the board. In this respect, labor and other shareholders share a common interest: creating a more responsive corporate governance system that will take shareholders' interests into account in decisionmaking.

However, there may be an inherent conflict between the investment goals of labor shareholders and those of other shareholders.[91] In addition to maximizing the return on its investments, labor is also interested in such long-term goals as job security, wage growth, and ensuring the adequacy and security of workers' retirement income.[92] Thus, labor activists may not believe that financial returns on their stock portfolios are their only reason for submitting corporate governance proposals.[93] Furthermore, labor unions have been accused of using the shareholder proposal mechanism as part of a "corporate campaign" to advance their interests as worker representatives in some companies. In the next section, we look at some of these claims.

A. Corporate Campaigns

Corporate campaigns are "multi-tactic pressure campaign[s] directed at a company (or companies) by a union engaged in collective bargaining, wage disputes or protesting workplace grievances."[94] Shareholder proposals are one of several tactics that the union deploys to pressure management to make concessions in its negotiations with the union. For example, in 1989 the United Mine Workers used shareholder proposals (although not Rule 14a-8) as part of a corporate campaign

91. In another paper, one of the authors examines this question more closely. *See* Schwab & Thomas, *supra* note 4.

92. *See* Michael A. Calabrese, *What Labor Wants: A Union Perspective on Pension Fund Shareholder Activism*, Corp. Governance Advisor, Jan./Feb. 1994, at 24, 25.

93. *Id.* at 26.

94. Patrick S. McGurn, *Labor Steps Up Use of 'Corporate Campaigns,'* IRRC Corp. Governance Bull., Jan./Feb. 1994, at 7, 7.

against the Pittston Company.[95] In that contest, the union solicited proxies as part of its effort to gain shareholder approval of its proposals.[96]

The unions' increased use of the shareholder proposal rule as a mechanism for bringing about corporate governance and other changes has led corporate management to accuse the unions of abusing the proxy voting process.[97] For example, the members of the International Brotherhood of Teamsters offered several shareholder proposals for the annual meeting at Consolidated Freightways in 1994 at a time when the Teamsters were engaged in national negotiations for a new labor contract with Consolidated Freightways.[98] The company promptly labeled these proposals as part of a "campaign of harassment," that has "everything to do with labor relations and nothing to do with corporate governance."[99]

Congress became involved in the debate over labor's use of the shareholder proposal rule. On October 31, 1995, the House Committee on Economic and Educational Opportunities, Subcommittee on Oversight and Investigation, began a review of the increased use of corporate campaigns by unions.[100] Congressman Hoekstra (R-MI), the Subcommittee Chair, was disturbed by reports of pressure tactics being used by unions in corporate campaigns.[101] He quoted from an International Brotherhood of Electrical Workers organizing manual, which said that the union's strategy was to apply economic pressure to get the employer to sign an agreement or to scale back its business, leave the union's jurisdiction, or go out of business.[102] In addition, Congress has been urged to examine whether the National Labor Relations Act should be amended to make it an unfair labor practice for a union to

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95. United Mine Workers of Am. v. Pittston Co., Fed. Sec. L. Rep. (CCH) ¶ 94,946 (D.D.C. Nov. 24, 1989).

96. *Id.* at 95,267.

97. McGurn, *Controversy Swirls*, *supra* note 46, at 1.

98. Consolidated Freightways, Inc., Proxy Statement, Mar. 21, 1994, *available in* LEXIS, Fedsec Library, Edgarp File, Filing 94516840.

99. Scism, *supra* note 76, at C1 (quoting James Allen, Vice President of Consolidated Freightways).

100. William Goodling, *Subcommittee Begins Review of Corporate Campaigns and Salting*, Cong. Press Release, Oct. 27, 1995.

101. Elizabeth Walpole-Hofmeister, *Organizing: Union 'Salts' Being Used To Apply Economic Pressure, House Panel Told*, Daily Lab. Rep. (BNA), Nov. 1, 1995, *available in* Westlaw, BNA-DLR Database.

102. *Id.* Congressman Hoekstra said, "I find the idea of hiding behind either the First Amendment or the National Labor Relations Act in order to put a company out of business patently offensive. It may be legal, but that certainly doesn't make it right." *Id.*

engage in certain corporate campaign tactics.[103] Corporate pressure for changes may lead to congressional action on this question.

B. The ATA's Rulemaking Petition

As part of this movement to restrict labor's access to company proxy statements through Rule 14a-8, the American Trucking Association (ATA) petitioned the SEC to change its interpretation of Rule 14a-8 to allow corporations to exclude shareholder proposals by labor representatives at companies that are involved in collective bargaining negotiations or union organizing campaigns.[104] The ATA claimed that the SEC's current interpretation of Rule 14a-8 allows unions to use shareholder proposals to pressure the management of companies that are engaged in contemporaneous collective bargaining negotiations and union organizing campaigns.[105] More specifically, the ATA (and other business groups) believes that labor is using the shareholder proposal device to "'achieve personal ends which are not necessarily in the common interest of the issuer's security holders generally.'"[106]

The ATA's proposals, if implemented by the SEC or Congress, would sharply curtail labor's use of the shareholder proposal rule.[107] Several objectors to the ATA proposals have pointed out that: (1) these proposals are beneficial to shareholders, and even if the proposals were unpopular, they would not receive sufficient votes to be considered again and hence reform is unnecessary;[108] (2) there are few documented proposals that are

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103. *Id.*

104. ATA Letter, *supra* note 9.

105. *Id.* at 2 (quoting Exchange Act Release No. 4185 (Nov. 5, 1948) (interpreting Rule 14a-8's exclusion of "personal grievances")).

106. *Id.* (quoting Exchange Act Release No. 4185 (interpreting Rule 14a-8's exclusion of "personal grievances")).

107. Letter from Robert Lenhard, Michael Zucker, & Ed Durkin, American Federation of State, County & Municipal Employees, AFL-CIO, to Arthur Levitt, SEC Chairman, & Steven M.N. Wallman, SEC Commissioner 6–9 (Oct. 26, 1995) (on file with author) [hereinafter AFSCME Letter].

At least one union has claimed that the ATA proposals would curtail the union's ability to engage in active monitoring of corporate management as required by the DOL. Letter from Frank Hanley, General President, International Union of Operating Engineers, to Arthur Levitt, SEC Chairman, & Steven M.N. Wallman, SEC Commissioner (Nov. 8, 1995) (on file with author).

108. AFSCME Letter, *supra* note 107, at 3; Letter from William Patterson & Bartlett Naylor, Office of Corporate Affairs, International Brotherhood of Teamsters, AFL-CIO, to Arthur Levitt, SEC Chairman, & Steven M.N. Wallman, SEC Commissioner, 7–9 (Nov. 16, 1995) (on file with author) [hereinafter Teamsters Letter].

cited by ATA as abuses of the system;[109] (3) the ATA's proposals are overbroad and would bar labor from offering shareholder proposals at some companies indefinitely;[110] (4) the proposed system is unworkable because the SEC would need to make factual determinations that it is ill-equipped to decide;[111] and (5) all shareholders who submit proposals have interests that differ from those of other shareholders.[112] Some objectors also raised constitutional questions about the legitimacy of the ATA proposals.[113]

In the next section, we attempt to determine whether the SEC should amend Rule 14a-8 as suggested. In particular, we ask whether the ATA's concerns are shared by the non-union shareholders of the companies where these proposals are being submitted.

V. EMPIRICAL ANALYSIS

One of the main purposes of Rule 14a-8 is to facilitate shareholder communication between shareholders themselves as well as between shareholders and corporate management.[114] The rule essentially taxes all shareholders for the costs of shareholder proposals by having the corporation pay for these communications. However, the basis for the "personal grievance" exclusion, and indirectly for the ATA's proposed rule changes, is that this tax should not be imposed on shareholders if the matter being placed before the electorate is not one of interest to shareholders generally, but rather is personal to a particular shareholder.

One clear measure of whether the company's shareholder body is interested in a proposal is shareholders' support for the proposal at the ballot box. If shareholders perceive that labor's proposals are directed

109. AFSCME Letter, *supra* note 107, at 5; Letter from Morton Bahr, President, Communications Workers of America, AFL-CIO, to Arthur Levitt, SEC Chairman, & Steven M.N. Wallman, SEC Commissioner 3–6 (Nov. 21, 1995) (on file with author) [hereinafter Communications Workers Letter].

110. AFSCME Letter, *supra* note 107, at 7; Communications Workers Letter, *supra* note 109, at 6–9; Letter from Donald S. Miller, Executive Director, Teachers' Retirement Board, City of New York, to Arthur Levitt, SEC Chairman, & Steven M.N. Wallman, SEC Commissioner 1 (Nov. 21, 1995) (on file with author); Teamsters Letter, *supra* note 108, at 10–12.

111. AFSCME Letter, *supra* note 107, at 8–10.

112. Letter from Sarah A.B. Teslik, Executive Director, Council of Institutional Investors, to Arthur Levitt, SEC Chairman 2 (Nov. 14, 1995) (on file with author).

113. Communication Workers Letter, *supra* note 109, at 10–11.

114. *See supra* note 66 and accompanying text. Companies thus bear the burden of demonstrating that an otherwise acceptable proposal should be kept off the ballot because it falls within one of Rule 14a-8's substantive exclusions.

not at furthering shareholder interests, but rather at labor's unique interests, we would anticipate that shareholders would vote against these labor proposals. Conversely, if shareholders vote for labor proposals in a manner similar to the way they vote for other proposals, we would conclude that shareholders view the labor proposals as no different from other shareholders' prospects.

A. Data and Descriptive Analysis

We investigated shareholder proposals during the 1994 proxy season.[115] The data are drawn from the Voting Results published by the Corporate Governance Service of the Investor Responsibility Research Center (IRRC) and from various issues of the Corporate Governance Bulletin also published by the IRRC.[116] Table 1[117] shows the distribution of corporate governance proposals categorized by the type of proposal and by whether the proposal was voted on, withdrawn by the submitting shareholder, omitted by the SEC, or in which the proposal's outcome was missing and could not be determined. We followed Karpoff, Malatesta, and Walkling in categorizing these proposals into four groups: (1) internal corporate governance issues, with subcategories for board composition and voting issues; (2) external corporate governance issues; (3) compensation-related issues; and (4) miscellaneous issues.[118]

We began with a total of 309 proposals that were included in the database. The greatest number of proposals were concentrated in the board composition subcategory of internal corporate governance issues (97, 31% of the 309 total proposals),[119] followed closely by

115. We chose 1994 as our sample year because the ATA Letter focused on current labor proposals. The 1992 proxy rule amendments are widely viewed as having facilitated shareholder communication and collective action on shareholder proposals. We wanted to use data from the period after the institution of these changes so that we could examine the issues raised by the ATA under the current regulatory regime. The 1994 proxy season was long enough after the proxy rule changes to insure that shareholder proponents were aware of them.

116. *Checklist of 1994 Shareholder Proposals*, IRRC Corp. Governance Bull., July/Aug. 1994, at 17, 17–31; *Checklist of 1994 Shareholder Proposals*, IRRC Corp. Governance Bull., Jan./Feb. 1994, at 22, 22–32.

117. *See infra* p. 74.

118. These categorizations are the same as those used by Jonathan M. Karpoff et al., *Corporate Governance and Shareholder Initiatives: Empirical Evidence*, 42 J. Fin. Econ. 365 (1996).

119. The five most popular board composition issues are repealing a classified board (37), imposing board inclusiveness (15), implementing an independent nominating committee (11), implementing an independent compensation committee (7), and limiting director tenure (6).

compensation-related issues (89, 29%).[120] Voting issues account for 65 proposals (21%),[121] followed by miscellaneous issues with 47 (15%),[122] and external corporate governance issues with 11 (4%).[123]

Voting results are available for only 192 of the 309 proposals. The remaining proposals were either withdrawn by the shareholder (29), omitted by the company with SEC approval (27), or we are missing data on the outcome of the vote (61). For those proposals for which we have voting data, the largest number, 62 (32%), deal with board composition issues. Voting issues and compensation-related issues are tied for second with 52 (27%) each, followed by miscellaneous issues with 19 (10%), and external corporate governance issues with 7 (4%).

Table 2[124] reports the proposals on the proxy ballot by type and sponsor for the 248 proposals known. Sponsors labeled "Public Institutions" include five different pension funds: CalPERS, NYCERS, New York City Fire, New York City Police, and New York City Teachers pension funds. "Private Institutions" include three different private organizations: the Interfaith Center on Corporate Responsibility (ICCR), US Trust, and Wild West Investors. The LongView Fund is a union-oriented equity index fund. Therefore, we have classified it as a labor sponsor to reflect its identification with labor groups.

A total of thirteen different labor unions are represented in the sample: Amalgamated Clothing and Textile Workers Union (ACTWU—now UNITE: Union of Needletrades, Industrial and Textile Employees); Communication Workers of America (CWA); Electrical Workers; Independent Association of Publishers' Employees (IAPE); Laborers; Oil, Chemical, and Atomic Workers International Union (OCAW); Operating Engineers; Service Employees; Sheet Metal Workers; Teamsters; United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW); United Brotherhood of Carpenters and Joiners of America (UBCJA); and United Food and Commercial Workers (UFCW). In addition, as noted above, we classified the LongView Fund as a labor group. These unions submitted a total of

120. The two most popular compensation-related issues are capping executive pay (43) and disclosing executive compensation (15).

121. The two most popular voting issues involve cumulative voting (34) and confidential voting (24).

122. The most frequently occurring items involving miscellaneous issues are rotating the annual meeting location (4), disclosing political contributions (4), imposing political nonpartisanship (4), and changing the annual meeting date (3).

123. External corporate governance issues exclusively involve voting on poison pill provisions.

124. *See infra* p. 75.

forty-one proposals, thirty-two of which eventually appeared on proxy ballots. We do not have information on whether other sponsor groups, such as individual investors, are also acting on behalf of labor interests in submitting proposals, although we note that the IRRC does classify some proposals by individuals as labor union proposals.[125]

Individual investors were the most frequent contributors to the sample of shareholder proposals with 67% of the total proposals in Table 2. Nearly 80% of the proposals submitted by individuals ultimately led to a shareholder vote.

Although not shown in a table, the most frequently cited reason why the SEC issued a no-action letter, allowing an issuer to omit a shareholder proposal without fear of an ensuing SEC enforcement action during the 1994 proxy season, was that the proposal dealt with the company's ordinary business operations.[126] These omitted proposals raise a host of different issues, including club memberships for senior executives, dividend reinvestment plans, and the rotation of the company's auditors. The second most often cited reason for a no-action letter, and the only one that includes union proposals in our sample, is that the proposal relates to a personal claim or redress of a personal grievance.[127] A total of eleven proposals were omitted based on the ordinary business operations exclusion, while six proposals were omitted because they were found to be related to a personal claim or redress of a personal grievance.

B. Results of the Analysis

In Table 3,[128] we present descriptive statistics on the fraction of votes cast that were in favor of a shareholder proposal. We call this variable FOR. Panel A reports the mean, median, and standard deviation of FOR, as well as the number of proposals by type of proposal and by sponsor category. For all proposals, the mean FOR was 21.5% and the median FOR was 18.4%. Labor unions and public institutions garnered the highest average FOR votes, 32.7% and 30.9%, respectively. Proposals sponsored by private institutions received, on average, FOR votes of

125. To the best of our knowledge, the shareholders placed in the individual category are unaffiliated and not acting on behalf of labor groups. However, it is possible that some of these proposals should be treated as labor proposals and grouped with the labor union proposals. *See infra* Part V.C.

126. *See* Rule 14a-8(c)(7), 17 C.F.R. § 240.14a-8(c)(7) (1997).

127. *See* Rule 14a-8(c)(4), 17 C.F.R. § 240.14a-8(c)(4).

128. *See infra* p. 76.

12.3%, while proposals sponsored by individuals received, on average, 18.2%.

Proposals in the external corporate governance category received the highest average FOR votes, 53.7%. Internal corporate governance proposals received an average of 25.9%, while the average for compensation-related proposals was 12.8%. Miscellaneous proposals received the lowest levels of support with only 7.3% of those voting casting their votes in favor of these proposals.

Recall that we are trying to determine if shareholders treat proposals by labor unions differently from proposals by other sponsors. In Panels B and C of Table 3, we report t-statistics for differences in the mean number of votes received and Wilcoxon Z-statistics for differences in the medians for various pairwise comparisons based on sponsor category and type of proposal. These tests measure whether the differences between the means and the medians of the votes cast in favor of proposals are significantly different between proposals sponsored by different groups.

Panel B shows that labor-sponsored proposals garner a statistically significant greater fraction of votes in their favor than proposals by all other sponsors. If we break out this category in more detail, however, and compare labor-sponsored proposals with each of the other categories of sponsors, then the largest differences in vote outcome occur between labor, private institution, and individual-sponsored proposals. If we focus on the differences between labor-sponsored proposals and proposals sponsored by the other two groups, we find that there is a statistically significant difference between the means and the medians. Interestingly, no significant difference exists between labor-sponsored and public-institution-sponsored proposals.

Panel C shows that there are significant differences in mean voting outcomes between different types of proposals. Although only seven external corporate governance proposals occur in our sample, they attract significantly more votes than any other type of proposal in the pairwise comparisons. Internal governance proposals obtained significantly more favorable votes than did compensation and miscellaneous proposals, and compensation proposals received significantly more favorable votes than do miscellaneous proposals.

Table 4[129] presents data on a subset of labor proposals that were identified by the ATA as examples of proposals that would have been barred from the corporate ballot under their proposal (the "ATA

129. *See infra* p. 78.

subsample").[130] The average favorable vote for these proposals was 28%. We conducted a pairwise comparison of this average with each of the other categories. The t-statistics for these differences are all insignificant at the ten percent level of confidence. The values are reported in the accompanying note.[131] We note that the average votes in favor of the ATA subsample were lower, albeit insignificantly, than the average for all other labor internal governance proposals.

The analysis of Tables 3 and 4 indicates that significant differences occur between some sponsor categories and proposal types. To assess whether shareholders treat labor-sponsored proposals differently from proposals by other sponsors, we REGRESSED the proportion of favorable votes, FOR, on various independent variables, which include dummy variables for sponsor category and proposal type, institutional fractional ownership, and insider fractional ownership. The ownership variables are included since other researchers have found that ownership variables help explain how shareholders vote on proposals.[132] Since FOR is bounded by zero and 100, we unbounded it by the following transformation: log[FOR/(1–FOR)].[133]

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130. *See* ATA Letter, *supra* note 9, at 3 n.3. The results for the 1995 proposals included in Table 4 are not strictly comparable to the 1994 results reported in the remainder of the paper. However, because the ATA only identified a small number of "conflict of interest" proposals, we include them in the table in order to calculate some measures of statistical significance.

In addition to the proposals shown in Table 4, the ATA identified an executive compensation proposal at Dow Jones & Co. All of the other proposals were "Internal Corporate Governance" proposals. In order to make meaningful statistical comparisons, we focused on comparisons between different sponsors' proposals within the "Internal Corporate Governance" category.

The Dow Jones & Co. proposal at issue received 2% of the favorable votes. The average for all executive compensation proposals was 12.8%. *See* Table 3, *infra* p. 76.

131. The values of the t-statistics are as follows:

(1) ATA subsample vs. all other internal corporate governance proposals: 0.39;

(2) ATA subsample vs. all other labor internal corporate governance proposals: -0.75;

(3) ATA subsample vs. public institutions, internal corporate governance proposals: 0.39;

(4) ATA subsample vs. private institutions, internal corporate governance proposals: 1.74 (significant at the 20% level of confidence); and

(5) ATA subsample vs. individuals, internal corporate governance proposals: 0.71.

132. In particular, see James A. Brickley et al., *Corporate Voting: Evidence from Charter Amendment Proposals*, 1 J. Corp. Fin. 5, 21–22 tbl. 3 (1994) (finding positive relationship between insider ownership and votes cast for management antitakeover proposals); James A. Brickley et al., *Ownership Structure and Voting on Antitakeover Amendments*, 20 J. Fin. Econ. 267, 272 tbl. 1 (1988) (finding significant relationship between institutional shareholder ownership and votes cast against management proposals).

133. *See* Harold Demsetz & Kenneth Lehn, *The Structure of Corporate Ownership: Causes and Consequences*, 93 J. Pol. Econ. 1155, 1163 (1985) (providing similar treatment of this variable).

The dummy variables used in Table 5[134] are as follows:

LABOR	= 1 if labor-sponsored proposal, 0 otherwise,
PUBLICINST	= 1 if public institution-sponsored proposal, 0 otherwise;
PRIVATEINST	= 1 if private institution-sponsored proposal, 0 otherwise;
INTERNALGOV	= 1 if proposal concerns internal corporate governance, 0 otherwise;
EXTERNALGOV	= 1 if proposal concerns external corporate governance, 0 otherwise;
MISCELLANEOUS	= 1 if proposal does not concern internal or external corporate governance or compensation-related issues, 0 otherwise;
INSTOWN	= fractional ownership by institutions as reported by Spectrum on Compact Disclosure;
INSIDEOWN	= fractional ownership by insiders as reported by Spectrum on Compact Disclosure as of the proxy statement date.

Since we do not have complete ownership data for all firms in our sample, we estimated regressions one and two in Table 5 using the full sample of 192 proposals and excluded the ownership variables.[135] In regressions three and four, we include the ownership variables in the regressions using a sample of 181 firms for which we have complete data.

In regressions one and three, we included only the dummy variable LABOR among the sponsor-related variables. LABOR is positive and

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134. *See infra* p. 79.

135. We considered including an additional variable for stock ownership by the proponent of each proposal. This variable would eliminate any possibility that our results would be biased in favor of proposals made by larger shareholders that hold a greater number of shares than smaller holders. We cannot determine in many cases how many shares were held by the shareholder proponent because companies frequently do not disclose this information.

However, we do not believe that these values would be large enough to seriously bias our results. In the cases where we determined (by looking at SEC no-action letter enclosures) the number of shares held by the proponents, their percentage ownership levels were below one percent of the company's stock.

Finally, it bears repeating that we are seeking to determine *all* shareholders' interest in a proposal. The fact that a proponent has made a proposal in which it is interested in the outcome does not mean it no longer has an interest as a shareholder. It certainly continues to be taxed by the company to pay for its pro rata share of the costs associated with the proposal.

statistically significant at the .01 level in regression one, while it is significant at the .05 level in regression three. Thus, after controlling for the type of proposal and, in regression three, institutional and insider ownership, labor-sponsored proposals received a greater fraction of votes for a proposal when compared to all other sponsors as a group.

However, in regressions two and four, we included LABOR, PUBLICINST, and PRIVATEINST as independent variables. In regression two, LABOR is significant at the .01 level, and in regression four, it is significant at the .05 level. Unlike regressions one and three, the comparison is against the FOR votes garnered by proposals sponsored by individuals.

PUBLICINST is significantly positive at the .05 level in regressions two and four. Thus, public institution-sponsored proposals garnered more FOR votes than did individual-sponsored proposals. Proposals by private institutions, however, received FOR votes that are significantly different from those received by proposals made by individuals in regression two, but not in regression four. Interestingly, the coefficient on PUBLICINST is slightly lower than that on LABOR. Thus, as in panel B of Table 3, proposals by public institutions received an insignificant difference in the percentage of votes cast in their favor than did labor-sponsored proposals.

In all four regressions, INTERNALGOV and EXTERNALGOV are positive and statistically significant at the .01 level, while MISCELLANEOUS is negative and statistically significant at the .01 level. These results indicate that both internal and external corporate governance proposals received significantly greater votes for the proposals than did compensation-related proposals, while miscellaneous proposals received significantly lower votes for the proposal.

Our results in regressions three and four indicate that institutional ownership had no significant relationship to the votes cast for a proposal. However, higher ownership by insiders resulted in a significantly lower vote in favor of a shareholder-sponsored proposal.

As reported in Table 5, proposals sponsored both by labor unions and public institutions resulted in a higher percentage of votes cast in favor of the proposal than those sponsored by individuals after controlling for type of proposal and ownership structure. This is consistent with the claim that shareholders do not view labor-sponsored proposals as merely harassment tactics by unions. Indeed, our results suggest that union proposals are treated by shareholders very much like those of public institutions, a group that does not have the same potential conflict of

interest. Therefore, our results do not support the claim that proposals submitted by labor unions represent a conflict of interest between one special group of shareholders, that is, labor interests, and the rest of the shareholders.

C. *Caveats*

Before discussing our conclusions, we want to note several limitations on this study. First, ideally we would like to have been able to analyze separately all of the shareholder proposals in which labor is acting to further nonshareholder interests and then compare these results with those for all other shareholder proposals. If we used the ATA's proposed rule as a means of determining which proposals to exclude, we would still have needed to identify all labor proposals at companies that were involved in collective bargaining negotiations or union organizing campaigns. We requested this information from the ATA (and several of the opponents to the proposal) but were turned down. Instead, we have examined a subsample of cases that were identified by the ATA in its proposal as clear instances of labor abuses of the shareholder proposal rule.

Second, we have tried to identify all labor proposals. This is easiest when the proposal is being submitted by a labor union. However, there may be situations when a proposal is being submitted by a different sponsor that is acting on behalf of labor. We have tried to identify those individuals who are submitting proposals on behalf of labor interests. For all individually-sponsored proposals in our sample, we searched for no-action letter filings in electronic databases. We checked those filings that we found to determine if the issuer raised the objection that the proposal was being made by the individual on labor's behalf. We found no instances where this was the case. Further, we asked individual shareholder representatives, and representatives of the AFL-CIO, all of whom are actively involved in making shareholder proposals, to identify any individual proposals in our sample that were being made on behalf of labor. Despite these precautions, we cannot be sure that we have succeeded in uncovering all instances where an individual was submitting a shareholder proposal on behalf of labor.

VI. CONCLUSION

We examined a data set containing 192 shareholder proposals submitted by labor unions, public institutions, private institutions, and

individuals covering internal and external corporate governance, compensation-related, and miscellaneous issues. We found that labor union proposals received more votes than did proposals from private institutions and individuals, even after controlling for the type of proposal and ownership structure. These higher vote totals for labor proposals were comparable to those received by public institutions.

We interpret these results to suggest that any conflicts of interest that may arise between labor unions and other shareholders may not be as great as feared. Proposals by labor unions are not treated harshly by shareholders in general. Rather, they appear to be viewed by shareholders as no different from proposals by other sponsors.

Table 1

Distribution of Shareholder Proposals by Type of Proposal During 1994 Proxy Season

Source of data: IRRC

Type of proposal	Proposal Voted On	Withdrawn by Sponsor	Omitted by SEC	Missing Outcome	Total
Internal Corporate Governance					
Board composition	62	9	3	23	97
Voting	52	4	0	9	65
Total:	**114**	**13**	**3**	**32**	**162**
External Corporate Governance	7	1	0	3	11
Compensation-related	52	13	11	13	89
Miscellaneous	19	2	13	13	47
TOTAL	**192**	**29**	**27**	**61**	**309**

Proposal Voted On: The proposal went to a shareholder vote. The voting results are recorded.

Withdrawn by Shareholder: The proposal was withdrawn or not presented by the shareholder.

Omitted by SEC: The SEC disallowed the proposal for one of 13 reasons.

Missing Outcome: The proposal's voting results were not reported by the IRRC for unknown reasons.

Table 2

Corporate Governance Proposals During 1994 Proxy Season by Sponsor

The numbers in each cell are:

Number of proposals voted on / Number of proposals withdrawn by shareholder or omitted by SEC.

Proposals with unknown outcomes are not included in this table.

Source of data: IRRC

Type of proposal	Public Institution	Private Institution	Labor Union	Individual Investor	Total
Internal Corporate Governance					
Board composition	12/3	6/5	8/1	36/3	62/12
Voting	6/2	0/0	8/2	38/0	52/4
Total:	**18/5**	**6/5**	**16/3**	**74/3**	**114/16**
External Corporate Governance	0/0	0/0	7/1	0/0	7/1
Compensation-related	0/0	4/0	6/4	2/20	52/24
Miscellaneous	0/1	0/1	3/1	16/12	9/15
TOTAL	**18/6**	**10/6**	**32/9**	**132/35**	**92/56**

The sponsor category **Public Institution** includes 5 different pension funds: CalPERS, NYCERS, New York City Fire, New York City Police, and New York City Teachers.

The sponsor category **Private Institution** includes 3 different organizations: ICCR, US Trust, and Wild West Investors.

The sponsor category **Labor Union** includes 13 different unions: ACTWU, CWA, Electrical Workers, IAPE, Laborers, OCAW, Operating Engineers, Service Employees, Sheet Metal Workers, Teamsters, UAW, UBCJA, and UFCW; and one union-sponsored fund: LongView Fund.

The sponsor category **Individual Investor** includes 43 different individuals.

Table 3

Descriptive Statistics of Fraction of Votes Cast that Are in Favor of Shareholder-Sponsored Corporate Governance Proposals During 1994 Proxy Season

Source of data: IRRC

Panel A: Descriptive statistics by type of proposal and sponsor. The first row numbers of each type of proposal represent mean and median, respectively. The second row numbers represent standard deviation and N (the number of proposals), respectively.

Type of proposal	Public Institution	Private Institution	Labor Union	Individual Investor	All
Internal Governance	.309,.285	.157,.085	.309,.283	.244,.263	.259,.272
	(.190,18)	(.137,6)	(.127,16)	(.138,74)	(.148,114)
External Governance	–	–	.536,.542	–	.537,.542
			(.093,7)		(.093,7)
Compensation	.071,.074	.229,.203	–	.119,.100	.128,.096
	(.020,4)	(.171,6)		(.052,42)	(.081,52)
Miscellaneous	–	–	.134,.145	.062,.042	.073,.057
			(.048,3)	(.047,16)	(.054,19)
All	.309,.285	.123,.075	.327,.314	.182,.140	.215,.184
	(.190,18)	(.112,10)	(.173,32)	(.130,132)	(.156,192)

Table 3, continued

Panel B: *t-statistics and Wilcoxon Z-statistics for various pairwise comparisons by sponsor.*

	t-statistic	Z-statistic
Labor vs. All others	4.68***	4.10***
Labor vs. Public Institutions	0.35	0.40
Labor vs. Private Institutions	3.51***	3.44***
Labor vs. Individuals	4.45***	4.31***

Panel C: *t-statistics and Wilcoxon Z-statistics for various pairwise comparisons by type of proposal.*

	t-statistic	Z-statistic
Internal governance vs. External governance	-4.88***	-3.89***
Internal governance vs. Compensation	7.31***	5.60***
Internal governance vs. Miscellaneous	10.01***	5.38***
External governance vs. Compensation	12.30***	4.21***
External governance vs. Miscellaneous	15.99***	3.82***
Compensation vs. Miscellaneous	2.74***	3.47***

***, **, * denotes statistical significance at the .01, .05, and .10 levels, respectively.

Table 4

Percent of Votes Cast that Are in Favor of Shareholder Proposals Sponsored by Labor Unions and Identified by ATA as Representing a Conflict of Interest Between the Unions and Shareholders' Interests in General

Sample limited to internal corporate governance proposals only.
Proposals occurred during 1994 and 1995 proxy season.

Source of data: IRRC

Company	Proxy Year	Proposal	Percent of Votes For
Avondale Industries	1995	Adopt confidential voting	14.6%
Avondale Industries	1995	Repeal classified board	22.9%
Caterpillar	1995	Repeal classified board	48.1%
Caterpillar	1995	Adopt cumulative voting	33.4%
Consolidated Freightways	1994	Repeal classified board	41.6%
Consolidated Freightways	1994	Adopt confidential voting	11.6%
Albertson's	1994	Repeal classified board	28.2%
Albertson's	1994	Adopt confidential voting	23.3%
Average of percent of votes cast for the proposals			**28.0%**

Table 5

OLS Regression Results

Estimated coefficients (t-statistics) for regressions of fraction of votes cast that are in favor of a shareholder-sponsored corporate governance proposal on sponsor type, proposal type, and ownership variables.

Dependent Variable =
log[Fraction of votes cast in favor of proposal/(1 – Fraction cast in favor)]

	Full Sample		Sample with Ownership & Data	
Independent Variables	(1) Labor Only	(2) All Sponsors	(3) Labor Only	(4) All Sponsors
Intercept	-2.12 (-18.08***)	-2.08 (-17.75***)	-2.36 (-10.86***)	2.25 (-10.41***)
LABOR	0.54 (3.03***)	0.56 (3.15***)	0.45 (2.27**)	0.48 (2.44**)
PUBLICINST		0.45 (2.13**)		0.46 (2.09**)
PRIVATEINST		-0.58 (-2.15**)		-0.65 (-2.32**)
INTERNALGOV	0.79 (5.70***)	0.71 (5.04***)	0.80 (5.47***)	0.73 (4.99***)
EXTERNALGOV	1.73 (4.67***)	1.67 (4.59***)	1.70 (4.49***)	1.66 (4.47***)
MISCELLANEOUS	-0.74 (-3.33***)	-0.79 (-3.60***)	-0.81 (-3.51***)	-0.84 (-3.72***)
INSTOWN			0.58 (1.60)	0.45 (1.22)
INSIDEOWN			-0.89 (-1.91*)	-1.06 (-2.32**)

Table 5, continued

N	192	192	181	181
Adjusted R^2	0.365	0.392	0.381	0.412
F-statistic	28.464	21.482	19.485	16.733
(p-value)	(0.0001)	(0.0001)	(0.0001)	(0.0001)

***, **, * denotes statistical significance at the .01, .05, and .10 levels, respectively.

Definition of Independent Variables in Table 5 Regression Equation

LABOR	= 1 if the sponsor is a labor union, otherwise 0.
PUBLICINST	= 1 if the sponsor is a public institution (e.g., a mutual fund), otherwise 0.
PRIVATEINST	= 1 if the sponsor is a private institution (e.g., a private pension fund), otherwise 0.
INTERNALGOV	= 1 if the proposal deals with an internal corporate governance issue, otherwise 0.
EXTERNALGOV	= 1 if the proposal deals with an external corporate governance issue, otherwise 0.
MISCELLANEOUS	= 1 if the proposal deals with a miscellaneous corporate issue, otherwise 0.
INSTOWN	= fraction of shares owned by institutional holders per Compact Disclosure and Spectrum.
INSIDEOWN	= fraction of shares owned by insiders per Compact Disclosure.