SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–39093; IC–22828; File No. S7–25–97]

RIN 3235–AH20

Amendments to Rules on Shareholder Proposals

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''we'' or ''Commission'') proposes revisions to the rule that opens, and then regulates, a channel of communication among shareholders, and between shareholders and the management of their companies: rule 14a–8, the shareholder proposal rule. We propose to recast rule 14a–8 into a Question & Answer format that both shareholders and companies should find easier to follow, and to modify the rule to address concerns raised by both shareholders and companies. We also propose revisions to related rules.

DATES: Public comments are due November 25, 1997.

ADDRESSES: Please send three copies of the comment letter to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington D.C. 20549. Comment letters can be sent electronically to the following e-mail address: rule-comments@sec.gov. The comment letter should refer to File No. S7–25–97; if e-mail is used please include the file number in the subject line. Anyone can inspect and copy the comment letters in the SEC's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. We will post comment letters submitted electronically on our Internet site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Frank G. Zarb, Jr., Special Counsel, Office of Chief Counsel, Division of Corporation Finance, at (202) 942–2900, or Doretha M. VanSlyke, Division of Investment Management, at (202) 942–0721, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing for comment amendments to the following rules under the Securities Exchange Act of 1934 (the ''Exchange Act''):[1] 14a–8,[2] 14a–4,[3] 14a–5,[4] 14a–2,[5] and 13d–5.[6]

I. Executive Summary

The shareholder proposal rule provides an avenue for communication between shareholders and companies, and among shareholders themselves. Like any other well-traveled road, however, the rule is in need of some repair. These proposals accordingly are designed to rectify problems identified by both shareholders and corporations.

The proposals today would make it easier for shareholders to include a broader range of proposals in companies' proxy materials, and provide companies with clearer ground rules and more flexibility to exclude proposals that failed to attract significant shareholder support in prior years. We are proposing a ''package'' of reforms that we believe best accommodates the concerns of most participants in the shareholder proposal process, including proposals to accomplish the following:

- Recast the rule into a more understandable Question & Answer format;
- Reverse the *Cracker Barrel* policy, making it easier for shareholders to include in companies' proxy materials employment-related proposals that raise significant social policy matters;
- Make it more difficult to present proposals again that received an insignificant percentage of the votes cast on earlier submissions, enhancing shareholders' ability to decide for themselves which proposals are important to the company;
- Introduce an ''override'' mechanism permitting 3% of the share ownership to override a company's decision to exclude a proposal under certain of the bases for exclusion;
- Adopt a new qualified exemption from the proxy rules under Section 14(a) of the Exchange Act, and a safe harbor under Section 13(d) of the Exchange Act and rule 13d–5, to make it easier for shareholders to use the new ''override;''
- Streamline the exclusion for matters considered irrelevant to corporate business, to permit companies to exclude proposals that relate to economically insignificant portions of their businesses;
- Streamline our administration of the rule whereby companies are permitted to exclude proposals furthering personal grievances or special interests; and
- Provide clearer ground rules for management's exercise of discretionary voting authority when a shareholder notifies the company that it intends to present a proposal outside the mechanism of rule 14a–8.

II. Introduction and Background

Rule 14a–8 provides, and then regulates, a channel of communication among shareholders, and between shareholders and companies. It is not the only avenue for communication, since a shareholder may undertake an independent proxy solicitation or may seek informal discussions with management or other shareholders outside the proxy process. Rule 14a–8 is popular because it provides an opportunity for any shareholder owning a relatively small amount of the company's shares to have his or her own proposal placed alongside management's proposals in the company's proxy materials for presentation to a vote at an annual or special meeting of shareholders.

The rule's operation is fairly simple. A shareholder must mail a copy of his or her proposal to the company in time to meet the deadline imposed by the rule.[7] If the company intends to omit the proposal from its proxy materials, it must first submit its reasons to the Commission.[8] The Division of Corporation Finance or Division of Investment Management (the ''Division'') usually issues a written response either concurring or declining to concur with the company's reasoning.[9] The Division's response is not legally binding, and does not necessarily reflect the view of the Commission.[10] Either party may obtain a legally binding decision on the excludability of a challenged proposal from a federal court.

Proposals are considered appropriate for inclusion in proxy materials under rule 14a–8 unless the company demonstrates that the proposal falls within one of thirteen bases for exclusion, or that the shareholder

[1] 15 U.S.C. 78a *et seq.*

[2] 17 CFR 240.14a–8.

[3] 17 CFR 240.14a–4.

[4] 17 CFR 240.14a–5.

[5] 17 CFR 240.14a–2.

[6] 17 CFR 240.13d–5.

[7] Rule 14a–8(a)(3) [17 CFR 240.14a–8(a)(3)].

[8] Rule 14a–8(d) [17 CFR 240.14a–8(d)].

[9] The Division of Corporation Finance has reviewed approximately 400 submissions under rule 14a–8 annually. The Division of Investment Management typically has reviewed fewer than 12 submissions from investment companies in previous years; shareholder proposals have only infrequently been submitted to investment companies, and those submitted have usually involved closed-end investment companies.

[10] The procedures on the rendering of staff advice for shareholder proposals are explained in Exchange Act Release No. 12599 (July 7, 1976) (41 FR 29989). These proposals do not alter the procedures set forth in that release.

proponent is otherwise ineligible to submit a proposal. A company may, for example, omit a shareholder proposal that is not a proper matter for shareholder action under state law,[11] or if the shareholder fails to demonstrate that he or she continuously held $1000 worth of the company's voting securities for at least one year prior to submitting a proposal.[12]

Between 300 and 400 companies typically receive a total of about 900 shareholder proposals each year.[13] Their subjects vary. A majority of the proposals each year focus on corporate governance matters—such as proposals to repeal by laws establishing a classified board of directors—and on compensation matters—such as proposals to eliminate pension plans for non-employee directors. Social policy issues, such as environmental matters or the manufacture of tobacco products, and other issues, such as extraordinary business transactions, are also the focus of a significant number of proposals each year.

While we believe that the rule works well overall, some shareholder and corporate groups have expressed concerns about certain aspects of the rule and how it operates. Some shareholders seek to broaden the subject matter categories of proposals that companies are required to include in their proxy statements,[14] focusing in particular on a 1992 no-action letter issued to Cracker Barrel Old Country Store, Inc.[15] In the Cracker Barrel letter, the Division announced a new ''bright line'' test for analysis of employment-related shareholder proposals that raise significant social policy issues.[16] Some shareholders want that test changed.

Just as some shareholders have expressed concern that the rule permits companies to exclude important proposals, some companies in turn believe that the rule and current interpretations of the rule compel them to include too many proposals of little relevance to their businesses.[17] Some companies suggest that the problem be addressed by an increase in the amount of stock a shareholder must hold to be eligible to submit a proposal, or in the percentage of the vote a proposal must receive to qualify for re-submission in future years.[18] Among companies responding to the Questionnaire, 40% rank as a top reform goal reduction of the types of proposals that they must include in their proxy materials.

Companies also seek additional guidance on their exercise of discretionary voting authority[19] when a shareholder notifies them of his or her intention to present proposals without invoking rule 14a–8.[20] And they raise other concerns about the operation of the rules governing shareholder proposals.[21]

Congress recently required that we conduct a comprehensive study of the shareholder proposal process, and submit a report on the results of the study by October 11, 1997.[22] We began the study in February 1997 with the distribution of a Questionnaire on shareholder proposals. While we did not design the Questionnaire to obtain a scientific sampling, it provided us with some indication of the views of interested shareholders and companies, including those who do not typically express their views to the Commission.[23] In addition, the Commission staff has held discussions with interested groups, and tapped its own reservoir of experience and knowledge about the rule.

Although we have considered some fundamentally different approaches to regulating the shareholder proposal process, the proposals today reflect our belief that most participants would prefer that we maintain the current system, with modifications. We request your comments on whether our view is correct, and on whether we should consider some other approach in lieu of the amendments proposed today.

We could, for instance, withdraw entirely from the area, leaving it to each state to adopt its own shareholder proposal rule to govern what proposals are appropriate to be included in companies' proxy materials. The shareholder proposal process affects the internal governance of corporations, and it is state law—not federal securities law—which is primarily concerned with corporate governance matters. In its current form, rule 14a–8 in fact defers to state law on the central question of whether a proposal is a proper matter for shareholder action.[24] The ''ordinary business'' exclusion[25] is based in part on state corporate law establishing spheres of authority for the board of directors on one hand, and the company's shareholders on the other.[26]

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[11] Rule 14a–8(c)(1) [17 CFR 240.14a–8(c)(1)].

[12] Rule 14a–8(a)(1) [17 CFR 240.14a–8(a)(1)].

[13] See American Society of Corporate Secretaries (''ASCS''), Report on Shareholder Proposals, July 1, 1995–June 30, 1996; IRRC Summary of 1996 U.S. Shareholder Resolutions, Apr. 12, 1997. The IRRC tracks proposals at approximately 1,500 companies each year, and the ASCS monitors proposals at approximately 1,950 public companies. A company is not required to contact the Commission staff unless it intends to omit the proposal from its proxy materials.

[14] In response to a questionnaire on shareholder proposals which we distributed last February (the ''Questionnaire''), 63% of shareholder respondents ranked as a top goal of reform expanding the categories of proposals that companies must include in their proxy materials. As discussed more fully below, the Commission staff prepared the Questionnaire as part of a Congressionally-mandated study of the shareholder proposal process.

[15] See, *e.g.*, Rulemaking Petition dated July 27, 1995, submitted to the Commission by the Interfaith Center on Corporate Responsibility, Calvert Group Ltd., and the Comptroller of the City of New York. The petition asked that the Commission modify its position announced in the no-action letter Cracker Barrel Old Country Store, Inc. (Oct. 13, 1992) (''*Cracker Barrel*'') (proposal that company implement employment practices related to sexual orientation). The proposals address the concerns raised by the petition. See Section III, Part D of this release.

[16] *Cracker Barrel.* The Commission subsequently upheld the Division's response. See Letter dated January 15, 1993 from Jonathan G. Katz, Secretary to the Commission, to Sue Ellen Dodell, Deputy Counsel, Office of Comptroller, The City of New York.

[17] See *e.g.*, Response of Porter Lavoy & Rose Inc., No. 31; The Finova Group, No. 61; Boise Cascade Corp., No. 163; Allied Signal Inc., No. 184; Intel Corporation, No. 216; RJR Nabisco, Inc., No. 207; The Proctor & Gamble Company, No. 264. The responses are available for inspection and copying in file number S7–5–97.

[18] See, *e.g.*, Response of Roanoke Electric Steel Corp, No. 44; Cooper Industries, No. 174; Carolina Power and Light Co., No. 156; Eastman Kodak Company, No. 268.

[19] Discretionary voting authority is the ability to vote proxies that shareholders have executed and returned to the company, on matters not reflected on the proxy card, and on which shareholders have not had an opportunity to vote.

[20] See, *e.g.*, Response of Gannett Co., Inc., No. 117; Questar Corp., No. 18; Albertson's Inc., No. 204; CNF Transportation, No. 11; Safety-Kleen Corp., No. 180; Honeywell Inc., No. 198.

[21] The American Trucking Associations (''ATA''), for instance, recently petitioned the Commission to amend rule 14a–8(c)(4), the personal grievance exclusion, to ''prevent labor unions from continuing to use the shareholder proposal process to advance union interests not shared by the target company's shareholders' generally.'' Rulemaking Petition dated October 13, 1995 submitted to the Commission by the ATA. The Commission considered the ATA's concerns in connection with these proposals. Section III, Part B, describes proposed modifications to the way we administer current rule 14a–8(c)(4).

[22] National Securities Markets Improvement Act of 1996, Pub. L. No. 104–290, § 510(b), 110 Stat. 3416 (1996). The Commission is required to study ''(A) whether shareholder access to proxy statements pursuant to section 14 of the Securities Exchange Act of 1934 has been impaired by recent statutory, judicial, or regulatory changes; and (B) the ability of shareholders to have proposals relating to corporate practices and social issues included as part of proxy statements.''

[23] We received a total of 330 responses, including 172 responses from companies, and 149 from individual and institutional shareholders. We also heard from a handful of other types of institutions, such as a proxy solicitation firm, an investor relations consulting firm, and an economic consulting firm. You may inspect and copy completed Questionnaires in our Public Reference Room, public file number S7–5–97.

[24] Rule 14a–8(c)(1).

[25] Rule 14a–8(c)(7) [17 CFR 240.14a–8(c)(7)].

[26] States likely do not currently have appropriated procedures in place to accommodate such an approach. We could retain rule 14a–8 for a period of time, such as 3 or 6 years, to permit states to

Continued

In 1982, the Commission proposed for comment fundamental alternatives to the existing shareholder proposal rule, although it did not propose leaving the matter up to the states. Under one proposal, the Commission would have adopted a supplemental rule to permit a company and its shareholders to adopt a plan providing their own alternative procedures governing the process. Another alternative would have required companies to include in their proxy materials all proposals that are proper under state law and that do not involve the election of directors, subject to a numerical maximum. Most of those who expressed views on the 1982 proposals rejected the proposed alternatives, and the Commission adopted revisions that left the rule essentially in its current form.[27]

We believe that it is worthwhile to consider whether there is a workable alternative approach to the current rule and process. Among other things, the current rule in effect places the Commission and its staff in the role of informal arbiter between companies and shareholders submitting a growing variety of shareholder proposals. In implementing rule 14a–8, the Commission and its staff are sometimes called upon to make difficult judgments about the proper interpretation of proposals and about the matters to which they relate. Should these judgments be made by institutions other than the Commission, or by the shareholders and companies themselves? Your comments are welcome on these matters.

Despite these considerations, the results of the Questionnaire appear to support the view that most participants would prefer that we maintain the current system, possibly with modifications. The Questionnaire sought views on a number of different alternatives to the existing system, none of which appeared to receive strong support from respondents. For instance, the Questionnaire asked about a system like that discussed above where states would be urged to adopt their own shareholder proposal rules in place of rule 14a–8; and about a system where each company would be permitted to adopt its own shareholder proposal rule, subject to shareholder approval. Neither shareholders nor companies appeared to favor these approaches.[28]

The Questionnaire also asked about another approach that would have substantially restricted companies' ability to exclude proposals, but would have placed a numerical cap on the total number of proposals that a company would be required to include in its proxy materials. The results were mixed. Many companies supported the approach, while most shareholders did not.[29]

The Questionnaire also asked whether respondents would prefer the existing system, with possible modifications, to some other alternative not identified in the Questionnaire. Most preferred retaining the existing system.[30]

The results also reflected some support for the Commission's continued involvement in the shareholder proposal process. Most shareholders and a number of companies responding to the Questionnaire indicated that the Commission's role should be expanded or stay the same.[31]

III. Proposed Amendments

We view the various reforms proposed today as a ''package'' designed to address in a balanced manner the sometimes conflicting concerns of different participants. Your comments should therefore focus not only on whether we should adopt each proposal viewed in isolation, but also on whether we should adopt the proposal as part of an overall package.

Part A below describes the proposed Question & Answer format for revised rule 14a–8, and clarifying language changes. Part B addresses our proposal to change the way the Division applies rule 14a–8(c)(4)[32], which permits companies to exclude proposals furthering personal grievances or special interests. Proposed amendments to rule 14a–8(c)(5)[33], the ''relevance'' exclusion, are explained in Part C. Part D describes how we propose to modify our interpretation of rule 14a–8(c)(7), which permits companies to exclude proposals relating to their ''ordinary business operations.'' In Part E, we describe proposed modifications to rule 14a–8(c)(12),[34] which permits companies to exclude proposals that received less than specified percentages of voting support on earlier submissions.

Part F describes a proposed mechanism to permit shareholders to ''override'' certain bases for excluding proposals. Part G addresses a proposed safe harbor from Section 13(d),[35] and a qualified exemption from the proxy rules, for shareholders using the proposed ''override'' described in Part F. Part H describes proposed revisions to rule 14a–4(c)[36] designed to establish clearer guidelines for the exercise of discretionary voting authority when a company receives advance notice that a shareholder intends to present a proposal for a vote without invoking rule 14a–8's mechanism. Finally, in Part I, we explain some other proposed amendments to rules 14a–8 and 14a–5.

A. Plain-English, Question & Answer Format

We propose to amend and recast Rule 14a–8 into a Question & Answer format so that the hundreds of shareholders and companies who refer to the rule each year can more easily understand its requirements.[37] We request your comments on whether the proposed revisions on the whole would make the rule easier to understand. Should we instead retain the format and style of the current rule?

Your comments should also address each of the proposed revisions individually. Except as specifically noted here, or elsewhere in Section III of this release, most of the proposed language modifications are intended solely to make the requirements easier to understand and follow, and not to result in substantive modifications. Some proposed revisions described in this Part A, however, are intended to reflect current Division or Commission interpretations of the rule. Your

adopt necessary procedures, if we decide to pursue this approach.

[27] See Exchange Act Release No. 20091 (Aug. 16, 1983) (the ''1983 Release'') [48 FR 38218].

[28] One percent of shareholder respondents and 47% of company respondents favored, and 93% of shareholders and 49% of companies disfavored, allowing each company to set up its own shareholder proposal process. Eighty-nine percent of shareholders, and an equal percentage of companies, disfavored replacing rule 14a–8 with state-adopted systems, while only 8% of companies and 5% of shareholders favored the approach.

[29] Sixty-three percent of company respondents and 9% of shareholder respondents supported the approach, while 34% of companies and 86% of shareholders disfavored it.

[30] Seventy-three percent of company respondents and 75% of shareholder respondents preferred the existing system either without reform or with other reforms. Only 6% of companies and 4% of shareholders, preferred some other alternative.

[31] Fifty-four percent of shareholder respondents and 47% of company respondents indicated that they believed the Commission's role would either increase or stay the same. Twenty-six percent of shareholders and 49% of companies indicated that our role should be diminished, and only 1% of shareholders and 8% of companies thought it should be eliminated. Additionally, 64% of shareholder respondents and 74% of companies indicated their belief that the Commission's role as informal ''referee'' in the shareholder proposal process is beneficial.

[32] 17 CFR 240.14a–8(c)(4).

[33] 17 CFR 240.14a–8(c)(5).

[34] 17 CFR 240.14a–8(c)(12).

[35] 15 U.S.C. 78m(d).

[36] 17 CFR 240.14a–4(c).

[37] The existing rule may be confusing for shareholders who may have had little or no prior experience dealing with our rules. In response to the Questionnaire, 65% of individual shareholder respondents indicated that they do not believe that shareholders generally understand the current shareholder proposal rule.

comments should address whether each proposed language modification makes the rule more understandable, whether some other revision would be more appropriate, and whether the proposed modification is consistent with current interpretations.

Most of the current rule's procedural and eligibility requirements would appear in the answers to Questions 2 through 8, and 12. We also proposed revisions to some of the thirteen bases upon which a company may rely for excluding a proposal, which appear in paragraph (c) of current rule 14a–8. The bases would now appear in the answer to Question 9.

In current paragraph (c)(1), permitting exclusion of proposals that are not proper subjects for shareholder action under state law, the reference to the ''laws of the issuer's domicile'' would be replaced by a reference to ''the laws of the state of the company's incorporation,'' which we have applied to have the same meaning. We would revise the note to the paragraph to reflect the Division's current practice of assuming that a proposal drafted as a recommendation or request is proper unless the company demonstrates otherwise.

We propose to make only minor plain-English revisions to current paragraph (c)(2),[38] replacing the word ''require'' with the word ''cause'' and moving to a ''note'' the portion of the current paragraph discussing the priority accorded domestic laws. We request your comments on whether some other formulation would make this paragraph easier to understand and follow, and whether the revisions appear consistent with current interpretations.[39]

Current paragraph (c)(3)[40] would be amended to eliminate the reference to ''regulations'' because it is redundant. We request your comments on whether this revision would make the rule clearer, or whether some other revisions would make the rule easier to understand and follow.

A proposed modification of the way we administer current paragraph (c)(4), and revisions to current paragraph (c)(5), are described in Parts B and C below.

As proposed, current paragraph (c)(6)[41] would be revised to permit exclusion ''[i]f the company would lack the power or authority to carry out the proposal.'' We believe that the revised language is clearer, without altering the meaning of the paragraph, which currently permits exclusion of proposals that are ''beyond the registrant's power to effectuate.'' We request your comments on whether some other revision would make the rule easier to understand and follow, and whether the revision appears consistent with current interpretations of the rule.[42]

Current paragraph (c)(7) permits the exclusion of proposals relating to a company's ''ordinary business operations.'' We recognize that the term ''ordinary business'' is a legal term of art that provides little indication of the types of matters to which it refers. We therefore propose to revise the paragraph to permit exclusion ''if the proposal relates to specific business decisions normally left to the discretion of management.'' The revised rule would provide a list of examples, which is not exclusive, including the way a newspaper formats its stock tables, whether a company charges an annual fee for use of its credit card, the wages a company pays its non-executive employees, and the way a company operates its dividend reinvestment plan. For an investment company, an example is a decision whether to invest in the securities of a specific company.

These proposed revisions are intended to make the ''ordinary business' exclusion easier to understand, not to modify current interpretations. We request comments on whether the examples of excludable matters provided are helpful and appropriate, and whether some other examples than the ones proposed would be more helpful. We also request your comments on the degree to which the proposed formulation would be consistent with current interpretations.[43]

We also request your comments on whether some other revision would be preferable. We could, for instance, retain the existing language, with or without additional guidance on its meaning. An example of this approach would be to revise current paragraph (c)(7) to permit omission of a proposal ''if it deals with a matter relating to the conduct of the company's ordinary business operations (matters that should be left to the discretion of the company's managers because of their complexity, impracticability of shareholder participation, or relative insignificance).'' Would this formulation be preferable to the current or proposed approach, and be consistent with current interpretations of the rule?

The proposed revisions to current paragraph (c)(8)[44] are designed to reflect the current interpretation that the rule applies only to proposals on elections of individuals for membership to, and removal from, the board of directors.[45] We propose to revise current paragraph (c)(9)[46] to reflect the Division's long-standing interpretation permitting omission of a shareholder proposal if the company demonstrates that its subject matter directly conflicts with all or part of one of management's proposals.[47] We request your comments on whether some other revision would make these rules easier to understand and follow, and whether the revisions appear consistent with current interpretations of the rules.

Current paragraph (c)(10),[48] permitting exclusion of ''moot'' proposals, would be revised to reflect the Commission's interpretation permitting exclusion of proposals that have been ''substantially implemented.''[49] Only minor stylistic revisions would be made to paragraph (c)(11)[50], which permits omission of substantially duplicative proposals. Although we significantly revised current paragraph (c)912),[51] the rule restricting resubmission of certain proposals, the only substantive proposed modifications to the paragraph are described in Part E below. We request your comments on whether the current rules are preferable, or whether some other revision would make the rules easier to understand and follow, and whether the proposed revisions appear consistent with current interpretations of the rules.

Finally, the rule as proposed to be revised would permit both companies and shareholders to send their rule 14a–8 submissions to the Commission by

[38] 17 CFR 240.14a–8(c)(2).

[39] See, *e.g., Firestone* (Dec. 8, 1987).

[40] 17 CFR 240.14a–8(c)(3).

[41] 17 CFR 240.14a–(c)(6).

[42] See, *e.g., SCECorp* (Dec. 20, 1995) (proposal that third party fiduciary trustees amend discretionary voting agreements).

[43] See the summary of the principal considerations in the application of the ''ordinary business'' exclusion in Part D below.

[44] 17 CFR 240.14a–8(c)(8).

[45] See, *e.g., Cornerstone Properties, Inc.* (Mar. 8, 1996) (proposal nominating proponent for election to company's board of directors).

[46] 17 CFR 240.14a–8(c)(9).

[47] See, *e.g., General Electric Corporation* (Jan. 28, 1997) (shareholder proposal requiring company to modify stock option plans conflicted with company proposal); *Northern States Power Co.* (July 25, 1995) (shareholder proposal counter to management's).

[48] 17 CFR 240–14a–8(c)(10).

[49] 1983 Release Consistent with that release, in order to have been ''substantially implemented,'' the company must have actually taken steps to implement the proposal. It is insufficient for the company to have merely considered the proposal, unless the proposal clearly seeks only consideration by the company, and not necessarily implementation.

[50] 17 CFR 240.14a–8(c)(11). See, *e.g., Detroit Edison* (Jan. 16, 1996).

[51] See, *e.g., Gannett Co.* (Feb. 12, 1996).

electronic mail. That option is not currently available.

B. Personal Claim or Grievance Exclusion: Rule 14a–8(c)(4)

We propose to modify the application of rule 14a–8(c)(4), which permits companies to exclude proposals relating to ''a personal claim or grievance against the registrant or any other person, or if it is designed to result in a benefit to the proponent or to further a personal interest, which benefit or interest is not shared by the other security holders at large.'' The goal of paragraph (c)(4) is straightforward: to screen out proposals designed to further a personal grievance or a special interest, since such proposals are unlikely to further the interests of all shareholders at large.[52] The Commission has recognized, however, that the exclusion is ''[p]erhaps the most subjective provision and definitely the most difficult for the staff to administer'' because it ''requires the staff to make determinations essentially involving the motivation of the proponent in submitting the proposal.'' [53]

Application of the exclusion is particularly difficult when the proposal is neutral on its face, meaning that the proposal itself does not by its terms relate to a personal grievance or special interest of the proponent. In those situations, the Division must make factual determinations, sometimes involving the proponent's or the company's credibility, based normally on circumstantial evidence presented in the parties' submissions.[54] In practice, the Division has infrequently concurred in the exclusion of a ''neutral'' proposal under rule 14a–8(c)(4).

We propose to modify the way the Division applies the rule so that the staff would concur in the exclusion of a proposal on this ground only if the proposal (including any supporting statement) on its face relates to a personal grievance or special interest. While a company would still be required to make a submission under rule 14a–8 if it intends to omit a ''neutral'' proposal under paragraph (c)(4), the Division would automatically express ''no view,'' rather than concur or decline to concur in its exclusion.

We propose this new approach because we recognize that the basic policy underlying paragraph (c)(4) is equally applicable to proposals that are neutral on their face. The proposed modification of the way we administer the rule merely reflects our appreciation that the Division's ability to make the necessary factual findings is limited in the context of such a proposal. Companies receiving ''no view'' responses could elect to omit the proposal if they believe they possess adequate factual records to demonstrate the personal grievance or interest. However, the Commission and its staff would not make that determination.

While this is a change in the Division's administration of the rule, we nevertheless request your comments on whether we should implement this change, including whether it would lead to abuse by either shareholders or companies.

C. Rule 14a–8(c)(5): The ''Relevance'' Exclusion

We propose to narrow and clarify the operation of rule 14a–8(c)(5), which is often called the ''relevance'' exclusion because its primary purpose is to screen out proposals that are of little or no economic relevance to the company and its business. Currently, the rule permits companies to exclude a proposal relating to

> operations which account for less than 5 percent of the registrant's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the registrant's business.

Since its adoption, the rule has suffered from the inherently subjective nature of the ''otherwise significantly related'' standard. The Commission has considered more objective tests. In 1976, for example, the Commission considered a purely economic test for determining a proposal's relevance, but rejected the idea largely out of recognition that some matters, such as cumulative voting rights or the ratification of auditors, may be important to the company despite the unavailability of a quantifiable economic value.[55] The Commission nonetheless recognized that there were ''circumstances in which economic data may indicate a valid basis for omitting a proposal under this provision.'' [56]

Realizing that the rule continued to suffer from imprecision, the Commission revised it in 1983 to add the specific 5% economic test and to modify the reference to ''significantly related'' matters.[57] Thus, if the subject of the proposal represented less than 5% of total assets, gross sales, and net earnings, the proponent could avoid exclusion of a proposal by demonstrating that the proposal is ''otherwise significantly related'' to the company's business.[58]

Largely as a result of the subjectivity of the ''otherwise significantly related'' language, that portion of the rule frequently overshadows the 5% economic standard. Thus, even if a proposal represents less than 5% of the company's total assets, net earnings, and gross sales, the proponent often can satisfy the ''otherwise significantly related'' part to defeat the company's reliance on the rule. In the period between September 30, 1996, and the date of this release, only two companies successfully invoked the rule to exclude proposals.[59]

The rule as revised would apply a purely economic standard. The exception for proposals that are ''otherwise significantly related'' would be deleted. A company would be permitted to exclude proposals relating to matters involving the purchase or sale of services or products that represent $10 million or less in gross revenue or total costs, whichever is appropriate, for the company's most recently completed fiscal year. However, an economic threshold lower than $10 million would apply if 3% of the company's revenue or total assets (whichever is higher), for its most recently completed fiscal year, results in a number lower than $10 million.

For instance, assume a proposal relates to a single retail store operated by a company with multiple stores, and the store generated $4 million in gross revenue for the company' most recently completed fiscal year. Because $4 million is less than $10 million, the company would be permitted to exclude the proposal unless the exception in the second part of the rule applies. However, because the company's gross revenue worldwide for the last completed fiscal year was $500 million, and its total assets totalled $400 million, the exception would not apply in this example. Three percent of the company's gross revenue for the relevant period (the higher number)

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[52] Exchange Act Release No. 19135 (Oct. 14, 1982) [47 FR 47420].

[53] *Id.*

[54] See, *e.g., Service Corporation Int'l* (Feb. 28, 1997) (company pointed to proponent's history of harassment as indicative of a personal claim or grievance); *Nortek Inc.* (Aug. 13, 1996) (staff did not concur with company's view that proposal requesting recision of a bylaw was excludable under rule 14a–8(c)(4)).

[55] Exchange Act Release No. 12999 (Nov. 22, 1976) [49 FR 52994].

[56] *Id.*

[57] 1983 Release; see also Exchange Act Release No. 19135 (Oct. 14, 1982).

[58] The proponent carries the burden of demonstrating that the proposal is ''otherwise significantly related.'' See Exchange Act Release No. 19135 (Oct. 14, 1982).

[59] *Atlantic Richfield Company* (Jan. 28, 1997) (proposal on company's operations in Myanmar); *La Jolla Pharmaceutical Company* (Feb. 18, 1997) (proposal on use of human fetal tissue).

amounts to $15 million—a number greater than $10 million. If it resulted in a lower number, that number would be the applicable threshold.

In response to the Questionnaire, companies stated that rule 14a–8 operates in a manner that requires them to include too many proposals of little or no relevance to their businesses.[60] We believe that the proposed revisions address this concern by establishing clearer, more predictable criteria for excluding proposals. The proposed revisions should also make it easier for companies to exclude economically insignificant proposals. The approach would appear to balance the various competing concerns, since under the proposed revision companies may also be unable to exclude some proposals—with relatively greater economic significance—that they are currently permitted to omit under the existing 5% test.

There would be four safeguards to prevent the revised rule from precluding proposals that may be significant to the company despite a low quantifiable value. First, the exclusion would apply only to proposals relating to quantifiable matters, such as operations in a specific foreign country, a specific product line, or a specific retail store or set of stores. It would not apply to proposals where quantification is impracticable or unreliable, such as proposals on cumulative voting, or the ratification of auditors.

Second, the economic threshold in the proposed rule has been reduced significantly from the threshold in current rule 14a–8(c)(5) to counter-balance the elimination of the ''otherwise significantly related'' portion of the current rule. The economic thresholds that would apply under the proposed rule would be the lesser of either $10 million in gross revenues or total costs (which is appropriate), or 3% of gross revenues or total assets (whichever is higher).

We recognize that $10 million may be economically significant for some smaller companies. That is why we propose the alternative 3% test which would make it more difficult to exclude proposals at smaller companies. The alternatives test could operate only to reduce the $10 million threshold, not to increase the threshold.

Third, the exclusion would apply only to proposals relating to the purchase or sale of products and services. This qualification is designed to help ensure that the exclusion is applied only to distinct operational matters relating to the company's business activities, and not to matters involving the company's internal governance, such as voting procedures for the board of directors.

Finally, we believe that any inflexibility that may result from adoption of a purely economic standard would be mitigated by the adoption of the ''override'' mechanism described in Part F below. That mechanism would permit a proponent who obtained sufficient shareholder support to override a company's use of current paragraph (c)(5) if he or she believed that it permitted exclusion of an important proposal.

We request your comments on whether we should consider some other modification of current paragraph (c)(5). For example, instead of eliminating the ''otherwise significantly related'' portion of the current paragraph, should we attempt to clarify and narrow that portion of the rule? Should it refer instead to specific types of proposals that would not be subject to the exclusion, such as corporate governance proposals and/or proposals relating to extraordinary transactions?[61] Should we revise the language to make it less subjective, to refer for instance to proposals where the substantiative action in the resolution relates to matters that under the applicable corporate law can be effectuated only by shareholders or the board of directors, or both acting together? Or should we instead retain the ''otherwise significantly related'' language?

We also request your comments on whether the qualification that the exclusion apply only to matters relating to purchase or sale of goods or services is necessary to ensure that the exclusion is not overly broad? Would some other formulation work more effectively, such as limiting application of the exclusion to matters relating to a company's assets or earnings?

In addition, we solicit your comments on whether economic thresholds other than $10 million in gross revenues or total costs, or 3% of gross revenues or total assets, might be more appropriate. Should there be only one threshold, such as the $10 million threshold, or the 3% threshold, or is it appropriate to have alternative thresholds, as proposed? The 3% test is intended to apply to relatively small companies where the fixed dollar test might be too high. Is that safeguard unnecessary if the fixed dollar threshold is set at a number as low as $10 million? The alternative 3% percent test would operate only to reduce the $10 million threshold, not to increase the threshold. We request your comments on whether the alternative test should also operate to increase the fixed dollar threshold.

Your comments should also address whether the proposed $10 million threshold is too low, so that it would fail to permit omission of economically insignificant proposals. If so, should the threshold be higher, such as $15 million or $25 million? Or would the rule as proposed permit companies to exclude too many proposals? If that is so, should the threshold be lower, such as $1 million, or $5 million? Similarly, should we adopt a percentage threshold lower than the proposed 3%, such as 1% or .5%, or a higher one, such as 5% or 8%?

The proposed $10 million threshold would be based on total costs or gross revenues, whichever is appropriate. Cost appears to be an appropriate measure for some matters, such as supply contracts, while revenue appears more appropriate for others, such as retail operations. Companies would not be permitted to choose between the two measures. For the percentage portion of the exclusion, we believe that a test based alternatively on gross revenues or total assets is warranted because it would apply in the most consistent and meaningful manner among different companies and industries compared to other possible measures. While revenues should in most cases be a consistent measure of size, assets may be a better measure for some types of companies, such as banks.

Should we instead adopt some other basis, or series of bases, for measuring the fixed dollar amount, such as pre-tax income, total assets, gross profit and/or net earnings? Instead of basing the amount on an alternative between two measures—such as revenues or cost—should we base it on only one measure, such as only cost, revenues, or assets? Similarly, we request your comments on whether the percentage portion of the test should be based on a measure other than gross revenues or total assets. Should we instead adopt some other basis, or series of bases, such as pre-tax income, gross profit and/or net earnings?

[60] See Section II above. In addition, of those responding to the Questionnaire, 59% of shareholders, and 54% of companies, ranked either simplification of the shareholder proposal process, or reduction of the cost and time required to participate, as a top goal of reform.

[61] The Questionnaire asked about a reformulation that would permit companies to exclude proposals representing less than 5% of assets, earnings, and sales, unless the proposal relates to corporate governance. Forty-one percent of shareholder respondents and 23% of companies indicated that they would favor such an approach.

D. The Interpretation of Rule 14a–8(c)(7): The ''Ordinary Business'' Exclusion

When adopted in 1953, the ''ordinary business'' exclusion had a fairly straightforward mission: to ''relieve the management of the necessity of including in its proxy material security holder proposals which relate to matters falling within the province of management.'' [62]

That mission became more complicated with the emergence of proposals focusing on social policy issues beginning in the late 1960's. As drafted, the rule provided no guidance on how to analyze proposals relating simultaneously to both an ''ordinary business'' matter and a significant social policy issue.

In 1976, the Commission considered revisions to the ''ordinary business'' exclusion, hoping to fashion more workable language distinguishing between ''mundane'' business matters and ''important'' ones.[63] It declined to adopt the new language after commentators expressed concern that the new language might be overly restrictive and difficult to apply.[64] In lieu of adopting revisions, the Commission stated that it would apply the exclusion in a ''somewhat more flexible manner.'' [65]

In applying the ''ordinary business'' exclusion to proposals relating to social policy issues, the Division applies the most well-reasoned standards possible, given the complexity of the task. From time to time, in light of experience dealing with proposals in particular subject areas, it adjusts its approach. Over the years, for instance, the Division has in several instances reversed its position on the excludability of proposals involving plant closings,[66] the manufacture of tobacco products,[67] executive compensation,[68] and golden parachutes.[69]

Another of these interpretive adjustments is a subject of today's proposals. In a 1992 no-action letter issued to the Cracker Barrel Old Country Stores, Inc.,[70] the Division announced that

> the fact that a shareholder proposal concerning a company's employment policies and practices for the general workforce is tied to a social issue will no longer be viewed as removing the proposal from the realm of ordinary business operations of the registrant. Rather, determinations with respect to any such proposals are properly governed by the employment-based nature of the proposal.

As a basis for the interpretive shift, the Division explained in the letter that

> [n]otwithstanding the general view that employment matters concerning the workforce of the company are excludable as matters involving the conduct of day-to-day business, exceptions have been made in some cases where a proponent based an employment-related proposal on 'social policy' concerns. In recent years, however, the line between includable and excludable employment-related proposals has been increasingly difficult to draw. The distinctions recognized by the staff are characterized by many as tenuous, without substance and effectively nullifying the application of the ordinary business exclusion to employment-related proposals.

The *Cracker Barrel* interpretation has been controversial since it was announced.[71] While the reasons for adopting the *Cracker Barrel* interpretation continue to have some validity, as well as significant support in the corporate community,[72] we believe that reversal of the position is warranted in light of the broader package of reforms proposed today. Reversal will require companies to include proposals in their proxy materials that some shareholders believe are important to companies and fellow shareholders. In place of the 1992 position, the Division would return to its approach to such proposals prevailing before it adopted the position. That is, employment-related proposals focusing on significant social policy issues could not automatically be excluded under the ''ordinary business'' exclusion.

Under this proposal, the ''bright line'' approach for employment-related proposals established by the *Cracker Barrel* position would be replaced by the case-by-case analysis that prevailed previously. Return to a case-by-case approach should redress the concerns of shareholders interested in submitting for a vote by fellow shareholders employment-related proposals raising significant social issues. While this would be a change in the Commission's interpretation of the rule, we nonetheless request your comments on whether we should reverse the *Cracker Barrel* interpretation. Your comments should focus on the proposed interpretive change independently of other proposals as well as part of the overall package of reforms proposed today.

In framing responses, commenters should bear in mind that the *Cracker Barrel* position relates only to employment-related proposals raising significant social policy issues. Reversal of the position would not affect the Division's analysis of any other category of proposals under the exclusion, such as proposals on general business operations. Also, the Division would continue to concur in the exclusion of straightforward employment proposals not raising significant social issues.[73]

Despite return to a case-by-case, analytical approach, some types of proposals raising social policy issues may continue to raise difficult interpretive questions. For instance, reversal of the *Cracker Barrel* position would not automatically result in the inclusion of proposals focusing on wage and other issues for companies' operations in the Maquiladora region of Mexico,[74] or on ''workplace practices.'' [75]

Finally, we believe that it would be useful to summarize the principal considerations in the Division's application of the ''ordinary business'' exclusion. These considerations would continue to impact our reasoning even

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[62] Exchange Act Release No. 4950 (Oct. 9, 1953) [18 FR 6646].

[63] Exchange Act Release No. 12598 (Jul. 7, 1976) [41 FR 29982].

[64] Exchange Act Release No. 12999 (Nov. 22, 1976) [41 FR 52994].

[65] *Id.*

[66] See *Pacific Telesis Group* (Feb. 2, 1989).

[67] See *Philip Morris Companies, Inc.* (Feb. 13, 1990).

[68] See *Reebok Int'l Ltd.* (Mar. 16, 1992).

[69] See *Transamerica Corp.* (Jan. 10, 1990).

[70] See *Cracker Barrel.*

[71] Shortly after its announcement, the New York City Employees Retirement System unsuccessfully challenged the Commission's authority to adopt the position. See *New York City Employee's Retirement System* v. *SEC*, 843 F. Supp. 858, *rev'd* 45 F.3d 7 (2d Cir. 1995). The Amalgamated Clothing and Textiles Union successfully challenged Wal-Mart's decision to exclude an affirmative action proposal after the Division concurred that the proposal could be excluded. See *Amalgamated Clothing and Textile Workers Union* v. *Wal-Mart Stores, Inc.*, 821 F. Supp. 877 (S.D.N.Y. 1993). During the last proxy season, we declined proponents' requests that we review three Division no-action responses implicating the interpretation, and concerning companies' affirmative action policies and practices. Commissioner Wallman dissented, and issued a dissenting statement.

[72] In response to the Questionnaire, 91% of companies favored excluding employment-related shareholder proposals raising significant social policy issues under the *Cracker Barrel* interpretation. Eighty-six percent of shareholders thought such proposals should be included.

[73] See, *e.g., Marion Merrell Dow, Inc.* (Mar. 26, 1993) (proposal on the scope of employees' responsibilities); *Eastman Kodak Company* (Jan. 30, 1991) (procedures for employee-management communications); *International Business Machines Corporation* (Dec. 28, 1995) (proposal requesting amendment of terms of employee benefit plans).

[74] See, *e.g., Allied Signal, Inc.* (Jan. 8, 1997) (proposal on company's Maquiladora operations). In response to the proponents' request for Commission review, we declined to review this no-action response in light of the ongoing Congressionally-mandated study of the shareholder proposal process.

[75] See, *e.g., W.R. Grace & Co.* (Feb. 29, 1996) (proposal on matters such as employee training, quality control).

if the proposals are adopted. The general underlying policy of this exclusion is consistent with the policy of most state corporate laws: to confine the resolution of ordinary business problems to management and the board of directors since it is impracticable for shareholders to decide how to solve such problems.[76] Although the policy is based on state law, it is not completely guided by it, due in part to an absence of state authority on many of the issues we are called upon to address.

The policy underlying the rule includes two central considerations. The first relates to the subject matter of the proposal. Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. However, proposals relating to such matters but focusing on significant social policy issues generally would not be considered to be excludable, because such issues typically fall outside the scope of management's prerogative.[77]

The second consideration relates to the degree to which the proposal seeks to ''micro management'' the company by probing too deeply into ''matters of a complex nature that shareholders, as a group, would not be qualified to make an informed judgment on, due to their lack of business expertise and lack of intimate knowledge of the [company's] business.''[78] This consideration may come into play in a number of circumstances, such as where the proposal seeks intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.[79]

[76] See Testimony of Chairman Armstrong, Hearings on SEC Enforcement problems Before a Subcommittee of the Senate Committee on Banking and Currency, 85th Cong., 1st Sess., pt. 1, at 118 (1957); see also Exchange Act Rel. No. 12999 (Nov. 22, 1976).

[77] See, *e.g., Reebok Int'l Ltd.* (Mar. 16, 1992).

[78] Exchange Act Release No. 12999 (Nov. 22, 1976).

[79] See, *e.g., Capital Cities/ABC, Inc.* (Apr. 4, 1991) (proposal requested detailed information on the composition of the company's workforce and other matters); *Templeton Dragon Fund/Newgate Management Associates* (Jun. 11, 1997) (proposal sought to establish the interval between repurchases and the amount of the initial repurchase offer for a fund's repurchase program); *Burlington Northern Santa Fe Corp.* (Jan. 22, 1997) (proposal on development of new technology for railroad braking systems); see also, *e.g., Roosevelt* v. *Dupont*, 958 F.2d 416, 427 (D.C. Cir. 1992) (proposal sought to impose earlier timetable for cessation of CFC production).

E. Rule 14a–8(c)(12): The Resubmission Thresholds

We propose to increase the resubmission thresholds under rule 14a–8(c)(12). If a proposal fails to receive a specified level of support, that rule permits a company to exclude a proposal focusing on substantially the same subject matter for a three-year period. In order to avoid possible exclusion, a proposal must receive at least 3% of the vote on its first submission, 6% on the second, and 10% on the third.

We propose to raise the thresholds to 6% on the first submission, 15% on the second submission, and 30% on the third. At least for the time frame contemplated by the rule, we believe that a proposal that has not achieved these levels of support has been fairly tested and stands no significant chance of obtaining the level of voting support required for approval. We propose to increase the second and third thresholds by relatively larger amounts because the proposal will have had two or three years to generate support.

The amendments would also respond to companies' concerns that they receive too many proposals of little or no relevance to their businesses.[80] In addition, we believe that the amendments are appropriate to counter-balance other proposals that would expand the range of proposals companies must include in their proxy materials, such as the proposed reversal of the *Cracker Barrel* position, and the ''override'' mechanism described in Part F below.

The theory of this approach is consistent with that of the proposed ''override'' mechanism: in some circumstances, shareholders may be the best judge of which rule 14a–8 proposals deserve space on the company's proxy card. Even with the proposed revisions, paragraph (c)(12) will continue to permit shareholders an opportunity to see otherwise proper proposals at least once, and to decide for themselves which are sufficiently important and relevant to see on the proxy card a second, third, or fourth time. In this respect, we believe that the proposed approach is preferable to other suggested alternatives, such as increasing the eligibility criteria for initial submissions,[81] or further restricting the types of proposals that may appear in proxy materials. We request your comments whether this approach is preferable to alternatives, such as increasing eligibility criteria.

We request your comments on whether the thresholds should remain at their current levels, or whether they should be amended to amounts lower or higher than those proposed. For instance, instead of increasing the first threshold of 6%, we could increase it to 5%, or to 8% or 10%. The second threshold instead could be increased to 10% or 20%, and the third to 15% or 40%. Alternatively, we could increase only one or two of the thresholds. To illustrate, we could increase only the second and third thresholds, for instance to 15% and 30%, but leave the first at its current level of 3%.

We also request your comments on whether the size of the thresholds should vary in inverse relationship to the size of the company. Under this alternative, the percentage vote that a proposal must receive could be higher or lower depending on the company's total assets, market capitalization, revenues, profits, earnings, or a combination of those factors. A smaller percentage would be sufficient for a larger company, and a larger percentage for a smaller company. This approach would account for the fact that obtaining a certain percentage of support may become more difficult as the size of the shareholder base increases. If you believe that the thresholds should vary, your comments should specify the factors that should be considered in distinguishing between companies.

Finally paragraph (c)(12) prescribes a ''votes cast'' standard for determining whether a proposal received sufficient voting support in previous years to bar its omission in the current year. Under this standard, which has been characterized as the ''most favorable to shareholder proponents,[82] abstentions and broker non-votes[83] are excluded

[80] See Section II above.

[81] For a discussion of the eligibility criteria, see Part I.2. below.

[82] *See* American Bar Association Interpretive Letter (avail. June 24, 1993) (quotation in footnote 2 of incoming letter describing staff's position, for tabulation purposes, on 14a–8(c)(12) resubmission thresholds; the letter sought staff interpretive advice on the proper treatment of broker non-votes and abstentions for purposes of Rule 16b–3).

[83] In Exchange Act Release No. 30849 (June 24, 1992) [57 FR 29564], at footnote 67, the Commission described abstentions and broker-dealer non-votes as follows:

In two instances, a shareholder will be deemed present at the meeting for quorum purposes, but will be deemed not to have voted on a particular matter. First, the shareholder may specifically abstain from the vote by registering an abstention vote. Second, a nominee holding shares for beneficial owners [*e.g.*, a broker-dealer] may have voted on certain matters at the meeting pursuant to discretionary authority or instructions from the beneficial owners, but with respect to other matters may not have received instructions from the

Continued

from the denominator comprised of the total number of votes cast ''For'' and ''Against'' a given proposal. This figure in turn is divided into the total number of favorable votes cast to obtain the requisite percentage.

The Commission believes that the staff should continue to apply this method of vote counting for (c)(12) purposes, regardless of whether the existing thresholds are increased. Comment is sought on whether a different method should be applied; for example, including abstentions and/or broker non-votes as votes cast in the denominator, and/or treating abstentions and/or broker non-votes as votes against a proposal. We note that treating abstentions and/or non-votes as votes cast would result in the largest denominator, requiring the most ''For'' votes to surmount the (c)(12) thresholds.

F. Proposed Override Mechanism

We propose to revise rule 14a–8 to permit a shareholder proponent to override the exclusions under rules 14a–8(c) (5) and (7) if he or she demonstrates that at least 3% of the company's outstanding voting shares support the submission of the proposal for a shareholder vote. Current rule 14a–8 does not include any mechanism for overriding exclusions currently listed in any paragraph of rule 14a–8.

The ''override'' mechanism would broaden the spectrum of proposals that may be included in companies' proxy materials where a certain percentage of the shareholder body believes that all shareholders should have an opportunity to express a view on the proposal. The proposed mechanism would accordingly provide shareholders an opportunity to decide for themselves which proposals are sufficiently important and relevant to all shareholders—and, therefore, to the company—to merit space in the company's proxy materials.

As an example, companies often rely on current paragraph (c)(7) in attempting to exclude shareholder proposals on a variety of issues. Under the proposed ''override,'' a shareholder obtaining the required level of support could avoid exclusion under that paragraph.

The requirement that the proponent obtain the support of a certain percentage of his or her fellow shareholders should serve two purposes. First, the percentage should be high enough to ensure that the proposals receiving that level of support are likely to be sufficiently relevant and important to the company to deserve a space in its proxy materials. Second, the percentage should not be so high as to make the ''override'' unattainable. We believe that 3% would strike the right balance, but we request your comments on whether the percentage should be higher, such as 5% or 8%, or lower, such as 1% or 2%. Your comments, preferably supported by empirical information, should address the degree to which a 3% support level is achievable.

As proposed, the shareholder who submitted the proposal could include his or her own shares in calculating the 3% necessary to accomplish an override. We recognize that, under this approach, a proponent who holds 3% of a company's outstanding voting shares could accomplish an override without having to obtain the endorsement of other shareholders. We request your comments on whether alternatively the rule should preclude consideration of the proponent's own shares in calculating the percentage required for an override.

We request your comments on whether we should adopt an alternative mechanism for establishing a shareholder override in addition to, or in place of, the 3% requirement. We could, for instance, permit an override by a fixed number of shareholders, such as 200, or 500 holders, either in place of the 3% threshold, or as an alternative test. If so, should it be permissible for the supporters to be members of the same organization, such as the same shareholder organization?

We also request your comments on whether the level of support a shareholder must obtain should vary in inverse relationship to the size of the company. That is, the percentage of share ownership that a proposal must receive could be higher or lower depending on the company's total assets, market capitalization, revenues, profits, earnings , income or a combination of those factors. A smaller percentage would be sufficient for a larger company, and a larger percentage for a smaller company. This approach would account for the fact that obtaining a certain percentage of support may become more difficult as the size of the shareholder base increases. If you believe that the thresholds should vary, your comments should specify the factors that should be considered in distinguishing between companies.

One method for obtaining the required support likely could be to enlist the support of institutions holding large blocks of the company's voting shares. We currently do not have conclusive information on the extent to which institutions would actually support inclusion of social proposals, and we request your comments on this question. Our review of institutional filings on form 13F indicates that in many cases the support of 3% could be achieved by enlisting the support of only one institutional holder,[84] although it did not indicate how many of those holders would as a practical matter likely be in a position to engage in shareholder proposal activity.

In calculating the percentage, a proponent could rely on the number of voting shares outstanding reported in the company's annual report to shareholders distributed for the prior year's annual meeting.[85] Proponents taking advantage of the ''override'' would be responsible for demonstrating to the company, not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting, that their proposals had received the endorsement by the holders of 3% of the company's shares entitled to be voted on the proposal at the meeting. That would include, from each supporter:

(i) His or her written statement supporting the inclusion of the proposal in the company's proxy materials for a specific meeting of shareholders. The statement must be executed and dated as of a date no earlier than the date of the company's annual meeting for the prior year. If the company did not hold a meeting the prior year, the statement must be dated no more than one year before the scheduled date of the meeting for which the proposal is submitted. Of course, a shareholder's support of an ''override'' effort would not include proxy authority with respect to the vote on the proposal if it is ultimately placed in the company's proxy materials;[86] and

(ii) A written statement from the record holder of the supporter's shares, specifying the number of shares that the supporter held as of the date of the supporter's statement described in (i) of this section.

It would be the proponent's responsibility to collect this evidence from the supporters and provide it to the company in an organized,

beneficial owner and [therefore] may not exercise discretionary voting power. Such unvoted shares are termed ''non-votes.''

[84] In the last quarter of 1996, institutional investment managers filing Form 13F [17 CFR 249.325] reported holdings in 5,993 listed equity issues. For 69% (4,166) issues, institutional holdings are sufficiently high that an investor would need to contact only one holder to communicate with at least 3% of the corporation's equity ownership.

[85] Companies are required to provide this information in the annual report under rule 5–20 of Regulation S–X. The information should also be available in the company's annual report on Form 10–K [17 CFR 249.310].

[86] See discussion in Part G below of proposed amendments to rules 14a–2 and 13d–5.

understandable form. We request your comments on these procedures, including the requirement that proponents submit the written evidence no later than 120 calendar days before the date that the company first mailed its proxy materials to shareholders for the prior year's annual meeting. Would a deadline set at 60 or 90 calendar days, or 150 or 180 calendar days, be more appropriate?

The 120-day deadline has the benefit of simplicity because it would track the deadline that currently applies to the submission of shareholder proposals to companies, which companies are already required to publish in their proxy materials. The 120-day deadline would also ensure that companies learn of a potential override sufficiently before they print and mail their proxies to review the proponent's written support and to discuss any questions on its sufficiency.

Under current rule 14a–8's timing requirements, there is little change that a proponent would learn whether a company intends to omit, and may properly omit, his or her proposal before invoking the override mechanism. Under paragraph (d) of current rule 14a–8, a company intending to omit a proposal is not required to submit its reasons to the Commission until 80 calendar days before the date the company files its definitive copies of its proxy statement and form of proxy.[87] That, of course, is after the proposed 120-day deadline for submitting ''override'' material to companies. We accordingly propose to amend rule 14a–8's timing requirements to provide a proponent a chance to learn the Division's views on whether the proposal is properly excludable before undertaking an override effort.

Under current rule 14a–8(d), the 80-day deadline applies to companies' submissions with the Commission without regard to when the company receives a copy of the shareholder proposal. Unless the company submits early, the Division's views on the excludability of the proposal may not be available until weeks before the date of the meeting of shareholders. We propose to amend current paragraph (d) to require companies to make their submissions no later than 40 calendar days after receiving a proposal. Thus, under proposed Question 12, a company would be required to submit its reasons to the Commission no later than 40 calendar days after the date that it receives a shareholder proposal for inclusion in its proxy materials, and no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. Under this approach, a proponent who submits his or her proposal to the company early enough would likely learn whether, in the Division's view, the proposal may be excluded before needing to commence an override effort.

We request your comments on whether it is necessary for proponents to learn of the Division's position before undertaking an override effort. We also request your comments on whether the proposed modification of rule 14a–8's timing requirements would provide proponents with an adequate opportunity to learn of the Division's response prior to commencing an override effort. Finally, would the proposed modification provide companies with adequate time to consider shareholder proposals, and to prepare and submit a rule 14a–8 filing with the Commission?[88] Should companies be allowed more time, such as 50 or 60 days, or less time, such as 30 days?

As proposed, written support for an override effort must be executed and dated no earlier than the date of the company's annual meeting for the previous year. The purpose of this requirement is to ensure that support for an override is sought and provided as of a date reasonably close to the date of the meeting at which the proposal is to be presented. It is also designed to prevent a proponent from using the same override more than once. We request your comments on whether proponents should have more time, such as 18 months, to collect override evidence, or less time, such as 9 months. We also request your comments on whether we should consider some other approach, such as stating that override evidence may be used only once, without placing a limitation on how old it can be.

The proposed share ownership requirements for supporting an override would be more lenient than the current eligibility requirements for actually submitting a proposal to a company. Paragraph (a) of current rule 14a–8 requires that the actual proponent have held his or her shares for at least one year before becoming eligible to submit a proposal to a company. One purpose of the one-year requirement is to curtail abuse of the rule by requiring that those who put the company and other shareholders to the expense of including a proposal in its proxy materials have had a continuous investment interest in the company. While we do not propose a one-year ownership requirement for supporting the placement of a proposal in a company's proxy materials under the override mechanism, we request your comments on whether we should adopt one. If so, your comments should address whether we should choose one year, or instead a shorter ownership period for the purposes of the override, such as 6 months, or a longer period, such as 2 years.

In addition, paragraph (a) of the current rule requires that an actual proponent state that he or she intends to hold his or her shares at least through the date of the meeting. Largely out of concern that the fiduciary duties of institutional holders would preclude them from making such a commitment, we do not propose that those supporting an override promise to hold their shares through the date of the meeting. We request your comments, however, on whether we should adopt such a requirement, and on whether it would, if adopted, interfere with fiduciary duties. Alternatively, should we require a supporter to state that he or she intends, as of the date of the statement, to hold his or her shares through the date of the meeting, without attaching a penalty to a sale of the shares before the meeting date?[89]

As proposed, the override mechanism would limit each shareholder to endorsement of no more than one proposal sponsored by another shareholder. That would not, however, affect the shareholder's eligibility to submit a proposal of his or her own. The purpose of the limit would be to place a limitation on the number of proposals that a group of shareholders could force a company to include in its proxy materials. We request your comments on whether the ''one endorsement'' limit should be more liberal, permitting each shareholder to endorse two or three proposals for each company. Or should it be more restrictive, permitting each shareholder to either submit one proposal, or to endorse one proposal, at each company? Under that approach, a shareholder who had endorsed a proposal would be disqualified from submitting his or her own proposal.

We view the proposed override as a supplemental, rather than a primary,

[87] See rule 14a–8(d)[17 CFR 240.14a–8(d)].

[88] Under current rule 14a–8(d), shareholder proposals must be submitted to the company no later than 120 calendar days before the date that the company mailed it proxy materials to shareholders the prior year. Because the company need not make its filing until 80 calendar days before the filing of definitive proxy materials, the current rule in most instances assures companies approximately 40 days to consider and respond to the receipt of a proposal.

[89] Under current rule 14a–8(a)(1), if a proponent fails to hold his or her securities continuously through the date of the meeting, the company may preclude him or her from including another proposal in its proxy materials for two calendar years.

method for including proposals in companies' proxy materials. Accordingly, we are not proposing any special mechanisms for requiring companies to provide shareholder lists or other shareholder information to proponents seeking to obtain support for an override. We request your comments on whether the rule should include any such mechanisms.

G. Safe Harbor Under Section 13(d); Qualified Exemption From Proxy Rules

To address concerns that a proponent's efforts to gather shareholder support to avail himself or herself of the override might be deterred by concerns about triggering filing and other obligations under Section 13(d)[90] or 14(a)[91] of the Exchange Act, we also propose a new safe harbor from the 13(d) ''group'' beneficial ownership reporting requirements, and a new exemption from the proxy rules in rule 14a–2.

Under current rules, there may be a concern that shareholders cooperating in an ''override'' effort, who beneficially own in aggregate more than 5 percent of the company's equity securities, might be required to file a Schedule 13D or 13G if deemed to have formed a ''group'' under rule 13d–5. Similarly, there may be a concern that the shareholder proponents and others assisting them in seeking support also could trigger obligations under the proxy rules if their cooperation involves any ''solicitation'' as defined in rule 14a–1(l)(1).[92] The relief afforded by the safe harbor would be limited to support for the inclusion of the proposal in the company's proxy materials for a shareholder vote. It would not extend to agreements or arrangements on how shareholders would ultimately vote if the proposal appears in the company's proxy materials. Proposed rule 13d–5(b)(3) would provide that:

Notwithstanding paragraph (b)(1) of this section, a group formed among the beneficial owners of a class of equity securities solely by an understanding, arrangement, or agreement that a shareholder proposal should be placed in a registrant's proxy materials for a shareholder vote, for the purpose of using the ''override'' mechanism provided in § 240.14a–8(j) (Question 10), shall be deemed not to have acquired any equity securities beneficially owned by the other members of the group for the purposes of Section 13(d)(1) of the Act (15 U.S.C. 78m); provided, however, that such understanding, arrangement or agreement does not relate to how the holders will vote on the proposal if it is ultimately placed in the registrant's proxy materials.

We request your comments on whether this relief is necessary in order to enable shareholders effectively to make use of the override, and, if so, whether it will serve that purpose adequately. We also request your comments on whether efforts to obtain an override for certain types of proposals (*e.g.*, those affecting control of the company) should be afforded protection under the safe harbor, and more generally on whether the proposed safe harbor is overly broad.

Proposed new rule 14a–2(b)(2) would provide an exemption from compliance with all proxy rules except rule 14a–9,[93] for any solicitation made for the sole purpose of gathering support for placing a shareholder proposal in a registrant's proxy materials pursuant the ''override'' mechanism provided in § 240.14a–8(j) (Question 10); provided that such solicitation does not seek proxy authority with respect to the vote on the proposal if it is ultimately placed in the registrant's proxy materials;

We request your comments on whether we should adopt proposed new rule 14a–2(b)(2), including whether it would provide adequate relief for shareholders concerned that their participation in an ''override'' effort could amount to a ''solicitation,'' or whether the proposed relief is overly broad. We also request your comments on whether, and the extent to which, the restrictions set forth in current rule 14a–2(b)(1) (i)–(x)[94] should also apply to limit the persons who may use the proposed new exemption. Alternatively, we have previously made clear that proponents of rule 14a–8 proposals may use the exemption provided by rule 14a–2(b)(1);[95] instead of adopting the proposed new rule, should we make clear that proponents seeking to use the proposed override mechanism may avail themselves of that exemption?

H. Rule 14a–4: Discretionary Voting Authority

If a shareholder submits a proposal under rule 14a–8 to be included in the company's proxy materials, but the company properly excludes the proposal, rule 14a–4(c)(4)[96] permits the company to exercise discretionary voting authority to vote uninstructed proxies against that proposal if the shareholder chooses an alternative route for its presentation to a vote. The proponent may, for instance, intend to present the proposal from the floor of the company's annual meeting, or solicit proxy votes independently by distributing its own proxy statement and form of proxy.

Rule 14a–4 does not, however, clearly address the exercise of discretionary voting authority if the shareholder chooses not to use rule 14a–8's procedures for placing a proposal in the company's proxy materials. This may occur if the proponent notifies the company of his or her intention to present the proposal from the floor of the meeting, or commences his or her own proxy solicitation, without ever invoking rule 14a–8's procedures.

The availability of discretionary voting authority on a non-14a–8 proposal has been the subject of litigation and attendant uncertainty.[97] Current rule 14a–4(c)(1) permits a company to exercise voting authority on proposals that the company did not know of a ''reasonable time'' before the meeting. The ''reasonable time'' standard has been the source of some uncertainty when a company is notified of a shareholder proposal shortly before its meeting is scheduled to take place.[98]

In response to the Questionnaire, companies indicated that they seek clearer ground rules and the avoidance of potential delay and expense when they are notified of possible proposals after they have begun to print or even mail proxy materials to shareholders.[99] We accordingly propose to amend rule 14a–4(c) in part to clarify when a company may exercise discretionary voting authority on a shareholder proposal where the proponent has not invoked rule 14a–8's procedures.

Last year, the Division provided no-action advice on the ability of a company to exercise discretionary voting authority under rule 14a–4(c)(1) to vote on a matter to be raised at an annual meeting, when the company received adequate advance notice of the proposal.[100] Under those no-action letters, a company that receives adequate advance notice of a non-rule 14a–8 proposal—such as under its advance notice bylaw—nevertheless may preserve its discretionary voting authority by disclosing in its proxy materials the nature of any proposal it has been advised may be presented, and

[90] 15 U.S.C. 78m(d).

[91] 15 U.S.C. 78n(a).

[92] 17 CFR 240.14a–1(l)(1).

[93] 17 CFR 240.14a–9.

[94] 17 CFR 240.14a–2(b)(1).

[95] See Exchange Act Release No. 31326 (Oct. 16, 1992) [57 FR 48276].

[96] 17 CFR 240.14a–4(c)(4).

[97] See, *e.g.*, *United Mine Workers of America* v. *Pittston Company*, Fed. Sec. L. Rep. ¶ 94,946 (D.D.C. Nov. 24, 1989); *Larkin* v. *Baltimore Bancorp*, 769 F. Supp. 919, 925 (D.Md. 1991). See also *Union of Needletrades, Industrial and Textile Employees (''UNITE'') et al.* v. *The May Department Stores Company*, 97 Civ. 3120 (SDNY).

[98] See, *e.g.*, *Larkin* v. *Baltimore Bancorp*, 769 F. Supp. 919, 925 (D.Md. 1991).

[99] See Section II above.

[100] See *Idaho Power Company* (Mar. 13, 1996) and *Borg-Warner Security Corporation* (Mar. 14, 1996).

the manner in which the company intends to exercise its discretion. Under the no-action letters, the company loses its voting discretion, however, once the proponent commences a proxy solicitation and solicits the percentage of holders required to carry the proposal.

Of course, the Division's no-action letters provide only informal advice, and we recognize that the position outlined in those letters has not eliminated all uncertainty in situations where a company has advance knowledge of a potential proxy contest. For instance, if the shareholder proponent files preliminary proxy materials after the company has filed its own proxy statement, or even after the company has mailed its definitive proxy statement and form of proxy to shareholders, the company may be placed in a dilemma of either including the shareholder's proposal on its proxy card, or risking the delay and expense of a last-minute resolicitation. That is because the company may not know whether the shareholder intends to begin to solicit proxies independently by circulating his/her own proxy card, along with the definitive version of his or her proxy statement, or how many shareholders will be solicited if such a solicitation is actually launched.

To address these uncertainties, we propose to amend paragraph (c)(1) of rule 14a–4, and to add new paragraph (c)(2), to provide clearer guidelines in these circumstances. The proposed revisions to paragraph (c)(1) would replace the ''reasonable time'' standard with a clear date after which notice of a possible shareholder solicitation would not be deemed adequate for purposes of proposed new paragraph (c)(2).

Revised paragraph (c)(1) would allow a company voting discretion where ''the registrant did not have notice of the matter more than 45 days before the date on which the registrant first mailed its proxy materials for the prior year's annual meeting.'' [101] This approach will not only provide clearer guidelines for shareholders and companies, but also benefit investors by helping to ensure that companies are notified of proposals sufficiently in advance of the annual meeting to provide shareholders a meaningful opportunity to review related disclosures in the proxy statement.

We recognize that the laws of some states authorize bylaw provisions requiring shareholders to provide advance notice of proposals that they intend to present at a meeting of shareholders. We do not intend to interfere with the operation of state law authorized definitions of advance notice. Accordingly, an advance notice bylaw provision ordinarily would override the 45-day period under rule 14a–4 as proposed to be amended, resulting in either a longer or shorter notice period. For example, if a company properly adopts a bylaw provision requiring advance notice 60 days before the previous year's mailing date, that date would apply instead of the date specified by the proposed paragraph 14a–4(c)(1).

We request your comments on whether it would be more appropriate to establish a shorter period than 45 days, such as 30 days or 15 days, or a longer period, such as 60 or 90 days for revised paragraph 14a–4(c)(1). We understand that some companies begin printing their proxy materials well in advance of the mailing date. We request your comments on whether the 45-day period is adequate to accommodate printing schedules.

Proposed new paragraph 14a–4(c)(2) would address a company's ability to exercise discretionary voting authority after it has received timely notice of a non-14a–8 proposal for the purposes of paragraph (c)(1). The new rule would permit the exercise of such authority if the proxy materials include: (i) In the proxy statement, a discussion of the nature of the matters and how the company intends to exercise its discretion on each matter, and (ii) on the proxy card, a cross-reference to the discussion in the proxy statement and a box allowing shareholders to withhold discretionary authority from management to vote on the same matter(s).

We believe that the proposed framework would benefit both shareholders and companies by establishing clearer and more predictable ground rules. The proposed framework also would provide shareholders with some control over the company's discretionary authority to vote their shares on matters for which the company received adequate notice. Under current rules, a company is not required to provide shareholders an opportunity to withhold discretionary authority on such matters where such authority properly can be exercised.[102] Under proposed new rule 14a–4(c)(2), the company would be required to provide shareholders who execute and return proxies an opportunity to withhold discretionary authority, albeit only on those matters for which it received adequate notice and which it described in its proxy statement. Should we provide shareholders greater latitude to ''grant'' discretionary voting authority, or to ''abstain,'' in addition to the ability to ''withhold''?

We request your comments on the proposed revisions to paragraph (c)(1), and the adoption of proposed new paragraph (c)(2). Would some other approach be more effective? For example, should we require companies to place proposals in their proxy materials if the proponent commences a formal proxy solicitation, and solicits the number of shares necessary to carry the proposal? What impact, if any, might the proposed revision(s) have on the conduct of proxy contests generally? Would the proposed amendments have the effect of unduly discouraging insurgent solicitations? Your comments should address the proposed revisions individually, together with the other proposed changes to rule 14a–4(c), and the broader package of reforms proposed today.

Although they would provide clearer guidance on the exercise of discretionary voting authority under rule 14a–4(c), the proposed amendments would not relieve companies of their obligation under rule 14a–9, the anti-fraud rule. Under that rule, companies must provide shareholders with sufficient information to make informed voting decisions as well as a meaningful opportunity to review the information. If the proponent solicits a large number of his or her fellow shareholders, for instance, a company may elect to provide shareholders with an opportunity to vote for or against a shareholder's proposal. In this and similar circumstances, the company must remain mindful of its obligations under rule 14a–9.[103]

[101] Because the company's mailing date for the previous year's annual meeting may not be available to shareholders, we propose to amend rule 14a–5(e) [17 CFR 240.14a–5(e)] to require companies to publish in their proxy materials the date by which notice would have to be received. This date will by definition be 75 days after the date by which shareholder proposals must normally be received under rule 14a–8 (Question 5). See Part I.4 below.

[102] Rule 14a–4(a)(3) currently provides that ''[n]o reference need be made * * * to proposals as to which discretionary authority is conferred pursuant to [rule 14a–4(c)].''

[103] Recently, for example, some companies have included shareholder proposals in supplemental proxy materials with revised forms of proxy, which they mailed shortly before the date that the annual meeting is scheduled to take place. Even if the supplemental proxy contains all material information necessary to make an informed voting decision, we understand that the beneficial holders may not receive the supplemental materials, or may receive them too late for meaningful review and

Continued

Finally, during the past proxy season, the Division permitted several companies to file proxy materials in definitive form despite prior notification of a non-14a–8 shareholder proposal, so long as they disclosed the nature of the proposal and how they intended to exercise discretionary voting authority if the proposal were to be presented.[104] In light of the proposed amendments to rule 14a–4, we would reverse that informal position, so that companies receiving notice of a non-rule 14a–8 proposal before the filing of their proxy materials would henceforth be required to file their materials in preliminary form, subject to staff review. We request your comments on this proposed reversal.

I. Other Proposed Modifications

We propose a few other modifications to rules 14a–8 and 14a–5:

1. The answer to Question 1 of revised rule 14a–8 would define a ''proposal'' as a request that the company or its board of directors take an action. The definition reflects our belief that a proposal that seeks no specific action, but merely purports to express shareholders' views, is inconsistent with the purposes of rule 14a–8 and may be excluded from companies' proxy materials. The Division, for instance, declined to concur in the exclusion of a ''proposal'' that shareholders express their dissatisfaction with the company's earlier endorsement of a specific legislative initiative.[105] Under the proposed rule, the Division would reach the opposite result, because the proposal did not request that the company take an action. We request your comment on whether this or some other approach may be preferable.

2. Rule 14a–8(a)(1) currently requires that a shareholder have held for one year the lesser of $1,000 in market value, or 1%, of the company's voting shares, at the time he or she submits a proposal. We propose adjusting the $1,000 requirement to account for inflation since first adopted in 1983.[106] The amended rule, which would appear in the answer to Question 2, would require continuous ownership of $2,000 in market value of the company's voting shares. While the actual inflation adjustment from the date of adoption to today would increase the existing requirement by approximately $600, we propose $2,000 to account for future inflation, and because it will be easier to use for calculations. We sought to avoid increasing the threshold further out of concern that a more significant increase could restrict access to companies' proxy materials by smaller shareholders, who equally with other holders have a strong interest in maintaining channels of communication with management and fellow shareholders. We request your comments on whether we should adopt a higher number such as $3,000, $5,000 or $10,000, or a lower number such as $1,500.

We also request your comments on whether we should modify or eliminate the one-year continuous ownership period. One purpose of the requirement is to curtail abuse of the rule by requiring that those who put the company and other shareholders to the expense of including a proposal in proxy materials have had a continuous investment interest in the company. We could, for example, permit shareholders more flexibility to submit proposals earlier, by adopting a shorter period, such as 6 months, or less flexibility, by adopting a longer period, such as 18 months. Alternatively, we could maintain the current one-year period, but provide that relatively larger holders, such as holders of 3% or 6% of the outstanding voting shares, would be eligible to submit proposals without regard to a continuous ownership period.

3. The answer to Question 6 in revised rule 14a–8 would describe the procedures a company must follow if it intends to omit a proposal on grounds that the proponent is ineligible or otherwise failed to comply with the rule's procedures. As proposed, the answer states that a company may omit a proposal on the grounds only after it has first noticed the proponent of the deficiency and gives the proponent 14 calendar days to remedy the deficiency.[107] The proposed language largely adopts the procedures set forth in current paragraph (a)(1)[108] and (a)(4)[109] of the current rule. However, the proposed 14-day period in which a shareholder must respond is shorter than the 21 calendar days allowed by current paragraph (a)(1), and by some of the Division's response letters under paragraph (a)(2).[110] We believe that the shorter period will be sufficient for shareholder proponents, and will help to streamline the rule's operation by establishing a single ''shareholder response period'' that would apply under all circumstances that may arise under the rule. The shorter response time should expedite the timing of a company's filings with the Commission and, in turn, the Commission's responses. We request your comments on whether we should adopt some other mechanism, including whether the proposed time for responding should be shorter, such as 10 calendar days, or longer, such as 21 calendar days.

4. Rule 14a–5(e) currently requires a company to disclose the deadline for submitting proposals to be included in proxy materials for the next year's annual meeting. We propose to revise the rule to require companies also to disclose the date after which proposals submitted outside the framework of rule 14a–8 are considered untimely for the purposes of rule 14a–4(c)(1).[111] This is because shareholders may not be aware of all the information necessary to calculate the date for themselves.

In addition, current paragraph (e) requires companies to notify shareholders of a new meeting date, and deadline for submitting proposals, if the date of the next annual meeting is subsequently advanced by more than 30 days, or delayed by more than 90 days. For the sake of consistency with other rules,[112] we propose to revise the rule to require notification of changes in the meeting date and each of the disclosed dates if the meeting date is delayed or advanced more than 30 calendar days. Finally, the current rule contemplates notification by ''any means calculated to so inform'' shareholders. We propose to require that such notification of date changes appear in the company's earliest quarterly report on Form 10–Q[113] or 10–QSB,[114] if practicable.[115] We request your comments on whether notice in a company's quarterly report is

consideration of whether to change or formulate new voting decisions. Timing considerations often depend on the facts and circumstances of individual cases, and the obligation to provide a meaningful opportunity rests with the company.

[104] Rule 14a–6 [17 CFR 240.14a–6] addresses when a company must file its proxy materials in definitive form, and when it must file in preliminary form.

[105] *Pacific Gas and Electric Company* (Jan. 21, 1997).

[106] See 1983 Release.

[107] Of course, consistent with current practice, a company would not have to follow these procedures if the deficiency cannot be remedied, such as if the proponent fails to submit a proposal by the company's proper deadline.

[108] 17 CFR 240.14a–8(a)(1).

[109] 17 CFR 240.14a–8(a)(4).

[110] 17 CFR 240.14a–8(a)(2). See, *e.g., CoBancorp Inc.* (Feb. 22, 1996); *Archer-Daniels-Midland* (July 29, 1996).

[111] See Part H above.

[112] Current rule 14a–8(a)(3)(i) [17 CFR 240.1a–8(a)(3)(i)], and proposed rule 14a–8 (Question 5), require the company to adjust the deadline for submitting proposals if the date of the annual meeting is delayed or advanced by more than 30 calender days.

[113] 17 CFR 249.308a. The new information, if applicable, would be disclosed under Item 5 of Form 10–Q or 10–QSB (''Other Information'').

[114] 17 CFR 249.308b.

[115] For investment companies, the proposal would require the notification to appear in shareholder reports under 30D–1 [17 CFR 270.30d–1] of the Investment Company Act.

likely to be effective, and whether we should require notification in some document other than the company's quarterly report, such as Form 8–K.[116]

5. Current rule 14a–8(e)[117] provides a mechanism for a shareholder to obtain staff review of a company's statement in opposition to a shareholder proposal appearing in its proxy materials. In our experience, only a handful of shareholders make use of the mechanism each year, and the staff review rarely results in modifications to the company's statement. In most instances, the shareholder's objection highlight matters that do not constitute materially false or misleading statements for the purpose of rule 14a–9. Accordingly, we propose to eliminate the mechanism provided by current rule 14a–8(e). We request your comments on this proposal.

. Current rule 14a–8(a)(2) provides that a proposal may be presented at a meeting either by the proponent or by his or her representative qualified under state law to present the proposal. It has been our long-standing interpretation of this rule that both the proponent and his or her representative must follow any procedures for attending the meeting and/or presenting the proposal that are authorized or required by state law (e.g., possession of a valid proxy). A proponent who holds his or her shares in street name may have to obtain from the record holder (usually a broker or bank) a proxy to permit attendance at the meeting and/or presentation of the proposal. A proponent's representative may have to obtain a proxy from the proponent. A particular state's law, of course, may not authorize or require any such procedures, or the company may elect not to adopt or enforce them where permissible under applicable state law.

We added the following advisory in the answer to Question 8 of the proposed rule: ''Whether you attend the meeting yourself or send a qualified representative to the meeting in your place, you should make sure that you, or your representative, follow any applicable procedures that are proper under state law for appearing at the meeting and/or presenting your proposal.'' We request your comments on this revision, including whether our long-standing interpretation on this subject is appropriate.

IV. Request for Comments

We request your comments on the proposals, other matters that may have an impact on the proposals, and your suggestions for additional changes. In addition to the requests for your comments on each of the specific proposals, we would like to hear your comments on the proposals viewed as a package of reforms, whether they fairly balance participants' sometimes conflicting concerns, and whether they would bring an overall improvement to the process whereby shareholders present proposals to fellow shareholders.

You should consider whether the Commission should instead adopt some fundamentally different approach to the shareholder proposal system. Some alternatives, such as encouraging each company to adopt its own shareholder proposal rule and process, would largely remove the Commission from its role of ''arbiter'' pursuant to the staff's role in issuing response letters. If you believe that we should adopt an alternative approach, your comments should explain the approach in some detail, including the role that the Commission should play.

You may also consider the purposes of the rule, and the degree to which the rule and the proposed amendments serve those purposes. We believe that the purpose of the rule is to ensure proper disclosure and enhance investor confidence in the securities markets by promoting proposals raising significant issues that are relevant to the company and its business. You may want to consider whether this is the proper purpose of the rule, and if so, what types of proposals are the most relevant and important.

We also request comments on the matters discussed in Sections V through VIII below, including our initial regulatory flexibility analysis, our preliminary analysis of costs and benefits and effects on competition, and our obligations under the Paperwork Reduction Act, and the Small Business Regulatory Enforcement Fairness Act of 1996.

If you wish to submit written comments, you should file three copies with Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW,. Washington, D.C. 20549. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. Comment letters should refer to File No. S7–25–97; this file number should be included on the subject line if e-mail is used. All comments received will be available for public inspection and copying in the Commission's public reference room at the same address. Electronically submitted comments will be posted on the Commission's Internet web site (http://www.sec.gov).

V. Initial Regulatory Flexibility Analysis

We have prepared this Initial Regulatory Flexibility Analysis under 5 U.S.C. 603 concerning the proposed amendments to rules 14a–8, 14a–2, 14a–4, 14a–5, and 13d–5. We will consider your written comments in the preparation of a final analysis. The purpose of the amendments is to streamline the operation of the rule, and address concerns raised by both shareholder and corporate participants. We propose the amendments pursuant to Sections 13, 14, and 23 of the Exchange Act[118] and Section 20(a) of the Investment Company Act of 1940[119] (''Investment Company Act'').

The amendments focus primarily on rule 14a–8, which requires companies to include shareholder proposals in their proxy materials, subject to certain bases for excluding them. We propose to revise the rule into a more understandable Question & Answer format; make it easier for shareholders to include a broader range of proposals in companies' proxy materials; and provide companies with clearer guidelines, and more flexibility to exclude economically insignificant proposals and proposals that lack significant shareholder support.

The proposed amendments to rules 14a–2 and 13d–5 are ancillary to the amendments to rule 14a–8. Proposed new 14a–2(b)(2) would provide an exemption from the proxy rules for shareholders attempting to comply with a proposed new ''override'' mechanism in rule 14a–8. The override would permit holders of 3% of the company's voting shares to override the operation of two bases for excluding proposals. Proposed new rule 13d–5 would provide relief for such holders from filing obligations under Section 13(d) of the Exchange Act.

We also propose to amend rule 14a–4 to further clarify when a company may exercise discretionary voting authority on proposals submitted outside the rubric of rule 14a–8.[120] We believe that the revisions would help to mitigate the uncertainty that some companies experience when presented with such proposals. The revisions should also decrease a company's likelihood of incurring the delay and expense of rescheduling its meeting of

[116] 17 CFR 249.308. The information would be included under Item 5 of that form.

[117] 17 CFR 240.14a–8(e).

[118] 15 U.S.C. 78m, 78n & 78u.

[119] 15 U.S.C. 80a–1 *et seq.*

[120] We propose related amendments to rule 14a–5 to require a company to identify in its proxy statement a date relating to its potential exercise of discretionary voting authority.

shareholders, or of resoliciting its shareholders.

The proposed amendments would affect small entities that are required to file proxy materials under the Exchange Act or the Investment Company Act. Exchange Act rule 0–10 defines ''small business'' as a company whose total assets on the last day of its most recent fiscal year were $5 million or less.[121] Investment Company Act rule 0–10 defines ''small entity'' as an investment company with net assets of $50 million or less as of that date.[122] We are currently aware of approximately 1,000 reporting companies that are not investment companies with assets of $5 million or less. There are approximately 800 investment companies that satisfy the ''small entity'' definition. Only approximately one-third of all investment companies have shareholder meetings and file proxy materials annually. Therefore, we believe approximately 250 small entity investment companies may be affected by the proposals.

Not all companies conducting a proxy solicitation receive shareholder proposals each year. Furthermore, a company that receives a proposal has no obligation to make a submission under rule 14a–8 unless it intends to exclude the proposal from its proxy materials. In the period from September 30, 1996 to today, we received submissions from a total of 245 companies, and only 6 were ''small businesses.''

Some of the proposed amendments to rule 14a–8 may broaden the range of proposals that companies must include in their proxy materials, requiring companies to include more proposals in their proxy materials than they have in the past. This includes the proposal to reverse the *Cracker Barrel* position on employment-related shareholder proposals raising social policy issues, and the proposal to permit the holders of 3% of the company's voting shares to override the exclusions under paragraphs (5) and (7) under Question 9 of the proposed rule. This year, the Division received approximately 30 submissions, none by ''small business,'' involving employment-related proposals tied to social issues. It is likely, however, that reversal of the *Cracker Barrel* position, if implemented, would lead to an increase in the number of proposals included in proxy materials each year. We request your comments on the potential impact on the number of employment-related proposals submitted to companies each year.

Because rule 14a–8 currently does not include a mechanism like the proposed override, there is no reliable way to predict how often shareholders would in the future take advantage of the override to force companies to include proposals that they would otherwise be permitted to exclude. We request your comments and supporting empirical data on the potential impact of the proposed override on the total number of proposals companies are required to include in their proxy materials.

Other proposed revisions, however, would enhance companies' ability to exclude certain proposals that are economically insignificant to them. As revised, paragraph (5) under proposed Question 9 would permit companies to exclude proposals on matters relating to the lesser of $10 million in total costs or gross revenues (whichever is appropriate), or 3% of total assets or gross revenues (whichever is higher). Because companies' submissions under current rule 14a–8 have not addressed these criteria, we presently have no reliable way to estimate their future impact on the number of proposals companies are required to include in their proxy materials. Unlike the current paragraph (c)(5), however, the proposed revision would enable companies to include companies to exclude proposals based solely on economic criteria, which may permit companies to exclude proposals that they are not permitted to exclude under the current rule. On the other hand, because the proposed economic thresholds are lower than the current thresholds, if the revisions are adopted, companies may be unable to exclude some proposals that they are currently permitted to exclude. We request your comments, preferably supported by empirical data, on the nature and magnitude of the potential impact of this proposed revision.

We expect the proposed increase in the resubmission thresholds under Question 9, paragraph (12), to cause a decrease in the total number of proposals companies must include in their proxy materials each year. Current rule 14a–8(c)(12) permits a company to exclude a proposal focusing on substantially the same subject matter as a prior proposal that failed to receive at least 3% of the vote on its first submission, 6% on the second, and 10% percent on the third. We propose to increase the thresholds to 6%, 15%, and 30%, respectively. However, because companies' submissions under current rule 14a–8 have not addressed these criteria, we presently do not have a reliable way to estimate the future impact on the number of proposals companies are required to include in their proxy materials. We nonetheless expect that the proposed revisions would increase the number of proposals that companies are permitted to exclude; a proposal would have to receive a higher percentage of the votes in order to avoid exclusion if the revisions are adopted. We request your comments, preferably supported by empirical data, on the potential impact of this proposal.

Rule 14a–8(a)(4) permits companies to exclude proposals relating to personal grievances or special interests. We propose to modify our administration of the rule to express ''no view'' if the proposal does not on its face relate to the grievance or interest. We request your comments on the potential impact of this proposal on the number of proposals companies are required to include in their proxy materials each year.

Your comments should address whether the proposals will on balance significantly alter the overall number of proposals companies are required to include in their proxy materials.

We do not have empirical data demonstrating the marginal cost of including an additional shareholder proposal in companies' proxy materials. However, question 14 of the Questionnaire asked each company respondent how much money on average it spends on printing costs (plus any directly related costs, such as additional postage and tabulation expenses) to include shareholder proposals in its proxy materials. While individual responses may have accounted for the printing of more than one proposal, the average cost reported by 67 companies was $49,563.[123] We expect that any additional printing costs are lower for small entities, since small entities typically should have to print fewer copies of their proxy materials because they have fewer shareholders. We request your comments, preferably supported by empirical data, on the incremental cost that ''small businesses'' would incur if required to include additional proposals in their proxy materials.

None of the proposed amendments should increase the time or burden of preparing individual submissions under rule 14a–8. Our proposal to reformat the rule into a more understandable Question & Answer format should help decrease the time and expense incurred by both shareholders and companies

[121] 17 CFR 240.0–10.

[122] 17 CFR 240.0–10.

[123] This average is based on respondents reporting costs greater than zero. Reported costs ranged from a low of $200 to a high of nearly $900,000. The median cost was $10,000.

attempting to comply with its provisions. Companies frequently consult with legal counsel in preparing submissions under rule 14a–8. The rule's added clarity may obviate the need for a shareholder or company to consult with counsel, depending on the issues raised by the submission. Under some circumstances, however, companies' submissions must include supporting opinions of counsel.

In addition, because a company that includes a proposal is not required to make a submission under rule 14a–8, any costs of including an additional proposal should be offset, at least partially, by not having to make a rule 14a–8 submission. Under rule 14a–8, a company is not required to make a submission to the Commission unless it intends to exclude the proposal from its proxy materials. Therefore, a company would save any costs associated with the submission if it decides to include the proposal.

We do not have empirical data demonstrating how much it costs companies to consider and prepare an individual submission under rule 14a–8. We do not believe, however, that the cost is likely to vary depending on the size of the company. That is, the cost to a small entity is likely to be the same as the cost to a larger entity. Question 13 of the Questionnaire asked respondent companies how much money they spend on average each year determining whether to include or exclude shareholder proposals and following Commission procedures in connection with any proposal that it wishes to exclude (including internal costs as well as any outside legal and other fees). While responses may have accounted for consideration of more than one proposal, the costs reported by 80 companies averaged $36,603.[124]

The proposed amendments to rule 14a–4 should favorably affect companies, including ''small business,'' because they would provide clearer ground rules when a shareholder presents a proposal without invoking rule 14a–8. We do not have empirical information on the number of ''small businesses'' that receive non-rule 14a–8 proposals each year, since non-14a–8 proposals do not necessarily lead to a submission to the Commission. We therefore request your comments on the number of ''small businesses'' that may be affected by the proposed amendments to rule 14a–4.

[124] This average is based on respondents reporting costs greater than zero. Reported costs ranged from a low of $10 to a high of approximately $1,200,000. The median cost was $10,000.

To the extent they receive such proposals, we believe that the proposed amendments to rule 14a–4 would favorably affect ''small businesses'' by reducing uncertainly, and decreasing the likelihood that the company would have to incur the delay and expense of rescheduling its annual meeting, or resoliciting its shareholders. We request your comments and empirical data, however, on any costs or other burdens that these amendments may impose on small entities.

Under the proposed revisions to rule 14a–4, a company wishing to preserve discretionary voting authority on certain possible proposals may be required to include in its proxy materials an additional discussion among other things describing the proposals. It may also be required to include an additional box on its proxy card permitting shareholders to withhold discretionary voting authority on the proposals if they are raised. We request your comments and empirical data on any incremental costs resulting from these proposed requirements. Automatic Data Processing, Inc. informed the staff that tabulation of an additional box on the proxy card permitting shareholders to withhold discretionary authority would likely cause no increase in the cost of its tabulation services. Daniels Financial Printing informed the staff that in most cases adding up to three-fourths of a page in the proxy statement would not increase the cost to the company. That is because up to an extra three-fourths of a page can normally be incorporated without increasing the page length by reformatting the document. Daniels Financial estimated that adding more than three-fourths of a page could increase costs by about $1,500 for an average sized company.

As discussed in section III.I of this release, the proposed amendment to rule 14a–5 would require companies to disclose an additional date in their proxy statements. Disclosure of the date should require no more than an additional sentence, and therefore should result in no, or negligible, additional printing costs. Because it is exemptive, the proposed amendment to rule 14a–2 should help shareholders attempting to use the proposed override mechanism to avoid the expense of preparing proxy materials, and should impose no additional costs. Similarly, because it would provide a safe harbor, the proposed amendments to rule 13d–5 should impose no additional costs on shareholders, which may include small entities.

Finally, current rule 14a–8(e) provides a mechanism for a proponent to challenge a company's statement in opposition to a proposal if the proponent believes that the statement contains materially false or misleading statements in violation of rule 14a–9. The elimination of the rule will likely save companies, including small entities, the expense of responding to challenge under the rule. This proposal is discussed more fully in section III.I. We request your comments on these views.

We considered significant alternatives to the proposed amendments for small entities with a class of securities registered under the Exchange Act. We could, for instance, exempt small businesses from any obligation to include shareholder proposals in their proxy materials. Such an exemption, however, would be inconsistent with the current purpose of the proxy rules, which is to provide and regulate a channel of communication among shareholders and public companies. Exempting small entities would deprive their shareholders of this channel of communication.

We also considered other alternatives identified in Section 603 of the Regulatory Flexibility Act to minimize the economic impact of the amendments on small entities. We considered the establishment of different compliance requirements or timetables that take into account the resources available to small entities. Different timetables, however, may make it difficult for the Division to issue responses in a timely manner, and could otherwise impede the efficient operation of the rule.

We also considered the clarification, consolidation, or simplification of the rule's compliance requirements for small entities. As explained more fully in section III.A. of this release, we propose to recast and reformat rule 14a-8 into a more understandable, Question & Answer format. As described above, some of the proposed amendments should enable companies, including small businesses, to exclude certain additional proposals from their proxy materials. As explained in section III.H., we also propose clearer guidelines for companies' exercise of discretionary voting authority under rule 14a–4. If adopted, these modifications should simplify and facilitate compliance by all companies, including small entities. We do not currently believe that there is any appropriate way to further facilitate compliance by small entities without compromising the current purposes of the proxy rules.

We also considered the use of performance rather than design standards. The rules that we propose to modify are not specifically designed to achieve certain levels of performance.

Rather, they are designed to serve other policies, such as to ensure adequate disclosure of material information, and to provide a mechanism for shareholders to present important and relevant matters for a vote by fellow shareholders. Performance standards accordingly would not directly serve the policies underlying the rules. We do not believe that any current federal rules duplicate, overlap, or conflict with the rules that we propose to amend.

We request your written comments on any aspect of this Initial Regulatory Flexibility Analysis. We particularly seek comment on: (i) The number of small entities that would be affected by the proposed amendments; (ii) the expected impact of, the proposals as discussed above; and (iii) how to quantify the number of small entities that would be affected by, and how to quantify the impact of, the proposed amendments. We ask commenters to describe the nature of any impact and provide empirical data supporting the extent of the impact.

VI. Cost-Benefit Analysis

The proposed rule changes should improve the efficiency of the process for determining which shareholder proposals must be included in proxy materials distributed by companies. They should help to ensure that a company includes shareholder proposals that are relevant to the company and likely to receive the support of a significant percentage of the company's shareholders. The proposed rule changes would also provide clearer guidelines for a company's exercise of discretionary voting authority when notified that a shareholder intends to present a proposal without invoking rule 14a–8's mechanisms.

We currently do not believe that the proposed changes would adversely affect capital formation, market efficiency, competition, or investors' confidence in the integrity of the securities markets. Rule 14a–8 requires companies to include shareholder proposals in their proxy materials, subject to specific bases for excluding them. We believe that the rule enhances investor confidence in the securities markets by providing a means for shareholders to communicate with management and among themselves on significant matters. By expanding the range of proposals that companies must include in their proxy materials, the proposed amendments to rule 14a–8 could make a company's managers more responsible to the shareholders. That, in turn, could better align the interests of the company's management with that of shareholders, possibly resulting in an improvement in the company's operations and the market price for its shares. Shareholder proposals could have a positive or negative impact, or no impact, on the price of a company's securities.[125] We are currently examining this issue, and we invite comment on the expected shareholder wealth impact of the rule.

At the same time, other amendments would improve the integrity and efficiency of the shareholder proposal process by increasing companies' ability to exclude economically insignificant proposals, or proposals lacking significant shareholder support.

We currently do not know whether the proposed amendments would on balance significantly affect the cost of complying with the rules. Not all companies receive shareholder proposals each year. And a company that receives a proposal has no obligation to make a submission under rule 14a–8 unless it intends to exclude the proposal from its proxy materials. In the period from September 30, 1996 to today, we received approximately 400 submissions under rule 14a–8.

Some of the proposed amendments to rule 14a-8 may broaden the range of proposals that companies must include in their proxy materials, requiring companies to include more proposals than they have in the past. This includes the proposal to reverse the *Cracker Barrel* position on employment-related shareholder proposals raising social policy issues, and the proposal to permit holders of 3 percent of the company's shares to override the exclusions under paragraphs (5) and (7) under proposed Question 9.

This year, the Division received approximately 30 submissions of proposals implicating the *Cracker Barrel* position on employment-related proposals tied to social issues. Reversal of that position could encourage more shareholders to submit these types of proposals to companies each year, and we do not know whether the modification would result in a significant increase in the number of such proposals. We request your comments, including any supporting empirical information on this question.

Because rule 14a–8 currently does not include a mechanism like the proposed ''override,'' we presently have no reliable means to predict how often shareholders would in the future take advantage of the override to force companies to include proposals that they would otherwise be permitted to exclude. During the last proxy season, the staff concurred in the exclusion of almost 100 proposals under two grounds for omitting proposal that would be subject to the proposed override (rules 14a–8 (c)(7) and (c)(5)). We request your comments and supporting empirical data on the potential impact of the override on the total number of proposals companies are required to include in their proxy materials.

Other proposed revisions, however, would enhance companies' ability to exclude economically insignificant proposals. As revised, paragraphs (5) under proposed Question 9 would permit companies to exclude proposals on matter relating to the lesser of $10 million in total costs or gross revenues, or 3 percent of total assets or gross revenues (whichever is higher). Because companies' submissions under current rule 14a–8 have not addressed these criteria, we presently have no reliable means to estimate their future impact on the number of proposals companies are required to include in their proxy materials. Unlike current rule 14a–8(c)(5), however, the proposed revision would enable companies to exclude proposals based solely on economic criteria, which may permit companies to exclude proposals that they are not permitted to exclude under the current rule. On the other hand, because the proposed economic thresholds are significantly lower than the current thresholds, if the revisions are adopted companies may be unable to exclude some proposals that they are currently permitted to exclude. We request your comments, preferably supported by empirical data, on the nature and magnitude of the potential impact of these proposed revisions.

We expect the proposed modifications to paragraph (12) under proposed Question 9 to cause a decrease in the total number of proposals companies must include in their proxy materials each year. Current rule 14a–8(c)(12) permits a company to exclude a proposal focusing on substantially the same subject matter as a prior proposal that failed to receive at least 3 percent of the vote on its first submission, 6 percent on the second, and 10 percent on the third. We propose to increase the thresholds to 6 percent, 15 percent, and 30 percent respectively. Because companies' submissions under current rule 14a–8 have not addressed these criteria, there is no reliable way to estimate their future impact on the number of proposals companies would

[125] See, *e.g.*, Michael P. Smith, Shareholder Activism by Institutional Investors: Evidence from CalPERS, The Journal of Finance, Vol. L1, No. 1, March 1996; Sunil Wahal, Pension Fund Activism and Firm Performance, Journal of Financial and Quantitative Analysis, Vol. 31, No. 1, March 1966.

be required to include in their proxy materials. Nevertheless, we expect that the revisions will increase the number of proposals that companies are permitted to exclude. We request your comments, preferably supported by empirical data, on the potential impact of this proposal.

Rule 14a–8(c)(4) permits companies to exclude proposals relating to personal grievances or special interests. We propose to modify our administration of the rule to express ''no view'' if the proposal does not on its face relate to the grievance or interest. We request your comments on the potential impact of this proposal on the number of proposals companies are required to include in their proxy materials each year.

We do not know whether the proposed revisions to rule 14a–8 would significantly alter the overall number of proposals companies are required to include each year. We request your comments, preferably supported by empirical information, on whether the proposed amendments, considered together, would in practice cause a significant overall increase or decrease in the number of proposals companies must include in their proxy materials each year.

We do not have empirical data demonstrating the marginal cost of including an additional shareholder proposal in companies' proxy materials. However, question 14 of the Questionnaire asked each company respondent how much money on average it spends on printing costs (plus any directly related costs, such as additional postage and tabulation expenses) to include shareholder proposals in its proxy materials. While individual responses may have accounted for the printing of more than one proposal, the average cost reported by 67 companies was $49,563.[126] We seek comment on whether this estimated cost is accurate; if not accurate, we ask commenters to submit more accurate cost data.

In addition, because a company that includes a proposal is not required to make a submission to the Commission under rule 14a–8, any incremental costs of including an additional proposal should be offset by savings on the submission. We do not know the extent to which any additional incremental costs would be offset by savings, and we therefore request your comments and empirical data on additional incremental savings, and the degree to which they would offset additional costs. Question 13 of the Questionnaire asked respondent companies how much money they spend on average each year determining whether to include or exclude shareholder proposals and following Commission procedures in connection with any proposal that it wishes to exclude (including internal costs as well as any outside legal and other fees). While individual responses may have accounted for consideration of more than one proposal, the costs reported by 80 companies averaged $36,603.[127] We seek comment on whether this estimated cost is accurate; if not accurate, we ask commenters to submit more accurate cost data.

The proposed amendments to rule 14a–4 would provide clearer ground rules for companies' exercise of discretionary voting authority when a company receives a shareholder proposal outside the rubric of rule 14a–8. We believe that these amendments would therefore eliminate much of the uncertainty that some companies experience in these circumstances, and decrease the likelihood a company will have to incur the delay and expense to resolicit its shareholders, or to reschedule its meeting of shareholders. We request your comments and empirical information on the potential effects of these proposed revisions to rule 14a–4.

Under the proposed revisions to rule 14a–4, a company wishing to preserve discretionary voting authority on certain possible proposals my be required to include in its proxy materials an additional discussion that, among other things, describes the proposals. It may also be required to include an additional box on its proxy card permitting shareholders to withhold discretionary voting authority on the proposals if they are raised. We request your comments and empirical data on any incremental cost resulting from these proposed requirements. Automatic Data Processing, Inc. informed the staff that tabulation of an additional box on the proxy card permitting shareholders to withhold discretionary authority would likely cause no increase in the cost of its tabulation services. Daniels Financial Printing informed the staff that in most cases adding up to three-fourths of a page in the proxy statement would not increase the cost to the company. That is because up to an extra three-fourths of a page can normally be incorporated without increasing the page length by reformatting the document. Daniels reported that adding more than three-fourths of a page could increase costs by about $1,500 for an average sized company. We seek comment on whether these estimated costs are accurate, and on the degree to which such costs may vary based on timing considerations, such as the proximity to the company's planned mailing date. If you believe that they are not accurate, we ask you to submit cost data.

The proposed amendments to rules 14a–2 and 13d–5 are ancillary to the amendments to rule 14a–8. Proposed rule 14a–2(b)(2) would provide an exemption from the proxy rules for shareholders attempting to comply with the proposed new ''override'' mechanism in rule 14a–8. The override would permit the holders of 3% of the company's voting shares to override the operation of two bases for excluding proposals. Proposed rule 13d–5 would provide relief for such shareholders for the purposes of Section 13(d). Because these amendments would be exemptive, we do not expect that they would be responsible for any additional costs or other burdens. We nonetheless request your comments on the accuracy of these views.

As discussed in section III.I., the proposed amendment to rule 14a–5 would require companies to disclose an additional date in their proxy statements. Disclosure of the date should require no more than an additional sentence, and therefore should result in no, or negligible, additional printing costs. We nonetheless request your comments on the accuracy of this view.

Finally, current rule 14a–8(e) provides a mechanism for a proponent to challenge the Division's statement in opposition to a proposal if the proponent believes that the statement contains materially false or misleading statements in violation of rule 14a–9. The elimination of the rule will likely save companies, including small entities, the expense of responding to challenges under the rule. This proposal is discussed more fully in section III.I. We request your comments on these views.

VII. Paperwork Reduction Act

Certain provisions of rules 14a–8, 14a–4, and 14a–5 contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), and the Commission has submitted proposed revisions to those rules to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The titles for the collections of information are ''Amendments to Shareholder Proposal Rules.''

[126] See note 123 above.

[127] See note 124 above.

Schedule 14A,[128] and the Commission's related proxy rules, including rules 14a–8, 14a–4, and 14a–5, were adopted pursuant to Section 14(a) of the Exchange Act. Section 14(a) directs the Commission to adopt rules ''as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this rule title.'' Schedule 14A prescribes information that a company must include in its proxy statement to ensure that shareholders are provided material information relating to voting decisions.

The Commission currently estimates that Schedule 14A results in a total annual compliance burden of 782,964 hours.[129] The burden was calculated by multiplying the estimated number of entities filing Schedule 14A annually (approximately 9,321) by the estimated average number of hours each entity spends completing the form (approximately 84 hours). The Commission staff estimated the number of entities that would complete and file the form based on the actual number of filers during the Commission's most recently completed fiscal year. The staff estimated the average number of hours each entity spends completing the form by contacting a number of law firms and other persons regularly involved in completing the form.

The amendments to rules 14a–8, 14a–4(c), and 14a–5, if adopted, would make it easier for shareholder proponents to submit a broader range of proposals, and provide companies subject to the proxy rules with clearer grounds and more flexibility to exclude proposals that fail to attract significant shareholder support, or that are economically insignificant. As a result, the Commission anticipates any additional burden to be offset by a corresponding reduction in the number of hours respondents need to comply with Schedule 14A.

The amendments focus primarily on rule 14a–8, which requires companies to include shareholder proposals in their proxy materials, subject to certain bases for excluding them. Not all companies receive shareholder proposals each year. Furthermore, a company that receives a shareholder proposal has no obligation to make a submission under rule 14a–8 unless it intends to exclude the proposal from its proxy materials. In the period from September 30, 1996 to today, we received submissions from a total of 245 companies, concerning approximately 400 proposals.

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information, (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden to collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20503, and should send a copy to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, with reference to File No. S7–25–97. The Office of Management and Budget is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996[130] (''SBREFA''), we also are requesting information on the potential impact of the proposed amendments on the economy on an annual basis. You should provide empirical data to support your views. Under SBREFA, the proposals must be submitted to Congress before they take effect. If they amount to a ''major rule,'' then effectiveness of the rules will be delayed 60 days pending Congressional review. We have not yet reached a conclusion on whether the proposals amount to a ''major rule,'' and we request your comments, supported by empirical data, on that issue.

A rule is ''major'' if it has resulted, or is likely to result in (i) an annual effect on the economy of $100 million or more; (ii) a major increase in costs or prices for consumers or individual industries; or (iii) significant adverse effects on competition, investment, or innovation.

We presently do not believe that there is a basis for concluding that the proposals will result in a major increase in costs or prices for consumers or individual industries. The proposals, which relate to the disclosures in public companies' proxy statements, and their exercise of discretionary voting authority, are not designed to, and should not, have any impact on consumer prices. As noted in the Cost-Benefit Analysis in section VI above, the costs associated with including shareholder proposals in companies' proxy materials averages less than $50,000.[131] The costs associated with excluding a proposal under rule 14a–8 averages less than $37,000.[132]

Similarly, we presently do not believe the proposals will have any adverse effects on competition, investment, or innovation. The proposals should improve the efficiency and effectiveness of a channel of communication between companies and shareholders.

We have not yet reached a conclusion on whether the proposals will have an annual effect on the economy of $100 million or more, and we request your comments, supported by empirical data, on the proposals' potential overall annual effect.

Some of the proposed amendment to rule 14a–8 may broaden the range of proposals that companies must include in their proxy materials, requiring companies to include more proposals than they have in the past. This includes our proposal to reverse the *Cracker Barrel* position on employment-related shareholder proposals raising social policy issues, and our proposal to permit holders of 3% of a company's voting shares to override the exclusions under paragraphs (5) and (7) under proposed Question 9.

This year, the Division received approximately 30 submissions on proposals implicating the *Cracker Barrel* position on employment-related proposals tied to social issues. Reversal of that position could encourage more shareholders to submit these types of proposals to companies each year. We request your comments, preferably supported by empirical data, on the

[128] 17 CFR 240.14a–101.

[129] This reflects an increase from previous estimates of total compliance burden. The increase results solely from an increase in the number of entities filing on Schedule 14A each year. The increase is not attributable to any of the proposals described in this release.

[130] Pub. L. 104–121, Title II, 110 Stat. 857 (1996).

[131] See note 123 above.

[132] See note 124 above.

potential impact on the number of employment-related proposals submitted to companies each year, and any related costs resulting from this proposal.

Because rule 14a–8 currently does not include an ''override'' mechanism, we have no reliable means to predict how often shareholders would in the future take advantage of the mechanism to force companies to include proposals that they would otherwise be permitted to exclude. We request your comments and supporting empirical data on the potential impact of the proposed override on the number of proposals companies are required to include in their proxy materials. Although in many cases garnering sufficient support for the override may require substantial efforts, we expect that shareholders will successfully use the override several times each year.

Other proposed revisions, however, would enhance companies' ability to exclude economically insignificant proposals. As revised, paragraph (5) under proposed Question 9 would permit companies to exclude proposals on matters relating to the lesser of $10 million in total costs or gross revenues, or 3% of total assets or gross revenues (whichever is higher). Because companies' submissions under current rule 14a–8 have not addressed these criteria, we have no reliable means to estimate the future impact of these proposed amendments on the number of proposals companies are required to include in their proxy materials. Unlike the current rule 14a–8(c)(5), however, companies would be permitted to exclude proposals based solely on economic criteria, which may permit companies to exclude proposals that they are not permitted to exclude under the current rule. On the other hand, because the proposed economic thresholds are lower than the current thresholds, if the revisions are adopted, companies may be unable to exclude some proposals that they are currently permitted to exclude. We request your comments, preferably supported by empirical data, on the nature and magnitude of the potential impact of this proposed revision.

We expect the proposed modifications to paragraph (12) under proposed Question 9 to cause a decrease in the total number of proposals companies must include in their proxy materials each year. Current rule 14a–8(c)(12) permits a company to exclude a proposal focusing on substantially the same subject matter as a prior proposal that failed to receive at least 3% of the vote on its first submission, 6% on the second, and 10% percent on the third. We propose to increase the thresholds to 6%, 15%, and 30%, respectively. Because companies' submissions under current rule 14a–8 do not address these proposed increased thresholds, there is no reliable way to estimate their future impact on the number of proposals companies are required to include in their proxy materials. Nonetheless, we expect that the revisions will increase the number of proposals that companies are permitted to exclude. We request your comments, preferably supported by empirical data, on the potential impact of this proposal.

Rule 14a–8(c)(4) permits companies to exclude proposals relating to personal grievances or special interests. We propose to modify our administration of the rule to express ''no view'' if the proposal does not on its face relate to the grievance or interest. We request your comments on the potential impact of this proposal on the number of proposals companies are required to include in their proxy materials each year.

We do not know whether the proposed revisions to rule 14a–8 would on balance significantly alter the overall number of proposals companies are required to include in their proxy materials. We request your comments and empirical data on this question. We do not presently have empirical data demonstrating the marginal cost of including an additional shareholder proposal in companies' proxy materials. However, question 14 of the Questionnaire asked each company respondent how much money on average it spends on printing costs (plus any directly related costs, such as additional postage and tabulation expenses) to include shareholder proposals in its proxy materials. While individual responses may have accounted for the printing of more than one proposal, the cost reported by 67 companies averaged $49.563.[133]

In addition, because a company that includes a proposal is not required to make a submission to the Commission under rule 14a–8, any incremental costs of including an additional proposal should be offset by savings on the submission. We do not know the extent to which any additional incremental costs would be offset by savings, and we therefore request your comments and empirical data on additional incremental savings, and the degree to which they would offset additional costs. Question 13 of the Questionnaire asked respondent companies how much money they spend on average each year determining whether to include or exclude shareholder proposals and following Commission procedures in connection with any proposal that it wishes to exclude (including internal costs as well as any outside legal and other fees). While individual responses may have accounted for consideration of more than one proposal, the costs reported by 80 companies averaged $36,603.[134]

Revised rule 14a–4(c) would provide companies with clearer guidelines for the exercise of discretionary voting authority on proposals presented by shareholders who do not invoke rule 14a–8's procedures. We do not know how many companies subject to our proxy rules receive such proposals each year, and request your comments and supporting empirical data on that question.

We believe the revisions, if adopted, will help some companies avoid costs associated with rescheduling their annual meetings, and possibly with resolicitations of proxy materials. We do not have empirical data to estimate reliably the scope or magnitude of any such savings, and we request your comments, preferably supported by empirical data, on this question.

Under the proposed revisions to rule 14a–4, a company wishing to preserve discretionary voting authority on certain possible proposals may be required to include in its proxy materials an additional discussion among other things describing the proposals. It may also be required to include an additional box on its proxy care permitting shareholders to withhold discretionary voting authority on the proposals if they are raised. We request your comments and empirical data on any incremental cost resulting from these proposed requirements. Automatic Data Processing, Inc. informed the staff that tabulation of an additional box on the proxy card permitting shareholders to withhold discretionary authority would likely cause no increase in the cost of its services. Daniels Financial Printing informed the staff that in most cases adding up to three-fourths of a page in the proxy statement would not increase the cost to the company. That is because up to an extra three-fourths of a page can normally be incorporated without increasing the page length by reformatting the document. Daniels Financial reported that adding more than three-fourths of a page could increase costs by about $1,500 for an average sized company.

As discussed in section III.I., the proposed amendment to rule 14a–5 would require companies to disclose an

[133] See note 123 above.

[134] See note 124 above.

additional date in their proxy statements. Disclosure of the date should require no more than an additional sentence, and therefore should result in no, or negligible,, additional printing costs. Because it is exemptive, the proposed amendment to rule 14a–2 should help some shareholders attempting to use the proposed override mechanism to avoid the expense of preparing proxy materials, and should impose no additional costs. Similarly, because it would provide a safe harbor, the proposed amendments to rule 13d–5 should impose no additional costs. We request your comments on these views.

Finally, current rule 14a–8(e) provides a mechanism for a proponent to challenge a company's statement in opposition to a proposal if the proponent believes that the statement contains materially false or misleading statements in violation of rule 14a–9. The elimination of the rule will likely save companies, including small entities, the expense of responding to challenges under the rule. This proposal is discussed more fully in section III.I. We request your comments on these views.

We also believe that certain shareholder proposals may have a positive or negative effect, or no effect, on shareholder wealth.[135] By expanding the range of proposals that companies must include in their proxy materials, the amendments could make a company's managers more responsive to the shareholders. That, in turn, could better align the interests of the company's management with that of shareholders, possibly resulting in an improvement in the company's operations and the market price for its shares. We currently lack reliable empirical data on the magnitude and frequency of any such effects. We request your comments supported by empirical data on the magnitude and frequency of any such effects. We request your comments supported by empirical data.

Relatively few shareholder proposals are approved by shareholders each year. Based on information provided to us by IRRC,[136] we understand that in the period from January 1, 1997 to date, 19 proposals obtained shareholder approval out of a total of 234 submitted to shareholder votes. Nine were proposals to repeal classified boards. Nine sought redemption of companies' shareholder rights plans. One focused on ''golden parachute'' payments to executives. Even if a proposal does not obtain shareholder approval, however, it may nonetheless influence management, especially if it receives substantial shareholder support. A proposal may also influence management even if it is not put to a shareholder vote. We understand that in some instances management has made concessions to shareholders in return for the withdrawal of a proposal.

Proposals addressing corporate governance matters tend to receive the most substantial shareholder support, and, we believe, are most likely to affect shareholder wealth. Examples are proposals on voting and nomination procedures for board members, and proposals to restrict or eliminate companies' shareholder rights plans. The proposed revisions do not focus on those types of proposals, and should not significantly affect shareholders' ability to include them in companies' proxy materials. As a result, we request your comments on the degree to which the proposals would impact shareholder wealth, viewing the proposals in isolation and together with other proposals.

The proposed modification to current rule 14a–8(c)(12) will affect all proposals, including corporate governance proposals. Those modifications will make it easier for a company to exclude a proposal that has failed to receive significant shareholder support in the recent past. Because we believe that the revised rule, if adopted, would operate to exclude only those proposals on which shareholders have already voted at least once previously, and have effectively rejected, we do not expect that the revisions to current rule 14a–8(c)(12) will have any significant impact on shareholder wealth. We request your comments, preferably supported by empirical data, on the accuracy of these views.

IX. Statutory Basis and Text of Amendments

We propose amendments to Rules 14a–8, 14a–4, 14a–2, 14a–5, and 13d–5 under the authority set forth in Sections 13, 14 and 23 of the Securities Exchange Act of 1934, and Section 20(a) of the Investment Company Act.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Text of Amendments

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, and 80b–11, unless otherwise noted.

* * * * *

2. By adding paragraph (b)(3) to § 240.13d–5 to read as follows:

§ 240.13d–5 Acquisition of securities.

* * * * *

(b) * * *

(3) Notwithstanding paragraph (b)(1) of this section, a group formed among the beneficial owners of a class of equity securities solely by an understanding, arrangement, or agreement that a shareholder proposal should be placed in a registrant's proxy materials for a shareholder vote, for the purpose of using the ''override'' mechanism provided in § 240.14a–8(j) (Question 10), shall be deemed not to have acquired any equity securities beneficially owned by the other members of the group for the purposes of Section 13(d)(1) of the Act (15 U.S.C. 78m); provided, however, that such understanding, arrangement or agreement does not relate to how the holders will vote on the proposal if it is ultimately placed in the registrant's proxy materials.

3. By amending § 240.14a–2 by redesignating paragraphs (b)(2) through (b)(4) as paragraphs (b)(3) through (b)(5), and by adding a new paragraph (b)(2), to read as follows:

§ 240.14a–2 Solicitations to which § 240.14a–3 to § 240.14a–15 apply.

* * * * *

(b) * * *

(2) For any solicitation made for the sole purpose of gathering support for placing a shareholder proposal in a registrant's proxy materials pursuant the ''override'' mechanism provided in § 240.14a–8(j) (Question 10); provided that such solicitation does not seek proxy authority with respect to the vote on the proposal if it is ultimately placed in the registrant's proxy materials;

* * * * *

4. By amending § 240.14a–4 by removing the last sentence in paragraph (a)(3) before the note, by revising the introductory text of paragraph (c) and paragraph (c)(1), redesignating paragraphs (c)(2) through (c)(5) as paragraphs (c)(3) through (c)(6), and

[135] See note 125 above.

[136] See note 13 above.

adding a new paragraph (c)(2), to read as follows:

§ 240.14a–4 Requirements as to proxy.

* * * * *

(c) A proxy may confer discretionary authority to vote on any matter presented by a security holder for a vote under the following circumstances:

(1) If the registrant did not have notice of the matter at least 45 days (or such date specified by an advance notice bylaw) before the date on which the registrant first mailed its proxy materials for the prior year's annual meeting of shareholders. If the registrant did not hold an annual meeting of shareholders the prior year, or if the date of the annual meeting has changed more than 30 days from the prior year, then notice must be received a reasonable time before the company mails its proxy materials for the current year.

(2) If the registrant includes, in the proxy statement, a discussion of the nature of any such matter and how the registrant intends to exercise its discretion on each matter, and, in the proxy card, a cross-reference to the discussion in the proxy statement and a box to withhold discretionary authority on the same matter(s).

5. By amending § 240.14a–5 by revising paragraph (e), and adding paragraph (f), to read as follows:

§ 240.14a–5 Presentation of information in proxy statement.

* * * * *

(e) All proxy statements shall disclose, under an appropriate caption, the following dates:

(1) The deadline for submitting shareholder proposals for inclusion in the registrant's proxy statement and form of proxy for the registrant's next annual meeting, calculated in the manner provided in § 240.14a–8(d) (Question 4); and

(2) The date after which notice of a shareholder proposal submitted outside the rubric of § 240.14a–8 is considered untimely, calculated in the manner provided by § 240.14a–4(c)(1).

(f) If the date of the next annual meeting is subsequently advanced or delayed by more than 30 calendar days from the date of the annual meeting to which the proxy statement relates, the registrant shall, in a timely manner, inform security holders of such change, and the new dates referred to in paragraphs (e)(1) and (e)(2) of this section, by including a notice in its earliest possible quarterly report on Form 10–Q (§ 249.308a of this chapter) or Form 10–QSB (§ 249.308b of this chapter), or, in the case of investment companies, in a shareholder report under § 270.30d–1 of this chapter under the Investment Company Act of 1940, or, if impracticable, any means reasonably calculated to inform shareholders.

6. By revising § 240.14a–8 to read as follows:

§ 240.14a–8 Shareholder proposals.

This section addresses when a company must include a shareholder's proposal in its proxy materials when it holds an annual or special meeting of shareholders. In summary, in order to have your shareholder proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the Commission. We structured the section in a question-and-answer format so that it is easier to understand. The references to ''you'' are to a shareholder seeking to submit the proposal.

(a) *Question 1: What is a proposal?* A shareholder proposal is your recommendation or requirement that the company and/or its board of directors take action. Your proposal should state as clearly as possible the course of action that you believe the company should follow. If your proposal is placed on the company's proxy card, shareholders will have an opportunity to case their votes either in support of your proposal or against your proposal. Unless otherwise indicated, the word ''proposal'' as used in this section refers both to your proposal, and to your corresponding statement in support of your proposal (if any).

(b) *Question 2: Who is eligible to submit a proposal, and how do I demonstrate to the company that I am eligible?* (1) In order to be eligible to submit a proposal, you must have continuously held at least $2,000 in market value, or 1% of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal. You will have to continue to hold those securities through the date of the meeting.

(2) If you are the registered holder of your securities, which means that your name appears in the company's records, the company can verify your eligibility on its own. However, if like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own. In this case, at the time you submit your proposal, you must prove your eligibility to the company in one of two ways:

(i) The first way is to submit to the company a written statement from the ''record'' holder of your securities (usually a broker or bank) verifying that, at the time you submitted your proposal, you continuously held the securities for at least one year. You must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders; or

(ii) The second way to prove ownership applies only if you have filed a Schedule 13D (§ 240.13d–101), Schedule 13G (§ 240.13d–102), Form 3 (§ 249.103 of this chapter), Form 4 (§ 249.104 of this chapter) and/or Form 5 (§ 249.105 of this chapter), or amendments to those documents, reflecting your ownership of the shares as of or before the date on which the one-year eligibility period begins. If you have filed one of these documents with the SEC, you may demonstrate your eligibility by submitting to the company:

(A) A copy of the schedule and/or form, and any subsequent amendments reporting a change in your ownership level;

(B) Your written statement that you continuously held the required number of shares for the one-year period as of the date of the statement; and

(C) Your written statement that you intend to continue ownership of the shares through the date of the company's annual or special meeting.

(c) *Question 3: How many proposals may I submit?* Each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.

(d) *Question 4: How long can my proposal be?* The proposal, including any accompanying supporting statement, may not exceed 500 words.

(e) *Question 5: What is the deadline for submitting a proposal?* (1) If you are submitting your proposal for the company's annual meeting, you can in most cases find the deadline in last year's proxy statement. However, if the company did not hold an annual meeting last year, or has changed the date of its meeting for this year more than thirty days from last year's meeting, you can find the deadline on one of the company's quarterly reports on Form 10–Q (§ 249.308a of this chapter) or 10–QSB (§ 249.308b of this chapter), or in shareholder reports of investment companies under § 270.30d–1 of this chapter of the Investment Company Act of 1940. In order to avoid confusion, shareholders should submit their proposals by means, including

electronic means, that permit them to prove the date of delivery.

(2) The deadline is calculated in the following manner if the proposal is submitted for a regularly scheduled annual meeting. The proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting. However, if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the deadline is a reasonable time before the company begins to print and mail its proxy materials.

(3) If you are submitting your proposal for a meeting of shareholders other than a regularly scheduled annual meeting, the deadline is a reasonable time before the company begins to print and mail its proxy materials.

(f) *Question 6: What if I fail to follow one of the eligibility or procedural requirements explained in answers to Questions 1 through 4 of this section?* (1) The company may omit your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies, as well as of the time frame for your response. Your response must be postmarked no later than 14 days from the date you received the company's notification.

(2) If you fail in your promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude any of your proposals from its proxy materials for any meeting held in the following two calendar years.

(g) *Question 7: Who has the burden of persuading the Commission or its staff that my proposal can be omitted?* Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to omit a proposal.

(h) *Question 8: Must I appear personally at the shareholders meeting to present the proposal?* (1) Either you, or your representative who is qualified under state law to present the proposal on your behalf, must attend the meeting to present the proposal. Whether you attend the meeting yourself or send a qualified representative to the meeting in your place, you should make sure that you, or your representative, follow any applicable procedures that are proper under state law for attending the meeting and/or presenting your proposal.

(2) If the company holds its shareholder meeting in whole or in part on the Internet, and the company permits you or your representative to present your proposal via the Internet, then you may appear through the Internet rather than traveling to the meeting to appear in person.

(3) If you or your qualified representative fail to appear and present the proposal, without good cause, the company may omit any of your proposals from its proxy materials for any meetings held in the following two calendar years.

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

(1) *Improper under state law:* If the proposal is not a proper subject for action by shareholders under the laws of the state of the company's incorporation;

Note to paragraph (i)(1): Depending on the subject matter, some proposals are not considered proper under state law if written so that they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

(2) *Violation of law:* If the proposal would, if implemented, cause the company to violate any state, federal, or foreign law;

Note to paragraph (i)(2): We will not apply this basis for exclusion to permit exclusion of a proposal on grounds that it would violate foreign law if compliance with the foreign law would result in a violation of any state or federal law.

(3) *Violation of proxy rules:* If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including § 240.14a–9, which prohibits materially false or misleading statements in proxy soliciting materials;

(4) *Personal grievance; special interest:* If the proposal relates to the redress of a personal claim or grievance against the company, or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which benefit or interest is not shared by the other shareholders at large;

(5) *Relevance:* If the proposal relates to a matter involving the purchase or sale of services or products which represents $10 million or less in gross revenues or total costs, whichever is appropriate, for the company's most recently completed fiscal year. However, if 3% of the company's gross revenue or total assets, whichever is higher, for the company's most recently completed fiscal year, results in a number less than $10 million, that number applies instead of $10 million;

(6) *Absence of power/authority:* If the company would lack the power or authority to implement the proposal;

(7) *Management functions:* If the proposal relates to specific business decisions normally left to the discretion of management;

Note to paragraph (i)(7): Examples of such matters include the way a newspaper formats its stock tables, whether a company charges an annual fee for use of its credit card, the wages a company pays its non-executive employees, and the way a company operates its dividend reinvestment plan. For an investment company, such matters include the decision whether to invest in the securities of a specific company.

(8) *Relates to election:* If the proposal relates to an election for membership on the company's board of directors;

(9) *Conflicts with company's proposal:* If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting;

Note to paragraph (i)(9): A company's submission to the Commission under this section should specify the points of conflict with the company's proposal.

(10) *Substantially implemented:* If the company has already substantially implemented the proposal;

(11) *Duplication:* If the proposal substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting;

(12) *Resubmissions:* If the proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding 5 calendar years, a company may omit it from its proxy materials for any meeting held within 3 calendar years of the last time it was included if the proposal received:

(i) Less than 6% of the vote if proposed once within the preceding 5 calendar years;

(ii) Less than 15% of the vote on its last submission to shareholders if proposed twice previously within the preceding 5 calendar years; or

(iii) Less than 30% of the vote on its last submission to shareholders if proposed three times or more previously

within the preceding 5 calendar years; and

(13) *Specific amount of dividends:* If the proposed relates to specific amounts of cash or stock dividends.

(j) *Question 10: If the company demonstrates that my proposal is excludable based on the criteria listed in the answer to Question 9, is there any other way to have my proposal included in the company's proxy materials?* (1) Yes. If enough of the company's shareholders support inclusion of your proposal in the company's proxy materials, then you may override certain of the criteria for excluding your proposal listed in answer to Question 9. More specifically, if you demonstrate to the company that the holders of 3% of the company's outstanding shares entitled to be voted on the proposal at the meeting agree that your proposal should be included in the company's proxy materials, then the company may not rely on criteria paragraphs (5) or (7) under Question 9 of this section to omit your proposal for that meeting. In calculating the 3%, you may include your own shares even if the proposal is your own. The percentage is based on the total number of voting shares outstanding for the year before the year for which the meeting is held. You should find that number in the company's annual report to shareholders for that year.

(2) However, it is your obligation to demonstrate that you have, or have gathered, the required support for including your proposal, by providing the company:

(i) A written statement from each of your supporters stating his or her support for the inclusion of your proposal in the company's proxy materials for a specific meeting of shareholders. The written statement must be executed and dated as of a date no earlier than the date of the company's annual meeting for the previous year. If the company did not hold a meeting the year before, the statement must be dated no more than one year before the scheduled date of the meeting for which the proposal is submitted; and

(ii) A written statement from the record holder of each supporter's shares, specifying the number of shares that the supporter held as of the date of the statement described in paragraph (j)(2)(i) of this section. It is your obligation to collect this evidence from your supporters, and to present it to the company in an organized, understandable form. You must provide the company with copies of the evidence by the due date for submitting a proposal.

(k) *Question 11: How many proposals sponsored by other shareholders may I support under the ''override'' mechanism described in the answer to Question 10 of this section?* At each company, you may support no more than one proposal sponsored by other shareholders under the ''override'' mechanism described in the answer to Question 10 of this section. Of course, this does not affect your ability to sponsor your own proposal. If the proposal is your own proposal, then it does not count against that limit.

(l) *Question 12: What procedures must the company follow if it intends to omit my proposal?* (1) If the company intends to omit a proposal from its proxy materials, it must file its reasons with the Commission no later than 40 calender days after the date that it receives your proposal, and no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The company must simultaneously provide you with a copy of its submission. The Commission staff may permit the company to make its submission later than 40 days after receiving your proposal, or 80 days before the company files its definitive proxy statement and form of proxy, if the company demonstrates good cause for missing the deadline.

(2) The company must file six paper copies (or alternatively file via e-mail to the following address: shprop@sec.gov) of the following:

(i) The proposal;

(ii) An explanation of why the company believes that it may omit the proposal, which should if possible refer to the most recent applicable authority, such as prior Division letters issued under the rule; and

(iii) A supporting opinion of counsel when such reasons are based on matters of state or foreign law.

(m) *Question 13: May I submit my own statement to the Commission responding to the company's arguments?* Yes, you may submit a response, but it is not required. You should try to submit any response to us, with a copy to the company, as soon as possible after the company makes its submission. This way, the Commission staff will have time to consider fully your submission before it issues its response. You may submit either six paper copies of your response, or alternatively, you may make your submission via e-mail to the following address: shprop@sec.gov.

(n) *Question 14: If the company includes my shareholder proposal in its proxy materials, what information about me must it include along with the proposal itself?* (1) The company's proxy statement must include your name and address, as well as the number of the company's voting securities that you hold. However, instead of providing that information, the company may instead include a statement that it will provide the information to shareholders promptly upon receiving an oral or written request.

(2) The company is not responsible for the contents of your proposal or supporting statement.

Dated: September 18, 1997.

By the Commission.

Jonathan G. Katz,

Secretary.

Concurrence of Commissioner Steven M.H. Wallman

The Commission today (Release No. S7–25–97) proposes a ''package'' of changes to the current process for submitting shareholder proposals. Not only does this process preclude valid shareholder debate on issues of significant importance to the companies in which shareholders invest, it also imposes burdens on corporations and on this Commission, such as requiring the Commission to engage in line-drawing for which it is ill-suited. A year ago I proposed changes to the rules to make them fairer and to eliminate much of that line-drawing. And I have repeatedly called for the reversal of Cracker Barrel—independent of any other or more comprehensive reform.

I recognize and appreciate how difficult it is to craft a solution to the problems posed by these rules, and I commend the staff and my colleagues for their efforts today. As a practical matter, those who are active participants in the shareholder proposal process are small in number—especially when compared with the number this Commission regulates or influences in other activities. But the practical impact of what can be accomplished through shareholders appropriately engaged in their corporations' affairs is enormous. Part of what makes our economy strong and our corporations successful is our system of active shareholders engaged in debate over matters of concern. And those matters consistently have included issues relating to corporate governance, workplace practices and social issues.

Because I believe so strongly in the benefits that accrue from responsible shareholders acting responsibly, I am concerned by this proposed ''package.'' While I concur in the issuance of this release so that the debate may begin, I believe this proposal may not have

sufficient benefits for the shareholder community to outweigh the detriments to that community and, therefore, may not be balanced. Moreover, I remain opposed as a matter of principle to the notion of holding the reversal of Cracker Barrel hostage to the success or failure of an overall reform effort. I urge my colleagues again to consider its immediate reversal.

I understand this is a complicated area involving many players with often divergent interests. Moreover, not all members of the corporate community, or the shareholder community, are affected in the same manner by either the current or the proposed process. Some companies have never received a shareholder proposal, while others receive a multitude on a yearly basis. Likewise, some proponents have no difficulty in placing their resolutions in the company's proxy statement, while others face a yearly battle to avert exclusion.

Under today's proposal, if it is adopted, the proponent community will obtain some benefit from the reversal, at least in form, of Cracker Barrel, as well as a lower economic standard under the relevance exclusion, and the availability for the first time of a shareholder override. From a practical perspective though, these benefits will primarily assist those proponents who currently have potential difficulty obtaining access to the proxy statement—such as social groups sponsoring social policy proposals related to employment. Since most shareholder proposals are not so characterized, this package provides little for all other proponents.

And with regard to social proposals, it remains to be seen whether the proposed changes will result in any increased access to the proxy statement. While Cracker Barrel may be reversed in form if the proposals are adopted, it is unclear from the release whether it will be reversed in substance. Although social policy proposals related to employment will no longer be automatically excludable, neither will they be automatically included.[1] The return to subjective line-drawing by the staff, coupled with the shift to a purely economic test under the relevance exclusion, leaves open the possibility of continued attempts to exclude many social proposals (whether related to employment or not).[2] While theoretically proponents of social proposals could be helped by the availability of a shareholder override, the burdens of the currently proposed override—a threshold set at the high level of 3%[3] combined with the practical difficulties of soliciting or doing a major publicity campaign[4]—will constrain its practical effectiveness.[5]

As to detriments, all members of the proponent community will be adversely impacted by the increased resubmission thresholds—thresholds that, as proposed, will rise to the very high level of 30% in the third year—without any practical benefits being provided in return to a large percentage of the proponents. Likewise, for those members of the proponent community who might use Rule 14a–4 in lieu of rule 14a–8, the proposed tightening of Rule 14a–4 will be troublesome. And to the extent that any part of the package is changed to decrease the benefits or increase the burdens on the proponent community, the lack of balance may well become intolerable.

Although I have strong reservations about this package as a whole and about specific provisions,[6] I vote today to issue this release to ensure that debate will ensue on this matter. In its current form, I agree that the release can be used to frame the issues and I believe it is in the best interests of all of those involved in the shareholder proposal process for change to be commenced as soon as possible. My hope would be that any changes ultimately adopted will, in fact, properly balance the interests of companies and shareholders.[7]

In any event, I must stress my dismay at the failure of this Commission to reverse Cracker Barrel. The continuation of Cracker Barrel over the past four years has been a terrible mistake—not from a practical perspective but rather from a policy perspective. As I have stated previously, Cracker Barrel has had little practical effect—most proponents of the types of proposals excludable under Cracker Barrel either succeed in having the companies include their proposals anyway, or otherwise have their concerns addressed and withdraw their proposals voluntarily. Nevertheless, Cracker Barrel is bad public policy because the wrong message is sent as to what the Commission believes is important. I fail to understand why its reversal can only be considered as part of any broader reform—after all Cracker Barrel was imposed on the proponent community without any reforms for their benefit and has tilted the balance, as a matter of principle, over these last four years in an unacceptable manner.

Finally, stepping back from the issue of whether Cracker Barrel should be reversed only as part of overall reform or on its own, the practical realities are that this reform proposal, with or without Cracker Barrel, likely cannot be adopted in time for the 1998 proxy season. The specter of continuing Cracker Barrel for yet another proxy season should simply be unacceptable. I strongly urge my colleagues to do the right thing—reverse Cracker Barrel now, in time for the 1998 proxy season.

I respectfully concur in the issuance of this release.

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[1] The release is unclear on whether new lines will be drawn and where those lines will fall.

[2] Since the new proposed economic test under the relevance exclusion focuses solely on historical financial statement components, it also excludes shareholder proposals motivated by far more important possible material liabilities or prospective costs, such as boycotts, negative publicity or lawsuits. The result is that this exclusion could be even more restrictive than Cracker Barrel. As an example, if a company employs slave labor in a small plant in Asia, a proposal relating to that operation would be excludable under this test, notwithstanding the significant potential costs to the company and its shareholders from the company's pursuing such a policy.

[3] Three percent of the outstanding stock of large corporations involves dollar amounts in the billions; it is unclear why the support of such a large financial stake is necessary before a proposal may be placed on the ballot.

[4] Moreover, the proposal does not require access to shareholder lists (although Rule 14a–7 theoretically may be useful)—and may be dependent on adequate relief under Sections 13(d) and 14 of the Securities Exchange Act of 1934.

[5] I am also concerned about the specter that the existence of the override—a concept that I originally proposed, but in a different context, and that I still independently support—will be used as a rationale for the staff's engaging in overly broad interpretations of the exclusions under Rule 14a–8 on the grounds that, if shareholders want the resolutions included, they can avail themselves of the override.

[6] I also am concerned about the extent of the reliance on the Division's Questionnaire as a basis for today's proposals given the failure to use scientific sampling in both its design and its distribution.

[7] As an additional goal, it would be worthwhile to reduce as much as possible the staff's role as line-drawers. One alternative that could accomplish this goal would be to permit all resolutions to be included subject to whatever exclusions the states wished to impose as a matter of internal corporate affairs—and the release asks questions about this approach. I suspect that both companies and shareholders will find this option to be impracticable. If they do not, I believe the Commission should give it more thought.