Michigan Law Review

Volume 96 | Issue 4

1998

Realigning Corporate Governance: Shareholder Activism by Labor Unions

Stewart J. Schwab
Cornell Law School

Randall S. Thomas
University of Iowa College of Law

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*Stewart J. Schwab**
and *Randall S. Thomas***

TABLE OF CONTENTS

* Professor, Cornell Law School. B.A. 1975, Swarthmore; J.D. 1980, Ph.D. (economics) 1981, University of Michigan. — Ed.

** Professor, University of Iowa College of Law. B.A. 1977, Haverford; Ph.D. (economics) 1983, J.D. 1985, University of Michigan. — Ed. For helpful comments on prior drafts, we thank William Carney, James Cox, Reinier Kraakman, Robert Lawless, Mark Ramseyer, Robert Thompson, Lea Vander Velde, Steven Willborn and participants at the Washington University Faculty Workshop and the NYU 50th Annual Conference on Labor Law. We would also like to thank Susan Schwochau and Leo Tsao for their superb research assistance.

Labor unions are active again — but this time as capitalists. The potential strength of union pension funds has long been noted,[1] but until recently unions have held their stock passively or invested in union-friendly companies. In the 1990s, however, unions have become the most aggressive of all institutional shareholders.[2] In most cases, it is hard to find a socialist or proletarian plot in what unions are doing with their shares. Rather, labor activism is a

1. *See* PETER F. DRUCKER, THE PENSION FUND REVOLUTION (1996) (originally published as THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA (1976)); JEREMY RIFKIN & RANDY BARBER, THE NORTH WILL RISE AGAIN: PENSIONS, POLITICS, AND POWER IN THE 1980S (1978).

2. *See* Joann S. Lublin, *'Poison Pills' Are Giving Shareholders a Big Headache, Union Proposals Assert*, WALL ST. J., May 23, 1997, at C1. For general discussions of labor unions' shareholder activism, see Aaron Bernstein, *Labor Flexes Its Muscles — As a Stockholder*, BUS. WK., July 18, 1994, at 79 (reporting that union-mounted proxy fights have quadrupled since 1992); Laura M. Litvan, *Unions Take Stock in Companies*, INVESTOR'S BUS. DAILY, Dec. 11, 1997, at 1 (discussing current union shareholder initiatives); Paul Sweeney, *Clash by Proxy*, ACROSS THE BOARD, May 1, 1996, at 21 (discussing labor union activism during the 1996 proxy season).

model for any large institutional investor attempting to maximize return on capital. Unions, union pension funds, individual union members, and labor-oriented investment funds are using the corporate voting process to push for a wide variety of changes in corporate governance. These range from redemption of rights plans[3] to implementation of confidential shareholder voting to caps on executive pay.

This shareholder activism by unions requires a major realignment of the traditional ideologies of shareholder, worker, and manager. Managers traditionally were thought to represent shareholders' interests and unions were thought to represent workers'. Of course, a viewpoint that equates managers' and shareholders' interests is naive.[4] Corporate scholars have long

3. Rights plans are one of the most powerful antitakeover defenses available to a target company. *See* Randall S. Thomas, *Judicial Review of Defensive Tactics in Proxy Contests: When Is Using A Rights Plan Right?*, 46 VAND. L. REV. 503, 505 (1993). Rights plans are discussed extensively in RANDALL S. THOMAS & CATHERINE T. DIXON, ARANOW & EINHORN ON PROXY CONTESTS FOR CORPORATE CONTROL § 20.02 (3d ed. Aspen L. & Bus. 1998) (footnotes omitted):

> Almost one-half of America's major public companies have Rights Plans, or "poison pills" as they are often called, and the remaining companies could put them in place quickly if needed. These plans are expressly authorized by most states' corporate codes. While a variety of different plans have been dubbed poison pills, the Share Purchase Rights Plan (Rights Plan) is the most popular. Some of the common characteristics of this type of Rights Plan are briefly described here.
>
> Rights plans are usually created by a target company's board of directors without a stockholder vote. The board must authorize the creation and distribution to its common stockholders of a dividend of one right for each share of common stock they own. The right entitles the stockholder to purchase common or preferred stock of the issuing company or any potential acquiror. While initially the rights are transferable only with the common stock and are not exercisable, once a "triggering event" occurs, new rights certificates are distributed to the issuing company's stockholders and may be exercised.
>
> . . . .
>
> The board of directors of the issuing company reserves the power to redeem the rights for a certain period of time at a nominal price. This gives the board tremendous negotiating leverage with the bidder: if the bidder agrees to the board's terms, the board can stop the rights from becoming redeemable, avert the economic devastation that would be inflicted on the bidder, and permit the bidder to acquire the company. If the bidder does not agree to accept the board's demands, then the directors can use the Rights Plan to stop the offer from proceeding.

Id.

A new and more potent version of the rights plan includes what are commonly referred to as "dead hand" or "continuing director" provisions. These provisions permit only incumbent directors or their designates to redeem or eliminate the rights plan. These provisions make it impossible for an acquiror to take control of the company through a proxy contest and then have the new board of directors remove the rights plan. In the few decided cases testing the validity of these provisions, the courts have split over whether they should be upheld. *Compare* Bank of New York Co. v. Irving Bank Corp., 528 N.Y.S.2d 482 (Sup. Ct. 1988) (invalidating a continuing-director provision under New York law) *with* Invacare Corp. v. Healthdyne Tech. Inc., 968 F. Supp. 1578 (N.D. Ga. 1997) (upholding a continuing director provision under Georgia law); *see also* Shawn C. Lese, Note, *Preventing Control from the Grave: A Proposal for Judicial Treatment of Dead Hand Provisions in Poison Pills*, 96 COLUM. L. REV. 2175 (1996) (arguing that courts should invalidate these provisions).

4. A viewpoint equating union and worker interests is similarly naive, as the union democracy literature has explored. *See* SEYMOUR MARTIN LIPSET ET AL., UNION

emphasized a divergence between managers and shareholders.[5] Indeed, in the 1980s workers often aligned with managers against shareholders in thwarting hostile takeovers, depriving shareholders of substantial premiums in the process.[6] Most empirical work has found that workers were not harmed by takeovers[7] and so gained little from this alignment. In the 1990s, a historic shift has begun, as worker-shareholders prod other shareholders into holding management more accountable. Important changes in corporate governance have already resulted. To maintain its momentum, this realignment will require unions to modify their self-image as well. Unions, swept along by actions of their pension funds, increasingly will focus on the long-run health of corporations. If they do not, labor-shareholder activism may be a fad of the 1990s, doomed to fizzle. But the potential exists for fundamental change in both corporations and unions.

Much of what the union shareholder is doing is familiar to other institutional shareholders — only the union sponsor is novel. For example, in 1997 unions sponsored several resolutions to redeem poison pills and to declassify corporate boards of directors — classic issues of corporate governance — using Rule 14a-8,[8] the traditional avenue for shareholders to place resolutions on the ballot at the annual meeting. Unions are also active in seeking changes in executive pay, an area a bit closer to labor interests and one in which institutional shareholder interest has been increasing recently. For example, a Teamsters' pension fund sponsored a shareholder resolution in General Electric's proxy statement for its 1997 annual meeting to cap executive base salaries at $1 million.[9]

DEMOCRACY (1956); Paul Jarley et al., *A Structural Contingency Approach to Bureaucracy and Democracy in U.S. National Unions*, 40 ACAD. OF MGMT. J. 831, 832-34 (1997).

5. The classic work emphasizing the separation between shareholder ownership and management control of corporations is ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1934).

6. *See* Randall S. Thomas & Kenneth J. Martin, *Should Labor Be Allowed to Make Shareholder Proposals*, 73 WASH. L. REV. (forthcoming 1998) (manuscript at 10-11, on file with authors) ("During [the 1980s], unions generally supported corporate management in resisting hostile acquisitions by, among other things, pushing for stronger state antitakeover laws and accepting defensive employee stock ownership plans. Employee shareholders also supported a host of other antitakeover devices that insulated management from the consequences of poor performance." (footnotes omitted)).

7. For an excellent summary of these studies, see Roberta Romano, *A Guide to Takeovers: Theory, Evidence and Regulation*, 9 YALE J. ON REG. 119, 140-42 (1992) (summarizing several studies and finding that "middle management . . . and not production plant employees [are the ones] whose ranks are slimmed down after acquisitions").

8. 17 C.F.R. § 240.14a-8 (1997).

9. *See* David Cay Johnston, *Teamsters Are Challenging G.E. Chief's Compensation*, N.Y. TIMES, Mar. 3, 1997, at D2. This proposal attracted nine percent of the votes cast at the annual meeting, leading Teamsters' officials to conclude that feelings among investors against

More startling are the innovative methods unions have developed to get corporations to listen to traditional shareholder complaints. Unions are at the cutting edge of corporate and securities law in getting their message out to other shareholders and corporate boards of directors. One example of such innovation is the Teamsters' widely publicized list of the "least valuable" corporate directors.[10] Press attacks on directors are an unusual shareholder method of voicing displeasure, but the Teamsters' substantive complaint with the directors was one dear to shareholders: the directors were not maximizing firm value. A more important development is the number of labor-sponsored "floor proposals" submitted for a shareholder vote at annual meetings, sometimes independently of the company's proxy statement. The innovation with the greatest long-term potential to alter the balance of power between shareholders and management is mandatory amendment of corporate bylaws by shareholders. Unions have been at the forefront in the recent movement by shareholders to amend corporate bylaws to limit the authority of boards of directors on the sensitive issue of takeover defenses.

Not all labor-shareholder activism involves a new-age alignment of shareholder and worker interests. Sometimes unions use their shareholder power simply as a new weapon to further unions' traditional organizing and collective-bargaining goals. Some of the shareholder activism certainly occurs at companies at which unions are concurrently engaged in contract negotiations or union organizing campaigns.[11] Corporate management claims that most union shareholder activity is part of a "corporate campaign" designed to win other concessions for workers. Corporate management representatives have even asked the SEC to restrict unions' ability to submit shareholder proposals.[12] For example, the

high pay for executives is growing. *See* William M. Carley, *GE Chairman Defends Pay, Stresses Quality,* WALL ST. J., Apr. 24, 1997, at A4.

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

11. *See* Frank Swoboda, *AFL-CIO Changing Its Tactics: Union to Expand Advertising, Corporate Campaigns Against Employers,* WASH. POST, Feb. 20, 1997, at C2 (reporting that the AFL-CIO announced plans to increase stockholder campaigns against a range of employers in the 1997 proxy season).

12. *See* Stephen Baker, *The Yelping over Labor's New Tactics,* BUS. WK., Oct. 23, 1995, at 75; *see also* Elizabeth Walpole-Hofmeister, *Corporate Campaigns: Business Leaders Blast Union Tactics; House Hearings Planned For November,* Daily Lab. Rep. (BNA), Sept. 22, 1995, at AA-1 (reporting that the American Trucking Association had sent a letter to the SEC asking that it change its rules to permit companies to refuse to include union-sponsored resolutions in proxy statements when they are submitted in the midst of a corporate campaign).

American Society of Corporate Secretaries and other management groups have urged the SEC to impose limits on unions that are using the shareholder-proxy process to increase their leverage at the collective bargaining table.[13] Management's arguments to restrict labor unions' shareholder activism rest on the premise that unions are seeking to protect jobs and further other labor interests at the expense of the corporation and other shareholders.

We argue, however, that much of the union-shareholder activism cannot be dismissed simply as an old dog's new tricks. In many cases, unions are trying to improve the financial performance of their pension funds, just like any other institutional investor. Between these two poles, we suspect that the goal behind some of the union-shareholder activity is to become more involved in strategic corporate decisions. In recent decades, unions have become increasingly frustrated at their lack of influence over basic corporate policy. Shareholder activism is a promising way of getting the attention of top management and the board of directors.

In this article, we investigate the consequences of the new shareholder activism of unions. We claim that much union-shareholder activity represents an alignment of shareholder and worker interests that attempts to prod management to increase the overall worth of the firm. At other times, the union shareholder seeks to benefit workers at the expense of other shareholders. But other shareholders are generally able to distinguish, on a case-by-case basis, which hat the union shareholder is wearing. Without the support of other shareholders, the union shareholder cannot change the company. These are not worker-owned firms. This check on union-shareholder power — in addition to existing fiduciary checks on union-pension-fund activism and powerful market forces — negate the need for any change in corporate or securities law to regulate union shareholders specifically. We therefore advocate no change in existing law. We do argue, however, that the alignment of union and other shareholders will have profound effects on both corporate governance and long-term union goals.

We begin, in Part I, by describing two stories of union-shareholder activism that illustrate some of the issues involved. Part II then outlines our theoretical framework. Here we distinguish union-shareholder initiatives designed to further unions' traditional organizing and collective bargaining goals from those

13. *See SEC Meets with Corporate Secretaries,* INSIGHTS, June 1996, at 33, *available in* LEXIS, News Library, Insite File.

that enhance unions' role as a participant in strategic corporate decisionmaking, a newer vision of the union. We also distinguish between activities of unions and their pension funds.

In Part III, we use this framework to describe labor unions' current voting initiatives. Our hypothesis is that it is no accident that unions are at the cutting edge of innovative corporate law. Their desire for a more visible presence in corporate boardrooms requires innovation. From the labor perspective, unions have slowly withered as they focused on collective bargaining and relied on strikes to back their demands. From the corporate perspective, unions have remained peripheral players in the boardroom, despite their vast stock holdings, because traditional shareholder voting initiatives, particularly under Rule 14a-8, are largely ineffective methods for focusing shareholders and directors on a limited number of corporate-governance issues. Further, but more tentatively, we suspect that unions are less able than other institutional shareholders to exercise influence through informal, behind-the-scenes discussions. Unions recognize the need for new approaches — including approaches that do not reflexively regard efficiency and profitability as goals of "enemy" shareholders, and this has led them to become more creative in exploring new ways of exercising their voices as shareholders.

Part IV evaluates how current legal and market forces regulate union-shareholder activism. We conclude that existing legal and market checks adequately constrain potential opportunistic union behavior, so that legal reform is unnecessary. We identify three forces that would check labor unions' efforts to act to further their members' interests at the expense of other shareholders: the fiduciary structure of Taft-Hartley union pension funds; the need to persuade other self-interested shareholders to vote for union initiatives; and the disciplinary power of capital markets, the market for corporate control, and product markets to constrain corporate conduct that deviates too far from maximizing shareholder profits. We conclude that these forces adequately limit labor unions' ability to expropriate more corporate value for their members, if they choose to pursue that course of action.

Finally, in Part V and the Conclusion, we examine several different areas where unions have been active and look at how these checks have affected their actions. We suggest that while union-shareholder activism potentially could have long-lasting effects on unions' role in corporate governance, it will be a passing fad unless unions can garner other shareholders' support for their

platform. To do so, unions need to focus their shareholder voting initiatives in areas where they have special advantages in monitoring management. If unions can package the results of their research in proposals that emphasize to shareholders the ways in which the two groups' interests are aligned, then union-shareholder activism could be here to stay.

I. Two Stories of Union-Shareholder Activism

As we examine union-shareholder activism, a key question is whether unions use their rights as shareholders merely as a new tactic for pursuing old goals, or whether they are forging a new role for unions. Not surprisingly, we find that unions have both old and new objectives in mind. We seek, however, to avoid simplistically equating old union goals with harm to other shareholders, and new union goals with furtherance of shareholder interests. Unions can play either role, and either role can help or hinder other shareholders. We begin our analysis and illustrate some of its complexity with two stories of recent shareholder activity.

A. *The UFCW Floor Fights at Albertson's*

Albertson's is a major chain of grocery stores, operating some 826 stores nationwide, concentrated in the western states. The United Food and Commercial Workers (UFCW) has organized many of the stores and represents about forty percent of Albertson's retail employees.[14] Albertson's more recently entered Arizona. In 1989, it operated a single store in Yuma;[15] as of January 1997, it had thirty-four stores in Arizona.[16] By 1996, UFCW Local 99R had organized the Yuma store and was negotiating a collective contract there. More importantly, it was conducting a corporate campaign to urge Albertson's to recognize the UFCW as the bargaining agent at some twenty-eight other stores in Arizona at which the union had obtained authorization cards from employees. UFCW is among the more successful unions at using the authorization card-corporate campaign approach to organizing as an alterna-

14. *See Nationwide Class Action Suit Targets Albertson's Pay Practices, Mistreatment of Workers,* U.S. Newswire, Apr. 21, 1997, *available in* 1997 WL 5712189.

15. *See* Melanie Johnston, *Supermarkets Feed Phoenix Glut,* Advertising Age, Nov. 13, 1989, at 66.

16. *See* Albertson's Inc., 1997 SEC Form 10-K, at 5, *available in* EDGAR, Film No. 97,576,545. The EDGAR database is available on LEXIS, on Westlaw, and at the SEC's homepage at <http://www.sec.gov/edgarhp.htm>.

tive to traditional NLRB elections accompanied by recognitional picketing.[17]

The national UFCW's corporate campaign against Albertson's included backing a number of lawsuits alleging violations of the Fair Labor Standards Act.[18] In addition, Local 99R bought forty-three shares of stock in Albertson's and pursued its right as a shareholder to introduce resolutions on the floor of the 1996 annual shareholder meeting.[19] Local 99R solicited the support of other Albertson's shareholders for a proposal on confidential shareholder voting.[20] The board of directors opposed the proposal. It emphasized that the cost to the union of its proxy solicitation exceeded the value of its forty-three shares, thus causing the board to believe that the union did not submit its proposal "in the interests of the stockholders," but rather to "pressure the Company to unionize its Arizona employees."[21] Nevertheless, the proposal received considerable support of other shareholders, getting 21.4% of the vote.[22]

Local 99R increased the pressure on the Albertson's board by carrying its shareholder campaign to other companies. Six Albertson's board members were officers or directors of other companies as well. Local 99R bought stock in these other companies and offered shareholder proposals at these other companies as well,[23] on such issues as voting on future golden parachutes, declassifying the board, and redeeming the poison pill.[24] The results of these shareholder proposals are presented in Table 3. The votes received range from 0.1% to 44.6%.

The effect of the union-shareholder activism at Albertson's is unclear. The union did get votes on several of its proposals, but none received majority shareholder support. Most of Albertson's Arizona stores remain nonunion.[25] In the 1997 proxy season, the

17. *See* Laura M. Litvan, *Can Unions Fit in New Economy?,* INVESTOR'S BUS. DAILY, Apr. 7, 1997, at A1.

18. *See* Aaron Bernstein, *This Union Suit Could Really Scratch,* BUS. WK., Mar. 10, 1997, at 37. The Fair Labor Standards Act is codified at 29 U.S.C. §§ 201-19 (1994).

19. *See* Albertson's, Inc., Proxy Statement 29 (Apr. 25, 1996), *available in* EDGAR, Film No. 96,401,613.

20. *See id.*

21. *Id.* at 30.

22. *See* INVESTOR RESPONSIBILITY RESEARCH CTR., SUMMARY OF 1996 U.S. SHAREHOLDER RESOLUTIONS 4 (1996) [hereinafter I.R.R.C., 1996 SUMMARY].

23. *See* Albertson's, Inc., *supra* note 19, at 30.

24. *See* I.R.R.C., 1996 SUMMARY, *supra* note 22, at 4.

25. *See, e.g., Food for Thought,* SEATTLE TIMES, Feb. 24, 1997, at D1, *available in* LEXIS, News Library, Seattn File (describing Local 99R's campaign to organize Albertson's grocery workers in Phoenix as unsuccessful).

UFCW has again targeted Albertson's and companies with interlocking directorates with corporate-governance proposals,[26] so the battle continues.

This story has several noteworthy points. The union's apparent goal was to increase its organizing power, a traditional union goal. The shareholder activity seemed to be a substitute for a strike. But the proposals were targeted at corporate-governance reforms that were not directly beneficial to narrow, worker-related union goals. The union seemed to attempt to ally itself with shareholders, albeit so far not completely successfully. The union introduced its proposals on the floor of the annual meeting, rather than through the companies' proxy statements. The use of a floor fight was an innovative technique under corporate law, which usually assumes that annual shareholders' meetings simply rubber stamp management's agenda.[27] The UFCW appeared to use this approach to gain a more visible presence in the Albertson's boardroom and to circumvent obstacles to gaining its objectives through traditional labor tactics. As such, these campaigns seem to reflect new union tactics in pursuit of old union goals.

B. *Teamsters' Pension Fund Bylaw Proposals at Fleming Companies, Inc.*

Fleming Companies, Inc., is one of the nation's largest food distributors. Its primary competitors include Kroger and Albertson's. Approximately half of its "associates" are unionized by one of four unions, including the Teamsters and the UFCW.[28] On July 7, 1986, the company implemented a poison pill with a ten-year life, impeding possible takeovers of the company.[29] Both California Public Employees Retirement System (CalPERS)[30] and the Council for

26. *See* COUNCIL OF INSTL. INVESTORS LETTER, Mar. 14, 1997, at 2.

27. *See* Mike Dorning, *Big Investors See Corporate Clout Growing*, CHI. TRIB., Mar. 14, 1994, at C1; *see generally* MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION chs. 9-10 (1976).

28. *See* Fleming Cos., Inc., 1997 SEC Form 10-K, at 2, 8, 9, *available in* EDGAR, Film No. 97,560,649.

29. *See* Fleming Cos., Inc., Definitive Proxy Statement 26-27 (Mar. 12, 1996), *available in* EDGAR, Film No. 96,534,058. The original pill was strengthened on August 22, 1989. It was due to expire July 6, 1996.

30. *See* Judith H. Dobrzynski, *A Top-10 List Not Too Many Care To Be On*, N.Y. TIMES, Feb. 11, 1997, at D5.

Institutional Investors (CII)[31] have listed Fleming Companies on their annual "worst companies" lists.

In 1996, the Teamsters' General Fund used Rule 14a-8 to propose a shareholder resolution recommending that the company redeem its current poison pill and have an affirmative shareholder vote prior to adopting any future poison pill. The company included this proposal in its proxy materials.[32] Despite management's declared opposition to the proposal, sixty-four percent of the voting shareholders voted to support it.[33] Nevertheless, less than two months later, Fleming's board of directors adopted a new poison pill.[34]

In 1997, the Teamsters' General Fund proposed that the shareholders amend the company's bylaws to mandate that the board redeem the poison pill and to forbid the board from enacting another without shareholder approval.[35] After losing federal litigation aimed at keeping the proposal off the ballot, the board "voluntarily" terminated its current pill.[36] Subsequently, 60.5% of the shareholders voted for the renewed Teamsters' resolution.[37]

We flag several points of interest in this story. First, the union action seemed closely intertwined with that of its pension funds. The Teamsters' General Fund, sponsor of the shareholder proposals, apparently owns only sixty-five shares of Fleming stock.[38] Various Teamsters' pension funds are important shareholders at Fleming Companies, however, holding some 117,000 shares in 1996.[39] Second, while many Fleming workers are members of the Teamsters' Union, no special collective bargaining or organizing ac-

31. *See* John Authers, *Investors' Council Renews Attack on U.S. Companies,* FIN. TIMES (London), Oct. 8, 1996, at 31. The CII list compares company performance for up to the past five years to share performance of other companies in the same industry.

32. *See* Fleming Cos., Inc., *supra* note 29, at 26-28.

33. *See* Fleming Cos., Inc., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 885, at *14 (Dec. 3, 1996).

34. *See id.*

35. *See* Ken Bertsch & Matt McGeary, *Activists Keep Up the Heat in 1997; Attention Focuses on Merger Activity, Poison Pills,* CORP. GOVERNANCE BULL., Oct. 1996-Jan. 1997, at 1.

36. *See Fleming Cos.: Board Decides to Terminate Company's Poison Pill Plan,* WALL ST. J., Mar. 19, 1997, at B4 [hereinafter *Fleming Cos.*].

37. *See Fleming Shareholders Sack Defense,* OMAHA WORLD HERALD, May 1, 1997, at 22. The Teamsters' anti-poison-pill resolution passed at the company's shareholder meeting held on April 30, 1997. *See id.*

38. *See* Fleming Cos., Inc., Definitive Proxy Statement 26 (Mar. 18, 1997), *available in* EDGAR, Film No. 97,558,298.

39. *See Fleming Shareholders Urge End to Poison Pill,* OMAHA WORLD HERALD, May 2, 1996, at 26.

tivity seemed to drive the shareholder proposals. The union goal seemed to be to remove management's defenses to a takeover so that its pension funds' stock could benefit. Third, the procedure was novel. In the first attempt, the union tried a standard precatory 14a-8 proposal. Despite majority support from shareholders, the incumbent board ignored the message from that traditional avenue. The next year, the union turned to a highly innovative type of shareholder activity — urging a mandatory change in corporate bylaws to restrict management's discretion to use a powerful antitakeover defense. These new tactics may be directed at a new goal — maximizing shareholder value.

In summary, the two stories show the difficulty of categorizing union-shareholder activity. In the Fleming case, the union seemed to act in a new role as catalyst of general shareholder interests. But one suspects that the Teamsters picked on Fleming, out of the numerous companies the fund had invested in that have poison pills, because of its hostile attitude towards the Teamsters. Still, the union succeeded in persuading other shareholders that its message served their goal of maximizing firm value. In Albertson's, by contrast, the union seemed to use shareholder pressure to further traditional organizing and collective bargaining goals. Its actions at the other companies, however, included an effort to redeem a poison pill — the identical effort in the Fleming case.[40] Apparently, other shareholders remained suspicious of the union's effort, as its poison-pill and other proposals did not receive majority shareholder support.

II. Shareholder Activism and Union Goals and Means

In this Part, we generalize the shareholder activism of unions and their pension funds by placing it in a framework of ends and means. We examine what is new and what is old about union-shareholder activism.

At the outset, we want to finesse two perennial questions about union activities in order to concentrate on the specific issue of union-shareholder activities. First, commentators often complain that union leaders do not serve their members but instead aggrandize their own positions. Just as difficulties in monitoring and other agency problems create slack between corporate managers and their shareholders, so too slack exists between union leaders and

40. *See also* Lublin, *supra* note 2 (noting that unions have sponsored resolutions to redeem poison pills at 13 companies in 1997).

their members.[41] In an article that emphasizes divergences between shareholders and managers, we do not want to assume naively that union leaders represent their members perfectly, particularly in the use of pension money. Certainly, unions have often been accused of misusing their members' pension funds.[42] It may turn out that pension money spent on shareholder resolutions and associated litigation is not a good investment.[43] Union members may be better off with lower dues or lower pension costs than with the shareholder activism. On the other hand, spending union or pension money to pursue rights aggressively as shareholders seems a trivial problem compared to siphoning funds to Las Vegas casinos. Or, to put the matter in corporate law language, union-shareholder activity at most raises duty-of-care problems, not duty-of-loyalty problems.

The second issue we wish to clarify and then finesse concerns unions and overall shareholder profitability. Our thesis argues that unions and their pension funds are aligning with other shareholders to create more efficient governance structures for corporations. The skeptic might wonder whether this lion-laying-with-lambs thesis is plausible. The empirical evidence shows that, overall, unions reduce profits that can be distributed to shareholders.[44] This differs from the claim that unions are inefficient, and considerable evidence suggests that unions enhance productivity, both by shocking management into better practices and by helping to solve collective-goods problems in the workplace.[45] Thus, overall unions may enlarge a corporation's pie but then grab an even larger slice. These two faces of unionism were documented by the influential

41. *See* Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367 (comparing union member-leader relationship with corporate shareholder-manager relationship).

42. *See* ARTHUR B. SHOSTAK, ROBUST UNIONISM 244-45, 248 (1991); Julius G. Getman, *Public Policy Implications of ERISA*, 68 ST. JOHN'S L. REV. 473, 475 (1994) (stating that "the misuse of pension funds is one of the greatest areas of union corruption").

43. *See infra* text accompanying notes 157-70 (discussing the inconclusive evidence on whether shareholder corporate-governance proposals improve firm performance).

44. *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 181 (1984) ("Though exceptions can be found, unionization is more often than not associated with lower profitability."); BARRY T. HIRSCH & JOHN T. ADDISON, THE ECONOMIC ANALYSIS OF UNIONS 211 (1986) ("[A]ll studies of which we are aware find unionism to be associated with lower profits.").

45. *See* FREEMAN & MEDOFF, *supra* note 44, at 169 ("[M]ost studies of productivity find that unionized establishments are more productive than otherwise comparable nonunion establishments."); HIRSCH & ADDISON, *supra* note 44, at 215 ("The collective voice model has rightly emphasized that unionism need not necessarily detract from productivity, and this is an important finding in itself. What is in doubt is the generality and robustness of the unions-raise-productivity thesis.").

labor economists Richard Freeman and James Medoff in their well-known book, *What Do Unions Do?*[46]

We avoid taking sides in a general debate over unions by focusing on a new and limited activity of unions and their pension funds — that of shareholder activist. Even if unions traditionally reduce shareholder profits, union-shareholder activism can enlarge the corporate pie without reducing the shareholding slice. As we discuss in detail later, the limited available evidence suggests that union-shareholder activism may improve profitability for all shareholders. Thus, other shareholders can applaud and follow union-shareholder activism because it increases their own investment return, even if they do not support the overall union agenda because it would lower their return.

A. *Traditional Union Functions and Weapons*

Traditional business unions have three basic functions and two related weapons to help achieve their goals. First, unions organize workers at nonunion firms. Second, once organized, unions bargain with management. Third, once a collective bargaining agreement is negotiated, unions monitor management to ensure that it complies with the agreement, usually by processing worker complaints through a grievance arbitration system. To achieve its goals, unions strike and picket recalcitrant firms.

It is worth emphasizing that in the key area of collective bargaining, a union has two methods of obtaining the most favorable contract for workers. First, of course, the union demands a bigger slice of the pie, arguing that the employer should offer higher wages, more benefits, and better working conditions. Second, however, collective bargaining attempts to increase the size of the pie by trading particular items to the highest-valued user. This is sometimes called win-win bargaining or value-added unionism.[47] This dual aspect of unionism will be a key feature of our analysis of the union as shareholder.

The National Labor Relations Act (NLRA) was drafted with traditional union functions and weapons in mind. First, the Act ac-

46. FREEMAN & MEDOFF, *supra* note 44; *see also* Richard B. Freeman & James L. Medoff, *The Two Faces of Unionism,* PUB. INTEREST, Fall 1979, at 69.

47. *See* Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism,* 71 N.Y.U. L. REV. 827 (1996) (arguing that existing labor law impedes newer forms of voice and various modes of communication between labor and management by constraining the groups to have a primarily adversarial relationship, and making suggestions as to how labor law should be changed to promote the voice aspect of unionism).

tively promotes the union functions of organization, collective bargaining, and grievance arbitration, while allowing workers free choice in whether to be represented by a union.[48] Second, labor laws regulate the traditional economic weapons — the strike and the picket sign — in a variety of ways. A major regulatory principle provides that the government should remain neutral in the economic battle between management and labor.[49] The relative economic strength of union and management, rather than the views or preferences of government officials, is supposed to determine the outcome of collective bargaining. On the other hand, striking and picketing are subject to detailed regulations.[50] In particular, the secondary boycott provisions try to prevent unions from dragging neutral employers into the fray.[51]

In recent years, unions have become increasingly frustrated with the NLRA and with their own declining importance in the American economy and society. Traditional business unionism no longer seems to work. The former president of the AFL-CIO even publicly called for a repeal of the NLRA,[52] and others emphasize its uselessness.[53] In the face of a hostile Congress, however, labor law reform is unlikely. Thus, unions must find ways to work within the current framework and to avoid obstacles with new tactics. The new president of the AFL-CIO, John Sweeney, has emphasized the need for new thinking and new action by the labor movement.[54]

B. *The Union Corporate Campaign*

In the last twenty years or so, new union tactics have left labor law regulation behind. Rather than relying solely on strikes and picketing as the means of achieving their aims, unions increasingly have resorted to a wide array of tactics. The umbrella term "union corporate campaign" is now used to describe this broad range of new tactics.

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48. *See* 29 U.S.C. § 157 (1994).

49. *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 232 (1990); Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1675 (1983)).

50. *See* 29 U.S.C. §§ 158(b)(4), (7), 158(d), 163 (1994).

51. *See* 29 U.S.C. § 158(b)(4).

52. *See* Harry Bernstein, *Creativity Needed to Stem Unions' Decline*, L.A. TIMES, Sept. 19, 1989, at pt. IV, 1.

53. *See* Martin J. Morand, *Canada: Our Model?*, MONTHLY REV., June 1990, at 40, 41-42.

54. *See* Aaron Bernstein, *Sweeney's Blitz,* BUS. WK., Feb. 17, 1997, at 56.

The union corporate campaign was pioneered by Ray Rogers when the Amalgamated Clothing and Textile Workers Union (ACTWU) attempted to organize J.P. Stevens in the late 1970s.[55] Among the many tactics used, which included massive media publicity and consumer boycotts, ACTWU and sympathetic church groups filed numerous shareholder proposals with J.P. Stevens. None of those proposals received more than 9.1% of the vote.[56] Another tactic was to isolate Stevens's management by pressuring its outside board members. During the campaign, three outside directors resigned to avoid adverse publicity at their home companies.[57] The campaign succeeded in getting J.P. Stevens to bargain with the union. As part of the settlement, ACTWU promised not to engage in further corporate campaign tactics at the company.[58]

At its broadest and blandest, the term *union corporate campaign* means any union tactics, other than traditional strikes and picketing, used to pressure management to change some behavior.[59] Usually, the term implies a coordinated campaign using several tactics, ranging from consumer boycotts and public-relations schemes to proxy contests and disruption of the corporation's dealings with creditors and lenders.[60]

Management groups define union corporate campaigns in less benign terms. In a 1995 press release, for example, the American Trucking Association called on Congress to investigate corporate

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55. *See* Judith Kenner Thompson, *Union Use of Public Interest Proxy Resolutions,* LAB. STUD. J., Fall 1988, at 40, 46.

56. *See id.* at 50 tbl.1. Most of the resolutions in the J.P. Stevens cases concerned the ability of the corporation to remain profitable, given its disregard of labor law, affirmative action policies, and safety and health regulations. *See id.* at 57.

57. *See id.* at 46.

58. *See* Stanley J. Brown & Alyse Bass, *Corporate Campaigns: Employer Responses to Labor's New Weapons*, 6 LAB. LAW. 975, 988-89 (1990); Joel H. Siegal, *Power in the Nineties: An Analysis of the Management of Pension Funds for the Attainment of Union and Public Interest Goals*, 1987 DET. C.L. REV. 673, 681 (describing the terms of the settlement between J.P. Stevens and ACTWU).

59. *See* Paul Jarley & Cheryl L. Maranto, *Union Corporate Campaigns: An Assessment*, 43 INDUS. & LAB. REL. REV. 505, 506-07 (1990); Herbert R. Northrup, *Union Corporate Campaigns and Inside Games as a Strike Form*, 19 EMPLOYEE REL. L.J. 507, 507-13 (1994) (emphasizing corporate campaigns as a substitute for traditional strikes). *See generally* CHARLES R. PERRY, UNION CORPORATE CAMPAIGNS (1987).

60. In a 1985 publication, the AFL-CIO listed 10 tactics that could be used in a corporate campaign: (1) building coalitions with other labor and non-labor groups; (2) public relations activities; (3) legislative initiatives; (4) appeals to regulatory agencies; (5) legal actions; (6) consumer actions; (7) pressuring lenders and creditors; (8) threats to withdraw pension fund assets; (9) stockholder actions; and (10) in-plant actions. *See* INDUSTRIAL UNION DEPT., AFL-CIO, DEVELOPING NEW TACTICS: WINNING WITH COORDINATED CORPORATE CAMPAIGNS 4-10 (1985).

campaign tactics, declaring that such campaigns' purpose was to damage the company:

> The purpose of a union corporate campaign is to damage a company's business, trade and reputation in order to pressure the company into concessions during a labor dispute or organizing drive. Such campaigns typically include carefully orchestrated tactics such as suspiciously-timed complaints to government agencies, consumer boycotts, shareholder resolutions, and harassment of company officers, directors and customers.[61]

The Association proposed, among other things, that the SEC refuse to include any union-sponsored shareholder resolutions in annual proxy statements if an organizing campaign or collective bargaining was imminent.[62]

The wide variety of goals and tactics used makes it difficult to characterize corporate campaigns. Often, a corporate campaign uses new tactics to pursue the traditional goals of organizing or collective bargaining. The new tactics are simply a complement or substitute for the traditional tactics of striking and picketing.[63] In these situations, unions engaged in a corporate campaign often self-consciously use warlike rhetoric, with management as the enemy.[64]

In other cases, the goals in a corporate campaign seem new. Some scholars believe that the union corporate campaign has arisen as unions try to influence strategic business decisions of top management.[65] Unions may also use various corporate-campaign tactics, however, in an effort to encourage management to listen to the union. Corporate-governance issues are not mandatory subjects of collective bargaining,[66] so management listens to unions' opinions or statements on these subjects only voluntarily. When viewed in this light, some union-shareholder proposals may appear to be an

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61. *See Business Leaders Attack Union "Corporate Campaign" Tactics; Call for Congressional Inquiry,* AMERICAN TRUCKING ASSOCIATIONS NEWS RELEASE (American Trucking Assns., Alexandria, Va.), Sept. 21, 1995.

62. *See id.* For a defense against charges that corporate campaigns constitute disloyalty for NLRA purposes, see Melinda J. Branscomb, *Labor, Loyalty, and the Corporate Campaign,* 73 B.U. L. REV. 291 (1993).

63. Jarley and Maranto use this approach, organizing corporate campaigns into three types: organizing, strike complement, and strike substitute. *See* Jarley & Maranto, *supra* note 59, at 507-10.

64. *See* Northrup, *supra* note 59, at 519 ("Union literature is couched in emotionally charged rhetoric and fighting or warlike terminology both in corporate campaign and in inside game activities in order to create and to maintain an atmosphere of conflict.").

65. *See* THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 195-97 (1994).

66. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 344 n.1 (1958) (defining the scope of mandatory subjects, including "'rates of pay, wages, hours of employment, or other conditions of employment'" (quoting 29 U.S.C. § 159(a) (1994))).

attempt to work within the constraints of securities law, and to avoid the limits of labor law, to gain management's ear on a wider range of topics. Management's willingness to listen will depend in part on whether other shareholders support the union. In this situation, unions are more likely to emphasize cooperative strategies.

C. *Union-Shareholder Activity — New Tactics or New Role?*

Union-shareholder activity sometimes serves old union goals. Often shareholder activity is part of a corporate campaign, used along with other tactics, to strengthen a union's collective-bargaining position. Generally, one might think such shareholder activism comes at the expense of other shareholders. Shareholder resolutions to pressure boards of directors to take union-favorable stances in collective bargaining may be an example. But, as we observed earlier,[67] unions do, in the course of collective bargaining, attempt to enlarge the overall pie as a means of getting a larger slice for workers. Using shareholder tactics can have pie-enlarging effects as well, even when the ultimate goal is to improve the workers' lot through collective bargaining. Attacks on poison pills[68] or excessive executive salaries in the midst of collective bargaining might fit in this category.

In other cases, unions seem to be using their shareholder power to forge a new role for themselves — becoming important players in the structure and strategic decisionmaking of the firm. In this new role, unions can further shareholders' interests as well as workers' interests. For example, unions can help corporations make efficient tradeoffs by representing workers' voices in collective decisions.[69] But unions, in their new strategic mode, could decrease overall firm value by needlessly delaying painful decisions. In short, there is no one-to-one relation between union goals and shareholder interests.

Still, to be successful, union-shareholder activism must gain the support of other shareholders. This is most likely to occur when unions embrace a goal of maximizing firm value — clearly a new way of thinking for some unions. Other shareholders are naturally suspicious of unions' motives, and union-shareholder activism will

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67. *See supra* section II.A.

68. *See* John M. Bizjak & Christopher J. Marquette, Are Shareholder Proposals All Bark and No Bite? Evidence from Shareholder Resolutions to Rescind Poison Pills (Jan. 1997) (unpublished manuscript, on file with authors) (observing that shareholder activism through poison-pill-recession proposals can be an effective form of managerial oversight and corporate governance).

69. *See generally* FREEMAN & MEDOFF, *supra* note 44.

remain quixotic unless the proposals plainly attempt to maximize overall firm value, rather than promote narrow union interests.[70]

An alignment of union and shareholder interests sounds unrealistic at first blush. The last foray of unions into corporate-governance issues occurred in the 1980s, when unions were active supporters of state legislation to thwart takeovers.[71] Management of large corporations also favored such statutes. The standard corporate law view of such legislation is that it protects managers of large corporations and harms shareholders,[72] who are prevented from receiving the benefit of higher share prices that result when corporate ownership is traded to higher-value users. In retrospect, takeover activity generally did not harm rank-and-file workers, and the alignment of unions with management against shareholders may be seen by unions today as a mistake. In the shareholder activism of the 1990s, unions have changed their alignment, creating informal coalitions with shareholders against management on certain issues.

Why have unions shifted toward a position of maximizing shareholder value? We suggest that there are at least four reasons why labor unions want to take a lead role in improving corporate-governance structures. First, union members have significant firm-specific human-capital investments in the firms where they work and thus are residual claimants of these firms.[73] Second, unions have special monitoring abilities and can create value for other shareholders through their policing of the agency costs of equity. Third, unions are outsiders to the traditional corporate-governance system and do not suffer many of the conflicts of interest that sideline or severely hamper other shareholders' activism. Finally, and more tentatively, if labor union membership is aging, it would be appropriate for unions to focus more of their efforts on improving

70. This conclusion corresponds with the findings of Judith Kenner Thompson's study of union proxy resolutions during 1975-1978. *See* Thompson, *supra* note 55. Although the resolutions were uniformly unsuccessful, Thompson notes that resolutions specifically worded to elicit shareholder support for a labor dispute received very low levels of support, while resolutions worded to address concerns shared by all shareholders received relatively higher rates of support. *See id.* at 56-57.

71. *See supra* note 6 and accompanying text.

72. *See* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 57-59 (1993) (noting that antitakeover statutes politically were supported by and served managers of large corporations); *see also* Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 31-36 (1991) (noting that managers also supported nonshareholder-constituency statutes).

73. *See* Bernard Black, Corporate Law and Residual Claimants (Dec. 1997) (unpublished manuscript, on file with author).

the value of the retirement component of worker compensation and therefore to engage in shareholder activism as a means of raising the value of pension assets held by workers.

Unions have a greater incentive than most shareholders to monitor management rather than free ride on monitoring by others. Workers are locked into the firm with firm-specific human-capital investments, while shareholders have diversified portfolios with relatively little fixed interest in a single firm. Workers thus have greater incentives to monitor management to ensure that the firm remains healthy. If unions could harness this incentive and ability to monitor and credibly relay their information to other shareholders, or to the independent directors on the board, a major role for unions could develop.[74] In short, if workers want to protect their residual claims on these firms, they have significant incentives to become activist shareholders and to reform inefficient corporate-governance systems.

Unions have the capability and incentive to play a beneficial monitoring role for shareholders. This capability arises from their unique access to information, which comes from their day-to-day involvement with the corporation. Unions, in representing workers, regularly assemble and analyze information about the firm from a variety of internal and external sources.[75] Unions routinely collect and evaluate general information regarding corporate performance, industry trends and forecasts, as well as information that is specific to contractual provisions. Many national and international unions maintain research departments for this purpose. In addition, most unions have on staff a number of professionals, including economists, lawyers, accountants, and human resources specialists, to assist them in their work.[76]

The informational expertise of unions may be most useful in scrutinizing executive-compensation decisions. Increasing competi-

74. One example of this is the UFCW's successful "information relay" portion of its corporate campaigns. The UFCW collects information from employees regarding employers' legal infractions and then "forwards" that information to news reporters, lawyers, or the appropriate regulatory authorities. *See* Bernstein, *supra* note 18, at 37. Recently, the UFCW has begun employing its own lawyers to pursue these claims. *See id.* Successful union monitoring of this type, conducted on behalf of shareholders, could eliminate or greatly reduce many types of corporate fraud.

75. Because unions collect information regarding employee preferences as part of these activities, their information-collection and communication activities may actually enhance productivity levels within the firm. For example, unions may communicate the "optimal" mix of compensation for employees, and thereby reduce turnover. *See* FREEMAN & MEDOFF, *supra* note 44, at 15.

76. *See* Paul F. Clark & Lois S. Gray, *Union Administration, in* THE STATE OF THE UNIONS 175, 184 (George Strauss et al. eds., 1991).

tion, and the resultant emphasis on cost-cutting and increasing productivity, has forced unions to become well versed in the myriad compensation mechanisms that directly tie worker productivity to corporate performance, as well as those that can be used to cut labor costs. As a result, unions negotiate over the establishment of compensation systems for their workers that have some of the same features — for example, stock plans, bonuses, profit-sharing mechanisms, and deferred compensation — as executive-compensation plans.

Unions also have access to information regarding the day-to-day activities of firms. To the extent that day-to-day operations reflect corporate policies and strategies defined by directors and officers, unions have information regarding the effect of those strategies "on the floor." Moreover, unions' presence in the firm gives them an opportunity not available to most shareholders to assess the extent to which compensation systems reward supervisors, managers, and officers for short-term, as opposed to long-term, improvements in productivity and decreases in operating costs. Unions often know when morale is good or whether a flashy new project is a boondoggle.

Even in cases where unions do not have unique access to information, they can help other shareholders by their willingness to challenge management. Union shareholders are rarely part of interlocking directorates and more generally are outside the usual "old boy" network of corporate investing that can impede corporate pension funds or financial institutions from opposing management. With less social capital at risk, unions can be the point of attack in ways that outside directors and certain other institutional investors cannot when the top management of a particular corporation becomes self-serving.[77] For example, outside directors who are CEOs of another corporation may be unwilling to raise serious questions about executive compensation for fear of having the spotlight turned on their own pay one day. Other institutional shareholders may have conflicts of interest that stop them from raising important corporate-governance issues.[78] But once a union share-

77. For a description and critique of this view, see Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 796 & n.3 (1993) ("[M]anagers of corporate pension funds and financial institutions have other business relations with issuers that are thought to generate conflicts of interest preventing them from opposing corporate management.").

78. *See* Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 826-27 (1992) (describing the various conflicts of interest that arise amongst institutional investors in opposing management actions); *see also* Sweeney,

holder raises the issue, other institutional investors may concur and outside directors may be compelled to act in the overall interest of shareholders.

On the other hand, other shareholders may suspect that unions are willing to sacrifice their shareholder stake for their worker interests. Just as public pension funds face distinctive conflicts that limit the effectiveness of their shareholder activism,[79] so do unions and union pension funds. Even standard corporate-governance proposals issued by a union are given extra scrutiny by corporate management.[80] Some observers have detected, however, greater willingness recently by other institutional shareholders to take union-shareholder proposals at face value.[81]

Finally, we tentatively suggest that increasing levels of union-shareholder activism may be due in part to a shift in the age composition of the unions. If the age distribution of labor unions is getting older, as statistical evidence suggests it is,[82] unions likely will place increased emphasis on retirement conditions, employer contributions, and other pension-related matters. Unions face strategic choices as to how best to provide these benefits for their constituents. One option is to rely on traditional bargaining approaches to secure improvements in those benefits. Another is to supplement these approaches with shareholder activism, given its potential for improving shareholder value both through the adoption of shareholder proposals and through negotiation with corporate boards.[83]

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supra note 2, at 25 ("[U]nions are barging into places where other institutional shareholders have been treading softly.").

79. Roberta Romano has emphasized the conflicts that public pension funds have in monitoring management. *See* Romano, *supra* note 77.

80. "When [unions] voice opposition to poison pills, classified boards, cumulative voting, and, increasingly, pay-for-performance of top executives . . . 'companies are looking under the four corners of [union] documents trying to interpret labor's true agenda.'" Sweeney, *supra* note 2, at 21 (quoting John Richardson, Deputy Director of Research for the Laborers' International Union of North America); *see also id.* at 23 (discussing Investor Responsibility Research Center attorney Patrick McGurn's claim that because the labor pension funds frequently have a "bifurcated agenda," they are often treated with more distrust than other shareholders).

81. Jon Lukomnik, City of New York deputy comptroller for pensions and overseer of some $60 billion in city employees' funds, was quoted as saying: "If [Taft-Hartley fund] proposals meet our written guidelines, we do not look at the sponsorship. We deal with the substance of the resolutions." *Id.* at 25.

82. Older workers are more likely to be union members than younger workers. *See Union Members: Who They Are, Where They Work, and What They Earn,* MONTHLY LAB. REV., May 1996, at 42. For an analysis of conflicting empirical studies of age as a determinate of unionism, see HIRSCH & ADDISON, *supra* note 44, at 58-59.

83. The potential for differences in opinion as to the appropriate strategy was revealed in the recent election for Teamsters' president. James P. Hoffa emphasized negotiation over specific early retirement provisions and a maintenance of shareholder activism, while Ron Carey advocated increased attention to corporate-governance activities and adoption of a

This possible motive seems especially powerful given the recent shift away from defined-benefit plans towards defined-contribution plans.[84] As a result, even though many union plans are still of the defined-benefit type, fund performance, in addition to the ability of their unions to negotiate greater employer-contribution levels and other retirement provisions, now increasingly influences members' benefits. This will add to unions' incentives to improve corporate-governance systems and to increase shareholder value.

Even if unions ultimately are unable to form a complete alliance with institutional investors, union-shareholder activism may serve the long-term interests of unions. For many years, unions have become increasingly irrelevant to major corporate decisions. They are simply ignored. Shareholder activism is one way to get the attention of the board of directors. Even if individual union-shareholder proposals do not receive a majority of shareholders' votes or embarrass management into changing its ways — and most do not — these proposals do attract attention. Boards of directors will become aware again of unions, which could be in the long-run interest of unions.

A key question in union-shareholder activism is whether and how the strategies of unions and their pension funds can and should be linked.[85] Public pension funds are among the fastest-growing equity holders in this country.[86] Workers are becoming capitalists.

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number of pension-fund-related reforms. *See* Christine Williamson, *Pension Key in Teamsters Election,* PENSIONS & INVESTMENTS, Nov. 11, 1996, at 3. Differences in strategies among unions, particularly in the area of corporate governance, were revealed when the United Auto Workers, the International Association of Machinists and Aerospace Workers, and the United Steelworkers of America began discussing their proposed merger. *See* Barry B. Burr, *Union of Pension Issues?: Merging Labor Groups Differ on Corporate Governance,* PENSIONS & INVESTMENTS, Aug. 7, 1995, at 3.

84. In 1977, union members' pension programs were more likely to be defined-benefit plans, in which a pension level is specified and payments by the company are geared toward maintaining this level. *See* FREEMAN & MEDOFF, *supra* note 44, at 68. Of union private-pension plans, 89% were of the defined benefit type, compared to 35% of nonunion plans. *See id.* Since that time, there has been a marked shift toward defined contribution plans. *See, e.g.,* William E. Even & David A. MacPherson, *Why Did Male Pension Coverage Decline in the 1980s?,* 47 INDUS. & LAB. REL. REV. 439, 441-42 (1994); Alan L. Gustman et al., *The Role of Pensions in the Labor Market: A Survey of the Literature,* 47 INDUS. & LAB. REL. REV. 417, 435 (1994). These plans specify the company's payments, while the investment success of the fund determines the benefits. Defined-contribution plans also increasingly are used as a supplement to defined-benefit plans. *See id.* at 435. For example, in 1996 the Teamsters' Union, which oversees 170 defined-benefit pension plans, began a national 401(k) plan as a supplemental savings plan. In order to obtain coverage, Teamsters' members' employers will have to agree in contract negotiations to include the 401(k) as a benefit. *See* Christine Williamson, *Teamsters Start National 401(k) Plan; 1 Million Workers to Be Eligible,* PENSIONS & INVESTMENTS, Apr. 29, 1996, at 1.

85. In our discussion, we will distinguish the actions of unions and their pension funds whenever possible, although it is not always possible for us to peek behind the scenes.

86. *See* Black, *supra* note 78, at 827.

Many observers have speculated for years about the potential power of pension funds to further worker goals.[87] Professor William Simon, however, is skeptical of the ability of pension funds to help corporate campaigns with traditional goals of organizing or bargaining with a particular employer.[88] Simon notes that the pension funds are diversified, and he concludes that their power could be brought to bear on a particular firm only if coordinated by labor federations with strong central control.[89] Such federations do not exist in the United States.[90]

Professor Simon suggests a "more modest" role for pension funds — to develop a coordinating institution that could research companies, recommend votes on contested shareholder voting issues, and field candidates for boards.[91] Simon's proposal for institutional investors resembles that made by Professors Gilson and Kraakman,[92] and put into practice by companies such as Institutional Shareholder Services. Simon calls this role "more modest" because it would have little direct effect on organizing or collective bargaining at individual companies.[93] But this role is indeed visionary and powerful if it would cause corporate boards to notice union goals and values — even if stated at a vague level of generality.

In the next section, we analyze in some detail the new methods that unions are using to bring their message to fellow shareholders or the board of directors. Unions, rather than other shareholders, have been at the forefront of these innovations. We suggest throughout that it is no accident that unions are being creative here. Unions' necessity may be the mother of invention. Institutional investors increasingly are using informal means to communicate with management.[94] Companies suspicious of unions' motives may not

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87. *See* RIFKIN & BARBER, *supra* note 1.

88. *See* William H. Simon, *The Prospects of Pension Fund Socialism,* 14 BERKELEY J. EMP. & LAB. L. 251, 270 (1993).

89. *See id.*

90. *See id.*

91. *See id.*

92. *See* Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors,* 43 STAN. L. REV. 863 (1991).

93. *See* Simon, *supra* note 88, at 270.

94. Some institutional investors, particularly large pension funds, are using the proxy process as a "bargaining chip" in their efforts to negotiate with management over issues related to firm performance or corporate governance. For example, in the 1995 proxy season, CalPERS, New York City Employee's Retirement System (NYCERS), the New York City Teachers' Retirement Systems, and the College Retirement Equities Fund (CREF) delayed announcement of the firms they had targeted for activism until after they held talks with top management. *See* Alan L. Dye & Gregory W. Hair, *Preparing for the Annual Meeting and Shareholder Activism, in* POSTGRADUATE COURSE IN FEDERAL SECURITIES LAW 349, 385

be as willing, however, to negotiate informally with unions regarding corporate-governance issues.[95] If unions are excluded from this informal network, they may find it necessary to rely on more formal mechanisms, such as shareholder resolutions, in order for the boards of directors to hear unions' "shareholder voice."

III. Labor's Shareholder Activism and Corporate Law

Labor groups have launched an unprecedented variety of voting initiatives at companies across the nation in the past few years. In this Part, we discuss the different methods that labor is using in these initiatives and the legal issues they raise. We aim to convince the corporate specialist that these union initiatives are sophisticated, important, and new. Our overall message is that these union-led techniques should not be viewed as ploys to enhance labor's share of the corporate pie, but rather as techniques that generally increase incentives of management to improve firm efficiency.

We begin by discussing labor-shareholder proposals made pursuant to Rule 14a-8. These proposals take two forms: traditional corporate-governance proposals, discussed in section III.A, and the more powerful, binding bylaw amendments, which are the topic of

(ALI-ABA Course of Study Materials No. SB-09, 1996). The groups submitted proposals if the company did not provide a satisfactory response or if negotiations failed. *See id.*

95. In general, larger, established pension funds may be more successful than unions in getting companies to negotiate over their concerns. *See id.* at 385. The size of funds such as CalPERS may provide them with an ability to trigger negotiations without first submitting proposals. Some have noted that the decline in activism by large pension funds during the 1996 season was in part due to their interest in — and ability to use — direct negotiations. *See* John C. Wilcox, *An Investor Relations Perspective on the SEC Communications Rules, in* A Practical Guide to SEC Proxy and Compensation Rules ch. 14 (2d ed. 1997), *reprinted in* Financial Institutions Mergers and Acquisitions: A New Era 571, 577 (PLI Corp. L. & Prac. Course Handbook Series No. B-973, 1997). Getting management to discuss key issues with investors other than established, large pension funds may require them first to submit a proposal. *See* Vineeta Anand, *Funds Flexing Muscles Early in Proxy Battles,* Pensions & Investments, Mar. 17, 1997, at 20 ("But without filing these proposals in the first place, investors find it hard to get attention." (quoting Douglas G. Cogan, Investor Responsibility Research Ctr.)).

Unlike many other investors, labor groups also face a significant amount of skepticism and suspicion when submitting proposals. Management initially reacted to increased union-shareholder activism by labeling the proposals submitted as "not real" proposals, but instead part of a campaign to force management to concede on issues related to collective bargaining. *See* Michael W. Goroff, *Recent Developments in Proxy Contests, in* Doing Deals 1995, at 347, 372-73 (PLI Corp. L. & Prac. Course Handbook Series No. B-711, 1995). Although today more companies appear willing to discuss issues raised by labor groups — as suggested by the number of proposals withdrawn after negotiations in the 1997 season — some still allege that unions submitting proposals have a "hidden agenda." *See, e.g.,* Lublin, *supra* note 2 (describing the current battle between May Department Stores and the Union of Needletrades, Industrial and Textile Employees (UNITE), in which the company alleges that UNITE submitted its poison pill measure — a proposal to amend the bylaws — solely to advance the union's own agenda).

section III.B. Section III.C looks at labor's submission of shareholder resolutions directly at the annual shareholders' meeting — so-called "floor resolutions." Unions have sought support for these proposals either through the use of the company's proxy materials or by conducting an independent solicitation of proxies. Section III.C examines some of the recent campaigns and the legal issues that they raise under the federal proxy rules. Finally, section III.D briefly discusses recent "Just Vote No" campaigns, in which unions and other shareholders selectively have withheld their approval for slates from candidates for a company's board of directors in order to register their disapproval of certain board actions.

Floor resolutions and binding bylaw amendments have the potential to bring about mandatory corporate action and inject unions directly into the boardroom. By contrast, traditional corporate-governance proposals and "Just Vote No" campaigns rely on indirect pressure on corporate boards to further union-shareholder objectives. A union's choice among these tactics will depend on what it perceives it needs to do to get a board's attention.

A. *Union Use of the Shareholder Proposal Rule — Rule 14a-8*

Shareholders of public companies have the ability, subject to certain limitations and restrictions, to put proposals on the company's ballot at its annual meeting through the use of SEC Rule 14a-8, the shareholder proposal rule.[96] If a security holder of a corporation notifies the company of its intention to present a proposal for action at a forthcoming shareholders' meeting, the company must include the proposal in its own proxy material and provide a means by which the security holders can vote with respect to the proposal. The issuer can exclude a proposal, however, if the proponent fails to meet certain procedural eligibility requirements[97] or substantive content restrictions.[98]

Until recently, shareholders did not use Rule 14a-8 to attempt to influence the management of public companies. During the first

96. *See* General Rules and Regulations, Securities Exchange Act of 1934, 17 C.F.R. § 240.14a-8 (1997). For a more complete description of Rule 14a-8, see THOMAS & DIXON, *supra* note 3, § 16.

97. Rule 14a-8(a) establishes four threshold eligibility requirements: (1) ownership of shares; (2) notice and attendance at meeting; (3) timeliness; and (4) number of proposals. *See* 17 C.F.R. § 240.14a-8(a). These are discussed in more detail in Thomas & Martin, *supra* note 6 (manuscript at 19 n.34).

98. Rule 14a-8(c)(1)-(13) set forth 13 circumstances under which companies may omit proposals from their proxy materials. *See* 17 C.F.R. § 240.14a-8(c). Two of these provisions, 14a-8(c)(4) and 14a-8(c)(7), are discussed below. *See infra* text accompanying notes 132-52.

thirty years of its existence, the rule was used primarily by small, individual shareholders to obtain a forum for expression of opinions that attracted little support from the rest of the shareholder body. These activists invoked the rule to obtain a forum for challenging management's conduct of internal corporate governance.[99] Pioneering "gadflies," such as Lewis Gilbert, offered resolutions on such financial or operational matters as dividend policy, selection of auditors, and officer and director compensation, as well as broader governance issues such as the location of the annual meeting, cumulative voting, and director qualifications.[100]

Beginning with Ralph Nader's legendary "Campaign GM" in the early 1970s, however, the focus of shareholder activism shifted to the role and responsibilities of the corporation in modern society.[101] Social-responsibility proposals, attacking a variety of perceived corporate evils, became increasingly numerous in the 1970s and 1980s, although they rarely received substantial support.

By the 1980s, investors began using the shareholder proposal process as a means of challenging corporate antitakeover initiatives.[102] In the 1990s, this trend has continued and was reinforced by the 1992 amendments to the federal proxy rules that gave shareholders enhanced latitude to communicate amongst themselves.[103] Institutions have successfully employed Rule 14a-8 to persuade companies to effect changes in board structure and function, execu-

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99. *See* Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy,* 23 GA. L. REV. 97, 116-17 (1988); *see also* Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule,* 18 GA. L. REV. 425, 428-30 (1984) (discussing the early usage of the shareholder proposal rule).

100. *See* Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation,* 46 VAND. L. REV. 1129, 1146 (1993); Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation,* 45 ALA. L. REV. 879, 879-80 (1994); Ryan, *supra* note 99, at 116-17; *see also* Frank D. Emerson & Franklin C. Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly,* 19 U. CHI. L. REV. 807, 813-30 (1952) (discussing a study of proxy solicitations from 1948-1951, in which the authors found that shareholder proposals generally addressed cumulative voting, auditor selection, annual meeting location, and post-meeting reports).

101. *See* Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM,* 69 MICH. L. REV. 419 (1971); Donald E. Schwartz & Elliot J. Weiss, *An Assessment of the SEC Shareholder Proposal Rule,* 65 GEO. L.J. 635 (1977); *see also* Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 680-82 (D.C. Cir. 1970) (construing the ordinary business exclusion to permit shareholders to make a proposal that would alter the nature of the company's business, and ordering Dow Chemical Company to include in its proxy materials a shareholder proposal seeking to stop the company's continued production of napalm despite the SEC's earlier issuance of a no-action letter), *vacated as moot,* 404 U.S. 403 (1972).

102. *See* Palmiter, *supra* note 100, at 883-84; Ryan, *supra* note 99, at 157-59.

103. For an extensive discussion of the 1992 proxy rule amendments, see THOMAS & DIXON, *supra* note 3, § 16.01(F).

tive and director compensation, and other governance-related matters.

Labor unions began using Rule 14a-8 heavily in the 1990s to make corporate-governance proposals.[104] In the 1994 proxy season, labor interests collectively used Rule 14a-8 to file a larger number of corporate-governance proposals (eighty) and won more majority votes (seven) on these proposals than any other investor group.[105] For the 1995 proxy season, labor organizations filed almost as many proposals as the year before.[106] A group of fourteen unions, union pension funds, individual union members and a labor-oriented investment fund filed seventy-five out of the 265 shareholder proposals on corporate-governance issues that were tracked by the Investor Responsibility Research Center (IRRC), an independent shareholder organization.[107] Labor organizations have continued to be very active in submitting shareholder proposals, although the number of proposals submitted in 1996 was slightly below their peak participation levels in 1994.[108] Tables 1 and 2 summarize data on union shareholder proposals in 1996 and 1997, respectively.

The amazing thing about these union-sponsored shareholder proposals is how ordinary they are, from the perspective of any institutional investor. They involve standard corporate-governance issues designed to maximize the value of the corporation by improving the efficiency of the market for corporate control and aligning manager incentives with shareholder interests. The most frequent proposals in the 1995 and 1996 proxy seasons were those to redeem or vote on poison pills and to repeal classified boards. Of the fifty-four labor-submitted proposals identified by IRRC for

104. For an in-depth discussion of the development of union-shareholder activism, see Thomas & Martin, *supra* note 6 (manuscript at 10-18).

105. *See* Patrick S. McGurn, *Labor, IRAA Spark Active 1995 Shareholder Campaign,* CORP. GOVERNANCE BULL., Nov.-Dec. 1994, at 1, 3 [hereinafter McGurn, *Shareholder Campaign*]; *see also* Bernstein, *supra* note 2, at 79 (observing that unions accounted for 70 proxy battles and 7 of the 11 victories registered by shareholders during 1994); Patrick S. McGurn, *Controversy Swirls Around Labor Unions' Shareholder Activism,* CORP. GOVERNANCE BULL., Jan.-Feb. 1994, at 3 [hereinafter McGurn, *Controversy*] (discussing proposals filed before actual votes taken). Several labor proposals to redeem a company's poison pill received more than 50% of the votes counted. *See id.*

106. *See* McGurn, *Shareholder Campaign, supra* note 105, at 1.

107. *See Checklist of 1995 Shareholder Proposals,* CORP. GOVERNANCE BULL., Apr.-June 1995, at 21-31.

108. Labor groups include unions, union pension funds, and labor-oriented investment funds — for example, Amalgamated Bank of New York LongView Collective Investment Fund. For further discussion of labor activism in the 1994 proxy season, see Thomas & Martin, *supra* note 6. *See also infra* app. tbls.1&2.

the 1997 proxy season, ten relate to poison pills and fourteen deal with declassifying the board.[109]

Labor organizations submitted a wide variety of other corporate-governance proposals in the 1997 proxy season. Proposals on board-related issues include adding an employee to the board,[110] limiting relatives on the board,[111] and prohibiting director conflicts of interest.[112] Proposals for cumulative voting and for confidential voting are still being submitted, but in smaller numbers.[113] Executive pay and performance proposals seem to be appearing more frequently in 1997 than in years past.[114]

Companies are apparently being more accommodating to union-shareholder proposals in the last couple of years. The 1996 proxy season saw a decline in the number of no-action requests by companies.[115] IRRC reports indicate that thirteen companies requested no-action letters for fourteen labor-submitted proposals.[116] Five of these were granted, primarily on the basis of the proposals being rendered moot under Rule 14a-8(c)(10).[117] Similar IRRC data for January 1997 show thirteen companies challenging fifteen proposals.[118] So far, the SEC has not concurred with companies' arguments that it should exclude proposals on the ground that they

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109. *See Checklist of 1997 Shareholder Proposals,* CORP. GOVERNANCE BULL., Oct. 1996-Jan. 1997, at 25-32.

110. *See id.* at 25.

111. *See id.* at 31.

112. *See, e.g.,* Robert W. Newbury, *Individuals Again Lead Pack on Shareholder Resolutions,* CORP. GOVERNANCE BULL., Oct. 1996-Jan. 1997, at 6 (observing that the Operating Engineers submitted a proposal in 1996, and again in 1997, to prohibit directors from receiving consulting fees while sitting on the board of WMX Technologies).

113. For example, there were nine proposals regarding confidential voting by June 1995, three such proposals by June 1996, and only one proposal by January 1997. *See* sources cited *infra* note 114.

114. Issues appearing with greater frequency include separating the chair and CEO position (one in 1995 and four by early 1997) and imposing various limitations on executive pay — for example, limiting deferred compensation, linking pay to overseas labor standards, limiting CEO pay increases to the percentage granted workers, and limiting the ability of a CEO to cash in options within six months of a major layoff. *See Checklist of 1997 Shareholder Proposals, supra* note 109, at 25-32; *Checklist of 1996 Shareholder Proposals,* CORP. GOVERNANCE BULL., Apr.-June 1996, at 19-31; *Checklist of 1995 Shareholder Proposals, supra* note 107, at 21-31. Proposals to restrict nonemployee director pensions are still popular, but their numbers are declining due to voluntary corporate action. *See Eliminate Director Pensions,* CORP. GOVERNANCE BULL., Oct. 1996-Jan. 1997, at 3.

115. There were 352 no-action requests by April 4, 1996, six percent fewer than at the same time the previous year. *See* Vineeta Anand, *Companies Opt for Peace: Shareholder Fighting Subdued in 1996 Meeting Season,* PENSIONS & INVESTMENTS, Apr. 15, 1996, at 19.

116. *See Checklist of 1996 Shareholder Proposals, supra* note 114.

117. 17 C.F.R. § 240.14a-8(c)(10) (1996).

118. *See Checklist of 1997 Shareholder Proposals, supra* note 109.

are aimed at remedying personal grievances.[119] Such proposals would be excludable under Rule 14a-8(c)(4).[120]

1. *Procedural Objections to Labor's Shareholder Proposals: Rule 14a-8(a)(4) and the Alter Ego Problem*

Rule 14a-8 has a number of procedural requirements that shareholders must satisfy. The one that has been applied most recently to labor unions is Rule 14a-8(a)(4), which limits labor and other shareholders to submitting "no more than one proposal and an accompanying supporting statement for inclusion in the registrant's proxy materials . . . ."[121] Shareholders may not submit alternative proposals for inclusion in the event their initial proposal is not included.[122]

This rule becomes an issue when a union or other shareholder attempts to avoid the one-proposal limitation by having persons they control submit additional proposals.[123] Companies often have objected to proposals submitted by multiple employee-shareholders on the ground that all of the proponents are acting on behalf of a union and hence should be restricted to submission of one collective proposal.

When faced with this issue, the SEC has stated that if one employee proponent is the "alter ego" of another proponent, or controls another proponent, it will require them to choose just one proposal to submit to the company.[124] In some situations, the

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119. *See, e.g.,* Dow Jones & Co., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 274, at *1 (Feb. 10, 1997); Frontier Corp., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 139, at *1 (Jan. 23, 1997).

120. 17 C.F.R. § 240.14a-8(c)(4).

121. 17 C.F.R. § 240.14a-8(a)(4).

122. *See* Southeast Banking Corp., SEC No-Action Letter, 1982 SEC No-Act. LEXIS 1885, at *1-*2 (Feb. 8, 1982).

123. *See* Pacific Enters., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 194, at *1-*2 (Feb. 12, 1996).

124. *See* Pacific Enters., 1996 SEC No-Act. LEXIS 194, at *2; Consolidated Freightways, Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 256, at *2 (Feb. 23, 1994); Consolidated Freightways, Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 213, at *2 (Feb. 9, 1994); Jefferson-Pilot Corp., SEC No-Action Letter, 1992 SEC No-Act. LEXIS 353, at *1-*2 (Mar. 12, 1992). As Linda Quinn and Andrea Menaker note:

> Companies have sought to exclude proposals sponsored by unions or union members on two grounds: one procedural, the other substantive. Procedurally, the company may contend that such proposals are submitted on behalf of the union, and that these union members are simply "nominal" proponents. Thus, the company may argue that the proposals should be excluded as exceeding the one proposal per proponent limit of Rule 14a-8(a)(4).

Linda C. Quinn & Andrea J. Menaker, *The Shareholder Proposal Process, in* A PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES 16-9 (A. Goodman & J. Olson eds., 2d ed. 1992 & Supp. 1997). Quinn and Menaker further cite Rule 14a-8(c)(4), the "personal

union's actions are sufficient to indicate that it controls the other proponents, typically union members. For example, the SEC granted no-action relief to one company where the union initially submitted six shareholder proposals under its own name, then, upon learning of the one-proposal limitation, resubmitted the proposals separately in its own name and that of several union members.[125]

In most situations, however, it will be very difficult for a company to succeed in obtaining relief under the alter-ego theory. Generally speaking, a showing that the proponent's union prepared the Rule 14a-8 proposal and supporting statement will not by itself lead to a grant of no-action relief for the company.[126] Furthermore, the SEC has determined that a union's provision of legal and clerical assistance to its members who are submitting shareholder proposals is not enough by itself to demonstrate that such members are merely nominal proponents acting for a union.[127] During the 1996 proxy season, the SEC began issuing a new response to companies' requests to exclude proposals on this basis, "indicating that based on the facts provided by both sides, the staff was unable to conclude whether or not the proponent was acting on behalf of another person."[128] This places a heavy burden on companies seeking to exclude proposals on this ground.[129] The SEC now appears to require clear evidence of abuse of the proposal process before permitting the company to exclude the proposal.[130]

Only one company seeking to exclude a union members' proposals met the SEC's burden during the 1996 season.[131] A review

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grievance" exclusion, as the second, substantive reason for claiming these proposals should be excluded. *See id.*

125. *See* Pacific Enters., 1996 SEC No-Act. LEXIS 194.

126. *See* Quinn & Menaker, *supra* note 124, at 16-10 n.26.

127. *See id.*

128. *Id.* at 16-10 (citing Consolidated Freightways, Inc., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 158 (Feb. 1, 1996), and Panhandle E. Corp., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 8 (Jan. 3, 1996)). According to Quinn & Menaker, the SEC staff "[i]n so responding . . . [has] made it clear that in not issuing a no-action letter it was not rejecting the company's position, but rather taking no position at all on the merits of the [(a)(4)] argument." *Id.*

129. The "change" in the SEC's position on this issue has been attributed to union lobbying of SEC Chair Arthur Levitt and then-Corporation Finance Division director Linda Quinn. *See* Robert S. Reder & Philip Berkowitz, *Recent Developments in Proxy Contests, in* DOING DEALS 1996, at 575, 644 (PLI Corp. L. & Prac. Course Handbook Series No. B-930, 1996).

130. *See id.* at 645.

131. *See* Abigail Arms, *Current Issues and Rulemaking Projects: Division of Corporation Finance-Securities and Exchange Commission, in* NEW DEVELOPMENTS IN SECURITIZATION 1996, at 179 (PLI Comm. L. & Prac. Course Handbook Series No. A-513, 1996). The com-

of the no-action letters available on LEXIS found only one company during the 1997 season challenging a shareholder proposal on the ground that the proposal was submitted by the alter ego of a union.[132]

2. *Substantive Objections to Labor's Shareholder Proposals*

Some corporations have resisted labor's efforts to use the shareholder-proposal rule by seeking to exclude labor proposals under the substantive provisions of Rule 14a-8(c).[133] Companies faced with labor-shareholder proposals usually argue for exclusion on the ground that the proposal either (1) relates to the redress of a personal claim or grievance against the company or is designed to further a personal interest of the proponent which is not shared with the other security holders at large — the "personal grievance" exclusion in 14a-8(c)(4),[134] or (2) deals with a matter relating to the conduct of the ordinary business operations of the company — the "ordinary business" exclusion in 14a-8(c)(7).[135] Unions increasingly are able to thwart these substantive objections, in large part because their proposals look like the proposals of other large, institutional investors.

a. Rule 14a-8(c)(4): "Personal Grievance" Exclusion. Management frequently tries to exclude labor proposals under Rule 14a-8(c)(4), the "personal grievance" exemption.[136] The SEC adopted this exemption to prevent a shareholder from harassing an issuer into giving the proponent some particular benefit not shared by other shareholders, or to accomplish objectives particular to the proponent and not to other shareholders.[137] The basis for this exclusion is an administrative concern that "the costs of vindicating an

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pany was Pacific Enterprises, which received two proposals from the Utility Workers. *See* Pacific Enters., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 194, at *1 (Feb. 12, 1996).

132. *See* Frontier Corp., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 155, at *3 (Jan. 23, 1997). Frontier challenged a proposal submitted by R. Flavin, the president of the CWA local that had also submitted a proposal to the company. Mr. Flavin withdrew his proposal before the SEC acted on Frontier's request. *See* Frontier Corp., 1997 SEC No-Act. LEXIS 155, at *1.

133. 17 C.F.R. § 240.14a-8(c) (1996).

134. 17 C.F.R. § 240.14a-8(c)(4).

135. 17 C.F.R. § 240.14a-8(c)(7). We should also mention that there are other grounds on which the company can seek no-action relief from the SEC. For further discussion of these exclusions, see THOMAS & DIXON, *supra* note 3, § 16.04.

136. 17 C.F.R. § 240.14(a)-8(c)(4). For further discussion of the history of § (c)(4) and its interpretation, see THOMAS & DIXON, *supra* note 3, § 16.04(D).

137. *See* THOMAS & DIXON, *supra* note 3, § 16.04(D).

individual shareholder's personal interests should not be shifted to the issuer and hence indirectly to all other shareholders."[138]

The SEC has not uniformly handled company challenges to labor-shareholder proposals under 14a-8(c)(4).[139] The SEC's present position with regard to labor-shareholder proposals is that employees have the same rights as other shareholders to offer these proposals. Proposals may not be excluded based only on the contention that the proponent is acting in the interests of union members. To exclude a labor-shareholder proposal, the company must present concrete, noncircumstantial evidence that the proposal is merely another tactic in the union's corporate campaign.[140] The burden is on the company to show that the proposal qualifies for exclusion.[141] In recent no-action letters, the SEC has tended to permit labor-shareholder proposals that relate to facially neutral corporate-governance issues.[142]

b. Rule 14a-8(c)(7): "Ordinary Business" Exclusion. Corporations frequently try to exclude labor-shareholder proposals on the ground that they relate to the ordinary business of the company under Rule 14a-8(c)(7). This "ordinary business" provision permits a company to exclude social- and public-policy proposals that relate to the day-to-day business affairs of the corporation.[143]

The SEC's interpretation of this provision has shifted over the years.[144] For many years prior to 1992, the SEC interpreted the rule to mean that shareholder proposals involving substantial policy considerations could not be omitted from proxy materials pursuant to the ordinary-business exception, even if they raised issues other-

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138. *Id.*

139. *See* Vineeta Anand, *Employee-Shareholders: An Angry New Voice,* PENSIONS & INVESTMENTS, Apr. 4, 1994, at 26; Patrick S. McGurn, *SEC Holds Key to Labor Shareholder Proposals,* CORP. GOVERNANCE BULL., Jan.-Feb. 1994, at 9; Leslie Scism, *Labor Unions Increasingly Initiate Proxy Proposals,* WALL ST. J., Mar. 1, 1994, at C1.

140. *See* 4 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 2020 (3d ed. 1990); McGurn, *supra* note 139, at 10 (quoting William E. Morley, senior associate director, Division of Corporate Finance, SEC).

141. *See* Beth Duncan, *SEC Streamlining Its Handling of No-Action Letters, Quinn Says,* BNA DAILY REP. FOR EXECUTIVES, June 15, 1995, at A12, A13 (reporting the remarks of Linda C. Quinn, Director, Division of Corporation Finance, SEC, at the 7th Annual General Counsel Conference, June 13, 1995).

142. See THOMAS & DIXON, *supra* note 3, § 16.04(D), for further discussion of these issues. *Cf.* Thomas & Martin, *supra* note 6.

143. *See* 17 C.F.R. § 240.14a-8(c)(7). The rationale for the exclusion is that management's exercise of its specialized talents should be protected from investors attempting to dictate the minutiae of daily business decisions. *See* THOMAS & DIXON, *supra* note 3, § 16.04(G).

144. See THOMAS & DIXON, *supra* note 3, § 16.04(G), for a further discussion of the history of this provision.

wise relating to the ordinary business of the corporation.[145] In 1992, the SEC reversed this interpretation in a no-action letter to Cracker Barrel Old Country Store, Inc., advising the company that it could omit a proposal addressing discrimination on the basis of sexual orientation under (c)(7), even though the proposal raised social-policy concerns.[146] The shareholder-proponent of the proposal challenged this change in federal court and won in the district court, only to be reversed on appeal by the Second Circuit.[147]

After the Second Circuit's decision, the SEC resumed[148] issuing no-action letters to companies stating that shareholder proposals that relate to the corporation's ordinary business but which also raise substantial social-policy considerations can be omitted from proxy materials pursuant to the "ordinary business" exception.[149] Thus, employment-related shareholder proposals may be omitted from proxy statements if they deal with ordinary business issues, even when they also raise important social-policy concerns.[150]

So far in the 1997 season, only two companies appear to have raised the "ordinary business" exemption in seeking to exclude labor-union proposals: Philip Morris's challenge to the Teamsters' proposal for an independent compensation committee on (c)(7) grounds was denied,[151] while Lockheed Martin's request to omit a union proposal on those grounds was allowed.[152]

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145. *See id.*

146. *See* Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, 1992 WL 289095, at *1-*3 (Oct. 13, 1992).

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

148. After refusing to consider Rule 14a-8(c)(7) challenges during the pendency of litigation, the SEC began issuing no-action letters in May 1995, when it concurred with BE Aerospace's argument that NYCERS' proposal to implement or increase activity on the McBride principles could be excluded. *See* BE Aerospace, Inc., SEC No-Action Letter, 1995 SEC No-Act. LEXIS 527, at *1 (May 31, 1995). The McBride principles ask that employers doing business in Northern Ireland promote equal employment opportunities for Catholics and Protestants in Northern Ireland and prohibit sexual harassment. *See* Dorning, *supra* note 27; Andrew J. Hoffman, *A Strategic Response to Investor Activism*, 37 SLOAN MGMT. REV. 51, 53 (1996).

149. *See* Duncan, *supra* note 141, at A12.

150. *See* Ken Bertsch, *Court Reverses Cracker Barrel Decision; Equal Employment Resolutions in Doubt*, NEWS FOR INVESTORS, Jan. 1995, at 1. As of this writing, the SEC is reviewing its policies on this question, and it appears likely that it will reverse its position once again. *See* Amendments to Rules on Shareholder Proposals, Exchange Act Release No. IC-22,828, 1997 WL 578696 at *12 (Sept. 18, 1997) [hereinafter SEC Proposals].

151. *See* Philip Morris Cos., Inc., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 218, at *1 (Jan. 30, 1997).

152. The CWA/ITU Negotiated Pension Plan's proposal would have mandated that "the board of directors . . . evaluate whether the company has a legal compliance program that adequately reviews conflicts of interest and the hiring of former government officials and

3. *Empirical Studies of Unions' and Other Shareholders' Corporate-Governance Proposals*

A variety of empirical studies have focused on the utility of shareholder proposals, looking at whether other shareholders support them and whether they lead to measurable improvements in corporate performance. Only one study, however, has focused specifically on labor-sponsored shareholder proposals, so we begin with a discussion of it.

a. Shareholder Support for Labor's Shareholder Voting Initiatives. Using data from the 1994 proxy season, Thomas and Martin examined how voting support differs for corporate-governance proposals sponsored by labor as compared with other shareholder groups.[153] After controlling for the type of shareholder proposal and the company's ownership structure, they found that: "(1) labor-sponsored proposals received a statistically significantly higher percentage of favorable votes than did similar proposals sponsored by private institutions and individuals; and (2) labor-sponsored proposals obtained approximately the same percentage of votes as proposals sponsored by public institutions."[154] These findings support the conclusion that shareholders view labor-shareholder corporate-governance proposals no differently than they view similar proposals submitted by other groups of shareholders.

These conclusions are subject to the challenge that labor proposals arise in two contexts: general corporate-governance proposals for which all shareholders share the same interest in improving corporate-governance structures, and situations in which labor has a conflict of interest with other shareholders because it is trying to further its interests as workers. To explore these issues, Thomas and Martin focused on a subsample of proposals identified by a management-oriented group as specific instances in which labor used the shareholder-proposal mechanism as part of a corporate campaign.[155] While these labor proposals received a slightly lower percentage of favorable votes than other similar proposals, the differences were not statistically significant.[156] This suggests that, even in situations in which labor is battling management over other issues, such as collective-bargaining negotiations, shareholders con-

employees and . . . prepare a report on its findings." Lockheed Martin, SEC No-Action Letter, 1997 SEC No-Act. LEXIS 208, at *1 (Jan. 29, 1997).

153. *See* Thomas & Martin, *supra* note 6.

154. *Id.* (manuscript at 7-8).

155. *See id.* (manuscript at 8).

156. *See id.*

tinue to treat labor corporate-governance proposals no differently than those submitted by other shareholder groups.

b. The Financial Impact of Shareholder Proposals. A variety of studies have attempted to measure the impact of shareholder corporate-governance proposals on firm value. Two studies have found little evidence that these proposals have any effect on target-firm performance. Karpoff, Malatesta, and Walkling studied 866 shareholder corporate-governance proposals at 317 publicly traded companies between March 1986 and October 1990.[157] They found that, while these proposals were targeted at poorly performing companies, they had little impact on firm policies or firm value.[158]

In another study of the impact of shareholder corporate-governance proposals, Wahal looked at firms targeted by nine major institutional investors between 1987 and 1993.[159] Wahal found that, although the funds were relatively successful in getting companies to adopt these corporate-governance reforms, the changes did not result in significant improvements in the companies' performances.[160]

These studies may not adequately measure the impact of union-shareholder proposals for two reasons. First, they do not control for the sponsor of the proposals. Thus, they cannot examine the difference between proposals by labor unions and other sponsors. Second, these studies use data for periods prior to the rise of union-shareholder activism. Thus, they tell us little about the financial effects of union-sponsored proposals. Further research is needed to determine if these general results apply to the union-sponsored proposals of recent years.[161]

Studies by Strickland, Wiles, and Zenner,[162] Opler and Sokobin,[163] and Bizak and Marquette,[164] by contrast, have found

157. *See* Jonathan M. Karpoff et al., Corporate Governance and Shareholder Initiatives: Empirical Evidence (May 8, 1995) (unpublished manuscript, on file with authors).

158. *See id.* at 30-31.

159. *See* Sunil Wahal, *Pension Fund Activism and Firm Performance,* 31 J. FIN. & QUANTITATIVE ANALYSIS 1 (1996). The nine funds include public pension funds from the states of California, Colorado, Florida, New York, Pennsylvania, and Wisconsin, and CREF.

160. *See id.* at 3.

161. Martin and Thomas are currently in the process of examining the impact of labor unions' and other sponsor groups' shareholder proposals on various measures of economic performance.

162. *See* Dean Strickland et al., *A Requiem for the USA: Is Small Shareholder Monitoring Effective?,* 40 J. FIN. ECON. 319 (1996).

163. *See* Tim Opler & Jonathan Sokobin, *Does Coordinated Institutional Activism Work? An Analysis of the Activities of the Council of Institutional Investors* (visited July 17, 1997) <http://www.cob.ohio-state.edu/~fin/faculty/opler/ciiabs.htm>.

164. *See* Bizjak & Marquette, *supra* note 68.

positive effects on firm value from institutional-shareholder activism. Strickland, Wiles, and Zenner examined efforts of the United Shareholders Association (USA) to monitor management performance during its existence from 1986-1993. They found that the USA proposals to alter corporate-governance structures and settlements of these proposals resulted in positive abnormal stock price returns of roughly 0.9% during a two-day event window, or approximately $39 million per firm, for a total of $1.3 billion for all firms in the sample.[165] They found no increases in firm value relating to proposals concerning poison pills or golden parachutes.[166]

Opler and Sokobin tracked the performance of firms identified by the Council of Institutional Investors as poor performers during 1991-1993. They found that in the sample years following their appearance on the CII list, these firms outperformed the S&P 500 by an average of eight percent.[167] They argue that this improved performance was the result of the institutional investors' monitoring efforts in a coordinated and quiet strategy to improve corporate governance at these firms.

Finally, Bizjak and Marquette examined 193 firms in which shareholders submitted proposals to rescind the company's poison pill antitakeover defenses between 1987 and 1993. They found evidence that poison pills were more likely to be restructured when there was a shareholder resolution and that these restructurings were associated with increases in shareholder value.[168] They also examined whether the identity of the sponsor of the proposal affected the likelihood of a pill restructuring and found that pension fund proposals had the greatest likelihood of success.[169] Bizjak and Marquette concluded that their results supported claims that shareholder resolutions to rescind poison pills have some effect on managers' actions and that shareholders monitor managerial behavior.

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165. *See* Strickland et al., *supra* note 162, at 321.

166. *See id.* at 333-35. They did find that other potential benefits included more monitoring effort by outside directors, increased SEC regulation of executive compensation disclosures, increased activism by other shareholders, especially public pension funds, and competitive pressure on other firms in the industry. *See id.* at 336-37.

167. *See* Opler & Sokobin, *supra* note 163, at 7.

168. *See* Bizjak & Marquette, *supra* note 68 (manuscript at 3).

169. Unions sponsored 16 of the shareholder resolutions in their sample. *See id.* (manuscript at 5). Union sponsorship is a positive and significant explanatory variable for pill resolutions that receive more than half of the votes cast at the annual shareholder meeting, but not in their other equations. *See id.* tbls.4-7. *Compare id.* app. tbl.5 *with id.* app. tbl.4.

While it is difficult to generalize from these studies and related studies,[170] we believe that they demonstrate two broad trends. First, changes in corporate-governance structures alone do not result in increases in firm value. If these changes are coupled with improved shareholder monitoring and related effects, however, they can lead to small but significant increases in value for all shareholders. If this is correct, it means that union-shareholder activists must couple their voting initiatives with continued monitoring efforts in order to bring about increases in firm value. We discuss these issues more in Parts IV and V below.

B. *Mandatory Bylaw Amendment Shareholder Proposals Under Rule 14a-8 and the* Fleming Companies *Decision*

Labor unions have recently begun using Rule 14a-8 to present proposals for changes to a company's bylaws for a binding shareholder vote.[171] State corporate law generally grants shareholders the unilateral right to amend corporate bylaws.[172] The grant of similar powers to the board of directors in a company's articles of incorporation or bylaws usually does not divest this right,[173] although a charter provision may explicitly deny shareholders the power to initiate a bylaw amendment.[174]

State law usually has not imposed express limits on the substance of corporate bylaws or shareholder-initiated amendments to the bylaws. Thus, shareholders arguably may address through by-

170. *See, e.g.*, Teresa Ghilarducci et al., Labour's Paradoxical Interests and the Evolution of Corporate Governance (1996) (unpublished manuscript, on file with authors); *see also* Laura Lin, *The Effectiveness of Outside Directors as a Corporate Governance Mechanism: Theories and Evidence*, 90 NW. U. L. REV. 898 (1996). *See generally* ANDREI SHLEIFER & ROBERT W. VISHNY, A SURVEY OF CORPORATE GOVERNANCE (National Bureau of Econ. Research Working Paper No. 5554, 1996).

171. Rule 14a-8 generally permits shareholders to submit binding resolutions on matters that state law commits to the shareholder body. *See* THOMAS & DIXON, *supra* note 3, § 16.04(A), for a further discussion of the issues discussed in this section. In other situations, the Commission staff has required that a mandatory proposal for action that would run afoul of (c)(1) be recast as precatory in order to be included on the proxy statement. *See id.*

172. *See* Bevis Longstreth & Nancy Kane, *Shareholders' Growing Role in Executive Compensation* (pt. 2), N.Y. L.J., Feb. 27, 1992, at 5; *see also* DEL. CODE ANN. tit. 8, § 109 (1991); N.Y. BUS. CORP. LAW § 601 (McKinney 1986); MODEL BUS. CORP. ACT § 10.20 (1996). *See generally* THOMAS & DIXON, *supra* note 3, § 16.04(A).

173. *See* R. Franklin Balotti & Daniel A. Dreisbach, *The Permissible Scope of Shareholder Bylaw Amendments in Delaware*, 1 CORP. GOVERNANCE ADVISOR, Oct.-Nov. 1992, at 19, 19; Kenneth J. Bialkin & Richard J. Grossman, *The Permissible Scope of Shareholder Bylaw Amendments in New York*, 1 CORP. GOVERNANCE ADVISOR, Oct.-Nov. 1992, at 25, 25; *see also* DEL. CODE ANN. tit. 8, § 109(a) (1991); N.Y. BUS. CORP. LAW § 601(a) (McKinney 1986).

174. *See* DEL. CODE ANN. tit. 8, § 109(a) (1991); N.Y. BUS. CORP. LAW § 601(a) (McKinney 1986).

law amendments any aspect of the business or affairs of the corporation or the respective rights and powers of the board and shareholders that is not barred explicitly by state law or the corporation's certificate of incorporation.[175] At some point, however, this broad shareholder power to adopt or amend corporate bylaws must yield to the board's authority to manage the business and affairs of the corporation.[176] The problem becomes one of drawing the exact line between the respective authorities of directors and shareholders under the relevant state law.

A federal district court in Oklahoma addressed these issues in *International Brotherhood of Teamsters General Fund v. Fleming Companies, Inc.*[177] The case developed out of a Teamsters' shareholder proposal at Fleming Companies for the 1997 annual meeting to amend the company's bylaws to redeem the current poison pill; require that the board of directors submit to shareholders its plan for any future poison pill; and prohibit the board from adopting the plan unless a majority of shareholders approved it.[178] Fleming responded by filing a declaratory action in state court seeking a ruling that the proposal violated Oklahoma state law.[179] The Teamsters in turn filed a federal suit alleging a violation of Rule 14a-8 and seek-

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175. *See* Longstreth & Kane, *supra* note 172, at 5; *see also* DEL. CODE ANN. tit. 8, § 109(b) (1991); N.Y. BUS. CORP. LAW § 601(c) (McKinney 1986). According to Longstreth and Kane,

> [i]t is highly doubtful, as a matter of statutory construction, that shareholders, who are expressly given the right to adopt or amend by-laws, which . . . may contain provisions relating to the business and affairs of the corporation and the relative rights and powers of directors and shareholders, are nonetheless preempted from exercising this right in connection with any subject matter that directors have authority to address under their power to manage.

Longstreth & Kane, *supra* note 172, at 5.

176. *See* Bialkin & Grossman, *supra* note 173, at 26-27 (observing that precisely where that point of irreconcilable conflict is reached under New York law is unclear, but concluding that shareholders likely would be barred from adopting bylaw amendments that unduly restricted the board's ability to determine corporate-governance and executive-compensation matters); *see also* Balotti & Dreisbach, *supra* note 173, at 21.

177. *See* International Bhd. of Teamsters Gen. Fund v. Fleming Cos., No. CIV-96-1650-A, 1997 U.S. Dist. LEXIS 2980 (W.D. Okla. Jan. 24, 1997) (granting plaintiff's motion for summary judgment requiring the company to include shareholder proposals in its proxy materials); International Bhd. of Teamsters Gen. Fund v. Fleming Cos., No. CIV-96-1650-A, 1997 U.S. Dist. LEXIS 2979 (W.D. Okla. Feb. 19, 1997) (denying defendant's motion to suspend injunction pending appeal). For further analysis of this decision, see John C. Coffee, Jr., *Bylaw Barricades: Union and Shareholder Rights,* N.Y. L.J., Mar. 27, 1997, at 5.

178. *See* Fleming Cos., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 885, at *3 (Dec. 3, 1996). The proposal was made after the Teamsters' General Fund submitted a proposal requesting that the company redeem its poison pill during the 1996 proxy season, which received 64% of the shareholder vote. *See* 1996 SEC No-Act. 885, at *14. The Fleming board responded to the vote by voting to renew the poison pill until 2006.

179. *See* Fleming Cos. v. International Bhd. of Teamsters Gen. Fund, No. CJ-96-6110 (Okla. Dist. Ct. Sept. 6, 1996).

ing declaratory and injunctive relief ordering the company to include the resolution in its proxy materials and proxy cards for the 1997 annual shareholders' meeting.[180]

In both cases, the courts were asked to determine whether shareholders could amend the bylaws so as to limit the board of directors' statutory decisionmaking authority. Oklahoma law provides that every domestic corporation "may create and issue . . . rights or options entitling the holders thereof to purchase from the corporation any shares of its capital stock," subject to any provisions in the certificate of incorporation.[181] Under this provision, the board claimed to have the power, subject to the certificate of incorporation — which was silent on the matter — to implement a shareholder rights plan, as such plans involve the creation of rights to purchase the company's securities under specified circumstances.[182]

The Teamsters argued that the board's power to implement a rights plan could be curtailed by shareholder action, pointing out that Oklahoma law gives shareholders the ultimate power to amend the corporate bylaws, which can be neither divested nor limited by the board,[183] and that it further provides that "the bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its shareholders, directors, officers or employees."[184] Fleming Companies responded that the Teamsters' proposal, be-

180. *See* Fleming Cos., 1996 SEC No-Act. LEXIS 885, at *9-*10.

181. OKLA. STAT. tit. 18, § 1038 (1991).

182. *See* Fleming Cos., 1996 SEC No-Act. LEXIS 885, at *10-*11. The SEC declined to issue a determination or comment on the company's arguments due to the pending litigation. *See* 1996 SEC No-Act. LEXIS 885, at *1.

183. OKLA. STAT. tit. 18, § 1013(A) (1991) provides:

> The original or other bylaws of a corporation may be adopted, amended or repealed by the incorporators, by the initial directors if they were named in the certificate of incorporation, or, before a corporation has received any payment for any of its stock, by its board of directors. After a corporation has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the shareholders entitled to vote, or, in the case of a nonstock corporation, in its members entitled to vote; provided, however, any corporation, in its certificate of incorporation, may confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstock corporation, upon its governing body by whatever name designated. The fact that such power has been so conferred upon the directors or governing body, as the case may be, shall not divest the shareholders or members of the power, nor limit their power to adopt, amend or repeal bylaws.

184. OKLA. STAT. tit. 18, § 1013(B).

cause it would limit the directors' statutory power, violated Oklahoma law.[185]

The federal district court ruled in favor of the Teamsters.[186] It found that the directors had the power to adopt any rights plan they desired under Oklahoma law, subject to the subsequent approval of the shareholders.[187] Fleming Companies has appealed the district court's decision,[188] although the company's directors terminated the current poison pill plan, effective April 30, 1997.[189]

Given the similarity between the Oklahoma and Delaware statutes, the district court's decision could have profound implications for labor groups' and other shareholders' ability to force companies to change their antitakeover defenses and corporate-governance structures. Other shareholders undoubtedly "will offer a lot" of these proposals.[190]

Boards of directors faced with these types of mandatory bylaw amendments, or the threat of such amendments, will need to take unions' actions very seriously or risk becoming takeover targets of potential acquirors alerted to their vulnerability by a successful shareholder vote. Unions that are frustrated with the more passive forms of shareholder activism, or with traditional labor organizing efforts, now have another avenue for gaining influence with companies.[191]

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185. *See* Transcript of Oral Arguments on Motions for Summary Judgment at 25, 28, International Bhd. of Teamsters Gen. Fund v. Fleming Co., No. CIV-96-1650-A, 1997 U.S. Dist. LEXIS 2980 (W.D. Okla. Jan. 24, 1997). The Teamsters responded that Fleming's position with regard to § 1038 would render § 1013(B) wholly ineffective, in that it suggests that the shareholders also could not adopt bylaws that relate to the business and affairs of the corporation, something over which Oklahoma law also granted the directors authority. *See* Transcript at 14-15.

186. *See* Transcript at 30-32.

187. *See* Transcript at 31. The judge cited two additional considerations that went "beyond the face of the statutes": his reservations regarding granting directors, the "constituency in corporate governance that is most likely to be viewing the situation in light of self-interest," with exclusive power to make decisions under § 1038, *see* Transcript at 31, and his reservations about putting issues affecting the marketability of shares beyond the cognizance of "the people who really care about the marketability of shares," *see* Transcript at 32. The judge also noted that Fleming's decision to ignore the shareholder's "large majority vote" on the poison pill exerted "a tug" on his decision. *See* Transcript at 32.

188. *See* Bertsch & McGeary, *supra* note 35, at 1; *see also* International Bhd. of Teamsters Gen. Fund v. Fleming Cos., No. CIV-96-1650-A, 1997 U.S. Dist. LEXIS 2979 (W.D. Okla. Feb. 19, 1997) (denying defendant's motion to suspend injunction pending appeal).

189. *See Fleming Cos., supra* note 36.

190. *See* Anand, *supra* note 95, at 20 (quoting Howard Sherman, President of Institutional Shareholder Services, Inc., a well-known shareholder advisory firm).

191. Several unions have proposed a variety of bylaw amendments at various companies. These proposals include the redemption of poison pills, elimination of classified boards, and adoption of confidential voting policies. *See* Coffee, *supra* note 177, at 127. UNITE has filed a federal lawsuit challenging May Department Stores's actions in responding to its

C. *Shareholder Resolutions at the Annual Meeting and Corporate Management's Responses*

Unions that want to get their proposals before the company's shareholders have another alternative to the shareholder proposal rule — they can present the proposal in their capacity as a shareholder of the company at the annual shareholders' meeting, subject to satisfaction of the company's advance notice bylaws, if any exist. According to the IRRC, seventeen floor resolutions were introduced in this manner during the 1996 proxy season, fourteen by labor groups.[192]

Labor groups have introduced floor resolutions at annual shareholders' meetings in an effort to increase pressure on employers with whom they have a dispute. For example, in the 1996 proxy season, the Teamsters announced such a proposal and independently solicited proxies from Gannett shareholders at a time when a Teamsters local was engaged in a lengthy strike against Detroit Newspaper Agency, a joint operating agency between Gannett's Detroit News and Knight-Ridder's Detroit Free Press.[193] In a related matter, the Teamsters conducted an independent proxy solicitation in support of its proposal to separate the chair and CEO positions at Union Pacific, of which one Gannett director, Drew Lewis, is the Chair and CEO. The supplemental material Union Pacific submitted to its shareholders, which included a revised proxy card, claimed that the Teamsters' action was due in part to its attempts to convince nonunion employees at Overnite Transportation Company, a Union Pacific subsidiary, to join the union.[194]

During the 1996 proxy season, the UFCW's Local 99R similarly filed proposals at Albertson's and at five other companies identified through interlocking directorates.[195] It submitted a total of eleven proposals regarding confidential voting, votes on future golden

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mandatory bylaw amendment. *See* Complaint, UNITE v. The May Dept. Stores Co., No. 97 Civ. 2120 (S.D.N.Y. filed Apr. 30, 1997).

192. *See* I.R.R.C., 1996 SUMMARY, *supra* note 22, at 4.

193. *See* Gannett Co., Preliminary Proxy Statement 23 (Mar. 22, 1996), *available in* EDGAR, Film No. 96,537,462.

194. *See* Union Pac. Corp., Definitive Additional Materials 1 (Apr. 5, 1996), *available in* EDGAR, Film No. 96,544,406.

195. *See* I.R.R.C., 1996 SUMMARY, *supra* note 22, at 4. Each of the targeted companies has directors who are also directors on Albertson's board. *See* Albertson's, Inc., Preliminary Proxy Statement 6-9 (Mar. 29, 1996), *available in* EDGAR, Film No. 96,540,623.

parachutes, declassifying the board, and redeeming the poison pill.[196] These proposals are summarized in Table 3.[197]

In 1997, the UFCW Local again is targeting Albertson's, in addition to six companies that share directors with Albertson's.[198] Preliminary proxy materials indicate that the UFCW's Phoenix Local is engaged in negotiations over a successor contract and is also attempting to unionize other Albertson's employees in Arizona.[199] The company has refused the Local's request to be voluntarily recognized as the representative of its currently nonunion workers and has instead insisted on "NLRB elections, which are slower and often more expensive to shareholders (they often result in years of litigation)."[200] The floor resolutions that the Local intends to introduce regard declassifying the board at Boeing, Boise Cascade, and Questar; confidential voting at Albertson's and Heritage Media; and redeeming a poison pill at Pier 1.[201] Table 3 in the appendix contains more information on the UFCW's 1997 shareholder initiatives.[202]

The UFCW appears to have chosen these proposals carefully to appeal to most shareholder groups. According to I.R.R.C. data, proposals raising these issues received an average of 42.1% of the vote for board declassification resolutions, 31.5% for confidential voting resolutions, and 53.4% for poison pill redemption resolutions, of the votes cast by shareholders at other companies in the 1996 proxy season.[203] In particular, I.R.R.C. data show that pro-

196. *See* I.R.R.C., 1996 SUMMARY, *supra* note 22, at 4.

197. *See infra* app. tbl.3.

198. *See* COUNCIL OF INSTL. INVESTORS LETTER, *supra* note 26, at 2.

199. *See* Albertson's, Inc., Preliminary Proxy Statement (Jan. 28, 1997) *available in* EDGAR, Film No. 97,512,181. The UFCW has attempted to organize employees at 28 Albertson's stores in Arizona. *See* Rani Cher Monson, *Unions Fail to Change Albertson's,* IDAHO STATESMAN, May 25, 1996, at 5B.

200. *See* Albertson's, Inc., *supra* note 199. The AFL-CIO now advocates the strategy of avoiding an NLRB election and obtaining voluntary recognition from employers once authorization cards have been signed by a majority of employees. *See* Bernstein, *supra* note 54, at 56.

201. Information is not yet available on the resolution(s) the UFCW intends to submit to TIS Mortgage Investment Company shareholders. *See* COUNCIL OF INSTL. INVESTORS LETTER, *supra* note 26, at 3.

202. *See infra* app. tbl.3.

203. *See* I.R.R.C., 1996 SUMMARY, *supra* note 22, at 1-2; *Declassify Boards,* CORP. GOVERNANCE BULL., Oct. 1996-Jan. 1997, at 9 (listing companies expecting shareholder declassification proposals). The 1996 Summary listed the percentages as noted above, with one exception. It indicated that 42.3% of shareholders supported proposals to declassify the board, but also noted that this figure included a proposal supported by management and that without that proposal, the figure was lower. The October-January publication states that 42.1% of shareholders supported board declassification proposals. *See Declassify Boards, supra,* at 9.

posals advocating declassifying the board received more support than proposals about other board issues. Likewise, confidential voting received more support on average than proposals raising any other voting issue. Proposals to redeem poison pills received greater support on average than proposals concerning any other antitakeover issue.[204] Thus, the introduction of these particular issues appears to reflect an effort to choose those issues that have a greater probability of success and that are therefore likely to place more pressure on the targeted employer.

This illustrates the point we raised in Part II: it is no accident that unions are on the cutting edge of new voting methods in this area. When they have been unsuccessful in getting the results they desire using traditional labor tactics or precatory Rule 14a-8 proposals, they have used innovative voting approaches designed to appeal to a broad cross-section of shareholders.

Labor unions' submission of floor resolutions allows them to bypass the restrictions in Rule 14a-8. Thus, a union may inform a company of its intention to introduce a resolution at the annual meeting without regard to the 120-day deadline in 14a-8(a)(3) and may do so without holding the requisite number of shares for the one-year period as required in 14a-8(a)(1).[205] A union also may submit more than the one-proposal maximum in 14a-8(a)(4). Thus, floor resolutions can raise multiple issues, seek binding changes to corporate structures, and be placed on the ballot with little notice to the company.

To gain support for these proposals, a union may seek to use the company's proxy materials to solicit shareholder support, or it may launch its own solicitation. It is much cheaper and more effective for a union if the company includes the proposal in its proxy materials by making disclosure concerning the proposal and including a line on its proxy card for shareholders to vote on the proposal.

Companies have several options when they know that a union will try to place a proposal before the shareholder meeting.[206] If

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204. *See* I.R.R.C., 1996 SUMMARY, *supra* note 22, at 1-2.

205. *See, e.g.*, Pope & Talbot, Inc., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 455, at *4 (Apr. 18, 1996) (observing that the UFCW informed the company of its intention to submit its resolution days before proxy materials were to be sent to shareholders); Union Pac. Corp., *supra* note 194, at 1 (observing that the Teamsters purchased shares of Union Pacific stock "a few days" before notifying the company of its plan to introduce its proposal at the annual meeting).

206. For example, in the 1996 proxy season Albertson's included on its original proxy card the UFCW's proposal and provided the company's statement in opposition in its materials. *See* Albertson's, Inc., *supra* note 195, at 25-27. Boeing, targeted in the 1997 season, has agreed to include UFCW's proposal on its proxy card and has submitted the company's state-

the company is aware of the proposal sufficiently early, then it may choose to include the union's proposal and supporting statement in the company's proxy materials, just as it would any shareholder proposal. If the company decides to do this, however, "the proposal is likely to get a high vote, comparable to any 'normal' shareholder proposal. Albertson's and Questar handled union proposals this way [in 1996] . . . and the proposals drew support ranging from 21% to 38%."[207]

Not surprisingly, some companies have chosen not to take this path. If the union is forced to raise the proposal at the meeting without any advance notice to the shareholders through the company materials, then most proxies already will have been voted. A proposal presented in this manner will probably not be able to garner many votes, even if the union is able to do some solicitation prior to or at the meeting. Thus, some union proposals that were not included in the company's proxy materials and original proxy cards drew votes of less than one or two percent.[208]

As discussed more fully below,[209] however, if the company is informed about the union's proposal in sufficient time prior to the meeting to include the proposal in its proxy materials and chooses not to include it, then the corporation must inform its shareholders that the proposal exists, as well as, if the company intends to use its discretionary voting authority to vote on the proposal, how the company plans to vote the proxies it receives. If the company fails to make this disclosure, then, subject to certain limitations, the SEC has opined that the company will be unable to exercise discretionary voting authority to vote the proxies it receives on the proposal.[210] In fact, in 1996, some companies decided to revise their proxy materials and send out new proxy cards carrying a union's proposal after learning that the union shareholder intended to make the proposal at the annual meeting.[211]

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ment in its proxy materials. *See* Boeing Co., Preliminary Proxy Statement 36-37 (Feb. 28, 1997), *available in* EDGAR, Film No. 97,548,485. Boise Cascade, targeted in the 1997 season, has included a statement indicating that it is aware of the UFCW's intention to introduce its proposal and that the company reserves the right to exercise its discretionary authority to vote against the proposal if it should be presented. *See* Boise Cascade Corp., Definitive Proxy Statement 7 (Mar. 5, 1997), *available in* EDGAR, Film No. 97,550,629.

207. COUNCIL OF INSTL. INVESTORS LETTER, *supra* note 26, at 2.

208. *See id.*

209. *See infra* section III.C.2.

210. See *infra* section III.C.2 for further discussion of this point.

211. *See* Union Pac. Corp., *supra* note 194.

Unions may choose to do their own solicitations in favor of their proposals, subject to the restrictions in the federal proxy rules. These solicitations are conducted outside of the limitations of Rule 14a-8 unless the proposal is presented thereunder, but they are subject to the remainder of the federal proxy rules. They can be directed at the entire shareholder body or targeted to select groups of shareholders.[212]

The principal drawback of union-sponsored independent solicitations is the cost — a full-scale solicitation at a large publicly traded corporation may cost several million dollars.[213] While lower cost alternatives — such as a targeted solicitation of institutional investors — are available, they are also less likely to marshal sufficient levels of support to pressure corporate management to make changes.

1. *Floor Proposals: Issues Raised by Rule 14a-6 and Rule 14a-9*

What obligation does a company have to disclose union-shareholder proposals of which it is aware before the company files its definitive proxy materials? Three often-overlapping federal proxy rules may govern the disclosures contained in a company's proxy materials about union proposals — Rules 14a-4,[214] 14a-6,[215] and 14a-9.[216] In this section, we discuss some of the obligations imposed by Rule 14a-6 and Rule 14a-9.

Rule 14a-6(a) compels a company to file its proxy (or information) statements solely in definitive form for certain types of solicitations — the so-called "plain-vanilla" proxy statement.[217] A company may not file a plain-vanilla proxy statement, however, if it comments on an actual or potential opposing stockholder solicitation that would be pursued by means other than a Rule 14a-8 proposal included in the registrant's proxy statement.[218] Rule 14a-9,

212. *See* THOMAS & DIXON, *supra* note 3, § 6.02.

213. *See id.* § 21.01 (presenting data on costs of recent proxy solicitations).

214. 17 C.F.R. § 240.14a-4 (1997).

215. 17 C.F.R. § 240.14a-6 (1997).

216. 17 C.F.R. § 240.14a-9 (1997).

217. The types of solicitations to which Rule 14a-6(a) applies include: "(a) the election of directors; (b) the election, approval or ratification of accountants; (c) a shareholder proposal carried in the registrant's proxy statement pursuant to Rule 14a-8; and/or (d) the approval or ratification of a registrant's executive or director compensation plan, or amendments thereto." THOMAS & DIXON, *supra* note 3, § 6.03(D).

218. *See* 17 C.F.R. § 240.14a-6(a). The rule makes it clear that a recommendation by the registrant's board that stockholders vote against a Rule 14a-8 shareholder proposal will not defeat the exclusion. *See* 17 C.F.R. § 240.14a-6(a) n.3. A company's argument on the merits of a stockholder proposal that is *not* carried in its proxy statement, however, but instead is

the antifraud rule in the proxy regulations, requires that the company's disclosures or omissions concerning any shareholder proposal not be false or misleading.[219]

When a company learns of a possible union challenge to be mounted independently of Rule 14a-8 reasonably well in advance of its solicitation of proxies for an otherwise routine annual meeting, several legal issues are raised. For union-shareholder resolutions made outside of Rule 14a-8, the courts have prohibited companies from filing plain-vanilla proxy materials that do not disclose the proposals. In *Shoen v. AMERCO,*[220] a federal district court ruled that a company violated Rules 14a-6 and 14a-9 by attempting to avoid the preliminary-filing requirement simply by failing to disclose that a shareholder intended to present a proposal for a shareholder vote at the annual shareholders' meeting. In that case, the court granted a preliminary injunction after finding that the company's failure to describe in its proxy statement three non-Rule 14a-8 proposals, which management was aware would be raised at the scheduled shareholders' meeting by a shareholder, did not permit plain-vanilla treatment of this document.[221] Even if the company has properly filed a definitive proxy statement before learning of a possible union solicitation, it nevertheless may run afoul of Rule 14a-9 or Rule 14a-4(c) unless it provides stockholders with reasonable notice of this development through the filing and distribution of a supplemental proxy statement and form of proxy that allows stockholders to give voting directions on the new matter.[222]

The interplay of Rules 14a-9 and 14a-4 was well-illustrated in a recent case involving a contested election of directors. In *Chambers v. Briggs & Stratton Corporation,*[223] the court granted

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the subject of an independent solicitation by the proponent or other person, ordinarily will bar plain-vanilla treatment. *See* 17 C.F.R. § 240.14a-6(a) n.3.

219. *See* Fountain v. Avondale Indus., Inc., C.A. No. 95-1198, 1995 U.S. Dist. LEXIS 5598, at *4-*5 (E.D. La. Apr. 21, 1995) (holding that Rule 14a-9 requires that the company make full and fair disclosure about the proposal if it chooses to comment on it).

220. 885 F. Supp. 1332 (D. Nev. 1994).

221. *See* 885 F. Supp. at 1346. For further discussion of this case, and its implications for shareholders under Rule 14a-6 and 14a-9, see THOMAS & DIXON, *supra* note 3, § 6.03(D) n.80.

222. As we discuss in the next section, shareholder proposals that are presented to a vote by means *other* than Rule 14a-8 are subject to the discretionary voting standards of Rule 14a-4(c)(1). This rule bars a registrant from using discretionary power to vote against such a proposal if it has received reasonable notice thereof prior to the solicitation but has failed nonetheless to seek voting instructions with respect to the proposal. *See* United Mine Workers v. Pittston Co., [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,946 (D.D.C. Nov. 24, 1989); *see also* THOMAS & DIXON, *supra* note 3, § 9.01(E)(3).

223. 863 F. Supp. 900 (E.D. Wis. 1994).

the plaintiff shareholder's motion for a preliminary injunction, finding that the company violated Rule 14a-9 by failing to identify the plaintiff as a board candidate in its proxy statement, even though he gave the company advance notice of his candidacy pursuant to the shareholder-nomination provisions of its by-laws. It ordered the company to disseminate a supplemental proxy statement identifying the plaintiff.[224] The company was not required under Rule 14a-4, however, to include a reference to the plaintiff's candidacy in its form of proxy.[225]

What happens when the union-shareholder proposals are originally submitted under Rule 14a-8, but subsequently the union seeks to submit them as floor proposals without complying with Rule 14a-8? In these circumstances, Rule 14a-6 permits a company to file its proxy statement solely in definitive form when it omits a Rule 14a-8 union proposal from its proxy statement based on a SEC no-action letter, even if it plans to vote against the proposal if it is the subject of an independent solicitation conducted by the union or rule the proposal out of order if it is introduced from the floor at the stockholders' meeting.[226] The SEC has taken the position, however, that the company must either make full disclosure in its definitive proxy statement of its intention to vote against the proposal or forgo the exercise of discretionary voting authority for that purpose.[227]

For unions acting as shareholders, these legal principles have several implications when the unions pursue shareholder resolutions outside of Rule 14a-8. First, if the union provides the company with reasonable advance notice of its non-Rule 14a-8 proposal before the company issues its proxy materials, then the company must file proxy materials that disclose the union proposal.[228] Sec-

224. *See* 863 F. Supp. at 906-07.

225. *See* Chambers v. Briggs & Stratton Corp., 883 F. Supp. 374, 376-78 (E.D. Wis. 1995) (declining to find on cross-motions for summary judgment that Rule 14a-4(b)(2) compelled inclusion of an opposition candidate's name in the company's form of proxy).

The SEC has also taken the position that a registrant is not required by Item 7 of Schedule 14A to include in its proxy statement the names of any nominees other than those for which the soliciting person is seeking proxy authority. *See* American Socy. of Corp. Secretaries, SEC Interp. Letter, 1996 SEC No-Act. LEXIS 265 (Feb. 27, 1996). But the SEC declined to address a company's Rule 14a-9 obligation, if any, to make such disclosure. *See also* THOMAS & DIXON, *supra* note 3, § 6.04(B)(6) n.205.

226. *See* DIVISION OF CORP. FIN., SEC, PROXY RULES REFERENCE BOOK 37-38 (1980) [hereinafter PROXY RULES REFERENCE BOOK].

227. *See id.*

228. If the company wishes to exercise discretionary voting authority, it must (1) furnish some minimum level of disclosure in its proxy statement to fulfill both Rule 14a-9 and 14a-4 requirements; (2) articulate its position on the proposal; and (3) include a separate item in its form of proxy enabling shareholders to give voting instructions. *See* United Mine Workers v. Pittston Co., [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,946 (D.D.C. Nov. 24,

ond, if the union advises the company of its intention to submit the proposal at the shareholders' meeting after the company has issued its definitive proxy materials but reasonably well in advance of the meeting, then the company may be forced to issue a supplemental proxy statement and card or forgo the exercise of discretionary voting authority. Finally, if (1) the shareholder proposal is initially submitted as a Rule 14a-8 proposal, (2) the company obtains a no-action letter permitting it to omit the proposal from the proxy materials, and (3) the union decides to present the proposal at the shareholders' meeting, then the company may file a definitive proxy statement, subject to Rule 14a-4's and Rule 14a-9's restrictions. Companies will rarely, if ever, be willing to give up their ability to exercise discretionary voting power, which makes the scope of a company's obligations under Rule 14a-4 a critical question.

2. *Floor Proposals: Discretionary Voting and Rule 14a-4*

Under state law, labor and other shareholders can submit proposals for shareholder approval at the annual shareholders' meeting, subject to compliance with any applicable bylaw provisions. When these matters arise at the meeting, the company's proxy materials may not have informed shareholders about them, and the company's proxy agents must rely on the discretionary authority conferred by the form of proxy in voting on any matter that requires shareholder action. Rule 14a-4(c)[229] affords some latitude to the company's proxy agent in this and certain other circumstances by allowing the exercise of discretionary voting power for designated actions.[230]

Rule 14a-4(c)(1) provides companies and other soliciting persons some flexibility to cope with the emergence of unanticipated

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1989); *see also* Robert T. Lang et al., *Shareholder Initiatives: Proposals and Solicitations*, *in* 4 SECURITIES LAW TECHNIQUES: TRANSACTIONS AND LITIGATION § 53.05(3)(b), at 53-151 (A.A. Sommer, Jr. ed., 1997).

229. 17 C.F.R. § 240.14a-4(c) (1997).

230. This power is limited to the following matters:

> (1) Matters which the persons making the solicitation do not know, a reasonable time before the solicitation, are to be presented at the meeting, if a specific statement to that effect is made in the proxy statement or form of proxy;
>
> (2) Approval of the minutes of the prior meeting if such approval does not amount to ratification of the action taken at that meeting;
>
> (3) The election of any person to any office for which a bona fide nominee is named in the proxy statement and such nominee is unable to serve or for good cause will not serve[;]
>
> (4) Any proposal omitted from the proxy statement and form of proxy pursuant to [Rule 14a-8] or [14a-9] of this chapter[; and]
>
> (5) Matters incident to the conduct of the meeting.

17 C.F.R. § 240.14a-4(c).

matters that arise shortly before or during the meeting.[231] Invoking this provision requires full disclosure — in either the proxy statement or form of proxy — of the proxy holder's intent to exercise discretionary authority on any such matter.[232] However, it "generally denies management the ability to use discretionary voting authority with respect to shareholder proposals as to which it had received adequate notice a reasonable time before the meeting."[233]

Professor Coffee has argued that the rule should be enforced strictly.[234] If Professor Coffee is correct, then once a company becomes aware of a non-Rule 14a-8 proposal raised by a union after the company's proxy cards have been delivered to shareholders, but within "a reasonable time before the solicitation," it must either (1) include this matter in a revised proxy card and disseminate it to shareholders with accompanying explanatory soliciting material, thus giving shareholders a meaningful opportunity to revoke any previously executed proxy granting discretionary authority;[235] or (2) if the matter is not so included in the card, forgo entirely the exercise of discretionary power on the matter.[236]

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231. *See* Securities Exchange Act of 1934, Exchange Act Release No. 1823, 1938 SEC LEXIS 678, at *3-*4 (Aug. 11, 1938). Discretionary authority is permitted to be exercised under (c)(1) only with respect to proposals initiated by persons *other* than the proxy holder. *See* Proxy Rules — Comprehensive Review, Exchange Act Release No. 23,789, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,044, at 88,331 (Nov. 10, 1986). Some years earlier, the SEC's Division of Corporation Finance took the position that a registrant's board may not rely on this provision to act on any registrant-proposed matter other than those incidental to the conduct of the meeting. *See* PROXY RULES REFERENCE BOOK, *supra* note 226, at 36.

232. *See* 17 C.F.R. § 240.14a-4(c)(1).

233. Coffee, *supra* note 177.

234. *See id.*

235. *See* United Mine Workers v. Pittston Co., [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,946 (D.D.C. Nov. 24, 1989); PROXY RULES REFERENCE BOOK, *supra* note 226, at 35. The Division of Corporation Finance has indicated that previously granted proxies need not be invalidated where the new proxies are circulated to permit revocation of such proxies in accordance with applicable state law. Thus, any old proxies not superseded by later-dated proxies may be tabulated. *See* PROXY RULES REFERENCE BOOK, *supra* note 226, at 35-36; *see also* Larkin v. Baltimore Bancorp, 769 F. Supp. 919, 927 (D. Md. 1991) (accepting as sufficient, for purposes of Rule 14a-4(c)(1), management's circulation of new cards providing the opportunity to revoke previously granted discretionary authority in light of last-minute dissident solicitation and describing this as "the 'authority is effective until revoked'" approach, rather than requiring the invalidation of all proxies already given to management), *affd.*, 948 F.2d 1281 (4th Cir. 1991).

236. *See* PROXY RULES REFERENCE BOOK, *supra* note 226, at 35; *see also Pittston Co.*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 95,273 (rejecting defendant Pittston's argument that it could not make the "specific statement" in its proxy statement or form of proxy contemplated by Rule 14a-4(c)(1), because it had not yet received "the actual text of [the union's] proposals" and therefore could not furnish the text thereof to shareholders in its proxy statement).

For the union-shareholder proponent, the question of whether it has provided adequate notice of a previously unknown agenda item to the registrant within "a reasonable time before the solicitation," and thereby has precluded the exercise of discretionary authority under Rule 14a-4(c)(1) pursuant to earlier-dated proxies, will turn on the facts and circumstances of a particular solicitation. In the leading case, *United Mine Workers of America v. Pittston Co.*,[237] the court granted summary judgment in favor of the plaintiff union. In its opinion, the court found that the company had received notice of the union's intent to present four resolutions at the annual meeting prior to delivering its proxy statement to shareholders by mail but that the company did not see the actual text of the resolutions and supporting statements until after the mailing.[238] While Pittston's proxy statement noted the substance of the resolutions and announced the company's plan to vote discretionary authority against the resolutions were they to be presented properly at the meeting, the company's card did not afford shareholders an opportunity to vote on any of them.[239]

Meanwhile, the plaintiff union obtained a temporary restraining order forcing the company to mail the union's own soliciting materials, including a form of proxy that contained a mechanism for shareholders to vote on its resolutions as well as management's uncontested board slate and request for auditor ratification.[240] Enclosed in Pittston's mailing of the union's materials, effected twenty-six days before the meeting, was a company card that omitted these resolutions, even though the existence of the resolutions — albeit not their substance or text — and the company's opposition were noted in an accompanying letter from the company.[241] A subsequent follow-up letter from the company to shareholders likewise failed to rectify this omission. The district court denied the union's motion to enjoin the meeting, however, on the ground that the company's intent to exercise discretionary authority violated the proxy rules, thus allowing the meeting to proceed as scheduled.[242]

237. [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,946 (D.D.C. Nov. 24, 1989).

238. *See* [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 95,273.

239. *See* [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 95,267.

240. *See* [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 95,267.

241. *See* [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 95,267-68.

242. *See* [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 95,268.

Several weeks after the court rendered its decision, the SEC staff warned in a letter to Pittston that such exercise had violated Rule 14a-4, and the SEC asked the company to indicate what responsive action it intended to take.[243] The court reached a similar conclusion, holding that "Pittston was capable of providing shareholders with a new proxy card that would allow voters to vote on each [union] resolution as they saw fit rather than to grant blanket discretionary authority to the Company."[244]

The SEC recently suggested, however, that management does not always need to include a shareholder floor proposal on the company's ballot in order to exercise discretionary voting authority. A recent SEC no-action letter has been interpreted "by some practitioners to imply that discretionary voting authority can still be utilized by management, when management informs the shareholders how it intends to vote and the insurgent does not solicit a majority of the shareholders."[245] In a no-action letter to Idaho Power Company the SEC staff examined that company's obligation to carry on its proxy card a non-Rule 14a-8 proposal.[246] It conditioned the company's obligation to carry the matter on its proxy card upon the proponent's "deliver[y of] a proxy statement and form of proxy to holders of a majority of shares entitled to vote on the matter or, if a greater percentage is required under applicable law to carry the proposal, holders of the minimum required."[247] The SEC concluded that, under these conditions, if the registrant either has been given adequate prior notice of the proponent's intent to solicit proxies pursuant to an advance notice bylaw or, absent such a bylaw, within a reasonable time before the shareholders' meeting,

243. *See* [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 95,268.

244. [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 95,273.

245. Coffee, *supra* note 177, at 7 (citing Idaho Power Co., SEC No-Action Letter, 1996 WL 114545 (Mar. 13, 1996)).

246. *See* Idaho Power Co., SEC No-Action Letter, 1996 WL 114545, at *8-*9 (Mar. 13, 1996).

247. Idaho Power Co., 1996 WL 114545, at *9. Thus, a proponent who is conducting a targeted non-exempt solicitation of less than a majority of the registrant's shareholders or an exempt solicitation of 10 or fewer shareholders under Rule 14a-2(b)(2), or who is engaging in an exempt solicitation under Rule 14a-2(b)(1), will not be able to invoke Rule 14a-4(c)(1) as a basis for "piggy-backing" on the registrant's card.

Furthermore, the Idaho Power no-action letter does not appear to require the company to make full disclosure about the union proposal — as contrasted with the disclosure necessary to preserve discretionary authority under Rule 14a-4(c)(1) — unless the union is circulating its own proxy statement and card to stockholders holding a majority of the shares entitled to vote on the matter. If the company claims that the union has not made the necessary solicitation when the company files its proxy statement, then the company could include only minimal disclosures in the proxy statement about the "nature of the proposal," *see* 1996 WL 114545, at *9, and later "cure" any defect in the initial proxy materials by making a supplemental filing. The company may believe that it gains a tactical advantage by doing so.

then the proposal must be carried on the registrant's form of proxy.[248]

Companies may prefer to recirculate a card bearing the new matter to enable shareholders to express their views without having to execute the union's form of proxy. Pope & Talbot employed this tactic in the 1996 proxy season.[249] Any unrevoked proxy returned prior to recirculation therefore may be voted against the matter pursuant to discretionary authority.[250] In the event the union, for strategic or other purposes, does not notify the company of its proposal in advance of the printing or mailing of the definitive proxy statement and card, the company must file and deliver a supplemental proxy piece and new card giving shareholders the opportu-

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248. In a recent speech, SEC Commissioner Steven M.H. Wallman advocated the amendment of Rule 14a-4(c)(1) to permit companies to vote discretionary authority against *Idaho Power*-style "late resolutions" — shareholder proposals that are not presented under Rule 14a-8, without having to carry such dissident proposals on their cards, so long as there is sufficient proxy-statement disclosure of the proposal and the intended use of discretionary authority. *See* Steven M.H. Wallman, *Reflections on Shareholder Proposals: Correcting the Past; Thinking of the Future, in* 2 PREPARATION OF ANNUAL DISCLOSURE DOCUMENTS 419, 431-32 (PLI Corp. L. & Prac. Course Handbook Series No. B-970, 1997) (remarks to the Council of Institutional Investors in Chicago, Illinois, Oct. 8, 1996). This suggestion was part of a broader model for reform of Rule 14a-8. *See* THOMAS & DIXON, *supra* note 3, § 16.

A similar proposal has been formally issued for notice and comment by the full Commission. First, the SEC has proposed to amend Rule 14a-4(c)(1) to substitute the "reasonable time" standard with a clear date after which notice will be deemed inadequate. The revised provision would allow a company voting discretion if it did not receive notice of a potential solicitation at least 45 days prior to the date the company first mailed its proxy materials to shareholders for the prior year's annual meeting. *See* SEC Proposals, *supra* note 150, at *21. Because shareholders typically would not have access to information setting the company's mailing date for the prior year's annual meeting, the SEC also proposes to change Rule 14a-5(e) to require that companies disclose in their proxy materials the date by which notice must be received. *See id.* at *24. Bylaw provisions authorized by state law that fix a different definition of advance notice would override the notice requirement in Rule 14a-4(c)(1). *See id.* at *21.

Second, the SEC has proposed a new paragraph, 14a-4(c)(2), to address the circumstances under which a company receiving adequate notice of a non-Rule 14a-8 proposal may exercise its discretionary voting authority. In order to exercise such authority, the company's proxy materials must include "a discussion of the nature of the matters and how the company intends to exercise its discretion on each matter" in the proxy statement, and "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)" on the proxy card. *Id.* at *22. Companies would still have the obligation imposed by Rule 14a-9 to provide shareholders with sufficient information to make informed voting decisions and to provide a meaningful opportunity to review information. *See id.* These materials would have to be filed in their preliminary form and be subject to staff review. Thus, the SEC would no longer allow companies to file proxy materials in definitive form despite prior notification, even if the materials disclose the nature of the proposal and how the company intends to exercise its discretionary authority. *See id.*

These proposals are the subject of public comment at the time of this writing.

249. *See* Pope & Talbot, Definitive Additional Materials (Apr. 12, 1996), *available in* EDGAR, Film No. 96,546,521.

250. *See* PROXY RULES REFERENCE BOOK, *supra* note 226, at 35-36.

nity to revoke previously cast proxies if the union solicits holders of more than a majority of the company's stock.[251]

A company can only use Rule 14a-4(c)(4) as the basis for exercising discretionary authority for "[a]ny proposal omitted from the proxy statement and form of proxy pursuant to [Rules 14a-8 or 14a-9]."[252] If a shareholder proposal is initially submitted to the company under Rule 14a-8 and the SEC issues a no-action letter, then the company may omit the proposal from its proxy materials.[253] If the company intends to exercise discretionary authority to vote on the excluded proposal if it is subsequently presented by the union on the floor at the meeting, however, then the SEC has taken the position that the company must have disclosed fully in its proxy statement the possibility that the excluded shareholder proposal might be raised at the meeting and that, in such event, the proxy will be voted in the discretion of the holder in order to exercise discretionary authority under this rule.[254]

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251. A pending federal action brought by UNITE raises the question of when a company can follow this procedure. The complaint alleges that the company was given notice of the shareholder's proposal "reasonably in advance" of the annual meeting and before mailing its proxy materials and was told that the union intended to solicit at least a majority of the company's outstanding shares. *See* Complaint, UNITE v. The May Dept. Stores Co., 97 Civ. 2120 (S.D.N.Y. filed Apr. 30, 1997). The company and the union dispute the outcome of the vote on the proposal. *See May, Union Dispute a Shareholders' Vote on Poison Pill Plan,* WALL ST. J., May 27, 1997, at A6.

252. 17 C.F.R. 240.14a-4(c)(4) (1997).

253. *See* Grimes v. Ohio Edison Co., 992 F.2d 455, 456 (2d Cir. 1993); Grimes v. Centerior Energy Corp., 909 F.2d 529, 530 (D.C. Cir. 1990).

254. *See* Pacific Enters., SEC No-Action Letter, 1990 WL 286196 (Nov. 9, 1990); LOSS & SELIGMAN, *supra* note 140, at 1968 n.124 (suggesting that Rule 14a-4(c)(5) is the basis for exercising discretionary authority in this situation); PROXY RULES REFERENCE BOOK, *supra* note 226, at 37-38; *see also* Lang et al., *supra* note 228, § 53.05(3), at 53-144 n.140 (citing the example of Consolidated Freightways's decision to include in its 1994 proxy statement disclosure of shareholder proposals despite the Division of Corporation Finance's grant of Rule 14a-8 no-action relief). The registrant's obligation to furnish this disclosure "does not depend on whether the security holder has advised the issuer of his intention to raise the matter at the meeting notwithstanding its exclusion from the proxy statement." PROXY RULES REFERENCE BOOK, *supra* note 226, at 38.

Two courts of appeal have ruled that a shareholder proposal properly excluded from a registrant proxy statement under Rule 14a-8(c)(7) — the so-called "ordinary business" exclusion, discussed in more detail in *supra* section III.A.2.b — need not be disclosed therein for Rule 14a-9 purposes, despite the proponent's stated intention to present the excluded proposal at the shareholders' meeting. *See Ohio Edison Co.,* 992 F.2d at 458; *Centerior Energy Corp.,* 909 F.2d at 533. Neither decision specifically addressed the Rule 14a-4 discretionary authority question.

For a more detailed discussion of the circumstances in which discretionary proxy voting authority may be exercised by registrants within the parameters of Rule 14a-4 and state law — whether with respect to a shareholder proposal omitted from a registrant's proxy statement in reliance upon the staff Rule 14a-8 no-action process, or any other matter of which the registrant has received reasonable notice in advance of the shareholders' meeting or other date of shareholder action, in the case of consents or authorizations — see THOMAS & DIXON, *supra* note 3, §§ 9.01(E)(3), 15.05.

From the union shareholder's perspective, the company's ability to exercise discretionary authority will turn on whether a shareholder proposal has been presented under Rule 14a-8. Thus, in the *Pittston* case, the plaintiff union's resolutions had never been submitted for inclusion in the company's proxy statement under Rule 14a-8 and thus could not be deemed excluded or excludable pursuant to any of the bases enumerated in Rule 14a-8(c).[255] The court found irrelevant the fact that such proposals could have been presented via Rule 14a-8.[256]

The end result of this analysis is that a union can advise the company in advance of its intent to present a proposal at the meeting without invoking Rule 14a-8, thereby blocking the company's ability to use discretionary authority under Rule 14a-4(c)(4) to vote proxies against the proposal. The company must turn to Rule 14a-4(c)(1) in order to exercise discretionary authority, which requires it to carry the proposal on its card and provide sufficient notice to the shareholders of the proposal in its proxy statement, provided the shareholder satisfies the conditions imposed by the *Idaho Power* no-action letter.[257]

D. *"Just Vote No" Campaigns*

In "Just Vote No" campaigns, shareholders withhold approval from the company's unopposed board slate at the annual election of directors to pressure management to improve its performance.[258] Although these campaigns have largely symbolic value, the negative publicity generated may provide a strong impetus for governance-related changes.[259] Unions and other institutional shareholders have actively participated in these campaigns, spot-

255. *See* United Mine Workers v. Pittston Co., [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,946, at 95,271-72 (D.D.C. Nov. 24, 1989).

256. *See Pittston Co.,* [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 95,271-95,272.

257. *But cf.* Wallman, *supra* note 248, at 431-32 (criticizing this practice).

258. *See* Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing With Barbarians Inside the Gates,* 45 STAN. L. REV. 857 (1993).

259. *See* Regulation of Communications Among Securityholders, Exchange Act Release No. 30,849, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,002, at 82,838 (June 24, 1992) (recognizing increasing shareholder use of this tactic to communicate with corporate management, and proposing enhanced disclosure of proxy voting results, including the number of votes withheld from each board candidate, in the next quarterly report on Form 10-Q or Form 10-K). This new disclosure requirement was adopted in October 1992. *See* THOMAS & DIXON, *supra* note 3, § 6.04(B)(19) n.334; *see also* Lang et al., *supra* note 228, §§ 53.02(1)(b)(ii) & (vi) (finding that announcements of voting intent can influence the votes of other shareholders); John Pound, *The Rise of the Political Model of Corporate Governance and Corporate Control,* 68 N.Y.U. L. REV. 1003, 1052 & n.194 (1993).

lighting certain companies and selected issues such as executive compensation.

For example, shareholders of the Walt Disney Company recently used a "Just Vote No" campaign to protest that company's "multimillion dollar payout to former President Michael Ovitz and a rich new contract for Chairman and Chief Executive Michael Eisner."[260] Institutional and individual shareholders withheld thirteen percent of the votes cast for the five company directors that were up for reelection at the meeting, while eight percent of the shareholders voted against Eisner's new contract.[261]

In 1995, shareholder "Just Vote No" campaigns garnered substantial support. At the Archer Daniel Midlands 1995 annual meeting, nearly twenty percent of the votes cast opposed management's slate of directors.[262] Shareholders at W.R. Grace & Company's 1995 annual meeting withheld nineteen percent of the votes cast for the reelection of four directors.[263]

Unions can participate in these campaigns without triggering the federal proxy rules solicitation provisions if the unions are careful to stay within the terms of certain safe harbors. Rule 14a-1(*l*)(2)(iv) provides that published or broadcast announcements by union and other stockholders, who otherwise are not soliciting proxies, of how they plan to vote on any matter submitted for stockholder approval are exempted from the definition of solicitation.[264] This regulatory safe harbor extends to a union shareholder's announced reasons for its decision to vote, abstain, or withhold proxies.

A second prong of the safe harbor protects a union pension fund that communicates its voting intentions to its beneficiaries or

260. Bruce Orwall, *Disney Holders Decry Payouts at Meeting,* WALL ST. J., Feb. 26, 1997, at A3.

261. *See id.* An additional 3.2% abstained from voting.

262. *See id.*

263. *See id.*

264. *See* 17 C.F.R. § 240.14a-1(*l*)(2)(iv) (1997). Rule 14a-1(*l*)(2)(iv) provides that the terms "solicit" and "solicitation" do not apply to:

> A communication by a security holder who does not otherwise engage in a proxy solicitation (other than a solicitation exempt under § 240.14a-2) stating how the security holder intends to vote and the reasons therefor, provided that the communication:
>
> (A) Is made by means of speeches in public forums, press releases, published or broadcast opinions, statements, or advertisements appearing in a broadcast media, or newspaper, magazine or other bona fide publication disseminated on a regular basis,
>
> (B) Is directed to persons to whom the security holder owes a fiduciary duty in connection with the voting of securities of the registrant held by the security holder, or
>
> (C) Is made in response to unsolicited requests for additional information with respect to a prior communication by the security holder made pursuant to this paragraph (*l*)(2)(iv).

17 C.F.R. 14a-1(*l*)(2)(iv).

other persons to whom it owes a fiduciary duty in connection with the voting of portfolio securities.[265] Written or oral reiterations of a public announcement previously made under the safe harbor are covered also, but only if responsive to unsolicited requests for information with respect to the earlier exempt announcement. An unlimited number of exempt statements relating to a specific solicitation may be made, provided that proxy authority is not being sought.

We suspect that labor unions have been heavily involved in these "Just Vote No" campaigns, either by supporting other shareholders' initiatives or by initiating them. These voting initiatives typically take place at companies where executive compensation levels are sufficiently high to concern other shareholders. Labor's interest in these battles could be twofold: to protect the value of its capital investment from management self-enrichment and to point out the inequities of management's negotiating position in negotiating compensation for rank-and-file workers.

IV. Checks on Labor-Shareholders' Conflicts of Interest

Labor unions often face a potential conflict of interest when they act as shareholders. On the one hand, they could be attempting to increase firm value in order to maximize their residual share as shareholders. On the other hand, they could be sacrificing their shareholder value in order to protect jobs or otherwise help their members.

In some situations, no apparent conflict exists between unions' dual roles. For example, some companies whose stock is held by union pension funds have no unionized workers or ongoing or prospective unionization campaigns. At other companies, labor unions and management may have a reasonably harmonious relationship, so that labor does not need to protect worker interests at the expense of other shareholders. Under these circumstances, when labor groups are initiating corporate-governance reform measures or other voting initiatives, labor is more likely to be acting as monitors of corporate management seeking to reduce the agency costs of equity.

In other cases, a conflict of interest clearly exists. Workers and management may have bitter historical relationships, or there may be ongoing or anticipated disputes over critical worker issues. In

265. *See* 17 C.F.R. § 240.14a-1(*l*)(2)(iv).

fact, as we have discussed above, labor has targeted some of its shareholder initiatives at companies where it is concurrently engaged in collective bargaining negotiations or union organizing campaigns. In these circumstances, corporate management and other shareholders may suspect that union-shareholder activism is just another form of leverage in labor negotiations.

Despite the potential conflict of interest, powerful forces constrain potential labor-shareholder opportunism and limit the conflicts that arise between labor qua shareholder and labor qua union. In this section, we examine three sets of legal and market forces that act as checks on opportunistic union shareholder conduct: (1) the fiduciary obligations of pension fund trustees; (2) labor's need to persuade other shareholders to vote for its shareholder initiatives; and (3) the capital market, the market for corporate control, and international product competition.

A. *Fiduciary and Other Checks on Taft-Hartley Pension Funds*

At the outset, it may be useful to clarify the meaning of the term *union pension fund.* Pension funds can be divided broadly into public- and private-sector funds. Some of the largest and most active institutional investors today are the public pension funds, with CalPERS being the paradigm activist investor.[266] Even though public-sector unions sometimes influence these public-employee pension plans, public-employee pension funds are not generally considered to be union pension funds.

Private-sector employees have two main types of pension plans. Most plans are corporate pension plans, whereby the corporation appoints the plan trustees who run the plan. Typically the trustees are officers of the corporation. Many of these corporate plans arise from collective bargaining negotiations, but the union's only role is to bargain over the level of contribution or benefits.[267] The union has no formal control over the plans. Again, these are not generally considered union pension funds.

Union pension funds are the other main type of private pension plans. Their structure is mandated by section 302 of the Taft-

266. Other public pension funds rarely engage in shareholder activism. Pension funds for federal government workers, for example, are required to invest in federal government securities, *see* AFL-CIO, INVESTMENT OF UNION PENSION FUNDS 19 (1981), and thus are unconcerned with private-sector corporate governance.

267. It has been estimated that up to two-thirds of all private pension funds involve collective bargaining. *See id.* at 20 tbl.1. The General Motors pension fund is an example of a corporate fund that comes from collective bargaining.

Hartley Act,[268] and so they are often referred to as "Taft-Hartley" plans. The Taft-Hartley Act forbids employers from making payments of any kind to a union,[269] including union-run pension funds,[270] but makes an exception for pension funds that have equal numbers of trustees appointed by management and the union and meet certain other requirements.[271] Perhaps forty percent of all collectively bargained plans are joint trustee plans.[272] The Department of Labor estimated that in 1992 there were 3,109 Taft-Hartley pension funds that collectively held approximately $215 billion.[273] Sometimes they are called multi-employer pension plans, because most jointly managed Taft-Hartley plans involve a dominant union with many employers. The Teamsters Central States Pension Fund is a prominent example.

The critical question here is the extent to which union pension funds are legally constrained from using their shareholder voting power to further goals other than maximizing their investment return. The securities laws, especially Rule 14a-8, address limits on what subjects unions can raise on the corporate ballot in ways we have analyzed above. Pension law and the Taft-Hartley Act have said little about the issue, but the broader issue of where union pension funds can invest their funds has been the subject of considerable litigation and commentary.

The most important check on investment abuses by union pension funds, at least in theory, was the joint union-management con-

268. Labor Management Relations Act of 1947, 29 U.S.C. § 186 (1994).

269. *See* 29 U.S.C. § 186(a)(2).

270. The Taft-Hartley Act allows unions to control directly a small number of pension plans, but these are of minor importance. They include a few grandfathered plans in existence before 1946 to which employers had made contributions. They also include plans funded by the union for the pensions of its own officers and employees, such as the employees' pension plan and trust of the International Union of Electrical, Radio, and Machine Workers. They also can include pension plans for workers funded solely through worker contributions. *See* Richard Blodgett, *Union Pension Fund Asset Management, in* ABUSE ON WALL STREET: CONFLICTS OF INTEREST IN THE SECURITIES MARKETS 320, 327-28 (1980). While these directly controlled plans deserve the title of "union pension funds," that term is generally reserved for the joint union-management plans discussed in the text.

271. *See* 29 U.S.C. § 186. In addition to jointly managed boards, the Taft-Hartley Act requires that (1) the funds be held in trust for the sole benefit of the employees and their families and dependents; (2) a written agreement that specifies the basis on which the employer will make payments; (3) an impartial umpire who can break deadlocks in the board, appointed by a federal district court if the parties cannot agree on an umpire; (4) an annual audit; and (5) limitation of the trust to certain purposes, such as pensions, health or life insurance, apprenticeship training, vacation or holiday funds, day care centers, scholarships, and legal services. *See* 29 U.S.C. § 186(c); *see also* NOEL ARNOLD LEVIN, GUIDELINES FOR FIDUCIARIES OF TAFT-HARTLEY TRUSTS: AN ERISA MANUAL 3 (1980).

272. *See* AFL-CIO, *supra* note 266, at 20 tbl.1.

273. *See* Sweeney, *supra* note 2, at 2.

trol of the trustees. The Taft-Hartley Act specifically aimed to prevent unions from using the pension funds as a "war chest," as the United Mine Workers in particular was thought to have done with its pension plans prior to 1947.[274]

Despite the balanced board membership, unions have tended to dominate these jointly managed funds. Indeed, it is "[o]ften . . . very difficult to distinguish between the pension fund and the union."[275] One reason is that the union pension funds have typically been funded through fixed contributions by the employer with the trustees of the fund setting the pension levels.[276] Whether the pension does well or poorly on its investment of such funds does not impact the employer directly. By contrast, in corporate defined-benefit funds, employers directly benefit from good investment performance, because they can put less money in for a given level of defined benefits. Because of the reduced incentives, management often has left the investment decisions to the union trustees.

The Taft-Hartley Act also imposes a fiduciary duty on plan trustees, mandating that all payments be held in trust for the "sole and exclusive benefit of the employees . . . and their families and dependents" and insisting that "the funds held therein cannot be used for any purpose other than paying such pensions or annuities."[277] The Taft-Hartley Act did not directly regulate where the pension fund could place its investments, however, and there are many anecdotes of union pension funds making bad or corrupt investments, although fiduciary-duty lawsuits sporadically policed abuses.[278]

Perhaps of greater bite than the Taft-Hartley duties are the more recent fiduciary duties imposed by ERISA on all private pension-fund trustees, whether corporate or jointly managed.[279] ERISA holds trustees to a prudent-person standard and requires

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274. *See* Blodgett, *supra* note 270, at 330 (noting Senator Taft's concern that the administration of the UMW pension and welfare fund was so unrestricted that "practically the fund became a war chest for the union").

275. *Id.* at 321.

276. *See id.* at 322-23.

277. 29 U.S.C. § 186(c) (1994).

278. In the well-known case of *Blankenship v. Boyle*, 329 F. Supp. 1089 (D.D.C. 1971), the court found a breach of the trustees' common law fiduciary duty when the United Mine Workers pension fund, on instructions of John L. Lewis, purchased shares in various utility companies to try to influence them to purchase union-mined coal.

279. *See* Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1000-1461; Blodgett, *supra* note 270, at 323.

diversified investments.[280] In addition, it makes each trustee individually liable for breaches of fiduciary duty,[281] a threat that may have encouraged greater involvement by the management trustees on the joint board.

Union pension funds have reacted in various ways to the tensions of becoming major capitalist investors in the stock market. Some union pension funds historically shunned the stock market entirely, investing only in bonds. Others had a policy against investing in nonunion companies.[282] One 1978 study showed that a sample of seventy-five union pension funds invested half as much as employer-controlled plans in fifteen predominately nonunion companies.[283] The economist Richard Freeman, writing in the early 1980s,, emphasized that the policy of noninvestment costs union pension funds the inside shareholder pressure they might have were they to invest in nonunion companies.[284] More recently, union pension funds have even made international investments.[285]

Pension funds increasingly are indexing their investments to track the general return of the stock market.[286] This passive strategy of investment makes pension funds less able to target their investments. Union pension funds appear to be less indexed than other pension funds, however, perhaps so that they can make more targeted use of investments.[287]

Indeed, a central issue for ERISA regulation of union pension funds involves their targeted social investments of one kind or another, such as providing housing loans for union members or investing in construction projects that employ union labor.[288] Much

280. *See* 29 U.S.C. § 1104(a)(1)(B), (C).

281. *See* 29 U.S.C. §§ 1104(a), 1105(c)(2)(B).

282. This policy of investing in unionized companies was popularized in RIFKIN & BARBER, *supra* note 1.

283. *See* RICHARD B. FREEMAN, UNIONS, PENSIONS, AND UNION PENSION FUNDS 44 (National Bureau of Econ. Research Working Paper No. 1226, 1983).

284. *See id.* at 46.

285. *See* Paul G. Barr, *Teamsters Fund Invests One-Third of Assets Overseas*, PENSIONS & INVESTMENTS, Feb. 3, 1997, at 1.

286. *See* JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 739 (2d ed. 1995) ("[T]he growth of passive investing from its inception in the early 1970s to its central role in modern practice has been the dominant event in the period since the enactment of ERISA."); Romano, *supra* note 77, at 833 (noting that large funds increased portfolio indexing beginning in the late 1980s).

287. Union pension funds are often asked "to screen and actively target or exclude certain types of investments as a means of advancing the multiple and long-term economic and social objectives of plan participants." Industrial Union Dept., AFL-CIO, *AFL-CIO Supports Strong Pension Protections, Activist Investing*, LABOR & INVESTMENTS, Fourth Quarter 1993, at 3.

288. *See* Simon, *supra* note 88, at 268.

litigation[289] and debate[290] has ensued over whether such investments are consistent with ERISA fiduciary duties. The Department of Labor more or less consistently has advocated an "other things equal" test, in which pension funds can make investments that benefit unions or workers if the risk-adjusted return matches other investments.[291] The latest incarnation of social investing involves "economically targeted investments," the subject of a 1994 interpretative bulletin of the Department of Labor that arguably encourages such investments.[292] The debate over social investing[293] or economically targeted investments[294] by union pension funds is beyond the scope of this article. The safest conclusion is that,

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289. *See, e.g.*, Brock v. Walton, 794 F.2d 586 (11th Cir. 1986). The pension fund in *Brock* encountered difficulties when Florida real estate prices fell in the late 1980s. *See* Joel Chernoff, *Ego Leads to Dennis Walton's Downfall*, PENSIONS & INVESTMENTS, July 8, 1991, at 1.

A number of other cases have discussed the compatibility of social investments and ERISA. *See, e.g.*, Withers v. Teachers' Retirement Sys., 447 F. Supp. 1248 (S.D.N.Y. 1978) (upholding Teachers' Retirement System bailout of New York City by buying $860 million of highly risky bonds), *affd. mem.*, 595 F.2d 1210 (2d Cir. 1979); Board of Trustees v. Mayor of Baltimore City, 562 A.2d 720 (Md. 1989) (upholding South African divestiture); Regents of the Univ. of Mich. v. State, 419 N.W.2d 773 (Mich. Ct. App. 1988) (holding that a state law requiring South African divestiture violated the Michigan Constitution).

290. *See, e.g.*, Joel C. Dobris, *Arguments in Favor of Fiduciary Divestment of "South African" Securities*, 65 NEB. L. REV. 209 (1986); James D. Hutchinson & Charles G. Cole, *Legal Standards Governing Investment of Pensions Assets for Social and Political Goals*, 128 U. PA. L. REV. 1340 (1980); Maria O'Brien Hylton, *"Socially Responsible" Investment: Doing Good Versus Doing Well in an Inefficient Market*, 42 AM. U. L. REV. 1 (1992); John H. Langbein, *Social Investing of Pension Funds and University Endowments: Unprincipled, Futile, and Illegal, in* DISINVESTMENT, IS IT LEGAL? IS IT MORAL? IS IT PRODUCTIVE? 1 (National Legal Ctr. for the Public Interest ed., 1985); John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72 (1980); Ian D. Lanoff, *The Social Investment of Private Pension Plan Assets: May It Be Done Lawfully under ERISA?*, 31 LAB. L.J. 387 (1980).

291. *See* John Godfrey, *Prudent Pension Trustee May Use Social Goals to Pick Investments, Reich Says*, 63 TAX NOTES 1745 (1994) ("'The Department of Labor does not condone the use of pension funds [in a way that subordinates financial return to some other social objective]. We prohibit it.' If, however, risk and return are not sacrificed, a trustee may choose to invest money with the intention of promoting a social objective." (quoting the testimony of Robert L. Reich, Secretary of Labor, before the Joint Economic Committee (June 22, 1994))).

292. *See* Interpretive Bulletin Relating to the Fiduciary Standard under ERISA in Considering Economically Targeted Investments, 29 C.F.R. § 2509.94-1 (1997).

293. *See, e.g.*, HILLEL GRAY, NEW DIRECTIONS IN THE INVESTMENT AND CONTROL OF PENSION FUNDS (1983); NOEL ARNOLD LEVIN & MARK E. BROSSMAN, SOCIAL INVESTING FOR PENSION FUNDS (1982); SOCIAL INVESTING (Dan M. McGill ed., 1984); Lanoff, *supra* note 290, at 389 (arguing that employment benefits to working beneficiaries is not a legitimate concern of trustees, at least if it requires a reduction in the fund's rate of return).

294. *Compare* Jayne Elizabeth Zanglein, *Protecting Retirees While Encouraging Economically Targeted Investments*, 5 KAN. J.L. & PUB. POLY. 47 (1996) (arguing that the Department of Labor appropriately continues the "all things equal" test for investing in ETIs) *with* Edward A. Zelinsky, *ETI, Phone the Department of Labor: Economically Targeted Investments, IB 94-1 and the Reincarnation of Industrial Policy*, 16 BERKELEY J. EMP. & LAB. L. 333 (1995) (arguing that the new bulletin improperly diverges from prior policy).

within bounds, ERISA — and certainly Taft-Hartley — allows union pension funds to invest in projects that benefit workers, so long as the risk and return is similar to other projects.

While union pension funds long have worried about where their money is invested, until recently they have paid relatively little attention to their voting power as shareholders. For example, a survey of union pension fund directors published by the AFL-CIO in 1981 found little awareness of the potential power of shareholder votes.[295] Some commentators have attributed pension funds' passivity to the tight fiduciary duties of ERISA. Writing in 1990, Professor Black noted in an influential article that the Department of Labor "had been silent on the basic question of whether an ERISA fiduciary can *ever* spend plan money to promote a shareholder proposal," and suggested that no ERISA fiduciary had ever done so.[296] While a few union pension plans had made proposals by 1990,[297] Black's statement reflects the general spirit that shareholder activism was beyond the scope of union and other ERISA-regulated pension funds.

The voting passivity of the 1980s clearly changed in the 1990s. In 1991, the AFL-CIO issued model proxy-voting and investment guidelines in which it encouraged its members to push more activist agendas.[298] This was followed in 1992 by the Industrial Union Department of the AFL-CIO passing a resolution urging "workers and their representatives to take a more active role in the governance of their corporations and in responsible investing and proxy voting by pension plans."[299] A similar resolution called for the use of "coordinated campaigns in demanding corporate responsibility."[300]

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295. *See* AFL-CIO, *supra* note 266, at 42 ("The proposition that the rights associated with ownership might be used to directly influence corporate behavior was by and large a new idea to those surveyed.").

296. Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 554-55 (1990). Black noted that the Department of Labor has required pension plans to vote their shares but has not encouraged plans to make their own proposals. *See id.* at 554.

297. *See* Ethan G. Stone, Note, *Must We Teach Abstinence?: Pensions' Relationship Investments and the Lessons of Fiduciary Duty*, 94 COLUM. L. REV. 2222, 2242 (1994) (challenging Black's passivity claim by noting that pension plans associated with the United Brotherhood of Carpenters were prominent shareholder activists of the late 1980s and sponsored many proposals).

298. *See* Jayne Elizabeth Zanglein, *Pensions, Proxies and Power: Recent Developments in the Use of Proxy Voting to Influence Corporate Governance*, 7 LAB. LAW. 771, 773-75 (1991).

299. Patrick S. McGurn, *Growth of Union Activism Is Byproduct of the 1980s*, CORP. GOVERNANCE BULL., Jan.-Feb. 1994, at 5, 6 (quoting resolutions from the IUD's Constitutional Convention in 1992).

300. *Id.*

The U.S. Department of Labor's issuance of proxy voting guidelines further encouraged the rise in labor shareholder activism.[301] In a 1994 interpretative bulletin, the Department of Labor advocated a corporate-activist role for private pension funds.[302] Investors were urged to monitor or influence corporate management when such activities would be likely to enhance the value of investments.[303] The Department of Labor suggested issues to raise in shareholder proposals, including the independence and expertise of candidates for boards of directors, executive compensation, the nature of long-term business plans, and corporate policies regarding mergers and acquisitions.[304] While the directive is imprecise about whether union-fund trustees can sacrifice investment returns for other goals,[305] the general spirit is to allow union pension funds to flex their power somewhat.

In short, ERISA does impose some limits on how far union pension funds can push shareholder resolutions. Cost-justified expenditures on resolutions dealing with corporate-governance issues are allowable. But union pension funds risk ERISA litigation when they sponsor resolutions that clearly can be shown to provide low returns.

ERISA, of course, only applies to the pension funds, not to the unions themselves. Unions can purchase stock and propose resolutions without breaching ERISA fiduciary duties. While the freedom from ERISA constraints may push toward direct union-shareholder activity, such actions may be less likely to succeed than actions by a union pension fund. Other shareholders may be suspicious of a union-shareholder proposal when the union spends far more on the proposal than it could ever hope to recoup in investment return. Recall that Albertson's management urged this cost-benefit calculus as a reason other shareholders should defeat a union proposal that related ostensibly purely to corporate governance:[306] it could be a (union) wolf in (shareholder) sheep's clothing. A pension fund sponsoring a corporate-governance proposal

301. *See* Patricia B. Limbacher, *DOL Peeking over Proxy Shoulders,* PENSIONS & INVESTMENTS, Mar. 6, 1995, at 1; Patrick S. McGurn, *DOL Issues New Guidelines on Proxy Voting, Active Investing,* CORP. GOVERNANCE BULL., July-Aug. 1994, at 1.

302. *See* Interpretive Bulletin Relating to the Employee Retirement Income Security Act of 1974, 29 C.F.R. § 2509.94-2 (1997).

303. *See* 29 C.F.R. § 2509.94-2(3).

304. *See* 29 C.F.R. § 2509.94-2.

305. *See* 29 C.F.R. § 2509.94-2(2).

306. *See supra* text accompanying note 21.

that could potentially earn it substantial shareholder profits may arouse less suspicion from other investors.

B. *Labor Needs Other Shareholders' Support for Their Voting Initiatives to Succeed*

Most labor voting initiatives cannot succeed without the support of other shareholders.[307] This is most apparent in situations in which labor is trying to force the board of directors to take action, such as in the *Fleming Companies* case, in which the union needed to obtain a majority of the votes cast in order to pass its mandatory by-law amendment proposal. Labor needs strong support even for its precatory voting initiatives, such as shareholder proposals under Rule 14a-8, however, if it wishes to persuade a corporate board of directors that shareholders want it to take the actions supported by labor.

Other shareholders will be more likely to support labor's voting initiatives when they relate to issues that have the potential to improve corporate performance. By contrast, when labor groups target issues that concern uniquely labor-related interests, and not

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307. This is true whenever labor groups do not have sufficient stock ownership at a company to bring about change solely by relying on their own voting power. In the 1996 proxy season, for example, the Laborers submitted a proposal to Alumax. *See infra* app. tbl.1. At that time, it held 320,000 shares of Alumax stock. *See* Alumax, Definitive Proxy Statement (Mar. 25, 1996), *available in* LEXIS, Corporate Library, Edgarplus File (Film No. 96,058,465). This represented approximately 0.7% of outstanding Alumax shares. *Cf.* Alumax, 1996 Form SEC 10-K (Nov. 30, 1996), *available in* EDGAR, Film No. 96,674,289 . Other examples based on submissions noted in Table 1 include:

Baker Hughes	
= 0.007%	Carpenters' holdings — 10,000 shares (Baker Hughes Inc., Definitive Proxy Statement 20 (Dec. 12, 1995), *available in* EDGAR, Film No. 95,601,083.) Outstanding shares — 145,149,834 (Baker Hughes Inc., 1996 SEC Form 10-K, *available in* EDGAR, Film No. 96,678,190)
K-Mart	
= 0.0025%	Laborers' holdings — 12,500 shares
= 0.00008%	UNITE and Teamsters (combined) — 390 shares (K-Mart Corp., Definitive Preliminary Revised Statement 21, 22 (Apr. 10, 1996), *available in* EDGAR, Film No. 96,545,773) Outstanding shares — 482,151,580 (K-Mart Corp., 1996 SEC Form 10-K, *available in* EDGAR, Film No. 96,544,576)
WMX	
= 0.03%	Operating Engineers' holdings — 149,788 shares (WMX Technologies, Inc., Definitive Proxy Statement 24, *available in* EDGAR, Film No. 96,540,167) Outstanding shares — 494,495,743 (WMX Technologies, Inc., 1996 SEC Form 10-K, *available in* EDGAR, Film No. 96,541,025)

more general ones of all shareholders, they will probably receive much lower levels of shareholder voting support.

This is not surprising. Labor will have a much harder time convincing rational shareholders that it is in their best interests to vote for proposals that do not on their face appear to increase the value of a company, or that are at least value-neutral. Many shareholders will be skeptical of proposals that appear to benefit only labor and view them as unjustified diversions of corporate resources to a special interest group. If labor unions want to build coalitions with other shareholders, they must be able to offer them something for their support.

Furthermore, as noted above, many institutional shareholders must seek to maximize value for their beneficiaries and will want to be sure that their voting policies are directed toward approving only those proposals that can be directly tied to shareholder value creation. Labor may be able to demonstrate this connection systematically for certain types of proposals sufficiently well to permit institutional shareholders to adopt favorable voting policies.[308] When labor cannot persuasively document such a connection, institutions and other shareholders will need to evaluate individual labor initiatives on a case-by-case basis, making it unlikely that labor will command the consistent levels of strong support that it needs to be effective with its voting agenda. This makes it all the more critical that labor couple its voting initiatives with its monitoring strengths to bring about the increases in firm value that will persuade other shareholders to follow its lead.

C. *Market Discipline*

Market forces act as a final check upon extreme forms of labor opportunism. If labor were to engage in a successful campaign of opportunistic behavior and to use its voting initiatives to persuade the board of directors to take actions that would divert substantial value away from shareholders to labor interests, these actions would have adverse consequences for the company in several different markets. For example, if the board of directors acted to increase worker pay and benefits drastically, without an offsetting

308. At present, many institutions have voting policies in favor of many traditional corporate-governance shareholder proposals but not on other issues. *See* Bernard S. Black, *Shareholder Activism and Corporate Governance in the United States*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (Peter Newman ed., forthcoming 1998) (noting that many institutional shareholders vote following the recommendation of Institutional Shareholder Services (ISS) and that ISS has guidelines about which proposals it will support, which leads shareholder proponents to tailor their proposals to fit within these guidelines).

increase in productivity, and this led to subpar corporate performance, it would raise the cost of raising capital from future equity sales. It would also lower the value of the corporation's existing stock, thereby increasing the likelihood that the firm would become a takeover target and decreasing the incentives associated with many forms of employee stock-option plans.

Product-market competition would also punish any firm that raised its labor costs too high. Other sellers, both domestic and international, would enjoy a cost advantage over the company. This would place the firm at a competitive disadvantage when it sought to sell its goods on the open market. Debt financing might also be more difficult and costly to obtain if lenders believed that the corporation faced a greater risk of failure from its inability to compete effectively. Even labor might realize that it cannot divert too much of the company's value to itself without jeopardizing the very benefits that it seeks: long-term job prospects and improved worker pay.[309]

Of course, these market forces will not punish mild forms of labor opportunism — only more extreme ones that adversely affect the corporation's bottom line visibly.[310] Nevertheless, they represent a very real check on runaway labor opportunism in the unlikely event that the other checks discussed above do not operate effectively.

V. Do These Checks Work?

A. *Current Shareholder Initiatives*

When we examine labor's current shareholder initiatives in the light of the above discussion, we can observe how these checks operate in practice.

1. *Traditional Corporate-Governance Proposals Under Rule 14a-8*

Labor corporate-governance proposals under Rule 14a-8 are the most heavily used form of shareholder voting initiative. Our analysis suggests that this is the case for good reasons. First, many pension funds have concluded that corporate-governance reforms are

309. If workers fear that changes of control will adversely affect their future employment, they may become more reserved in their demands.

310. We should also note that, to the extent that the market for corporate control is impeded by antitakeover barriers, such as state antitakeover statutes, this will weaken its ability to act as a check on labor opportunism.

value-enhancing measures and have adopted voting policies in favor of such proposals.[311] Many other shareholders appear to share this view. Second, labor corporate-governance proposals receive the highest levels of voting support of proposals made by any sponsor group.[312] Furthermore, these proposals do not seem to disturb the capital market, as empirical studies show that they have either no negative effects or small positive effects on stock prices. All of these factors tend to indicate that there is little potential for labor opportunism with Rule 14a-8 corporate-governance proposals and thus little need to treat them differently from other shareholders' proposals.

2. *Employment-Related Voting Initiatives*

Labor's 1996 voting initiatives at Albertson's and related companies illustrate a different configuration of these forces. These proposals raised issues that affected labor's interests qua labor, although the proposals themselves were for changes in corporate-governance structures. As a result, they received relatively strong levels of shareholder support.[313] By contrast, when labor makes proposals under Rule 14a-8 that raise only employee-related issues, those proposals obtain less support from shareholders.

While we lack hard evidence about why shareholders vote as they do on these proposals, our analysis above is consistent with the observed voting patterns. For example, we believe that institutional shareholders have voting policies that require them to vote in favor of corporate-governance proposals but not worker-oriented proposals. Thus, for employment-related proposals, these shareholders would need to consider the issues raised in these contests on a case-by-case basis, which will reduce the number of votes automatically cast in favor of these proposals. Second, employment-related

311. *See* Bevis Longstreth, *A Look at the SEC's Adaptation to Global Market Pressures*, 33 COLUM. J. TRANSNATL. L. 319, 320 (1995) (noting that "the role of shareholder democracy in the governance process . . . has expanded from a handful of Don Quixotes in earlier decades to the large, mostly public, pension funds engaged in shareholder activism today"); Romano, *supra* note 77, at 833-36 (reporting the results of a 1990 IRRC survey of voting policies of public and private pension funds); Ryan, *supra* note 99, at 155-56 (reporting the results of a 1985 IRRC survey of voting policies); *supra* note 308. For a detailed description of pension funds' positions on various corporate governance proposals and the rationales therefor, see John Lukomnik, *The New York City Board of Education Pension Fund, New York City Employee's Retirement System, New York City Fire Department Pension Fund and New York City Police Department Pension Fund: Statement of Procedures and Policies for Voting Proxies*, *in* CONTESTS FOR CORPORATE CONTROL 1997, at 221, 256-68 (PLI Corp. L. & Prac. Course Handbook Series No. B-972, 1997).

312. *See* Thomas & Martin, *supra* note 6 (manuscript at 7-8).

313. *See infra* app. tbl.3 (summarizing these data).

shareholder proposals raise the possibility that labor is acting in a self-interested manner, which should make other shareholders less likely to support their actions. Finally, it is difficult to determine what the impact of these proposals would be on financial and other markets because they have not been adopted by many corporations. If labor wants to succeed in getting these proposals adopted, it needs to find a way to document that they have value to the firm and to demonstrate that to other shareholders.

3. *Executive Compensation*

The existing corporate-governance system in American corporations provides only weak oversight over the level of executive-compensation payments.[314] The dramatic increases in executive pay levels over the past five years have made them an easy target for shareholder groups. This explains in part the popularity of many of the "Just Vote No" campaigns.[315] Labor is well positioned to launch a joint program with other shareholders to attack these payments.

Labor may be a better monitor of executive-compensation levels than most shareholders. While labor unions have the same public information regarding executive compensation that is available to shareholders,[316] their obligations at the bargaining table, relative expertise on compensation-related matters, and presence in the firm can be expected to make labor more knowledgeable than the average shareholder about the implications for corporate performance of executive pay levels and the processes used to determine those levels.

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314. *See, e.g.*, GRAEF S. CRYSTAL, IN SEARCH OF EXCESS: THE OVERCOMPENSATION OF AMERICAN EXECUTIVES (1991); Charles M. Elson, *Executive Overcompensation — A Board-Based Solution*, 34 B.C. L. REV. 937, 981 (1993) (suggesting board self-motivation as a solution to stimulating effective board oversight); Roger Lowenstein, *On the Difficulty of Hiring Good Help*, WALL ST. J., Mar. 27, 1997, at C1 (reporting on the overcompensation of CEOs). In recent years, the SEC has become much more aggressive in requiring full disclosure to shareholders of executive-compensation arrangements. *See* THOMAS & DIXON, *supra* note 3, § 7 (containing a complete discussion of the SEC's executive-pay disclosure regulations).

315. *See supra* section III.D.

316. Although an employer is required to furnish the union with information that is relevant to a legitimate collective bargaining need, *see* Emeryville Research Ctr., Shell Dev. Co. v. NLRB, 441 F.2d 880, 883 (9th Cir. 1971), manager and executive compensation, unlike bargaining unit wage and related data, would not be considered presumptively relevant and thus the union would have the burden of justifying its request, *cf.* Brown Newspaper Publg. Co., 238 N.L.R.B. 187 (1978) (relying on the fact that nonbargaining unit personnel were similar to those in the unit in holding that the employer was required to provide compensation information). In addition, there likely would be confidentiality issues raised by an employer facing such a request.

As noted in Part II, unions are well versed in the incentives — or lack thereof — incorporated in most compensation structures used to pay executives. Moreover, when faced with information regarding executive compensation, unions' general knowledge of compensation mechanisms makes them better equipped to decipher reported information and draw conclusions regarding its implications.[317] Unions' knowledge of compensation generally also allows them to understand that a number of systems are not reported in materials distributed to shareholders.

Labor has made use of its knowledge of these issues. For example, on April 10, 1997, the AFL-CIO launched *Executive PayWatch*, a web site on the Internet, as part of an effort to bring issues related to executive compensation to the attention of the public.[318] *Executive PayWatch* allows individuals to compare their own salaries with those of corporate executives of ninety-six firms.[319] The site also provides information on how shareholders can decipher proxy statements and use their proxies and the shareholder-proposal mechanism to encourage change.[320]

Given its position as a potential monitor of corporate management on executive compensation, will labor act in shareholders' best interests in pushing for changes in the existing system? At one level, any time that labor can form a coalition with shareholders to reduce management's share of the corporate income creates the potential for a joint benefit for both groups. Thus, to muster shareholder support for a campaign to reduce executive compensation, labor will need to use its expertise and knowledge regarding com-

317. Concern over shareholders' ability to become informed about executive compensation led the SEC in February of 1992 to announce new reporting requirements. *See Breeden Announces SEC Initiative on Executive Compensation Issues*, 24 Sec. Reg. & L. Rep. (BNA), Feb. 21, 1992. For a discussion of the new requirements, see THOMAS & DIXON, *supra* note 3, § 7.

318. *See Executive PayWatch* (visited Dec. 5, 1997) <http://aflcio.paywatch.org/ceopay>. In addition, the Teamsters' Union has issued its own study of the effectiveness of corporate directors that attaches significant weight to corporate performance and its relationship to executive pay. *See* OFFICE OF CORP. AFFAIRS, INTERNATIONAL BRHD. OF TEAMSTERS, AMERICA'S LEAST VALUABLE DIRECTORS (1997); Dobrzynski, *supra* note 10.

319. *See Executive Paywatch*, *supra* note 318. The site also encourages individuals to: "call on the regulators" to lobby for full disclosure (noting that severance benefits and deferred compensation are not reported); "take it to Congress" and support Representative Sabo's bill that would "cap the business tax deductibility of all executive compensation . . . to 25 times that of the lowest paid full-time worker in the same firm"; and "rally your coworkers and the community." *Id.* It also includes a sample e-mail message to send to senators and representatives. *See id.*

320. *See id.*

pensation to demonstrate how executive compensation systems can negatively affect shareholder value.[321]

Lowering the rate of growth of — or absolute levels of — management compensation risks a reduction in the value of the corporation for all participants, however, if good managers leave the firm to go elsewhere. Management can argue that labor is attacking its compensation levels as a means of creating pressure on the company to accommodate labor interests at shareholders' expense. Unless labor can demonstrate that this is incorrect, many shareholders may choose to support management rather than risk the loss of valuable managerial talent.

B. *Implications of Labor-Shareholder Activism for the Debate over Director Fiduciary Duties*

In Oliver Williamson's well-known article, *Corporate Governance,*[322] he argues that the board of directors of a corporation should have a fiduciary duty only to the company's shareholders. Shareholders need board representation to protect their investment because they are the only "voluntary constituency whose relation with the corporation does not come up for periodic renewal," because their investment is not associated with any particular asset and hence difficult to protect, and because they face a significant risk of having their firm-specific investment expropriated.[323] Other forms of contractual protection, in Williamson's view, are inadequate to safeguard shareholders' interests.

By contrast, Williamson claims that the board of directors should not have a fiduciary duty to other constituencies, such as workers, because those groups have the ability to seek explicit or implicit contractual protections of their rights. Workers can act to protect their firm-specific investments through explicit contracts, such as collective bargaining agreements.[324] Where such explicit contractual protections are unavailable, workers can negotiate implicit contracts with firms to protect their firm-specific investments. Although firms have incentives to renege ex post on these implicit

321. Labor needs to avoid presenting executive compensation solely as an issue of fairness to workers, thereby reflecting the adversarial side of labor-management relations.

322. Oliver Williamson, *Corporate Governance,* 93 YALE L.J. 1197 (1984).

323. *Id.* at 1210.

324. *See id.* at 1208. Labor representation on the board of directors might be necessary for informational purposes to prevent labor agreements from drifting out of alignment. *See id.* at 1208-09.

agreements, reputational considerations may prevent this type of firm opportunism.[325]

Marleen O'Connor has used Williamson's transaction-cost analysis to suggest that boards of directors should be required to consider other interests beyond those of shareholders.[326] In particular, she argues that we need to expand directors' fiduciary duties to consider worker interests explicitly as well as shareholder interests.[327] She claims that labor needs board representation in order to protect its firm-specific investments.[328] O'Connor believes that the firm's reputational interest in protecting workers' implicit contracts gives them inadequate protection.[329] She proposes a mandatory regime of "neutral referee" directors to protect employees from opportunistic conduct by firms.[330]

Our analysis suggests that if unions are successful in mobilizing shareholder support for their voting initiatives, they may be able to get boards to consider labor's interests as part of their processes of considering shareholder interests without any dramatic changes in legal rules. If this is correct, it gives labor another method of seeking to protect labor's firm-specific investments and implicit contracts, as labor and other shareholders press management to keep its word. Furthermore, it suggests that labor qua shareholder should use its monitoring abilities to keep itself and other shareholders advised about board actions that affect workers' firm-specific investments and, more generally, firm value.

The limitations on labor-shareholder activism explored above also suggest the limits on labor's ability to use shareholder activism as a means of protecting its firm-specific investment. This will be easiest when labor can demonstrate that protecting its interests will be value enhancing — or at least value neutral — for all shareholders. This would enable it to marshal enough institutional and other shareholder support to press the board of directors to take specific actions, or at least more generally to consider labor's interests when

325. *See* Jonathan R. Macey, *Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes*, 1989 DUKE L.J. 173, 176 (arguing that nonshareholder groups can best protect their firm-specific investments by negotiating contractual provisions); *cf.* Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 910 (1993) (suggesting that reputational considerations may help to enforce implicit employment agreements).

326. *See* O'Connor, *supra* note 325, at 946-65.

327. *See id.* at 955.

328. *See id.*

329. *See id.* at 911.

330. *See id.* at 955-65.

it acts. This discussion between labor and management could take place using the same informal means of communication enjoyed by other institutional shareholders or, if that is unavailable for labor's use, by more formal methods.

Conclusion

Labor unions are aggressively using their ownership power to push corporate-governance reforms. So far, much of their activity is tactical. Lasting changes in corporate governance can occur if unions develop a more strategic model of their role in corporate governance. A strategic model would require unions to concentrate on areas where their interests coincide with other shareholders and where they can demonstrate that their actions will increase firm value. This requires that labor unions adopt a platform of maximizing long-term growth for shareholders and other stakeholders, as well as for themselves. In particular, unions must convince other shareholders that they are acting in areas where they have an informational advantage about the corporation's and management's operations. If labor can demonstrate to other shareholders that it is using its monitoring advantages to take actions to increase firm value by policing management shirking and reducing the agency costs of equity, then other shareholders will be more willing to follow its lead in future voting initiatives. This opens up the possibility that labor union shareholders could reinvigorate some currently ineffectual corporate-governance systems. These might include the policing of securities fraud and other types of corporate misconduct through the use of existing litigation techniques.

In taking on this monitoring role, however, unions transform themselves as well. They are already becoming sophisticated players in corporate-governance battles. These battles emphasize efficiency and firm value. By aligning themselves with shareholders in these battles, unions inevitably shift from an antagonistic player to a strategically cooperative player in corporate governance.

APPENDIX

TABLE 1

1996 LABOR SHAREHOLDER PROPOSALS

Company	Sponsor	Proposal	Status
Albertson's	Teamsters	Repeal classified board	32.3%
Alumax	Laborers	Repeal classified board	68.6% (p)
Alza	Laborers	Repeal classified board	withdrawn
American Stores	Teamsters	Redeem or vote on poison pill	withdrawn
Baker Hughes	UBCJA	Redeem or vote on poison pill	73.4% (p)
Baltimore Gas & Electric	LongView	Restrict nonemployee director pensions	not in proxy
Bankers Trust NY	Laborers	No director liability exemption	withdrawn
Bausch & Lomb	UBCJA	No director liability exemption	withdrawn
	Operating Engineers	Repeal classified board	not in proxy
Bell Atlantic	Teamsters	Redeem or vote on poison pill	omitted (c-10)
	CWA	Cumulative voting	not in proxy
	CWA-Hammond	Directors/candidates attend annual meeting	24.7%
Boeing	Teamsters	Redeem or vote on poison pill	withdrawn
Cablevision	Service Employees	Confidential voting	withdrawn
Caterpillar	UBCJA	Repeal classified board	49.2%
Chase Manhattan	Teamsters	Redeem or vote on poison pill	withdrawn
Chevron	UBCJA	Redeem or vote on poison pill	not in proxy
Compaq Computer	Teamsters	Redeem or vote on poison pill	omitted (c-10)
Conrail	Service Employees	Redeem or vote on poison pill	withdrawn
Consolidated Natural Gas	LongView	Redeem or vote on poison pill	50.8%
Dow Jones	IAPE	Allow union representative on board	omitted (c-8)
Eastman Kodak	Teamsters	Cumulative voting	27.3%
Fleming	Teamsters	Redeem or vote on poison pill	64.0% (p)
Forest Laboratories	Service Employees	Redeem or vote on poison pill	not in proxy
GTE	IBEW-Langlais	Cap executive compensation	22.4%
	IBEW-Davis	Cap executive compensation	22.1%
General Electric	Teamsters	Restrict nonemployee director pensions	omitted (c-11)
	CWA	Restrict nonemployee director pensions	not in proxy
General Instruments	Service Employees	Repeal classified board [1]	86.2% (p)
Houston Industries	Teamsters	Redeem or vote on poison pill	withdrawn
Kimberly-Clark	UBCJA	Repeal classified board	withdrawn
Kmart	Laborers	Cumulative voting	29.3%
	Teamsters,UNITE	Repeal classified board	43.1%
	Teamsters,UNITE	Restrict nonemployee director pensions	29.8%
	Teamsters,UNITE	Study sale of company	13.0%
Knight-Ridder	Laborers	Redeem or vote on poison pill	39.2%
Lockheed Martin	Operating Engineers	Vote on future poison pills	not in proxy
Louisiana Pacific	LongView	Repeal classified board	43.2%
McGraw-Hill	Laborers	Repeal classified board	withdrawn
Mead	Paperworkers	Repeal classified board	withdrawn
	UBCJA	Vote on future golden parachutes	50.8%
Melville	Laborers	Repeal classified board	withdrawn
Mercantile Stores	LongView	Repeal classified board	30.4%
Merrill Lynch	Laborers	Repeal classified board	32.2%
3M	Teamsters	Reincorporate in Minnesota	2.3%
Mobil	Service Employees	Redeem or vote on poison pill	withdrawn
NorAm Energy	LongView	Vote on future golden parachutes	withdrawn
Panhandle Eastern	OCAW-Miller	Confidential voting	not in proxy
	OCAW-Rule	Redeem or vote on poison pill	not in proxy
	OCAW-Sipe	Vote on future golden parachutes	44.6%
	OCAW-Smith	Repeal classified board	51.0%
	OCAW-Merrill	Repeal fair price	49.3%
Penney (J.C.)	UNITE	Redeem or vote on poison pill	40.6%

Pfizer	Service Employees	Redeem or vote on poison pill	not in proxy
Philip Morris	Operating Engineers	Restrict nonemployee director pensions	withdrawn
Rite Aid	LongView	Redeem or vote on poison pill	[2]
Sears, Roebuck	Teamsters	Separate chair and CEO	withdrawn
Sprint	IBEW	Restrict nonemployee director pensions	34.8%
	CWA	Create shareholder committee	6.6%
SuperValu	LongView	Redeem or vote on poison pill	64.8% (p)
Tenneco	UBCJA	No director liability exemption	withdrawn
	Teamsters	Redeem or vote on poison pill	37.4%
Time Warner	Teamsters	Separate chair and CEO	17.9%
Toys 'R' Us	Teamsters	Confidential voting	not in proxy
Transamerica	Teamsters	Redeem or vote on poison pill	32.2%
Union Pacific	UBCJA	Repeal classified board	withdrawn
Unocal	Service Employees	Use Council of Institutional Investors' board policies	omitted (c-10)
	Teamsters	Separate chair and CEO	withdrawn
Upjohn	Operating Engineers	Restrict nonemployee director pensions	withdrawn
WMX Technologies	Operating Engineers	Prohibit director conflict of interest	30.7%
	Teamsters	Repeal classified board	45.6%
Wellman	UNITE	Redeem or vote on poison pill	44.6%
Weyerhauser	LongView	Redeem or vote on poison pill	52.3% (p)
Wheelabrator Technologies	Operating Engineers	Repeal classified board	17.7%
Woolworth	LongView	Repeal classified board	[3]

[1] This proposal was supported by management.
[2] The company indicated in its SEC filings that this proposal passed, but gave no vote counts.
[3] The annual meeting was held June 13, 1996. Information regarding status was not found.

Legend:

(p)	Passed
CWA	Communication Workers of America
IAPE	Independent Association of Publishers' Employees
IBEW	International Brotherhood of Electrical Workers
Laborers	Laborers' International Union of North America
LongView	Amalgamated Bank of New York LongView Collective Investment Fund
OCAW	Oil, Chemical & Atomic Workers International Union
Operating Engineers	International Union of Operating Engineers
Paperworkers	United Paperworkers International Union
Service Employees	Service Employees International Union
Teamsters	International Brotherhood of Teamsters
UBCJA	Pension funds affiliated with the United Brotherhood of Carpenters and Joiners of America
UNITE	Union of Needletrades, Industrial and Textile Employees (formerly ACTWU)

Source: Checklist of 1996 Shareholder Proposals, *supra* note 114, supplemented with information from companies' 10-Q filings where data on shareholder votes were unavailable at the time the IRRC Bulletin was published. Where votes were added, they were calculated as (for)/(for + against) (abstentions were not included).

We note that there are some inconsistencies between the information contained in the company's proxy statements and that in the IRRC Bulletin. In our tables, we have chosen to use the IRRC data where available in order to maintain consistency.

TABLE 2
1997 LABOR SHAREHOLDER PROPOSALS

Company	Sponsor	Proposal
AT&T	CWA-Irvine	Cumulative voting
Albertson's	Teamsters	Repeal classified board
Amoco	Service Employees	Separate chair and CEO
Ashland	OCAW-Brown	Allow an employee on the board
Baltimore Gas & Electric	LongView	Restrict nonemployee director pensions
Bell Atlantic	CWA-Rucker	Cumulative voting
	Operating Engineers	Cumulative voting
Boise Cascade	Teamsters	Repeal classified board
Caraustar Industries	Paperworkers	Repeal classified board
Caterpillar	UAW-Lazarowitz	Restrict nonemployee director pensions
Chase Manhattan	Teamsters	Separate chair and CEO
Columbia/HCA Healthcare	LongView	Redeem or vote on poison pill
Dayton Hudson	LongView	Redeem or vote on poison pill
DuPont(E.I.) de Nemours	UBCJA	Independent nominating committee
Eastman Kodak	Teamsters	Repeal classified board
Enron	Operating Engineers	Cumulative voting
		Redeem or vote on poison pill (By-
Fleming	Teamsters	Law)
	UBCJA	Repeal classified board
Frontier	CWA	Vote on future golden parachutes
Fruit of the Loom	LongView	Redeem or vote on poison pill
GATX	Paperworkers	Vote on future golden parachutes
General Electric	Teamsters	Limit deferred compensation/OBRA
General Motors	Teamsters	Link director pay to performance
Georgia Pacific	UBCJA	Repeal classified board
Home Depot	Teamsters	Separate chair and CEO
Illinois Tool Works	Paperworkers	Separate chair and CEO
International Paper	UBCJA	Vote on future golden parachutes
Limited	LongView	Link executive pay to overseas labor standards
Merck	UBCJA	Confidential voting
Mobil	Teamsters	No option cash in within 6 mos. of major layoff
Monsanto	UBCJA	Redeem or vote on poison pill
Penney (J.C.)	UBCJA	Restrict nonemployee director pensions
PepsiCo	Teamsters	Limit deferred compensation/OBRA
Philip Morris	Teamsters	Independent compensation committee
Quaker Oats	LongView	Redeem or vote on poison pill
RJR Nabisco	Teamsters	Link director pay to performance
Sears, Roebuck	Teamsters	Repeal classified board
Sprint	CWA-Speight	Cap executive pay to employee pay increase
	IBEW	Restrict nonemployee director pensions
	Teamsters	Repeal classified board
Stone Container	Paperworkers	Limit relatives on the board
TRW	Operating Engineers	Redeem or vote on poison pill
Tenneco	Teamsters	Repeal classified board
Texaco	Teamsters	Repeal classified board
Tribune	Teamsters	Repeal classified board
Union Camp	Paperworkers	Repeal classified board
Unisys	Operating Engineers	Repeal classified board
WMX Technologies	Operating Engineers	Prohibit director conflict of interest
Westinghouse Electric	Operating Engineers	Redeem or vote on poison pill
Weyerhauser	LongView	Redeem or vote on poison pill
Willamette Industries	Paperworkers	Repeal classified board

Legend:

CWA	Communication Workers of America
IBEW	International Brotherhood of Electrical Workers
Laborers	Laborers' International Union of North America
LongView	Amalgamated Bank of New York LongView Collective Investment Fund
OCAW	Oil, Chemical & Atomic Workers International Union

Operating Engineers	International Union of Operating Engineers
Paperworkers	United Paperworkers International Union
Service Employees	Service Employees International Union
Teamsters	International Brotherhood of Teamsters
UAW	International Union, United Automobile, Aerospace & Agricultural Implement Workers of America
UBCJA	Pension funds affiliated with the United Brotherhood of Carpenters and Joiners of America

Source: *Checklist of 1997 Shareholder Proposals, supra* note 109.

TABLE 3

ACTIVITIES OF LOCAL 99R, UNITED FOOD AND COMMERCIAL WORKERS

1996 Season

Company	Proposal	Status
Albertson's	Confidential voting	21.4%
Idaho Power	Confidential voting	14.1%
Pier 1 Imports	Confidential voting	44.6%
Pope & Talbot	Confidential voting	.1%
	Vote on future golden parachutes	not presented
Questar	Confidential voting	37.9%
	Vote on future golden parachutes	22.0%
Tektronics	Repeal classified board	34.3%
	Vote on future golden parachutes	8.8%
	Redeem or vote on poison pill	34.0%

Source: IRRC, 1996 SUMMARY, *supra* note 22, at 4.

1997 Season

Company	Proposal	Notes
Albertson's	Confidential voting	company advised UFCW will not present at meeting [1]
Boeing	Repeal classified board	another identical proposal under 14a-8 in proxy material [2]
Boise Cascade	Repeal classified board	
Heritage Media	Confidential voting	
Pier 1 Imports	Redeem or vote on poison pill	union has indicated it will not independently solicit [3]
Questar	Repeal classified board	no mention in proxy materials that the UFCW local intends to present a proposal [4]
TIS Mortgage		

[1] Albertson's, Inc., Definitive Proxy Statement 29 (Apr. 8, 1997), *available in* EDGAR, Film No. 97,576,512.

[2] Boeing Co., Definitive Proxy Statement (Mar. 14, 1997), *available in* EDGAR, Film No. 97,556,332.

[3] Questar Corp., Definitive Proxy Statement (Apr. 7, 1997), *available in* EDGAR, Film No. 97,575,768.

[4] TIS Mortage Corp., Definitive Proxy Statement (Apr. 23, 1997) *available in* EDGAR, Film No. 97,585,820.

Source: COUNCIL OF INSTL. INVESTORS LETTER, *supra* note 26, at 2; preliminary proxy statements.