MEMORANDUM

TO : Lee B. Spencer, Jr.
John Huber
Linda Quinn

FROM : Bill Morley
Mike Kargula

SUBJECT : Proposed Revision of Rule 14a-8

This memorandum is intended to provide you with our preliminary thoughts on possible approaches to be taken to revise Rule 14a-8. You will find in reading this material that we have not proposed a great many changes in the existing rules. In most instances the problems we are encountering are not problems with the rules, but problems with the staff interpretation of the provisions. As a result, we are suggesting that the Commission release accompanying the proposed changes discuss the interpretations and propose some new interpretations. We would suggest that public comment be sought on these interpretive positions, particularly those interpretations which we intend to change. It must also be noted that unless we adopt one of the alternative suggestions set forth in the final section of this memorandum, the proposed changes will not significantly reduce the staff time required to process shareholder proposals. While it is hoped that the changes will clarify and simplify staff responses, unless we decide to get out of the shareholder business, we will still be receiving several hundred letters a year under Rule 14a-8.

PROPOSED REVISION OF RULE 14a-8

Rule 14a-8(a)

(a) If any security holder of an issuer notifies the issuer of his intention to present a proposal for action at a forthcoming meeting of the issuer's security holders, the issuer shall set forth the proposal in its proxy statement and identify it in its form of proxy and provide means by which security holders can make the specification required by Rule 14a-4(b) [19 CFR 240.14a-4(b)]. Notwithstanding the foregoing, the issuer shall not be required to include the proposal in its proxy statement or form of proxy unless the security holder (hereinafter, the "proponent") has complied with the requirements of this paragraph and paragraphs (b) and (c) hereof:

No changes are proposed for the introductory portion of paragraph (a).

Rule 14a-8(a)(1)

(1) Eligibility. At the time he submits the proposal, the proponent shall be a record or beneficial owner of a security entitled to be voted at the meeting on his proposal, and he shall continue to own such security through the date on which the meeting is held. If the issuer requests documentary support for a proponent's claim that he is a beneficial owner of a voting security of the issuer, the proponent shall furnish appropriate documentation within 10 business days after receiving the request. In the event the issuer includes the proponent's proposal in its proxy soliciting materials for the meeting and the proponent fails to comply with the requirement that he continuously be a voting security holder through the meeting date, the issuer shall not be required to include any proposals submitted by the proponent in its proxy soliciting materials for any meeting held in the following two calendar years.

No changes are proposed in the eligibility provisions of paragraph (a)(1). While there continue to be suggestions from some issuers for some form of holding period or specific shareholding requirements for proponents, we would suggest that such requirements not be proposed. The Staff Report on Corporate Accountability recommended against such requirements. Unless the required amount of shares was placed unreasonably high, most frequent users of the Rule would be able to meet the requirements; accordingly, such a change would do little to lower the number of proposals. Although a minimum holding period might have greater appeal it should be noted that if the timeliness requirement of Rule 14a-8(a)(3) is increased to 120 days, as proposed, proponents will have to be beneficial owners of the issuers securities for approximately 6 months prior to the date of the meeting.

We would intend to include in the release examples of no-action and interpretive letters which set forth staff positions on the various provisions of paragraph (a)(1).

For example:

1. Letter to McGraw Hill, Inc. which addresses the issue of when a proponent becomes a shareholder entitled to submit a proposal.

2. Letters to the Washington Post Company and the New York Times addressing the issue of whether the proponent was a shareholder entitled to vote on the matter at the annual meeting.

3. Letter to Norsul Oil & Mining Ltd. concerning the sale of shares prior to the time of the meeting.

4. Letter to UMC Resources concerning the proponent's obligation to provide documentary proof of his ownership when a good faith effort is made within the 10 business days, and the broker fails to act promptly.

5. Letter to Dresser Industries regarding the issuer's responsibility to notify the proponent that it has 10 business days to respond. (This letter actually came up in connection with the notice requirement in 14a-8(a)(2), but the point is valid in all cases where the proponent is given 10 days to respond).

Rule 14a-8(a)(2)

(2) Notice. The proponent shall notify the issuer in writing of his intention to appear personally at the meeting to present his proposal for action. The proponent shall furnish the requisite notice at the time he submits the proposal, except that if he was unaware of the notice requirement at that time, he shall comply with it within 10 business days after being informed of it by the issuer. If the proponent, after furnishing in good faith the notice required by this provision, subsequently determines that he will be unable to appear personally at the meeting, he shall arrange to have another security holder of the issuer present his proposal on his behalf at the meeting. In the event the proponent or his proxy fails, without good cause, to present the proposal for action at the meeting, the issuer shall not be required to include any proposals submitted by the proponent in its proxy soliciting materials for any meeting held in the following two calendar years.

In Release 34-17517 the Commission proposed two amendments to paragraph (a)(2)

> (2) Notice. The proponent shall notify the issuer in writing of his intention to appear personally at the meeting to present his proposal for action. Such notice shall include the proponent's name, address and the number of shares of the voting security of the issuer which he owns. The proponent shall furnish the requisite notice at the time he submits the proposal, except that if he was unaware of the notice requirement at that time he shall comply with it within 10 business days after being informed of it by the management. If the proponent after furnishing in good faith the notice required by this provision, subsequently determines that he will be unable to appear personally at the meeting, he shall arrange to have [another security holder of the issuer] an individual designated as his proxy who is qualified under state law present his proposal on his behalf at the meeting. In the event the proponent or his proxy fails, without good cause, to present the proposal for action at the meeting, the issuer shall not be required to include any proposals submitted by the proponent in its proxy soliciting materials for any meeting held in the following two calendar years.

The amendments would require that (1) the proponent notify the issuer of the number of shares of its stock which he holds at the time the proposal is submitted and (2) the proponent would not have to arrange for another shareholder to represent him if he is unable to attend the meeting to present the proposal, but would only have to arrange for someone who is qualified to act as his proxy under state law.

A quick review of the comments already received on these changes indicates that there was very little discussion on the first point and that the commentators are split about evenly on the second proposed change. We would suggest that we repropose these changes and solicit further comment. The commentators that are opposed to the change argue that it is improper to open up their meetings to nonshareholders. In the long run we think we should stay with this change because it is difficult to argue with the fact that under state law a proxy does not have to be a shareholder. In addition, this change is merely codifying staff practice.

While not recommending any other changes in paragraph (a)(2), we would recommend that we announce in the release a change in one of our interpretative positions. In a 1978 letter to Atlas Corporation, the Division took the position on an Evelyn Davis proposal that attendance at another meeting was good cause for failure to present a proposal, so long as an attempt was made to get someone else to attend the meeting. We think that position is wrong and should be changed. The position should be that under the two meeting circumstance, a proponent will have to get someone else to present the proposal, and if the proponent fails to get a proxy, then that issuer may omit proposals for the next two years.

This section of the release should also discuss the Dresser Industries letter which indicates that the 10 business day requirement must be specifically set forth in the issuer's correspondence with the proponent. This letter also discusses the question of whether a proponent is required to receive such notice if he is a frequent user of the Rule and therefore should be aware of the notice requirement.

Rule 14a-8(a)(3)

(3) Timeliness. The proponent shall submit his proposal sufficiently far in advance of the meeting so that it is received by the issuer within the following time periods:

(i) Annual Meetings. A proposal to be presented at an annual meeting shall be received at the issuer's principal executive offices not less than 90 days in advance of the date of the issuer's proxy statement released to security holders in connection with the previous year's annual meeting of security holders in connection with the previous year's annual meeting of security holders, except that if no annual meeting was held in the previous year or the date of the annual meeting has been changed by more than 30 calendar days from the date contemplated at the time of the previous year's proxy statement, a proposal shall be received by the issuer a reasonable time before the solicitation is made.

(ii) Other Meetings. A proposal to be presented at any meeting other than an annual meeting shall be received a reasonable time before the solicitation is made.

NOTE: In order to curtail controversy as to the date on which a proposal was received by the management, it is suggested that proponents submit their proposals by Certified Mail-Return Receipt Requested.

We would propose a change from 90 days to 120 days for the timely submission of proposals. A number of commentators on Release 34-17517 addressed issues outside of the specific changes proposed. The most frequently raised suggestion was a change in the 90 day requirement. The reason for the change is that with the increased number of proposals being submitted and the longer lead times necessary for printing proxy materials many companies have as little as 10 days between the last date for submission of proposals and the filing date required under Rule 14a-8(d) for objections to proposals. The staff has seen evidence of this problem as shown by an increase in the number of requests for a waiver of the 50 day filing requirement in 14a-8(d). In addition, with the increased number of letters the staff is having a more difficult time in meeting its deadlines for responses. By increasing the issuer's time by 30 days part of that burden would be reduced. In addition, we would propose a change to 60 days in Rule 14a-8(d) giving the staff more time as well. This should help to alleviate the problems with printing and mailing dates. Finally, as long as this date is well publicized in proxy statements pursuant to Rule 14a-5(f), proponents should not be inconvenienced. There would of course have to be a delayed phase in implementing this amendment to the rule so that it would not affect meetings during the Spring of 1983.

Again, we would propose to provide summaries of certain significant interpretive letters relevant to timeliness in the release.

1. The Union Oil of California letter which sets forth the procedure for counting the number of days.

2. The AMAX letter which indicates that for shareholder proposals where the last day for submission is a Saturday or Sunday, the proposal must be received on the preceding Friday.

3. Certain letters which discuss the concept of "reasonable time" in advance of the meeting for those instances where a meeting date has been changed.

Rule 14a-8(a)(4)

(4) Number and Length of Proposals. The proponent may submit a maximum of two proposals of not more than 300 words each for inclusion in the issuer's proxy materials for a meeting of security holders. If the proponent fails to comply with either of these requirements, or if he fails to comply with the 200-word limit on supporting statements mentioned in paragraph (b), he shall be provided the opportunity by the issuer to reduce, within 10 business days, the items submitted by him to the limits required by this rule.

In Release 34-17517, the Commission proposed an amendment to paragraph (a)(4)

> ▶ (4) Number and Length of Proposals. The proponent may submit a maximum of two proposals and an accompanying supporting statement for each for inclusion in the issuer's proxy materials for a meeting of security holders. If the proponent submits more than two proposals, or if he fails to comply with the 500 word limit mentioned in paragraph (b) of this section, he shall be provided the opportunity to reduce, within 10 business days, the items submitted by him to the limits required by this rule.◀

The purpose of the amendment was to change the current procedure of permitting proposals of 300 words and supporting statements of 200 words to allow the proponent to use the 500 total words in any combination that he wished.

With limited exception, the public comment on this change has been favorable. The only negative reactions suggested that this would cause proponents' submissions to be more lengthy. These comments suggest that the commentators did not understand that there was no change in the overall word limitation. I would suggest that we try to clarify this point and request additional comment.

Certain commentators on Release 34-17517 and in the Corporate Governance proceedings suggested that this provision be amended to reduce the number of proposals permitted from two to one. This would be one method of reducing the total number of proposals submitted each year. A review of the contested proposals received in the current proxy season suggests that such a change would have reduced the number of proposals by about 25%. However, we do not feel that there is any great need for this change at the present time particularly in view of the changes which we are proposing in some of the substantive provisions of the rule.

We would like to include in the release discussions of two current interpretive letters addressing the issue of attempts by proponents to avoid the two proposal rule. In those letters to Texas Instruments and Trans World Corporation the staff prevented abuses of the existing rule where proponents sought to include six and eight proposals, respectively.

Rule 14a-8(b)

(b) If the issuer opposes any proposal received from a proponent, it shall also, at the request of the proponent, include in its proxy statement a statement of the proponent of not more than 200 words in support of the proposal, which statement shall not include the name and address of the proponent. The statement and request of the proponent shall be furnished to the issuer at the time that the proposal is furnished, and the issuer shall not be responsible for such statement. The proxy statement shall also include either the name and address of the proponent or a statement that such information will be furnished by the issuer or by the Commission to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor. If the name and address of the proponent are omitted from the proxy statement, they shall be furnished to the Commission at the time of filing the issuer's preliminary proxy material pursuant to Rule 14a-6(a) [17 CFR 240.14a-2(a)].

In Release 34-17517 the Commission proposed amendments to paragraph (b)

> (b) A proposal and its supporting statement, in the aggregate, shall not exceed 500 words. The supporting statement shall be furnished to the issuer at the time that the proposal is furnished, and the issuer shall not be responsible for such statement. The proxy statement also shall include the name and address of the proponent and the number of shares of of the voting security of the issuer held by the proponent.

The changes would (1) permit the proponent to include a supporting statement whether or not the issuer opposed the proposal; (2) allow the proponent along with paragraph (a)(4) to use 500 words in any combination that he wished; and (3) require the issuer to include the name and address of the proponent, as well as the number of shares held by the proponent in the proxy statement.

The public comment on the first two changes was largely favorable, but the comment on the third change was for the most part negative. While we think that we should repropose these changes, we would suggest the following alternative if the third amendment is not to be adopted:

> (b) A proposal and its supporting statement, in the aggregate, shall not exceed 500 words. The supporting statement shall be furnished to the issuer at the time that the proposal is furnished, and the issuer shall not be responsible for such statement. The proxy statement shall also include either the name and address of the proponent or a statement that such information will be furnished by the issuer to any person, orally or in writing, as requested, promptly upon the receipt of any oral or written request therefor.

It can be noted that we have suggested that the rule be changed to remove the option of having the staff provide the required information. While there have been no problems providing the information in those cases where the proposal was contested, it has often been difficult to answer such requests when the proposal is uncontested. Often the proxy material containing the uncontested proposals has not been reviewed and all of the materials have been sent to the files before the request arrives. In those cases, getting the files and the names has proved difficult. With current staff levels this is a minor problem which can be eliminated.

<u>Rule 14a-8(c)(1)</u>

(c) The issuer may omit a proposal and any statement in support thereof from its proxy statement and form of proxy under any of the following circumstances:

(1) If the proposal is, under the laws of the issuer's domicile, not a proper subject for action by security holders.

NOTE. A proposal that may be improper under the applicable state law when framed as a mandate or directive may be proper when framed as a recommendation or request.

We do not propose to make any change to paragraph (c)(1). While complaints are heard from time to time that the note to the Rule and the recommendation format have made (c)(1) unusable, we continue to believe that most proposals in recommendation format are proper subjects for shareholder action. What we would suggest is to provide some examples of instances where proposals have been excluded under paragraph (c)(1) even where the proposals were recommendations.

One problem area that the staff has had with paragraph (c)(1) is the situation where both the proponent and the issuer provide opinions of counsel on state law provisions and those opinions differ. Where possible the staff has tried to make a determination, but in some situations we have declined to express a view because of the differing interpretations of state law.

14a-8(c)(2)

(2) If the proposal would, if implemented, require the issuer to violate any state law or federal law of the United States, or any law of any foreign jurisdiction, to which the issuer is subject, except that this provision shall not apply with respect to any foreign law compliance with which would be violative of any state law or federal law of the United States;

We also do not propose to make any change in paragraph (c)(2). We have received few complaints relating to this section and the provisions is infrequently relied upon by issuers. As with (c)(1), the problems that arise involve the lack of staff expertise on the statutory provision cited. With good opinions of counsel this is not too great a problem, but with conflicting legal opinions it is a problem. We feel that the release should emphasize the need for a good legal opinion from anyone who wishes to rely on this provision.

Rule 14a-8(c)(3)

(3) If the proposal or the supporting statement is contrary to any of the Commission's proxy rules and regulations, including Rule 14a-9 [17 CFR 240.14a-9], which prohibits false or misleading statements in proxy soliciting materials;

We would not propose to make any changes in this provision. We would, however, like to reiterate the request made in Release 33-6253 and some of our letters that issuers avoid frivolous objections and concentrate on significant points under paragraph (c)(3).

One additional issue that we believe should be raised is that this paragraph is only available where the proposal itself would be contrary to the proxy rules and not where the proponent's conduct may have violated the proxy rules in some way. The latter problem may appropriately be dealt with in other ways, but not through omission of the proposal under paragaph (c)(3).

One complaint which is occasionally voiced by issuers in connection with this provision is that the staff too frequently permits proponents the opportunity to amend misleading statements included in the proposal. Companies would prefer the omission of any material judged to be misleading. In our view, the subjective nature of what may or may not be misleading would suggest that such an approach would be inappropriate. The problem associated with amendments, the time involved, should be somewhat alleviated if we increase the time available to the staff to review letters under Rule 14a-8(d).

Rule 14a-8(c)(4)

(4) If the proposal relates to the enforcement of a personal claim or the redress of a personal grievance against the issuer or any other person;

We would recommend that paragraph (c)(4) be amended by adding the following clause:

> "or if the submission of the proposal involves an abuse of the shareholder process."

Beginning with the Ingersol-Rand Co. letter in 1978, the staff has from time to time extended the reach of the specific language of existing paragraph (c)(4) by applying the abuse of process test. On several occasions commentators have expressed the view that it is inappropriate to apply such a test because it is not set forth in Rule 14a-8. Accordingly, it would seem that this is a good time to codify the position.

In addition to amending the paragraph, we would suggest that the release should include a discussion and examples of the tests for exclusion under Rule 14a-8(c)(4) which the staff has applied over the years.

First, we would set forth the basic test that requires the Company to demonstrate a direct relationship between the subject matter of the proposal and the personal grievance. The second approach to be discussed would be the "one of many tactics" standard which came out of the 1979 letters relating to the Synanon proposals. These letters permit exclusion even where the proposal might be of interest to all security holders because the proponent is using the proposals as one of many tactics to redress a grievance. Another example of this type of approach is the letters to Armco regarding a proposal submitted by Evelyn Y. Davis. The third approach we would discuss involves the abuse of process concept established in the letters to Ingersol-Rand and Cummings, Inc. Both of these letters involve the threat to submit proposals if the companies would not buy back the proponent's securities.

There does not appear to be any great sentiment for any other major changes in paragraph (c)(4). In fact, issuers seem content to provide the staff with a great volume of facts designed to establish the existence of a personal grievance. It is the staff that is finding the provision difficult to deal with. We are faced with lengthy factual submissions from issuers and proponents pertaining to the claimed grievance. In this area more than any other we begin to function like a court as a trier of fact. Because of these difficulties, we would suggest the Commission announce in the release that the staff will no longer express a view with respect to the applicability of the exclusion provided by Rule 14a-8(c)(4). This position would be based upon the premise that determinations in this area are almost exclusively factual and that the staff is not in a position to have all the facts necessary to make a determination. This approach was taken in a number of instances during the past proxy season, notably with Evelyn Davis proposals to Bendix, AT&T, Eastern and Bristol Myers. It should be noted that with the exception of AT&T, all of these companies eventually included the proposal.

We realize that this position will not be popular with either issuers or proponents, but it will save significant staff time because letters under paragraph (c)(4) have been the most difficult problem in the administration of Rule 14a-8 during this past proxy season.

Rule 14a-8(c)(5)

(5) If the proposal deals with a matter that is not significantly related to the issuer's business;

While we do not propose to change this paragraph, that conclusion is a very difficult one. Since the reversal of the so called 1% test in 1978 there have been complaints that there is no objective test for exclusions under paragraph (c)(5) and that that provision no longer provides a viable basis for excluding proposals. As a result, issuers have frequently suggested that the staff should revise the rule to specifically provide that proposals which are not economically significant may be omitted, and to establish an objective test for economic significance. The problem with that approach is that it ignores the entire history of Rule 14a-8 and the fact that a number of subjects which are entirely proper for shareholder proposals would be omitted because they cannot be accounted for in economic terms. This question was actually considered in connection with the 1976 amendments even before the "1% test" controversy arose.

In Release 34-12999, the Commission indicated that a solely economic test was inappropriate because "there are instances in which the matter involved in a proposal is significant to an issuer's business, even though such significance is not apparent from an economic view-point." The Commission did, however, go on to say that it "recognized that there are circumstances in which economic data may indicate a valid basis for omitting a proposal under this provision."

As a matter of fact, in the last two proxy seasons there have been a number of instances where we have issued no action letters based on the limited activity the company had in the area raised by the proposal. We would, of course, identify those letters in order to provide some guidance to the public.

We would also suggest that the Commission announce an objective economic test that companies might meet as a first step towards exclusion under paragraph (c)(5). We would propose that the Commission indicate that if the issuer showed that the matter involved in the proposal relates to operations which account for less than 1% of the issuer's gross revenues, gross income and assests for the most recent fiscal year then the proposal could be omitted, as long as it did not involve those traditional subjects dealing with stockholder relationships with management or proposals relating to ethical issues. It may be that this test should also include a minimum figure, say $1 million, for each of these catagories so that large companies would not be able to meet the test in all circumstances just because of their size. This is a point frequently raised by proponents' representatives when opposing an economic test.

This approach would not satisfy those persons looking for a totally objective test, but we are unable to conclude that a totally objective test is feasible. The test would at least provide a bench mark for the economic criteria to be used in considering the availability of paragraph (c)(5).

<u>14a-8(c)(6)</u>

(6) If the proposal deals with a matter that is beyond the issuer's power to effectuate;

We do not intend to make any changes in this provision. This paragraph is seldom used and has received little comment over the years.

<u>14a-8(c)(7)</u>

(7) If the proposal deals with a matter relating to the conduct of the ordinary business operations of the issuer;

We would suggest that the wording of this paragraph remain the same. We would, however, suggest that the release discuss the approach to be used by the staff in interpreting this provision. Our recommendations on this matter would be similar to the approach suggested in the <u>Staff Report on Corporate Accountability</u>. In fact much of the following discussion comes from memoranda prepared by Donna Middlehurst in January 1981.

We would attempt to establish a clearer distinction between proposals which involve "broad policy" considerations and those involving day to day operations. This would be done by providing numerous examples of each type of proposal. It is likely that the approach would actually narrow the scope of those proposals which could be omitted under paragraph (c)(7). At the same time, however, we would announce the recission of the existing policy of allowing the inclusion of all proposals that are framed as a request for a special report, special committee, or by-law amendment. Many of these proposals will still be included because they relate to policy matters, but a significant number will also be rejected because they involve day to day matters. (This change would be particularly effective in dealing with Evelyn Davis proposals, but not so effective on the proposals submitted by religious groups).

One subject that the Staff Report particularly highlighted was proposals relating to executive compensation. We are proposing that an approach similar to that taken on dividend proposals be adopted. That approach would involve a determination that proposals relating to compensation would not be excludable under paragraph (c)(7), but we would suggest that paragraph (c)(13) be expanded to indicate that proposals relating to specific amounts of compensation be excludable. This interpretation would increase the number of proposals that companies would be required to include, but a lot of the existing proposals would still be omitted under proposed rule 14a-8(c)(13). In addition, a large number of compensation proposals involve individual shareholder complaints relating to their pension benefits. Those proposals in all likelihood would be excludable under paragraph (c)(4).

The proposed approach will not reduce the staff's workload on shareholder proposals and it will not alleviate the fact that decisions under this paragraph will continue to involve subjective judgments. We would, however, hope that this approach will provide greater certainty as to how the staff will interpret the paragraph in the future.

14a-8(c)(8)

(8) If the proposal relates to an election to office;

We would suggest that the wording of paragraph (c)(8) be left in its current form. In accordance with current practice and the suggestion in the Staff Report on Corporate Accountability, we intend to make it clear in the release that this provision is not available for the omission of proposals that recommend the establishment of particular voting procedures or requirements for nominations, as long as such proposals are drafted in such a way that they would not disrupt the election to take place at the meeting where the proposals are to be voted upon.

14a-8(c)(9)

(9) If the proposal is counter to a proposal to be submitted by the issuer at the meeting;

This is another paragraph of the rule that is not frequently used or commented upon. Accordingly, we do not propose any changes. One suggestion which is raised from time to time, is that a proponent who submits a counter proposal should be permitted to have his supporting statement used even if the proposal is omitted. The staff has opposed that position in the past and we continue to oppose it because the management is required by the proxy rules to provide all of the information that is necessary for the shareholders to make an informed decision. Opposing statements in these situations which generally arise in connection with mergers and acquisitions rarely contain substantive reasons why the transaction should not be completed. Rule 14a-7, however, is available to those proponents who wish to make arguments against such transactions.

Rule 14a-8(c)(10)

(10) If the proposal has been rendered moot;

We do not intend to propose any change in the wording of this paragraph. We would intend to emphasize once again that in order for a proposal to be moot the company must be doing or intend to do exactly what the proposal requests. It has been suggested that we should go to a test of permitting the exclusion of proposals where the company is doing substantially what the proponent asks. We would recommend that such a test not be applied. We already have enough trouble with tests based on "significantly" and "substantially" without increasing the number of situations where we have to make subjective judgments. The provision as interpreted may limit its usefulness, but at least everyone has a good idea of how it will be interpreted.

One suggestion for a change in the applicability of paragraph (c)(10) would permit the exclusion of recommendation proposals where the company indicates that its Board of Directors has considered the proposed action and voted not to take such action. While this approach has some appeal, we would point out that the Board's vote might be significantly different if the proposal were voted on by the shareholders and a significant percentage of the shareholders favored the action.

Rule 14a-8(c)(11)

(11) If the proposal is substantially duplicative of a proposal previously submitted to the issuer by another proponent, which proposal will be included in the issuer's proxy material for the meeting;

This provision is used infrequently and we believe that it should be retained in its present form. We would emphasize in the release, however, that the provision is not intended to be used in those situations where an identical proposal is submitted by several cosponsors. That is the only interpretative problem we have encountered since the provision was adopted.

Rule 14a-8(c)(12)

(12) If substantially the same proposal has previously been submitted to security holders in the issuer's proxy statement and form of proxy relating to any annual or special meeting of security holders held within the preceding 5 calendar years, it may be omitted from the issuer's proxy materials relating to any meeting of security holders held within 3 calendar years after the latest such previous submission:

PROVIDED, That -
(i) If the proposal was submitted at only one meeting during such preceding period, it received less than 3 percent of the total number of votes cast in regard thereto; or
(ii) If the proposal was submitted at only two meetings during such preceding period, it received at the time of its second submission less than 6 percent of the total number of votes cast in regard thereto; or
(iii) If the prior proposal was submitted at three or more meetings during such preceding period, it received at the time of its latest submission less than 10 percent of the total number of votes cast in regard thereto; and

At the present time this provision of Rule 14a-8 is perhaps the most controversial. This controversy stems from the existing staff interpretation of the phrase "substantially the same proposal" and the tactics of the church group proponents taking advantage of this interpretation by making minor changes in proposals from year to year to avoid the applicability of the provision.

Historically the staff has interpreted the phrase "substantially the same proposal" in a very restrictive manner. Certain proponents have taken advantage of that position to repeat proposals dealing with the same subject matter by making relatively minor changes in the proposal. In 1976, the Commission proposed the revision of the provision to allow the omission of a proposal that involved "substantially the same subject matter" as a prior proposal that failed to receive the percentage of votes in its last submission. After extensive public comment the Commission decided not to adopt the proposed change.

The Commission's decision in that regard was based on three factors: (1) that abuses of the existing provision have been rare; (2) that the new standard would be impossible to administer because of the subjective determinations required; and (3) that it would unduly constrain shareholder sufferage because of its possible "umbrella" effect (i.e., it would omit proposals that had only a vague relation to the subject matter of a prior proposal).

The Commission did express concern about the possible abuse of Rule 14a-8(c)(12). As a result, a second test for exclusion was established. That text would permit the staff to issue a no action letter for the omission of a proposal which, although not substantially the same as any one proposal submitted in a prior year, is composed essentially of the elements of two or more proposals that were submitted for a vote in prior years and failed to receive the percentage of the total vote specified in the rule.

At the current time, we are seeing more and more abuses of the existing provision. The remaining two reasons for not going to "substantially the same subject matter" test enunciated by the Commission in 1976, however, remain valid. It should be pointed out that we have been creating an ever increasing body of interpretations under the alternative test. More and more companies are successful in using this approach.

In our view there are three possible approches to revising the existing application of Rule 14a-8(c)(12). First, we could once again propose a "same subject matter" revision to the rule. The main drawback to this approach is that it would be more difficult for the staff to interpret because of the increase in subjective judgments. Second, we could accomplish very much the same result by merely announcing that the staff will interpret the existing language "substantially the same proposal" more liberally. This approach would create the same problems of subjective interpretation as the first suggestion. The third possibility would be to raise the 3% - 6% - 10% levels in the existing rule to something like 5% - 8% - 12%. While we do not have any specific data to indicate that such a change would significantly reduce the number of repeat proposals, our intuitive reaction is that that would be the case. This final approach would be the most easily administered. This approach would, however, be the most controversial with proponents. The 5% lower level threshold is partially supportable by information provided by proponents' representatives (Professor Neuhauser and Swartz) who point out that it is at the 5% to 7% level that management will tend to alter its policies in response to proposals.

While it is clear that some revision of paragraph (c)(12) is needed, we do not have a specific choice among the three alternatives suggested. Whichever approach is selected we would propose to provide a discussion of the positions we have expressed with respect to the alternative "same elements" test.

14a-8(c)(13)

(13) If the proposal relates to specific amounts of cash or stock dividends;

As indicated in connection with paragraph (c)(7), we would propose to amend Rule 14a-8(c)(13) to read:

> "If the proposal relates to specific amounts of cash or or stock dividends, or specific levels of executive compensation."

The release would indicate that this provision would also be applicable to formulas for dividend payments or executive compensation.

14a-8(d)

(d) Whenever the issuer asserts, for any reason, that a proposal and any statement in support thereof received from a proponent may properly be omitted from its proxy statement and form of proxy, it shall file with the Commission, not later than 50 days prior to the date the preliminary copies of the proxy statement and form of proxy are filed pursuant to Rule 14a-6(a), or such shorter period prior to such date as the Commission or its staff may permit, five copies of the following items: (1) the proposal; (2) any statement in support thereof as received from the proponent; (3) a statement of the reasons why the issuer deems such omission to be proper in the particular case; and (4) where such reasons are based on matters of law, a supporting opinion of counsel. The issuer shall at the same time, if it has not already done so, notify the proponent of its intention to omit the proposal from its proxy statement and form of proxy and shall forward to him a copy of the statement of reasons why the issuer deems the omission of the proposal to be proper and a copy of such supporting opinion of counsel.

As indicated earlier, we would propose the amendment of this provision to indicate that the company must file with the Commission 60 days prior to the date for filing the preliminary proxy materials. This change would provide the staff more time to deal with the ever increasing workload of contested shareholder proposals.

Rule 14a-8(e)

(e) If the issuer intends to include in the proxy statement a statement in opposition to a proposal received from a proponent, it shall, not later than ten calendar days prior to the date the preliminary copies of the proxy statement and form of proxy are filed pursuant to Rule 14a-6(a), or, in the event that the proposal must be revised to be includable, not later than five calendar days after receipt by the issuer of the revised proposal, promptly forward to the proponent a copy of the statement in opposition to the proposal.

In the event the proponent believes that the statement in opposition contains materially false or misleading statements within the meaning of §240.14a-9 and the proponent wishes to bring this matter to the attention of the Commission, the proponent should promptly provide the staff with a letter setting forth the reasons for this view and at the same time promptly provide the issuer with a copy of such letter.

We would also propose a change in the 14a-8(e) filing deadlines. It is suggested that such materials be provided to shareholders 15 days in advance as opposed to 10 days. Some companies have complained of an inability to meet the existing deadline because of delays in staff letters concerning contested proposals. This problem should be alleviated with the 60 day change in Rule 14a-8(d). We have also received complaints from proponents that the current 10 day provision does not give them sufficient time to notify the staff of any problems in opposition statements. The proposed 5 day change should also alleviate that problem

Alternative Proposals

It is our intention to include in the release certain alternative approaches to dealing with shareholder proposals. The intention would be to solicit public comment on those alternative approaches as well.

The first alternative would be to suggest that the staff adopt the proposed changes and interpretations of Rule 14a-8, but to indicate that the staff will no longer respond with no action letters to companies who wish to contest the inclusion of a proposal. The release would indicate that the rule would set forth grounds for exclusion, but that disputes as to the applicability of a particular provision would be settled in the courts. Such litigation would be instituted by the proponent or possibly by the Commission. This approach would have the salutary effect of getting the staff out of the business of dealing with the vast majority of shareholder proposals. It should be noted, however, that neither issuers nor proponents are liable to endorse such an approach.

The second alternative approach would be to set forth Commissioner Longstreth's proposed revision. The approach would also get the staff out of the shareholder proposal area, but is liable to have even less appeal for issuers and proponents.