

Article Reprint

IROs Monitoring 2008 Shareholder Proposals May Be Seeing 2009 Critical Issues for Their Companies

By Lois Yurow

June 2008

INVESTOR RELATIONS *update*

EDITOR

Hank Boerner

ASSISTANT EDITOR AND PRODUCTION MANAGER

Melissa Jones

COPY EDITOR

Patricia Reuss, *Write-for-You*

EDITORIAL ADVISORY BOARD

Valerie Haertel David Olson
Linda Kelleher Brian Rivel
Michelle Levine Maureen Wolff-Reid
Peg Lupton Bill Walkowiak

DIRECTORS

Bina Thompson, *Chair*
K. Blair Christie Catherine Mathis
Derek Cole Nicole McIntosh
Sally Curley Jeff Morgan
Don De Laria David Prichard
Carol DiRaimo Elizabeth Saunders
Geoffrey G. Galow Douglas Wilburne
Barbara Gasper Bradley Wilks
Jenny R. Kobin Mona Zeehandelaar
Ian Bacque, *CIRI Representative*

IR Update is published monthly by the National Investor Relations Institute as a service to its members. Annual subscriptions are available to nonmembers: \$175. ISSN 1098-5220 © 2008 by the National Investor Relations Institute. All rights reserved. Web site: www.niri.org. Reprint permission granted by NIRI.

FOR SUBSCRIPTIONS OR CHANGE OF ADDRESS, CONTACT:

NIRI-*IR Update*, 8020 Towers Crescent Drive, Suite 250, Vienna, VA 22182,
Phone: (703) 506-3570, FAX: (703) 506-3571, e-mail: amumeka@niri.org
Annual e-subscriptions for nonmembers: \$75

ADVERTISING:

Scott Oser, Advertising consultant, Phone: (301) 279-0468, e-mail: soser@niri.org

PLEASE SEND QUERIES, SUBMISSIONS AND REPRINTS REQUESTS TO:

Melissa Jones, Manager, Marketing Communication, Phone: (703) 462-2207,
e-mail: mjones@niri.org.

REPRINT FEES PER ARTICLE:

Electronic copy — Adobe Acrobat PDF file

Authors only: \$75, Members: \$200,

Nonmembers: \$300

Web posting or e-mail distribution: \$500

Hard copies: Quantity under 10: \$10/copy

Quantities 10–100: \$5/copy

An estimate will be provided
for quantities over 100. All prices are
subject to a signed agreement.



BY LOIS YUROW

A flac shareholders got an advisory vote on executive compensation May 5th and the Earth didn't stand still! That was probably the most notable event of the 2008 proxy season — at least so far — but IROs should look at the big picture. Your company may not have received any shareholder proposals this year, but proposals submitted to other companies and the responses they generate can provide insight into the minds of your investors.

While the 2008 peak proxy season voting outcomes remain fresh in mind, this article looks at the recurring themes as well as the new ideas that shareholders raised. We also consider whether a recent Department of Labor advisory

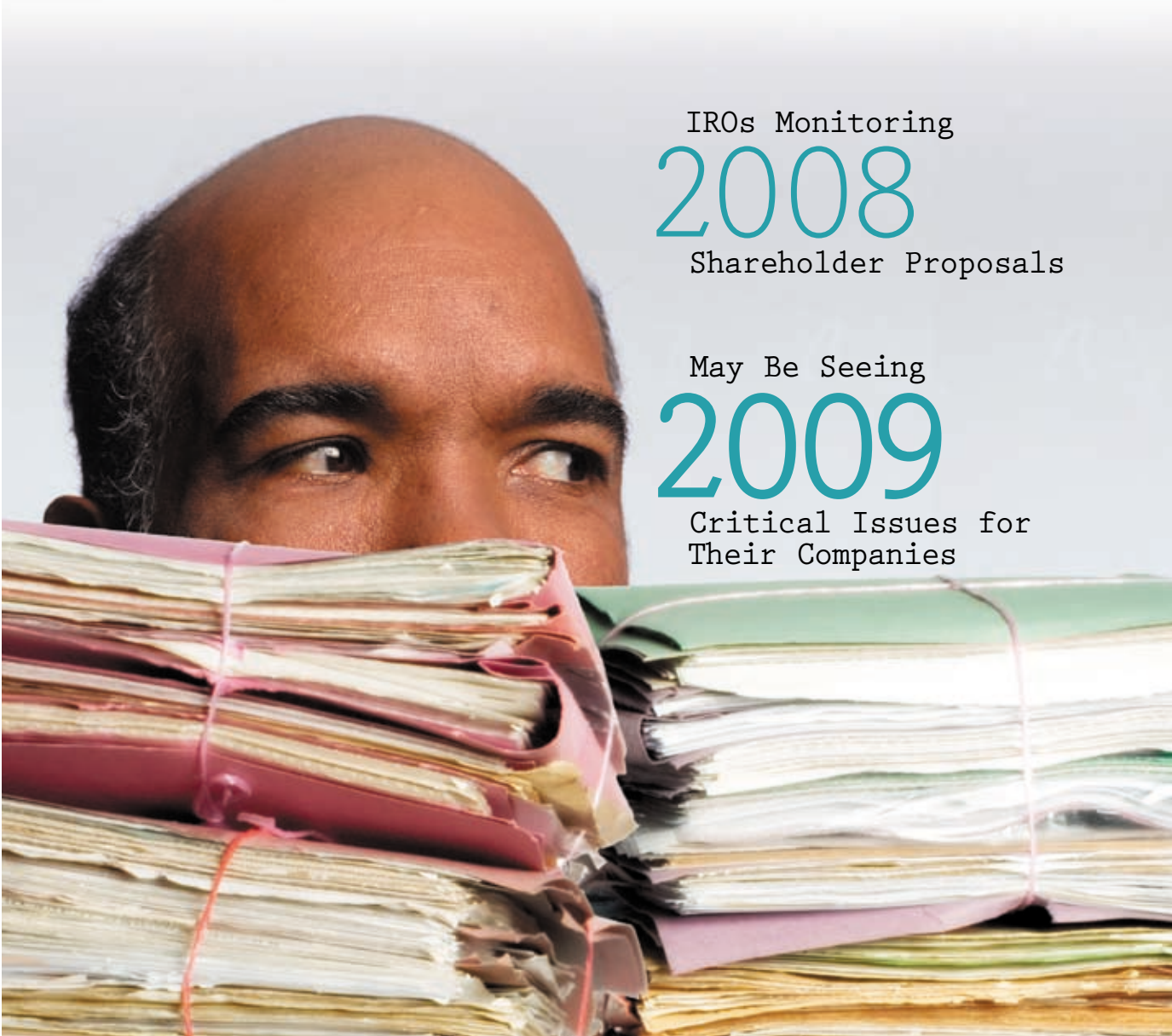
opinion will constrain the advocacy work of union pension plans, which are active sponsors of shareholder proposals.

What is a “shareholder proposal?”

A shareholder proposal is “[a] recommendation or requirement that the company ... take action.” Most shareholder proposals are advisory: they express the shareholders’ “wishes” or recommendations. Proponents rarely seek more force because, as the SEC has explained, “some proposals are not considered proper under state law [and can be excluded from the company’s proxy] if they would be binding on the company.”



Lois Yurow



IROs Monitoring 2008 Shareholder Proposals

May Be Seeing 2009 Critical Issues for Their Companies

Issues — Old favorites

Some issues never lose traction; many companies saw repeat proposals this season. IROs at those companies may wonder how long the dispute can last. The short answer is: a long time. If a proposal garners the support prescribed by SEC Rule 14a-8, the proponents can submit it indefinitely. (The required support varies, but a 10% vote always can keep an issue alive.)

So, what proposals keep cropping up? Some are outliers. This is the eleventh year that ExxonMobil shareholders will vote on a proposal to prohibit employment discrimination based on “gender identity.” GE shareholders considered (for the third time) — and resoundingly rejected — a proposal seeking disclosure about how the company formulates its climate policy and the costs and benefits (to GE) of the company’s support for regulations designed to reduce global warming.

Most recurring proposals are more traditional. Shareholders want stricter and more defined criteria for executive compensation, and performance-based (rather than time-vested) equity compensation. They want boards declassified, political contributions disclosed, conflicts of interest eliminated, and greenhouse gas emissions reduced.

SHAREHOLDERS ARE SUBMITTING PROPOSALS ASKING COMPANIES TO “ENGAGE” PROPONENTS OF ANY PROPOSAL THAT ACHIEVES A MAJORITY VOTE.

“Say on Pay” — the Big Issue

But the big issue this year is “say on pay”— proposals seeking an advisory shareholder vote on executive compensation. There were over 40 say on pay proposals introduced in 2007, garnering an average vote of 42 percent. In 2008 approximately 90 companies are facing say on pay proposals. One such proposal won majority support at Apple, but several others (such as at Citigroup, Merrill Lynch, and Morgan Stanley) were less popular.

To make this issue more interesting, Aflac shareholders approved the company’s compensation model at the annual meeting in May. Verizon, Blockbuster, and Par Pharmaceuticals all have agreed to implement say on pay beginning in 2009. IROs and executives no doubt will study these votes as they anticipate future say on pay proposals at their own companies.

What’s new in 2008?

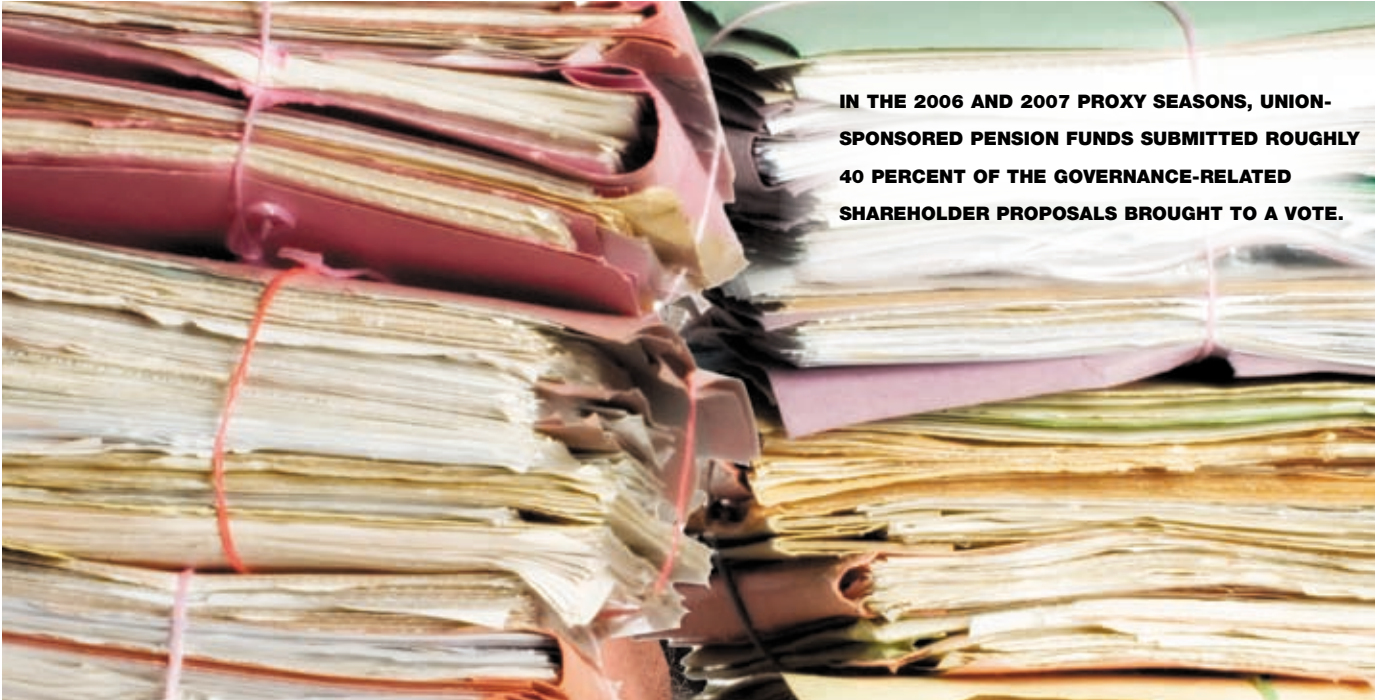
Not surprisingly, current events inspire many proposals. Shareholders at almost 60 mutual funds will consider proposals asking for “oversight procedures to screen out investments in companies that . . . substantially contribute to genocide, patterns of extraordinary and egregious violations of human rights, or crimes against humanity.” (Support for these proposals is running at almost 25% as of May.) Lenders and companies in the home-building industry are seeing proposals seeking improved risk-management processes and enhanced disclosure about participation in high-risk loans. At least six companies received resolutions seeking details on succession planning.

Other new proposals are aimed squarely at management. AFSCME is sponsoring proposals to combat perceived abuses of executives’ Rule 10b5-1 prearranged trading plans, and seeking a ban on stock sales by senior executives when their companies are engaged in buybacks. Two labor organizations sponsored proposals asking companies to eliminate tax gross-ups, which reimburse executives for taxes owed in connection with various perks, unless other management employees receive similar reimbursements. The AFL-CIO wants to limit employment contracts for named executive officers to three-year terms and require shareholder approval for renewal. Finally, shareholders are submitting proposals asking companies to “engage” proponents of any proposal that achieves a majority vote.

How are companies responding?

Corporate responses to shareholder proposals vary. Many companies try to avoid including proposals in their proxy statements. Indeed, RiskMetrics Group reports that “issuers [have] challenged 33 percent of all governance-related proposals filed this year.” The sidebar explains the grounds a company can rely on if exclusion is the goal. Other companies include the proposal, but add a statement in opposition. Still others negotiate to get the proposal withdrawn, and have learned that inviting discussion can be very effective. For example, in 2007, shareholders submitted 136 proposals seeking a majority vote requirement to elect directors; 75 of those were withdrawn before the annual meeting.

The more interesting question is how companies respond after a proposal receives a majority vote. One study found that companies only implemented 22 percent of majority-approved shareholder proposals in 1997, but that number rose to 41 percent by 2004. Predictably, companies were more likely to implement proposals



IN THE 2006 AND 2007 PROXY SEASONS, UNION-SPONSORED PENSION FUNDS SUBMITTED ROUGHLY 40 PERCENT OF THE GOVERNANCE-RELATED SHAREHOLDER PROPOSALS BROUGHT TO A VOTE.

that got overwhelming votes, that were supported by influential shareholders, and that also were adopted by industry peers.

These numbers declined slightly last year. According to RiskMetrics, “more than 40 companies have adopted reforms in response to [the 114] shareholder proposals that received majority support in 2007,” which constitutes a 35 percent success rate for shareholders. Shareholders are showing their displeasure with those results by opposing directors at companies that ignore majority-supported proposals. ISS encourages this reaction in its 2008 proxy voting guidelines: “[v]ote AGAINST or WITHHOLD from all nominees ... if ... [t]he board failed to act on a shareholder proposal that received approval by a majority of the shares outstanding the previous year [or] ... the majority of shares cast for the previous two consecutive years.”

Did pension funds get their wings clipped?

The shareholder proposal landscape may begin to change in 2009. The Labor Department issued an advisory opinion in December reminding pension plans that “activities intended to monitor or influence the management of a corporation ... [are permissible] only where the responsible fiduciary concludes that there is a reasonable expectation that such activities ... [are] likely to ... enhance ... the value of the plan’s investment ... sufficient to outweigh the costs involved.”

The opinion explains that under ERISA (the law governing pension plans), “fiduciaries risk violating [their obligations to plan participants] when they ... attempt to further legislative, regulatory or public policy issues through the proxy process when there is no clear economic benefit to the plan.” Previous DOL publications indicate that pension plans can advocate safely on matters such as board qualifications and independence, executive compensation, mergers and acquisitions, and long-term business plans. But the December advisory opinion highlights the difference between governance matters and more policy-based issues. For example, “the likelihood that the adoption of a proxy resolution ... requiring corporate directors and officers to disclose their personal political contributions would enhance the value of a plan’s investment in the corporation appears sufficiently remote that the expenditure of plan assets to further such a resolution ... clearly raises compliance issues.”

PREDICTABLY, COMPANIES WERE MORE LIKELY TO IMPLEMENT PROPOSALS THAT GOT OVERWHELMING VOTES, THAT WERE SUPPORTED BY INFLUENTIAL SHAREHOLDERS, AND THAT ALSO WERE ADOPTED BY INDUSTRY PEERS.

In the 2006 and 2007 proxy seasons, union-sponsored pension funds submitted roughly 40 percent of the governance-related shareholder proposals brought to a vote. Public employee pension funds like CalPERS sponsored an additional five percent of those proposals. (Public funds are not subject to ERISA, but the fiduciary principles binding their trustees are the same.) There is no readily available data about union funds' sponsorship of policy-related proposals (involving climate change or disclosure of political contributions, for example), but they likely have some involvement with those issues. Some topics (say, extending tax gross-ups beyond the executive suite, or modifying Rule 10b5-1 trading plans) arguably straddle the governance/policy divide. Now that the Labor Department appears to be monitoring union-sponsored initiatives more closely, we could see a decline in "pure policy" and borderline proposals.

Conclusions

No doubt the 2008 proxy season has kept IROs engaged. You may have argued against including a proposal in your proxy. You may have negotiated with a shareholder advocate — either before your annual meeting or after a proposal generated substantial support. Even if you are just a spectator this year, pay attention to the proposals introduced and votes taking place at other companies. It could be your turn in 2009. [IRU](#)

Lois Yurow practiced corporate and securities law for several years and now helps public companies satisfy the SEC's plain English disclosure requirements. You can contact her at lois@securitieseditor.com.

CAN COMPANIES OMIT SHAREHOLDER PROPOSALS FROM THEIR PROXY STATEMENTS?

The SEC's Rule 14a-8 explains when public companies must include shareholder proposals in their proxy materials and when proposals may be excluded. The rule prescribes shareholder qualifications (primarily an ownership threshold) and procedural requirements (such as submission deadlines and word counts). If a shareholder satisfies these criteria, the company must include the shareholder's proposal in its proxy or prove that the proposal has one of thirteen "defects." To meet that burden, the company must explain the deficiency to the SEC and ask for a "no-action" letter, which is informal assurance from SEC Staff that excluding the proposal will not invite an enforcement action.

Under Rule 14a-8, a shareholder proposal can be excluded if it:

- Is not a proper subject for action by shareholders. A proposal that purports to be binding usually can be excluded under this prong.
- Would involve violation of any law.
- Violates proxy rules, including rules prohibiting false and misleading statements. This exclusion also covers "vague and indefinite" proposals that the company may implement in ways the shareholders did not intend.
- Addresses a personal grievance or special interest.
- Is not relevant to the company's business.
- Asks for something the company lacks the power or authority to do.
- Relates to the company's ordinary business operations or management functions. This exclusion prevents shareholders from micro-managing the business. However, proposals that might otherwise fit under this prong must be included if they raise "significant social policy issues," such as the "no genocide investing" proposal discussed in the article.
- Relates to an election.
- Conflicts with a proposal offered by the company.
- Has been substantially implemented already.
- Duplicates another proposal in the proxy.
- Resubmits a proposal that did not receive the prescribed support in prior years.
- Seeks a specific amount of dividends.

