

# Corporate & Financial Weekly Digest

October 28, 2011 by [Robert L. Kohl](#)

## SEC's Division of Corporation Finance Issues Bulletin Regarding Shareholder Proposals

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On October 18, the staff of the Division of Corporation Finance of the Securities and Exchange Commission issued a legal bulletin (No. 14F) providing guidance relating to shareholder proposals under Rule 14a-8 promulgated under the Securities Exchange Act of 1934, as amended. This bulletin discusses the staff's reversal of its position regarding proof of ownership for shareholder proposals, clarifies the treatment of revised shareholder proposals, provides guidance on common errors shareholders can avoid when submitting proof of ownership to issuers, clarifies procedures for withdrawing no-action requests for proposals submitted by multiple proponents, and outlines the SEC's use of email to transmit no-action responses.

### Proof of Ownership for Shareholder Proposals

Under Rule 14a-8(b), to be eligible to submit a shareholder proposal, a shareholder must have continuously held at least \$2,000 in market value, or 1%, of the issuer's securities entitled to be voted on the proposal at the shareholder meeting for at least one year as of the date the shareholder submits the proposal. A shareholder that is not the registered owner of the securities must prove its eligibility to submit a proposal by submitting a written statement from the record holder verifying that, at the time the proposal was submitted, the shareholder held the required amount of securities continuously for at least one year. Most shareholders are not registered owners of securities, but hold their securities in book-entry form through a securities intermediary, such as a broker or a bank, which deposits customer securities with, and holds the securities through, the Depository Trust Company (DTC). In *The Hain Celestial Group, Inc.* (Oct. 1, 2008), the staff had previously taken the position that an introducing broker could be considered a record holder for purposes of Rule 14a-8(b)(2)(i) even though the introducing broker does not hold the securities. As introducing brokers generally are not DTC participants, and therefore typically do not appear on the DTC's securities position listing, *Hain Celestial* had required issuers to accept proof of ownership letters from such brokers in cases where, unlike the positions of registered owners and brokers and banks that are DTC participants, the issuer is unable to verify the positions against its own or its transfer agent's records or against the DTC's securities position listing. In

light of two recent court cases, the staff has reversed its position in *Hain Celestial*, and, going forward, only banks and brokers who are participants in DTC will be viewed as record holders of securities that are deposited at DTC. The result of the staff's reversal is that a shareholder that has purchased shares through an introducing broker must submit a proof of ownership statement from the introducing broker and from the DTC participant holding shares for the account of the introducing broker. However, the staff will grant no-action relief to an issuer on the basis that the shareholder's proof of ownership is not from a DTC participant only if the issuer's notice of defect adequately describes the required proof of ownership. Under Rule 14a-8(f)(1), the shareholder will have an opportunity to obtain the requisite proof of ownership after receiving the notice of defect.

### Submission of Revised Shareholder Proposals

The bulletin clarifies that a shareholder that submits a revised proposal before the deadline for receiving shareholder proposals is deemed to have effectively withdrawn the initial proposal and is not in violation of the one-proposal limitation in Rule 14a-8(c). Further, if the issuer intends to submit a no-action request, it must do so with respect to the revised proposal. If a shareholder submits revisions to a proposal after the deadline for receiving shareholder proposals, the issuer is not required to accept the revisions. If the issuer does not accept the revisions, it must treat the revised proposal as a second proposal and submit a notice stating its intention to exclude the revised proposal, which notice may cite Rule 14a-8(e) as the reason for exclusion.

### Additional Guidance

The bulletin provides the following additional guidance concerning shareholder proposals:

- the staff noted common errors shareholders make when submitting a proof of ownership letter to an issuer, including a failure of the letter to verify the shareholder's ownership for the entire one-year period preceding and including the date the proposal is submitted and a failure of the letter to confirm continuous ownership of the securities for the requisite time period, and the bulletin provides form language that a shareholder may instruct his or her broker or bank to include in the required verification of ownership;
- where a shareholder proposal has been submitted by multiple proponents and an issuer has submitted a no-action request, the staff will now process an issuer request withdrawing the no-action request if the issuer provides a letter from the lead filer that includes a representation that the lead filer is authorized to withdraw the shareholder proposal on behalf of each proponent identified in the issuer's no-action request; and
- the staff encourages issuers and proponents to include email contact information in any correspondence to each other or the staff and announced that the staff will

transmit its no-action responses solely by email to issuers and proponents where email contact information has been provided.

Click [here](#) for Staff Legal Bulletin No. 14F.

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