State Law And Shareholder Representatives

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As noted yesterday, the Securities and Exchange Commission has proposed to amend Rule 14a-8 to "the process for shareholder proposals to be included in a company’s proxy statement". Among other things, the SEC is proposing to amend the eligibility requirements of Rule 14a-8 to require shareholders that use a representative to submit a proposal for inclusion in a company's proxy statement to provide documentation attesting that the shareholder supports the proposal and authorizes the representative to submit the proposal on the shareholder's behalf. The proposing release notes that Rule 14a-8 does not presently address a shareholder's ability to submit a proposal through a representative and that "absent Commission regulation, this practice has been governed by state agency law."

As a matter of fact, the California General Corporation law is silent on who, other than the board of directors, may present proposals at shareholder meetings. The GCL is also silent on how proposals are to be presented. It does not, for example, require that proposals be moved and seconded. Thus, it should be no surprise that the GCL does not expressly address whether someone may act as representative of a shareholder to present a proposal at a meeting.

The GCL does, of course, provide that every person entitled vote shares may authorize another person or persons to act by proxy with respect to those shares. Cal. Corp. Code § 705(a). The GCL defines "proxy", however, only in reference to the power to vote: "'Proxy' means a written authorization signed or an electronic transmission authorized by a shareholder or the shareholder's attorney in fact giving another person or persons power to vote with respect to the shares of such shareholder". Cal. Corp. Code § 178 (emphasis added). Thus, merely authorizing another person to submit a proposal for inclusion in a proxy would not be a "proxy" as defined by the GCL. Such a relationship, however, does meet the Civil Code's definition of an agent: "one who represents another, called the principal, in dealings with third persons". Cal. Civ. Code § 2295. The proposing release's use of "representative" in lieu of "proxy" is consistent with these definitions.

The SEC's proposal does not address whether the use of representatives may be subject to limitations or conditions or even prohibited by state law or a company's articles or bylaws. Many public companies already have provisions governing the process by which proposals may be brought before a meeting. Typically, these take the form of advance notice requirements.