

Law Firms Submit Joint Letter to SEC to Oppose Shareholder Nominations to Corporate Boards

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Seven of Manhattan's elite law firms took the rare step of signing on to a single letter to the Securities and Exchange Commission to voice their opinion on how the agency should implement a proposal to allow shareholders to nominate company directors.

Lawyers involved in drafting the letter, submitted Monday, acknowledge it was rare for one letter to come from all the firms, which included Cravath, Swaine & Moore, Sullivan & Cromwell and Wachtell, Lipton, Rosen & Katz.

At least four of the firms also sent separate letters addressing concerns with the policy direction the SEC is taking.

The other firms to sign the joint letter were Davis Polk & Wardwell; Latham & Watkins; Skadden, Arps, Slate, Meagher & Flom; and Simpson Thacher & Bartlett.

Read the [SEC proposals](#), the [firms' letter](#) and [other comments](#).

At issue is a proposed rule before the SEC that would make it easier for shareholders to nominate and elect individual directors to corporate boards. Supporters of the change argue that shareholders do not have the ability to hold boards of directors accountable. The lax oversight, they say, allowed financial institutions and companies at the center of the economic crisis to pile on excess risk.

The shareholder rights proposal would require public companies to include in their proxy materials shareholder nominees for directors that could comprise up to a quarter of the board. It would also give shareholders the ability to put forward proposals for broader access to the ballot than the commission would require.

The seven firms, who are known for the representing management and boards at corporations and financial institutions, are largely opposed to expanding shareholder rights.

But they largely address in their letter the functionality of the proposal, making suggestions on how the SEC should implement it if it is approved.

"If the SEC chooses to adopt [the proposed rule], we would urge the SEC to be cautious in implementing what all participants in this debate acknowledge will be one of the most significant rule changes in SEC history," the letter said.

The seven firms recommend the SEC amend an existing rule to allow shareholders to submit proposals for governance changes that would allow them to nominate directors. But they do not support the SEC's proposal to require shareholder access at all the affected companies.

Their position is not without opposition. A group of 80 professors of law, business and economics on Monday submitted a letter urging the SEC to adopt a rule based on its current proposals, "and to do so without adopting modifications that could dilute the value of the rule to public investors."

"We believe that providing shareholders with rights to place director candidates on the company's proxy card, as the SEC proposes doing, would improve director accountability," wrote [Harvard Law School professor Lucian Bebchuk](#) on behalf of the group.

Lawyers involved in developing the law firms' letter say it is not unheard of for the seven firms to submit a joint letter, though it is infrequent. They last submitted a joint letter in February 2006, which in its text described itself as "unusual," to address proposed changes to the so-called "best-price rule" for tender offers.

"We do know the [2006] letter was cited by the commission in its final release a number of times, so that's indicative that they listen to us," said Charles Nathan, the co-chair of M&A at Latham & Watkins. "But that's about all you can do, look to see the number of times you get cited."

Discussions about sending a joint letter arose roughly two months ago, lawyers involved say. "It came up at one of our regular meetings," Nathan said. "We just have an informal meeting every couple of months to talk about mostly M&A matters but also corporate governance matters. We've been doing that for a number of years."

Two lawyers interviewed said Simpson Thacher & Bartlett took the lead in quarterbacking the letter writing process. While their position would seem to match that of their corporate clients, lawyers involved in drafting the letter say they did not bill time writing it.

A few of the firms sent separate letters. Both Simpson Thacher and Wachtell's individual letters go beyond the mechanics of the proposal to argue against giving shareholders more rights because of the financial crisis.

"While the causes of the crisis are undoubtedly complex, there can be no dispute that major contributing factors were excessive risk-taking and leverage, and an undue emphasis on short-term results -- ills that would be exacerbated by changes that give activist shareholders even more power to direct corporate behavior," Wachtell said in its letter.