

Via Email: rule-comments@sec.gov

17 August 2009

Elizabeth M. Murphy, Secretary
Securities & Exchange Commission
100 F Street, NE
Washington DC 20549-1090

Re: Facilitating Shareholder Director Nominations (File No. S7-10-09)

Dear Ms. Murphy:

As global institutional investors with over \$200 billion in assets under management, we write to strongly support the SEC's proposed rules to facilitate shareholder nomination of director candidates.

Director Accountability Strengthens Independence and Communication

We are quite familiar with practices in other markets that allow shareholders to remove ineffective directors or put candidates up for election without running expensive proxy contests. Our experience in markets like Britain, Australia and the Netherlands, is that those rights are rarely used. Instead, because of greater director accountability to the shareholders whom they represent, boards tend to put forth qualified candidates that are more responsive to shareholder interests.

Correspondingly, the quality and quantity of communication between boards and shareholders is better where directors can be held accountable by shareholders. More attention is devoted to the candidate selection process, as well as explaining how it fits with company strategic goals.¹ The additional information flow helps inform shareholders and keeps directors in touch with market sentiment. This strengthens board independence, reduces risk surprises and improves corporate governance. We expect the proposed rule changes would have the same positive effects in the United States.

Director Accountability is Needed to Address Declining Investor Sentiment

Investor opinion about corporate governance integrity in the United States has been on a relative decline, as governance practices in other markets have improved. For example, Governance Metrics International now ranks the United States behind Britain, Australia, Canada and Ireland in corporate governance quality.² In addition, the CFA Institute 2009 Financial Market Integrity

¹ We also strongly support the SEC's proposed rule on additional proxy disclosures (File No. S7-13-09), which would mandate additional director candidate information in the proxy.

² See <http://www.gmiratings.com>.

Index survey of investment professionals found a marked decline over the past year in global sentiment of investment professionals toward the United States, with only 43 percent of non-US respondents reporting they would recommend investing in the United States (based solely on ethical behavior and regulation of capital market systems), down from 67 percent a year earlier.³ The largest decline was attributed to growing negative views of corporate boards.

Similarly, a recent survey of individual investors done for ShareOwners.org found that 91 percent identified corporate directors as most responsible for the financial crisis.⁴ Proxy access was favored by 82 percent.

This should come as no surprise. Massive investor losses in successive economic crises over the past decade, each fueled in large part by systemic board governance failures, have brought a keen focus on board accountability at United States companies. The proposed rule will help, over time, to address this loss of investor confidence. Ultimately, we expect that it will improve the competitive position of United States companies in the capital markets.

Director Accountability Offers Return and Risk Benefits

A recent study by the IRRC Institute found that companies with hybrid boards (those containing outside shareholder representatives) outperformed their peers by 16.6 percent during the year in which the outsiders were added.⁵ While the study focused on dissident slates, it illustrates the potential of proxy access to provide a less costly alternative for improving governance at poorly-managed companies, without an expensive and disruptive takeover contest.

Another study done by academics at the University of Michigan and Northwestern University identified significant risks for shareholders from current boardroom culture at United States companies.⁶ The research concluded that behavioral norms of boards discourage effective monitoring of company management and actually punish directors for taking actions to promote shareholder interests. The authors note:

“[Our] findings suggest how director selection processes may contribute to the frequent failure of boards to adequately control management decision making and behavior, which in turn has been implicated in a variety of adverse organizational outcomes, including ill-conceived acquisitions and alliances, failure to initiate timely strategic change, accounting scandals, and white-collar crime.”

We see the proposed rule as an effective antidote to the dysfunction identified by Westphal and Stern. In the long-term, proxy access should help to bring about the balance to boardrooms that is needed to reduce the incidence of boards that have been captured by management.

³See <http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2009.n5.1>.

⁴See <http://216.250.243.12/so/062509%20ShareOwners%20org%20US%20investor%20survey%20report%20FINAL1.pdf>.

⁵ See http://www.irrcinstitute.org/pdf/IRRC_05_09_EffectiveHybridBoards.pdf.

⁶ James D. Westphal and Ithai Stern, “Flattery will Get You Everywhere (Especially if You are a Male Caucasian); How Ingratiation, Boardroom Behavior, and Demographic Minority Status Affect Additional Board Appointments at U.S. Companies,” *Academy of Management Journal* 2007, Vol. 50, No. 2.

Suggested Changes to the Proposed Rule

While we support the rule as proposed, the following comments are offered to further improve use of the proxy statement as a means to facilitate communication and accountability between boards and shareholders:

- The Proxy as a Substitute for the Annual Meeting: The proposed rule addresses proxy communication and disclosure issues in a world where few shareholders attend annual meetings. However, one of the main functions of the annual meeting is to provide a forum for communication and direct interaction between the board and shareholders. We think the proxy should be viewed in the same light, as a shared two-way communication tool that allows shareholders to communicate with the board on issues that would traditionally be raised at the meeting. Otherwise, the board loses an opportunity to get unfiltered information directly from its shareholders. We encourage the SEC to explicitly treat the proxy statement as a shared communication tool that serves as a substitute for face-to-face interaction of the annual meeting.
- Added Value of Better Accountability and Information Flow: Many of the arguments raised by opponents of proxy access seem to assume there is no value in exposing directors to divergent points of view. We think those comments merely highlight the need for increased communication between shareholders and boards, as well as improved director accountability to the shareholders who elect them. Proxy access is one of the least costly ways for shareholders to improve both director accountability and the quality of debate and decision-making inside the boardroom. This is particularly important at companies with “rubber stamp” boards. The alternative is expensive and disruptive control contests. The greater efficiency of proxy access as a vehicle for improving corporate governance at mismanaged companies should be recognized.
- Additional Guidance is Needed: While we do not see Regulation FD as a roadblock to communication between directors and shareholders, many boards cite Regulation FD as a reason to avoid any interaction with shareholders. The SEC could use promulgation of the proxy access rule as an opportunity to clarify application of Regulation FD to shareholder-director communication. In addition, many shareholders will be concerned about the potential for exposure to joint liability from participating with other investors in a group to nominate a board candidate. Additional commentary about the limits of joint liability for unapproved statements of other shareholders within a nominating group would help to allay those concerns.
- Shareholders Should Explain Votes Against the Company: We see proxy access as a vehicle for improving communication and accountability between shareholders and directors. In order to foster clear communication and understanding, we suggest that the SEC encourage shareholders to explain their reasons for significant negative votes on the board’s director candidates. This could be valuable information that would help the directors improve their understanding of how the company is viewed in the markets.

- Allow a Minimum of Two Board Member Nominees: At some companies, it could be important that shareholders be able to nominate at least two board members, provided that this would not result in a change of control. For example, an additional shareholder representative may be needed on the board to second motions that will bring matters in front of the board for official action. We would like to see the final rule allow a minimum of two candidates to be nominated.
- Change “First to File” Preference: In situations where more candidates are put forth (by different shareholders) than is allowable under the proposed rule, we do not believe preference should be given to the first to file. That would encourage shareholders to file early, without attempting to engage the board in discussion about resolving shareholders concerns. Instead, we would like to see preference given to the largest shareholder or group.
- Substitute Candidates: We are concerned about the impact of a prohibition on allowing shareholders to substitute a new candidate if the initial candidate is challenged. That would encourage an unduly adversarial approach by both sides. The rule would better foster engagement and open communication by allowing candidate substitution, if time permits.
- Comprehensive Reporting of Positions: All interests in company securities or contracts, including derivatives, should be disclosed on Schedule 14N. We encourage the SEC to fully address disclosure and counting of short positions, swaps and securities lending transactions involving the company’s securities in the final rule.
- SEC Resolution of Challenges: In order to allow timely resolution of disputes, we support implementation of an abbreviated SEC process to resolve candidate challenges. We also believe the company should bear the burden of proof when challenging candidates, to discourage unnecessary objections.
- Proxy Resolution Rights are Important by Themselves: We believe the SEC should make the proposed changes to Regulation 14a-8(i)(8), regardless of whether the main proxy access rules are adopted or are subsequently invalidated.

In summary, the undersigned institutional investors strongly support the SEC’s proposed rules to facilitate shareholder nomination of director candidates. Based on our experience in other markets, we expect that United States companies and investors would reap substantial benefits from proxy access that will more than offset any associated costs. We hope the SEC will adopt final rules in time to allow proxy access for the 2010 proxy season.

Please contact us if you have any questions or if we can provide further assistance.

Sincerely,

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