American Society of Corporate Secretaries
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March 30, 2004

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549
Attention: Jonathan G. Katz, Secretary
Via e-mail: rule-comments@sec.gov

Re: Security Holder Director Nominations
(Release No. 34-48626; IC-26206; File No. S7-19-03; RIN 3235-AI93)

Ladies and Gentlemen:

The American Society of Corporate Secretaries, Inc. (ASCS) is a professional association founded in 1946, serving more than 3,000 issuers. Job responsibilities of our members include working with corporate boards of directors and senior management regarding corporate governance; assuring issuer compliance with securities regulations and listing requirements; and coordinating activities with shareholders such as proxy voting for the annual meeting of shareholders and negotiation of shareholder proposals. The majority of ASCS members are attorneys.

We thank the Commission and Staff for the opportunity to participate in the Roundtable. We appreciate your consideration of all interested parties' concerns during that well-organized process. We also appreciate the extension of the comment period and the opportunity to comment a second time in light of what we learned during the Roundtable.

The proposal states that the proposed rules are intended to improve disclosure to security holders to enhance their ability to participate meaningfully in the proxy process for the nomination and election of directors. We support that objective, and after participating in the Roundtable, we appreciate more fully the position of various parties that the Commission should take action at this time. However, we continue to believe the proposal is not the best method of achieving the objective and also may produce unintended negative consequences.

Many of our members feel the current system, as recently modified by the new final rule on Disclosure regarding Nominating Committee Functions and Communications between Security Holders and Boards of Directors (File No. S7-14-03) and the new New York Stock Exchange/NASDAQ corporate governance listing standards, should be allowed to settle and be tested before the Commission can assess whether the proposed rules are required.

Should the Commission nevertheless determine to adopt a final rule at this time we believe the final rule, including the triggering events, should not become effective until a full calendar year following the date the final rule becomes effective. This would allow time for the mechanical issues (discussed below) to be evaluated. And it would facilitate the goal of encouraging interaction by providing adequate time for companies to adopt thoughtful plans and processes and, where needed, to add corporate governance staff.

In the event the Commission determines that a final rule must be adopted at this time, we request that the Commission consider modifications to safeguard against certain unintended negative consequences, as follows:

New System May Increase Adversarial Relations: We continue to be very concerned that the proposed new nominations system is likely to make the relationship between investors and directors more adversarial because the system culminates in a contested election. We believe additional adversarial proceedings will result in a number of unintended negative consequences. These consequences include diminishing the chance for meaningful interaction among shareholders, senior management and directors; distracting boards and senior management from important business and strategic concerns; driving up costs that will impact all shareholders, including those who are not involved in the proceedings; and disputed proceedings where the Staff, the Commission and the courts to will need to take an active role.

This concern is magnified because the proposal includes no role for the nominating committee of the board of directors in evaluating and selecting the new nominee. One critical job of the nominating committee when considering nominees is to assess the impact of a potential nominee's election on overall board dynamics. The dynamics of a particular board are unique, and those dynamics impact a director's performance. A certain leadership style may work well on one board, yet be ineffective on another board. One director, on paper, may appear to be strong or weak on a particular issue, but only those who are inside the boardroom understand if he or she adds strength on that issue for that board. The shareholder-nominator has no knowledge of the board's dynamics and cannot evaluate whether a candidate could be effective on a particular board without input from that nominating committee. Yet setting the contested election as the end game chills the opportunity for meaningful interaction.

Any time one member of a group is "forced" into the group, while others are chosen collaboratively, some friction is to be expected. This would be the case under the proposal where the shareholder nominee would be automatically included, while the other nominees would continue to be chosen collaboratively.

Our concern about increasing adversarial relations could be addressed in a number of ways. One way would be to adopt the "advise and consent" process suggested by Professor Grundfest. At culmination, the advise and consent process could result in removal of a director but not in either a contested election or introduction of a nominee selected outside the normal collaborative process. Another way to address the concern would be to revise the proposal to require action by the nominating committee in assessing and approving nominees submitted by a shareholder-nominator, and where appropriate, avoiding a contested election (for example, by increasing the size of the board or eliminating another nominee).

Mechanical Issues. Our past comments highlighted a number of areas where the current mechanical system and rules relating to shareholder communication (the NOBO/OBO system for example):

- do not allow transparency;
- do not allow identification of, or electronic communication with, true beneficial owners;
- do not allow end-to-end confirmation of the vote (particularly murky, for example, in the case of loaned/borrowed shares, common in hedging transactions); and
- increase issuers' costs by forcing communications through third party providers.

We are also concerned that the proxy cards for contested elections would be confusing, particularly to individual investors. Our proxy solicitors tell us that even with the separate, different-colored cards used in contested elections today, there is confusion.

Currently, these issues are vexing but present a significant problem only in change of control contests, where there typically are court interactions and other delays and costs that mask the impact of these issues. Under the proposed system, with the opportunity for contested elections at many issuers on a frequent basis, these mechanical issues take on a new significance that should be thoroughly considered as part of the change that would occur if the proposed system were adopted. The Society is concerned that mechanical problems would lead to disputes where the Staff, the Commission and the courts would need to take an active role.

We suggest a thorough study performed by an independent party is needed, such as the recent United Kingdom Myner's report, to allow the Commission to identify and assess the mechanical issues. The Society believes issuers would be willing to fund the costs of

such a study, and the Society would be willing to take a leadership role or to participate at the request of the Commission or Staff.

As noted during the Roundtable, the concern over the mechanical issue is higher because under the proposal, there could be close votes on several events (the two triggers and contested elections) at multiple companies, all during the very busy, very short proxy season. Elimination of the number of voting events would ameliorate the concerns about the mechanical issues. For example by adopting the "advise and consent" process suggested by Professor Grundfest, all voting events but one – the withhold vote – would be eliminated, reducing the possible stresses on the proxy process. Further, perhaps adopting a final rule as a pilot, say for only the largest 100 companies or for 100 "volunteer" companies, would also allow time for a more thorough analysis of the mechanical issues.

Add A Clear Link To Unresponsiveness By the Issuer. The proposal and the testimony at the Roundtable show that shareholders are frustrated with the well-publicized scandals, with certain issuers that showed cavalier disregard for majority votes on shareholder proposals and with boards and senior management that refuse to interact with shareholders. However, the proposal provides no clear link between a particular governance frustration and an outcome that is related to the particular frustration.

To address these concerns we suggest:

- Any trigger should be initiated in relation to a clearly designated, specific problem. For example, if the withhold vote trigger is included, then any shareholder/group that wishes to publicize or communicate in favor of a withhold vote campaign should be required to file a disclosure document indicating the specific dissatisfaction with that director's service on that issuer's board. Or if a proposal-for-access trigger is included, it should be required to include a statement about specific proxy process issues at that issuer and how adding a shareholder-nominated director to the board would relate to that proxy process issue.
- Any trigger should be adopted by a majority of the outstanding shares, in order to make sure that any unintended negative consequences are not unfairly imposed on shareholders that did not participate in initiating the process. Further, no matter what percentage vote might be required, no one shareholder owning less than 50% should be able to take unilateral action. These revisions would also address companies' strong concern that the proposal would allow special interest shareholders leverage for issues not related to the objectives of the proposed rule. The increase would also balance the impact of the proxy voting advisory firms.

Reconsideration. Should the Commission determine to adopt a final rule, we suggest there be a requirement to periodically (a) audit and publicly report on all instances where the triggers and/or nominations processes are used, for the purpose of identifying the consequences that may arise, and (b) reconsider whether the rule is in the public interest.

Please call either of the undersigned should you have questions.

Cordially,

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