



October 1, 2007

Nancy Morris, Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

cc: Chairman Christopher Cox

Via email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Re: File Number S7-16-07 and S7-17-07

Dear Secretary Morris and Chairman Cox:

I am writing on behalf of the Service Employees International Union (SEIU) Master Trust and its three related pension plans, in response to the Commission's request for public comment on SEC Release No. 34-56160 and Release No. 34-56161, regarding shareholder proxy access, shareholder proposals related to the election of directors, and questions about existing rules on advisory shareholder resolutions.

The SEIU Master Trust represents \$1.9 billion in pension funds active in US and international corporate governance and corporate engagement. We have been following the Commission's actions on this important topic for many years, and congratulate the Commission and its staff on all the arduous work going into possible solutions regarding shareholder proxy access. Unfortunately, the SEIU Master Trust cannot support either proposal put forth by the Commission, and believes the SEC and its staff need to go back to the drawing board for a workable solution that would make it more realistic for long-term shareholders to nominate independent candidates to corporate boards.

On July 27<sup>th</sup>, 2007, the Commission issued two opposing releases on the subject of shareholder access to the proxy and the election of directors. The first, Release No. 34-56160, proposed disclosure requirements and procedures for shareholders to, in limited circumstances, propose bylaw proposals to companies regarding director nominees using the corporate proxy (hereafter referred to as the 5% Proposal).

SERVICE EMPLOYEES  
INTERNATIONAL UNION, CLC

SEIU MASTER TRUST

Dupont Circle, N.W., Ste. 900  
Washington, DC 20036-1202

202.730.7500

800.458.1010

[www.SEIU.org](http://www.SEIU.org)

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The second, Release No. 34-56161, would codify the past interpretation by the Commission regarding resolutions related to the election of directors at public corporations, and their disallowance. The second release does not seem to promote improved measures for investor nominations to corporate boards using the 14a-8 process. The SEIU Master Trust is supportive of shareholders with long-term interests having reasonable rights to nominate candidates to company boards, and allowing such nominees on the company proxy. Therefore, we do not support Release 34-56161 (the non-access proposal).

Additionally, we feel Release No. 34-56160 (the 5% Proposal) is inherently flawed because of the following factors, which I will describe in more detail following:

- The rule sets a much higher precedent and rigorousness for disclosure from investors merely wanting greater shareholder input into the nominations process than is now required for investors seeking a controlling interest.
- The rule would give a significant advantage to short-term owners (like hedge funds) over long-term owners in being able to utilize the tools the SEC is contemplating.
- Questions raised about companies opting-out of advisory shareholder proposals should not progress towards a formal rulemaking. Advisory shareholder proposals are a cost-effective and efficient mechanism for boards to receive input from shareholders on a wide array of material topics, and the board has the discretion to implement these requests as they see fit. A rollback of shareholder rights in this manner would set a dangerous precedent by giving companies an ability to opt out of certain SEC 14a-8 requirements and setting their own bylaws regarding shareholder input.
- The 5% ownership requirement for merely filing a binding bylaw proposal is unworkable and would not be used by most active investors that are fundamentally concerned with improving corporate governance.
- Electronic forums should not supplant the 14a-8 process, but may present new opportunities for communication between companies and investors going forward.

### **Shareholder Proxy Access and Its Uses by Investors**

Shareholders have requested some form of proxy access or a greater role in board nominations going back to the 1940s, and yet the Commission has yet to institute this fundamental reform. Shareholders seek a role in this process because they believe that a director nominated by shareholders would: better represent broader investor interests in the company; analyze board issues through the mindset of a long-term investor; and help remind other directors of their key role on the board—to represent the interests of shareholders over that of management, and to properly oversee management on shareholders' behalf.

Yet corporate management largely controls the nominations process at most publicly traded companies—even after the SEC instituted reforms in 2003 regarding greater communication between boards and shareholders that hoped to improve the process for shareholder suggestions for nominees to the board (a rule that was partnered with the controversial 2003 proposed rule by the Commission regarding proxy access).

Shareholders should have an accessible mechanism for ensuring that their interests are more fully represented on boards—a mechanism that does not require aggressive and expensive take-over attempts. Shareholders have an obligation to nominate directors when there are failures in corporate management, and they need a practical process to do so. We disagree with many mechanisms that protect board members from criticism or replacement. A board's best protection is to run the company well on behalf of its diverse owners.

The Commission's suggested 5% ownership for a shareholder or group of shareholders to merely file a binding bylaw proposal, in order to develop a process for access, might work well in a market like the UK, which has very concentrated share ownership, but it is ineffective in the US, where typically mutual funds or hedge funds are the investors having such a concentrated stake in a single issuer—and typically do not file shareholder proposals of any kind. According to analysis and comments by the Council of Institutional Investors<sup>1</sup> (of which the SEIU Master Trust is a member), even if the 10 largest pension funds in the US were to combine their holdings, they would be unable to meet the 5% ownership threshold at most US corporations. This tells us that 5% is too high to serve as a meaningful threshold. In addition, if the very largest pensions have difficulty mustering such a position, the 5% rule would give much greater leverage and disproportionate influence to hedge funds and would disadvantage medium and long-term investors. Furthermore, evidence from several years of N-PX filings with the Commission suggest that mutual funds, even after greater disclosure of their voting records, have a difficult time voting against management on many routine and non-routine items on the proxy, especially director elections and executive pay issues.

Because it seems the SEC has not well understood who would use proxy access, and for what means, we recommend the Commission revisit the rulemaking process regarding proxy access, to seek broader investor input, and re-propose proxy access rules if they are necessary. We highly recommend that the Commission, if it were to do so, propose several alternatives in a proposed ruling that would meet the needs of long-term owners—both small and large. A suggestion would be both a percentage threshold, like 1%, held for a longer time than one year, or one year at a minimum, or a group of shareholders in total number (for example, 20 investors each holding a minimum stake).

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<sup>1</sup> See *Comments to the SEC on File No S7-16-07, dated September 18, 2007, from CII General Counsel Jeff Mahoney.*

We additionally suggest that the Commission not vote on such controversial topics without a full complement of Commissioners, since the vote has been very close in recent years.

### **13G Disclosures**

The Commission's suggested requirements for filing a Schedule 13G are overly detailed and highly burdensome for shareholders that would be required to report under a 5% threshold. The level of complexity of the required disclosure is unnecessary and serves only to discourage investors from participating more fully in the nomination and election process. It also reveals that the Commission and its staff might not understand *who would use proxy access provisions, and why. Concerned investors wanting access to the proxy seek to improve the independence and accountability of boards of directors, not to takeover a company.* The rule, as written, seems to benefit investors interested in company takeovers more than those seeking reform of ineffective or unethical directors. To require the paper trail to the extent proposed, for investors wanting a better process for actual independent candidates nominated to boards, seems counterproductive to the true intent of proxy access. The disclosures would also take enormous amounts of time and money, and may hinder the shareholder dialogue process in unforeseen ways.

### **Electronic Forums**

We applaud the Commission's investigation into how new technologies can benefit investors and the capital markets, but more study is needed on how to do this.

We support efforts by the Commission to update company, director, and shareholder practices to better utilize electronic media and the Internet. We believe that electronic forums, chat rooms, and web pages for questions and compliance concerns are reasonable and necessary. However, we do not believe that an electronic discussion can adequately substitute for a structured process of voting on management and shareholder proposals at the annual meeting. We believe there is great value in shareholders having at least one opportunity each year to address their directors in person and to petition the entire shareholder base with proposals related to corporate governance and strategy.

We see electronic discussions as another opportunity for accountability and communication, but not as a substitute for a rigorous, formalized governance process. This is why investors are supportive of companies webcasting their annual meetings, but are generally not in favor of web-only virtual shareholder meetings—where the company can pick and choose which questions it wants to answer and not face shareholders directly in an act of annual accountability.

If the Commission is thinking that electronic forums in the very near future might supplant communication processes provided by advisory shareholder resolutions, the

proxy, and in-person investor meetings, we would highly suggest you visit a few large corporate chat rooms on Motley Fool, or Yahoo! or the like. You might spend hours trying to find a posting that has relevance to company performance, does not contain vulgarity, or is not a long list of personal diatribes by bored investors. This is why, even though the resolution filing process is time consuming and requires meticulous paperwork and legal guidance, advisory proposals are a saner and much more efficient method for shareholders to communicate with boards and management at this time. Oversight by companies themselves of such chatrooms or forums would create yet another burden and time commitment, not to mention legal and compliance issues that have not been resolved.

### **Advisory Shareholder Proposals**

Advisory resolutions provide an opportunity for shareholders to communicate their priorities for corporate governance and risk management and should not be curtailed, as implied by questions asked in the 5% Proposal. In the absence of the ability to clearly nominate directors to the proxy or to actually elect directors from a pool wider than a plurality vote in the US, shareholder proposals have proved a useful means for shareholders to communicate with boards. In fact, the growing number of shareholders that vote in favor of non-binding proposals indicate their widespread utility to investors large and small.

Non-binding proposals have been useful for many years in bringing emerging business issues to the attention of directors, management, and fellow shareholders. For example, advisory proposals have played an important role in notifying corporations of the need to deal with climate change and reduce their greenhouse gas emissions before federal and international regulations decide strategy for them. They have been critical for a decade in warning companies of the dangers of predatory lending, supply chain hazards, and toxins, while also pointing out the benefits of board diversity, auditor independence, and compensation reform.

We are concerned that the 5% Proposal questions, regarding raising the resubmission thresholds for shareholder proposals, is unwarranted and would effectively bar a number of advisory resolutions that have built investor support over time. Were resubmission rates substantially raised, it would undercut the purpose of the shareholder proposal process. That is, for shareholders to communicate with directors on emerging or pressing issues of concern.

Because shareholder rights are more limited in the US than they are in Europe in some respects, the 14a-8 shareholder resolution process plays an important role in facilitating communication between owners and companies. This communication is vital, as it often points out material risks to management years ahead of scandal or when it is needed, providing companies with time and opportunity to prepare for what competitors might be ignoring.

There is also an ever-widening body of literature on the materiality of environmental, social, and governance factors in US and international capital markets. Non-binding shareholder proposals have served a critical function by helping to convince US companies to adopt more responsible governance practices, to issue better annual and CSR reports, and to take meaningful steps to address many previously unrecognized risks. As fiduciaries, we value the role these proposals have played in protecting the long-term value of our investments.

As investors with broadly diversified holdings, we value consistent and transparent markets. In our view, the concepts discussed in the 5% Proposal that would permit individual companies or their shareholders to determine the rules and procedures governing the submission of non-binding proposals would not serve the public interest or the goal of investor protection. These concepts would merely serve to insulate certain companies, and render these companies less accountable. Far from furthering the goal of efficient capital formation, it would more likely lead to a hodgepodge of inconsistent requirements.

For decades, non-binding shareholder resolutions have served as a critical tool for improving corporate governance, and for holding corporate management and boards of directors accountable for a broad range of stakeholder concerns, many of which present legitimate risks to long-term shareholder value. We believe this tool, and the current rules that govern its use, has served companies and shareholders well, and has positively contributed to the global competitiveness of the US markets. Rather than encourage shareholders to raise these issues as binding bylaw amendments (one clear implication of the 5% Proposal), we encourage the Commission to continue to allow the directors of US companies to address these issues at their discretion.

### **Conclusion**

The SEIU Master Trust further rejects the argument that proxy access would be used solely by special interest shareholders. The investors that have asked the Commission for some form of access to the proxy are the ones that have worked diligently over several decades to improve corporate governance, reporting, independence, and transparency at companies and in the markets. Many public pension funds, labor funds, and socially responsible mutual funds are the investors that routinely comment on SEC proposals, petition the SEC for clarifications and new guidance on issues of merit, conscientiously vote their proxies, and set best standards in the industry for their own reporting, transparency, and fiduciary actions.

The Commission would do well to remember that shareholders proponents would need to secure majority support from voting shareholders in order to either amend by-laws to allow for shareholder-generated director nominations or to actually elect an alternate candidate following a by-law revision. This also holds true for advisory proposals. The

opposed by management is high and will most certainly prevent special interest groups from exercising undue influence on corporate boards. However, were a majority of shareholders to agree that an improved process or a different director were needed, then changes would seem appropriate and desirable.

And while we applaud all the time and effort the Commission has put into the rulemakings, presently and in 2003, we respectfully suggest the Commission go back to the drawing board yet again and figure out a means for shareholder proxy access that would improve director nominations, shareholder input into those nominees, and strengthen the elections process as a whole at corporations. Proxy access should not be used mainly by hedge funds that may have a short term or narrow interest in a company, or by investors that may well have the means for running a contested slate to the board if their main purpose is a takeover.

We will continue to watch these developments closely, and appreciate the opportunity to comment on this critically important corporate governance matter. Please do not hesitate to contact me at (202) 730-7051 with any questions or clarifications on our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen Abrecht". The signature is fluid and cursive, with a long horizontal stroke at the end.

Stephen Abrecht  
Executive Director  
SEIU Master Trust

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