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May 15, 2007

Nancy M. Morris
Secretary
Securities & Exchange Commission
450 Fifth Street N.W.
Washington, DC 20549-0609

Re: File Number 4-537 SEC Announces Roundtable Discussions Regarding Proxy Process

Dear Ms. Morris:

What is fundamentally wrong with corporate governance in America?

In a nutshell, it is difficult for stockholders to hold management accountable for its misdeeds. This is not a new insight. In 1776, Adam Smith wrote in The Wealth of Nations: "The directors of such companies being the managers rather of other people's money than of their own will not watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Negligence and profusion therefore must always prevail in such a company." He added: "No other sovereigns ever were, or from the nature of things, ever could be, so perfectly indifferent about the happiness or misery of their subjects as the proprietors of such a mercantile company are, and necessarily must be."

Let's fast forward to 1934. Here is what Congressman Lea of California said in the Congressional record of May 1, 1934:

> In the main, the men controlling these great corporations are not large owners of the stocks of the corporations they control. Too often they have yielded to the temptation to control these great business institutions to their own interests, and with a zeal out of proportion to the loyalty they have shown their stockholders. Thus in recent years we have seen the directors of corporations, without the knowledge of their shareholders, voting themselves vast bonuses out of all proportion to what legitimate management would justify. We have had revelations of salaries paid to directors and officers of great corporations which showed shameful mismanagement; which showed that the men in charge of some of these corporations were more concerned in managing its affairs for their own benefit than for the benefit of the stockholders.

It is now 2007 and it is fair to say that the lot of shareholders has hardly improved. For the umpteenth time, the Commission is reexamining the proxy rules. Once again it will be inundated with comments from advocates for management insisting that nothing is

broken and from those that see corporate elections as a way to advance causes unrelated to enhancing shareholder value. Here is my two cents.

The Purpose of Rules Adopted Pursuant to Section 14(a)

The purpose of the proxy rules is "to give true vitality to the concept of corporate democracy,"[1] Section 14(a) assigns to the Commission the responsibility to adopt rules for soliciting proxies "as necessary or appropriate in the public interest or for the protection of investors." In J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964), the Supreme Court expanded on this theme:

> The purpose of 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H. R. Rep. No. 1383, 73d Cong., 2d Sess., 13. It was intended to "control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders." Id., at 14. "Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." S. Rep. No. 792, 73d Cong., 2d Sess., 12. These broad remedial purposes are evidenced in the language of [Section 14(a)]. . . .

The Real Issue: Ensuring Fair Elections

It is irrefutable that the proxy rules have failed "to give true vitality to the concept of corporate democracy" and a corporate election today remains largely an empty exercise. The problem is not that shareholders cannot nominate candidates for director. The problem is that those nominations must be presented at a stockholder meeting and most shareholders find it inconvenient to attend the meeting. Hence, the vote at meetings of public corporations is predominantly via proxy. Since the corporation's proxy card does not include all bona fide nominees (and proxy contests are prohibitively expensive), shareholders that do not attend the meeting have no practical means to have their votes cast for nominees they might vote for if they attended the meeting.

The solution is to ban "one party" proxy cards. Such a proxy card frustrates the free exercise of voting rights because it results in the "election" of directors who might not otherwise have been elected if shareholders received a proxy card that listed all bona fide nominees.

Q: What is a fair election? A: Look to federal labor law.

The standard for a fair corporate election was set forth in Aprahamian v. HBO & Co.,

[1] Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 676 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972)

531 A.2d 1204, 1206-07 (Del. Ch. 1987):

> The corporate election process, if it is to have any validity, must be conducted with scrupulous fairness and without any advantage being conferred or denied to any candidate or slate of candidates. In the interests of corporate democracy, those in charge of the election machinery of a corporation must be held to the highest standards in providing for and conducting corporate elections.

This standard is consistent with the federal standard for electing officers of labor union set forth in Section 481 of The Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 481). Section 481 requires that:

- Every labor organization refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution.

- Adequate safeguards to insure a fair election shall be provided [by every labor organization].

- Every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such [labor] organization or any member thereof.

Tinkering with the current fundamentally unfair corporate election process is futile. Instead, the Commission should look to Section 481, substituting "company" for "labor organization" and "shareholder" for "member," to craft, interpret and enforce proxy rules that will afford shareholders of publicly traded corporations the same level of voting rights as union members. Specifically, the Commission should immediately take the common sense position that a proxy card that excludes the name of any bona fide nominee known to the soliciting party is materially misleading and hence a violation of rule 14a-9(a).[2] Even the pro-management Committee on Federal Regulation of Securities

[2] "No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

of the American Bar Association's Section of Business Law Disclosure has advocated the use of a fair proxy card. In its January 7, 2004 comment letter,[3] it said:

> Disclosure on the proxy card should be clear and uncomplicated so that the voting decisions by shareholders will in all cases represent an informed judgment. Furthermore, the structure of the proxy card should be neutral in terms of the ability of a shareholder to vote on an informed basis.

How can a proxy card that does not include every known bona fide nominee be "neutral in terms of the ability of a shareholder to vote on an informed basis?" How can it meet the *Borak* standard of "preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders?" Answer: It can't. Interpreting rule 14a-9(a) to require every proxy card to include the name of every known bona fide nominee for director will go a long way toward achieving the goal of vitalizing "the concept of corporate democracy."

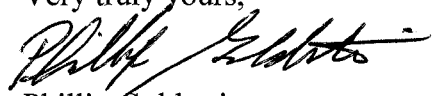
Conclusion

Over the years, the Commission has spent far too much of its resources on baby steps that have failed "to give true vitality to the concept of corporate democracy." Shareholders already have the right under state law to propose nominees for director but they need a mechanism to effectively utilize that right. In short, they need to be provided with a proxy card that includes all bona fide nominees.

Shareholders have waited seventy-three years for the Commission to fulfill the will of Congress by adopting rules to "[prevent] the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders." Isn't that long enough? Interpreting rule 14a-9(a) in accordance with the principles set forth in Section 481 of The Labor-Management Reporting and Disclosure Act of 1959 would go a long way toward making "the free exercise of the voting rights of stockholders" a reality and almost certainly would be upheld by a court as a valid exercise of the Commission's rulemaking authority.

I appreciate the opportunity to submit this comment letter. However, I have no illusions that it will have any impact upon the sorry state of management accountability to shareholders because millions of dispersed investors are no match for a well organized and highly motivated corporate lobby.

Very truly yours,



Phillip Goldstein
Co-founder and Principal

[3] *See* http://www.sec.gov/rules/proposed/s71903/aba010704.htm