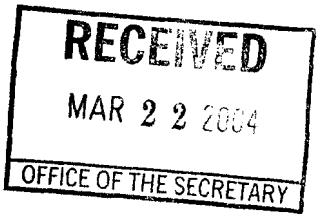
S7-19-03

768

SUPREME COURT OF DELAWARE



E. NORMAN VEASEY
CHIEF JUSTICE

DELAWARE STATE OFFICE BUILDING
820 NORTH FRENCH STREET
P.O. BOX 1997
WILMINGTON, DELAWARE 19899

TELEPHONE: (302) 577-8700
FAX: (302) 577-5697

March 11, 2004

Director Alan L. Beller
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

BY FAX AND MAIL

RE: *Proposed Rule: Security Holder Director Nominations*

Dear Alan:

This is to follow up on my personal views and the alternatives I suggested at the Roundtable yesterday.

As I mentioned at the Roundtable, the issues relating to the Commission's proposed rule are not directly involved in the mission of the Judicial Branch of government in Delaware. That mission is to decide state cases fairly and swiftly in a balanced and predictable manner. The policy and federalism issues discussed at the Roundtable are of great interest to the State of Delaware. But the Judicial Branch, as an institution, is not in a position to advocate that the Commission should take or should not take any particular action. My observations and suggestions are purely my own personal views and do not necessarily reflect the views of my judicial colleagues.

As you know, I took no position on the legal authority of the Commission to adopt the proposed rule. Even assuming, without deciding or conceding, that the Commission has the legal authority to adopt the proposed rule, I have a federalism concern. That concern is whether the Commission, as a matter of policy, *should* undertake to provide a substantive right in certain stockholders when the creation of that right by the Commission intrudes upon and may be in conflict with corporate internal affairs that are the province of state law.

I respectfully submit that the Commission might consider deferring temporarily final action on its pending proposal. First, I believe there should be further empirical evaluation of the effectiveness of the prevalence of Best Practices (including widespread use of effective, independent Nominating/Corporate Governance Committees) that are now sweeping American corporate boardrooms. Second, the deferral could be accompanied by an encouragement for states to amend their enabling acts to provide that directors must be elected by a majority of votes cast. This brings me to the suggestion that I mentioned briefly in our panel at the Roundtable.

Assuming that the Commission is determined, notwithstanding the concerns expressed at the Roundtable, to go forward with the proposed rule, I suggested an alternative to the proposals put forth earlier in the day by Ira Millstein and Joe Grundfest. My suggestion, which is grounded on state law, would ameliorate to some extent—although it would not eliminate—the lingering federalism problems. Under my proposal, the Commission could exempt from the operation of its rule, when promulgated, any issuer that requires that a majority of the votes cast is necessary to elect a director.

A requirement that a director must receive a majority of the votes cast could be imposed by the certificate of incorporation of the issuer or by state statute. Another possibility might be a bylaw, provided that such a bylaw is validly adopted under state law. As I mentioned at the Roundtable, some aspects of Delaware law about stockholder-adopted bylaws are unsettled. In all events, any provision in state law or organic corporate documents would have to be carefully drafted to eliminate unintended consequences and to provide for the consequences upon the eventuality that one or more of the director candidates should not achieve a majority of the votes cast.

This change in the way that directors are elected would give stockholders a stronger voice in the election process. This concept would seem to be consistent with the goals of the Commission and is more consistent with principles of federalism than the imposition of the proposed rule would be without such a reference to state law or private ordering.

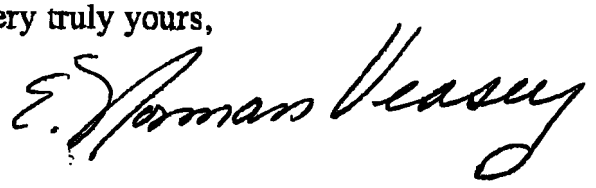
The other suggestion I mentioned at the Roundtable is separate from and independent of the foregoing proposal. It is analogous to the model of "comply or disclose" that is in general use in the United Kingdom under the Combined Code. Such a provision in an amended version of the proposed rule would not create a *right*, but would

set forth an *aspirational* standard. If the issuer did not comply with the aspirational standard by itself creating the right to propose a nominee in the issuer's proxy statement after the triggering events, it would have to disclose that fact and the reasons for noncompliance.

I leave to others any further steps in the implementation of my suggestions. I will, however, be happy to address any questions the Commission may have.

I appreciate very much your inviting me to participate in the Roundtable. I think the process of the Roundtable was good, and the discussions in all the panels I heard were very interesting and constructive, whether or not I agreed with them.

Very truly yours,



ENV:cmm

cc: Giovanni P. Prezioso, Esquire
Chairman William H. Donaldson
Commissioner Cynthia A. Glassman
Commissioner Harvey J. Goldschmid
Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Supreme Court Justice Randy J. Holland
Supreme Court Justice Carolyn Berger
Supreme Court Justice Myron T. Steele
Supreme Court Justice Jack B. Jacobs
Chancellor William B. Chandler III
Ira M. Millstein, Esquire
Professor Joseph A. Grundfest
Professor Lawrence Hamermesh
Professor Charles M. Elson
R. Franklin Balotti, Esquire