

September 28, 2007

Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE.
Washington, DC 20549-1090
By email to rule-comments@sec.gov

Re: Release No. 34-56160 (File Number: S7-16-07) and Release No. 34-56161 (File Number: S7-17-07)

Dear Secretary Morris:

I am writing on behalf of Domini Social Investments in response to the Securities and Exchange Commission's ("the Commission") request for comments on Release No. 34-56160 and Release No. 34-56161, relating to the election of corporate directors. As always, we appreciate the opportunity to provide our perspective on these matters. This letter supplements our prior letter of June 21, expressing our opposition to any material revisions to Rule 14a-8.¹

Domini Social Investments manages \$1.6 billion in assets for individual and institutional mutual fund investors who wish to incorporate social and environmental criteria into their investment decisions. On behalf of our shareholders, we are committed to actively engaging with the corporations held in our mutual fund portfolios, through conscientious proxy voting, letter writing, direct dialogue and the filing of shareholder proposals. Since 1994, we have filed more than 150 non-binding proposals on a wide variety of social, environmental and governance issues with U.S. corporations, and have engaged in dozens of long-term dialogues with corporate management teams on these issues. Our efforts have resulted in policy changes, enhanced public reporting and a greater awareness by key firms of a range of critical issues from sweatshop labor to climate change. We undertake these efforts as fiduciaries, and report regularly on these activities to our shareholders and the public.

Director Nominations

We support responsible proposals to improve the ability of shareholders to nominate directors to the board as a means to encourage greater board accountability, and share the view of many investors that the current process is unacceptable.² As the short proposal ("*Shareholder Proposals Relating to the Election of Directors*", Release No. 34-56161) merely codifies the Commission's position prior to the *AFSCME v. AIG* decision, we must oppose this proposal.

¹ Our previous letter is available at <http://www.sec.gov/comments/4-537/4537-45.pdf>.

² Prior comment letters from Domini on the director election process are available at <http://www.sec.gov/rules/proposed/s71903/akanzer122203.htm>, and <http://www.sec.gov/rules/other/s71003/domini061203.txt>.



We also oppose the longer proposal (“*Shareholder Proposals*”, Release No. 34-56160, hereafter “the Release”), which presents a means for shareholders to utilize the proxy statement to nominate directors, but sets an unreasonably high 5% threshold for submission. As other commentators, including CalPERS, the New York City Comptroller’s office and the Council of Institutional Investors, have noted, a 5% threshold is generally unattainable even for the largest pension funds in the country. We are also concerned that a 5% threshold would virtually inoculate the largest companies, such as Wal-Mart or ExxonMobil, from the process. This effectively creates both two classes of investors *and* two classes of companies. It would not serve the public interest, or the interest of investors, to shield the largest companies from this process, while leaving the boards of smaller public companies open to shareholder nominees. It is the largest companies that are most in need of additional accountability mechanisms due to their significant impact on the economy, the retirement prospects of pensioners, the environment, and communities around the world.

As discussed in our earlier letter, we do not believe that proxy access and the right to file non-binding proposals are interchangeable or comparable rights, although both are important accountability mechanisms. We therefore strongly urge the Commission to move forward by presenting a reasonable means for shareholders to nominate directors, without eviscerating the right to file non-binding proposals. Unfortunately, the two proposals presented for public comment do not, in our view, advance this important debate.

In addition, in light of the controversial nature of the proxy access issue, the departure of Commissioner Campos, and the impending departure of Commissioner Nazareth, we encourage the Commission to postpone further consideration of this issue until a full Commission is once again constituted.

Non-binding Proposals

We are also deeply concerned by the series of questions posed in Release No. 34-56160 relating to non-binding shareholder proposals. We urge the Commission to abandon these concepts, and preserve the current iteration of Rule 14a-8, a rule that we believe has served investors, corporations and the public interest well.

In the wake of a series of roundtable discussions on the proxy process, the Release contains an embedded concept release that raises a series of alarming questions regarding the right to file non-binding shareholder proposals.

Whether or not the *AFSCME v. AIG* decision compels the Commission to revisit the director nomination process and the interpretation of Rule 14a-8(i)(8), we believe that any adjustments or reinterpretations of the remaining provisions of Rule 14a-8 are unwarranted. In our view, these concepts represent a radical departure from the SEC’s historic approach to proxy regulation generally, and non-binding proposals in particular.

There are a number of troubling concepts raised in this release, but many of these, we believe, are far too open-ended and undefined to adequately address in a comment letter of reasonable length. Rather than



attempt to pursue each question through its various implications, we are focusing our comments on the following three concepts, which cause us particular concern:

1. The consideration of permitting companies to “opt out” of the resolution process
2. The consideration of raising the submission or resubmission thresholds for non-binding proposals
3. The replacement of non-binding proposals with electronic forums

We address each of these concepts below.

1. *The consideration of permitting companies to “opt out” of the resolution process*

At the outset, and as discussed in our previous letter, we believe that Rule 14a-8 has created an effective and intelligible process for both issuers and proponents, and there is no need to make any changes to the rule. In addition, we strongly believe that the process could not function without SEC oversight, and strongly oppose any further deference to state law in this arena.

We also disagree with the Commission’s suggestion that developments in the last 25 years have “diminished the concerns about shareholders’ ability to act as a group,” reducing the need for a mandated federal approach to shareholder proposals (*Release No. 34-56160* at 51). (We assume that this conclusion also forms the basis for the idea to raise resubmission thresholds.) Despite these developments, and indeed because of some of these developments, federal regulation remains critical.

There are two significant developments not noted by the Commission, which both militate in favor of continued federal regulation of the proxy. The first is globalization – a Delaware corporation may now have operations everywhere in the world, source from thousands of individual vendors that employ millions of workers, and be owned by shareholders based in every state and many foreign nations. It is becoming anachronistic to defer to state law when it comes to an accountability mechanism for such an entity. The second development is the dramatic expansion of indirect share ownership to ordinary Americans, primarily through mutual funds. The rapid growth of the mutual fund industry would arguably bode well for those seeking to address the problems of collective action. However, as documented in several studies of mutual fund proxy voting records, the largest mutual funds continue to defer to management on most shareholder proposals, and continue to oppose virtually every social or environmental issue presented, as a matter of policy.³ As a matter of sound public policy, these trends should cause us to question the relevance of state law, not the role of federal regulation, and suggest a need for *greater* vigilance on the part of the Commission. They certainly suggest that the classic collective action problems have not been solved, they have merely been transformed.

³ See, e.g., “*Analysis of Fund Voting Results for 2004-2005: Focus on shareholder sponsored resolutions*” (Jan. 2006), a study issued by the Corporate Library that analyzed two years of voting activity for 45 mutual fund families. The study analyzed more than 500,000 individual votes at more than 5,000 corporate annual meetings, focusing on votes relating to shareholder resolutions on corporate governance and social and environmental issues. The study found that “mainstream funds” supported only 30% of the shareholder resolutions filed, with the largest fund families consistently voting with management. See also, comprehensive data available at www.fundvotes.com.



We also encourage the Commission to consider the perspective presented by the Council of Institutional Investors (“CII”), in their comment letter of September 18.⁴ The CII noted that “developments in the last 25 years’ evidence the growing number of shareowners willing to vote for precatory resolutions and that many such resolutions are being adopted.” The rising levels of support for non-binding proposals should be read as evidence of the health and vitality of Rule 14a-8, rather than as a call for reform. It would run contrary to all empirical evidence we have seen to undermine this critical rule at a time, as CII notes, “when companies are improving their corporate governance policies in response to shareowner precatory resolutions in record numbers....”

In practice, we believe the application of this “opt out” concept would insulate the most non-responsive companies from shareholder concerns, and replace the current level playing field with an inconsistent array of rules and procedures that would vary by issuer. The first result would substantially set back all of our efforts to foster greater corporate accountability, and the second would frustrate both issuers’ and investors’ efforts to effectively engage with each other.

The “opt out” concept is also at odds with one of the historic bases for federal regulation of the proxy - the principle of placing shareholders that attend by proxy in the same position as those that attend in person. If a company opts out of the shareholder proposal process, whether through board action or a shareholder vote, shareholders that are able to be present at the annual meeting — who will generally be permitted to raise questions from the floor — will be placed at an advantage over those that attend ‘by proxy.’ This would create two classes of shareholders, divided by geography and wealth, and neither will be able to benefit from the insights of the other.

Even those privileged to raise a question from the floor will be disenfranchised, however, because they will be denied the ability to have their question put before all shareholders for a vote, unless they can present it as a binding bylaw amendment. As discussed below, the electronic forum option would not remedy this situation.

Further, the Commission has not set forth any rationale to justify a system where current shareholders would be permitted to effectively disenfranchise future shareholders. Any attempt by investors to re-institute non-binding shareholder proposals through a bylaw amendment would face a significant uphill climb, needing to convince a majority or supermajority of investors to reverse a decision they recently made.

This concept raises numerous open questions, many of which are outlined in the Release. One overarching question remains unasked, however — is it not fundamentally undemocratic to remove a federal right in deference to state law, when the bearer of the federal right (the shareholder) is not a citizen of the state, and therefore has no meaningful means to change that state’s laws?

⁴ <http://www.sec.gov/comments/s7-16-07/s71607-200.pdf>



2. *The consideration of raising the submission or resubmission thresholds for non-binding proposals*

In our opinion, the Commission has not provided any reasonable basis for adjusting the ownership thresholds for submitting a non-binding proposal, or the vote thresholds required for resubmission. As we discussed in our June 21 letter, the quality of an idea is not dependent on the size of the proponent's shareholdings, and it is to the credit of our system that small investors are permitted to submit proposals alongside large ones. This has resulted in numerous meaningful reforms, and a rich and diverse dialogue at corporate annual meetings. The current \$2,000/one year ownership requirement should be maintained.

We also believe the current resubmission thresholds are appropriate, and have permitted critically important issues to build support over the course of several years – ensuring that prudent fiduciaries have a continuing opportunity to raise long-term risks with issuers and with other investors long before these issues become material to short-term stock price.

Either as proponents or voters, fiduciaries use shareholder proposals to raise issues of long-term value with management, the board of directors and other shareholders, and to fulfill their fiduciary duty to monitor their holdings. Proposals may present emerging issues, or novel approaches to old problems. Many institutional investors evaluate these issues with great care, and develop articulate positions on the issues over a period of years. As institutional investor sentiment changes over time, proxy advisory firms — often reluctant to establish policies that appear to be too far ahead of their clients — can gauge the changing environment and adjust their policies. In our experience, proxy advisory firms such as Institutional Shareholder Services (ISS) have on a number of occasions come to support proposals that they had originally opposed. This is an ongoing process, and every year there are new issues, and the discussions with ISS and the institutional investor community begin anew.

Social and environmental issues are inherently long-term. An environmental issue may take years to develop into a crisis, at which point it may be prohibitively expensive (or impossible) to fix. Prudent fiduciaries, therefore, wish to address risks before they become material. Reasonable resubmission thresholds, such as those currently established by Rule 14a-8, provide such fiduciaries with the opportunity to put themselves ahead of the curve on long-term risks. Proposals that address such issues often take time to build broad support. The current vote thresholds make this learning process possible, enabling fiduciaries (including corporate directors) to monitor these issues as they develop. Higher vote thresholds would severely damage this process, and exacerbate the current rampant short-termism in our markets by removing these nascent long-term risks from consideration.

Many issues raised in non-binding proposals that were once considered frivolous have become mainstream concerns. Ten to fifteen years ago, when members of the Interfaith Center on Corporate Responsibility were filing the first proposals seeking to establish corporate accountability for global supply chains, many investors failed to see the connection to long-term shareholder value. Today, in the wake of numerous product recalls from China and Mexico, the consequences of global outsourcing are becoming clear. The dynamic has been similar for proposals on climate change, which Sir Nicholas



Stern recently described as “the greatest and widest-ranging market failure ever seen.”⁵ On a wide range of issues, from corporate operations in Burma, to sexual orientation non-discrimination, to toxic chemicals in consumer products, proponents of social-issue proposals have been far ahead of the curve, presenting important issues for truly prudent fiduciaries to consider.

High resubmission thresholds imply that the proxy statement is only appropriate for addressing issues that have already achieved wide notice, despite very serious and legitimate concerns that many investors are already far too short-term oriented. The Commission’s objective should be to enhance the tools available to the most prudent fiduciaries, rather than catering to those investors who ignore risks until they become crises.

Non-binding proposals, it must be stressed, do not need to garner a majority vote to be effective. It has been our experience that leading companies often see the benefit of addressing risks before they become front-page news or intractable problems. Companies often, for example, choose to open dialogue even before the votes are cast, leading to agreement and withdrawal of the resolution, or they will begin to actively address an issue when a proposal receives a vote of 8-10%. This process is not coercive, as some have claimed. It is, rather, a reasonable and well-regulated process of engagement, whereby companies and their shareholders seek common ground in pursuit of their shared long-term goals. It is important to note, however, that in many cases these productive discussions would not begin without the ability of shareholders to place a non-binding proposal on the corporate proxy.

3. The replacement of non-binding proposals with electronic forums

Non-binding shareholder proposals are an important check on company behavior, and not merely a communication mechanism, as is implied by the idea of replacing such proposals with electronic forums. Proposals focus attention on long-term risks because they provide the proponent with real leverage, arising from the proposal’s appearance on the corporate proxy statement, its review by the board of directors, and its presentation, in person, to management, the board, and shareholders at the company’s annual meeting. None of these elements are present in an electronic forum, and therefore no electronic forum — which itself could become a time-consuming and expensive distraction for companies — could effectively substitute for the shareholder proposal.

Of course, we support the use of electronic media and new technologies wherever they may increase efficiencies, decrease costs and improve access to information. For the reasons noted above, we would reject any electronic forum “in lieu of” the shareholder proposal process. As a separate process, however, the critical test we would apply is whether such a forum could serve as a useful tool for fiduciaries. The concept that has been presented is far too open-ended to pass that test, and raises numerous open questions, such as:

⁵ *Stern Review on the Economics of Climate Change*, prepared by Sir Nicholas Stern, Head of the Government Economics Service and Adviser to the Government on the economics of climate change and development, presented to the Prime Minister and the Chancellor of the Exchequer on the Economics of Climate Change, 30 October 2006, available at http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/sternreview_summary.cfm



- How could a fiduciary with a broadly diversified portfolio be expected to monitor the information shared on a daily electronic forum established for each of his holdings?
- Would companies be provided safe-harbor under Regulation FD to disclose material information on these forums? If so, how would a fiduciary be able to find it?
- What would be the value of an electronic referendum that was not addressed to the company's entire base of shareholders?
- Would the board of directors have any obligation to monitor the forum?
- What safeguards could be put in place to ensure that information shared on such a forum was not false or misleading? Without such safeguards, what are the risks to investors?
- We believe an unregulated forum would be of little value to investors. Could the SEC regulate such a forum without raising First Amendment concerns?

Conclusion

We thank the Commission for the opportunity to comment on these proposals. Rule 14a-8 has proven to be a critical fiduciary tool. We urge the Commission to abandon any consideration of weakening this rule, and respectfully request that the two proposals under consideration be rejected.

Sincerely,

A handwritten signature in black ink, appearing to read 'Adam Kanzer', written over a light gray rectangular background.

Adam M. Kanzer
Managing Director & General Counsel