



SOCIETY OF CORPORATE SECRETARIES  
& GOVERNANCE PROFESSIONALS

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October 5, 2007

Securities and Exchange Commission  
100 F St., N.E.  
Washington, D.C. 20549  
Attention: Nancy M. Morris, Secretary

Re: File No. S7-16-07  
Release Nos. 34-56160; IC-27913  
*Shareholder Proposals*

File No. S7-17-07  
Release Nos. 34-56161; IC-27915  
*Shareholder Proposals Relating to the Election of Directors*

Ladies and Gentlemen:

The Society of Corporate Secretaries & Governance Professionals (the “Society”) appreciates the opportunity to respond to the request for comments made by the Securities and Exchange Commission (the “Commission”) in its July 27, 2007, releases entitled “Shareholder Proposals” (the “Access Proposal”) and “Shareholder Proposals Relating to the Election of Directors” (the “Director Exclusion Proposal”). Because these are alternative proposals, and the issues involved in the proposals are intertwined, we have chosen to respond to both of these proposals in a single letter.

The Society, founded in 1946 as the American Society of Corporate Secretaries, has over 4,000 members representing approximately 3,000 companies, most of which are issuers of publicly-traded securities. Our members provide expertise to their corporations in securities laws and in corporate governance, including interaction with shareholders about shareholder proposals. In addition, as corporate secretaries, our members are directly involved in and routinely manage the preparation and distribution of proxy materials and the conduct of stockholder meetings on behalf of their companies.

We strongly support, and believe in, good corporate governance and in the right of shareholders to have an effective vote in the election process. We also support the Commission’s efforts to clarify director election rules and strengthen the proxy election system. In light of the uncertainty surrounding access proposals after the Second Circuit’s opinion in *American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group, Inc.*, 462 F.3d 121 (2d Cir. 2006) (AFSCME v. AIG), we welcome the Commission’s adoption of its long-standing

interpretation of shareholder proposals regarding director elections in the Director Exclusion Proposal.

For the reasons set forth below, we believe the Commission should adopt the Director Exclusion Proposal, or at the very least issue no-action letters permitting the exclusion of access proposals consistent with the adoption of its interpretation. The additional certainty provided by these actions is necessary and appropriate at this time.

Also, as discussed below, we strongly urge the Commission to set aside the Access Proposal at this time as we believe that Proposal would undermine protections built into the Commission's proxy rules and have other undesirable consequences.

In addition, rather than an isolated focus on proxy access, we believe the Commission should take the opportunity to conduct a more comprehensive review of the entire shareholder communication, shareholder proposal and proxy process. We have previously commented on some of these ideas in our letter dated May 11, 2007 regarding the roundtable process, and we again urge the Commission to undertake a more comprehensive review of this important area. The issues involved are much too important, complex and intertwined to be dealt with in the context of isolated actions.

We provide comments below on both proposals, along with suggestions regarding a review of Rule 14a-8 and proposed next steps to address some of the issues raised by the proxy roundtables.

### **The Director Exclusion Proposal – File No. S7-17-07**

The proposed Director Exclusion Proposal amendments to Rule 14a-8(i)(8) clarify the Commission's long-standing exclusion of proposals that relate to elections of directors. We therefore strongly urge the Commission to adopt this proposed rule well in advance of the 2008 proxy season in order to provide necessary clarity to both issuers and shareholders and to eliminate the uncertainty that has resulted from the AFSCME v. AIG decision. There is no justification for the shareholder proposal process to be subject to a potentially different interpretation in the Second Circuit than elsewhere.

We also believe that no new facts or circumstances have arisen to change the reasons for excluding shareholder proposals relating to the election of directors. The Director Exclusion Proposal recognizes that shareholder proposals that could result in director election contests are not appropriate for inclusion in management's proxy statement because such proposals should only be made in compliance with the contested election proxy rules. The Director Exclusion Proposal is carefully tailored to exclude proposals that could result in contested director elections – while recognizing that shareholders who wish to nominate directors have other avenues in place by which to submit such nominees for consideration to the board of directors of the issuer and, failing that, to other fellow shareholders.

We further believe that the amendment proposed by the Commission provides sufficient certainty with respect to the scope of the exclusion, and the discussion in the release leaves little room for doubt with respect to the Commission's intended meaning. We therefore believe that specifying procedures that the staff historically has found to fall within the exclusion is not necessary and could be confusing, because it would be difficult to draft a comprehensive list that includes every possible permutation of a procedure covered by the exclusion. Any list would need to contain case-by-case examples that, to the extent there is any doubt, are better covered in a no-action letter than in an amendment to the rule. For example, in addition to the procedures listed in (A) through (D) in the example given by the Commission (Federal Register, page 43493), one could also include: (E) results in ad hominem attacks on one or more directors standing for election; (F) requires resignations of one or more directors; and (G) requires a nomination process that submits more nominees for election at an annual meeting than the number of open spaces on the board -- and there could be many more.

Finally, we believe it is important for the Commission staff to once again issue no-action letters permitting the exclusion of access proposals. Such action would create certainty for companies and shareholders alike and avoid costly and time-consuming litigation. It is also consistent with the Second Circuit's decision in AFSCME v. AIG that simply requested that the Commission explain its interpretation of the rule. The Commission has complied with the Second Circuit's decision by adopting its interpretation of the rule contained in the Director Exclusion Proposal. Therefore, even if the Director Exclusion Proposal is not adopted in advance of the 2008 proxy season, as we urge above, the staff should commence issuing no-action letters consistent with its interpretation of the exclusion set forth in the release.

#### **The Access Proposal – File No. S7-16-07**

The Access Proposal eviscerates the protections carefully crafted by the Commission with respect to shareholder proposals that could result in contested elections. In our view, director election contests should be separate from the Rule 14a-8 shareholder proposal process in order to maintain the increased disclosure and process requirements applicable to such contests. It would be inappropriate for individual shareholders or groups of shareholders, who do not owe a fiduciary duty to the company or other shareholders, to be allowed to use company assets and resources to propose changes in the company's governing documents or elect a competing slate of directors.

Existing proxy rules and current corporate governance practices provide shareholders with various avenues to seek change in the composition of the board of directors. The recent adoption of the e-proxy rules makes it easier and more cost effective for shareholders to conduct a proxy contest. SEC and self-regulatory organization rules have strengthened the nominating process and the independence of boards. Majority voting procedures provide shareholders with a powerful tool to express dissatisfaction with directors nominated by the board pursuant to the nominating committee process. Many companies meet on an informal basis with large shareholders, and these informal avenues

of communication tend to be more constructive and less disruptive than an election contest.

Our particular concerns with respect to the Access Proposal are discussed below.

A. Weakening of Nominating Committee Process

The Access Proposal is inconsistent with, and would undermine, initiatives of the SEC, the NYSE and other self regulatory organizations to strengthen the role and independence of nominating and corporate governance committees. These committees, composed entirely of independent directors, are charged with the responsibility of identifying qualified individuals to serve as board members and to represent shareholders as a whole. While it is entirely appropriate for shareholders to nominate individuals to serve on the board, if such nominees can circumvent the careful processes put in place (and disclosed to shareholders) by the nominating committee, the authority and function of such committees would be undermined. This circumvention of the established process may result in the election of persons who represent special interest groups, do not meet applicable board membership criteria, are not independent, and may cause the violation of regulatory laws to which the company is subject (e.g., director interlocks).

B. Improper Shifting of Proxy Contest Costs

By permitting a shareholder, large or small, to use the company's proxy statement to nominate its own directors, the additional costs associated with director elections would be shifted from the shareholder seeking to engage in the proxy contest to all of the company's shareholders. This result is not warranted, especially given the Commission's new e-proxy rules that are likely to reduce significantly the costs to those shareholders who wish to engage in a traditional proxy contest.

C. Misuse of Schedule 13G and Control Reporting

In the questions it asks with respect to the proposal, the Commission recognizes the tension between filing a 13G and the ability to influence control of the company by proposing a bylaw amendment to submit shareholder nominees in the company's proxy statement. The proposed increased disclosures contained in items 8B and 8C to Schedule 13G regarding information about the shareholder proponent and the relationships of the shareholder proponent to management do not resolve this tension. In fact, this proposed system is confusing, and it is doubtful that the average investor would peruse 13G filings to find such information. Information of this nature should be provided in the core documents sent to security holders, as in the case with contested director elections.

We also do not believe that this tension can be relieved through safe harbors "of some kind" or by limiting the number of candidates sought to be included in the proposal. It is disingenuous to assume that shareholders who propose a bylaw amendment to permit them to place director nominees in the company's proxy statement

have no purpose to influence control of the company. In constructing the bylaw amendment, the shareholder proponent will have the ability to control how shareholder nominees are submitted outside of the nominating committee process and which shareholders qualify for submitting such nominees in the proxy statement. If a shareholder chooses to seek such influence over the company, the shareholder should lose 13G eligibility and be required to file ownership reports on a Schedule 13D.

#### D. Confusing Proxy Statement Disclosures

The disclosures provided pursuant to proposed new Item 24 to Schedule 14A and Rule 14a-17 are likely to be confusing to investors. Particular problems include:

- *Contested elections:* To the extent that an election is contested, it would be confusing to have the contested solicitation as part of the company's proxy statement. Those solicitations should be part of a separate proxy statement and separate proxy card under Rule 14a-12.
- *Nominating process:* With the inclusion of a shareholder proponent's nominees in the proxy statement, investors may believe, mistakenly, that the proponent's nominees were subject to the company's nominating committee process disclosed in the proxy statement.
- *Relationship with management:* The required disclosures of Item 24 to Schedule 14A focus on the shareholder proponent's relationship with management and the company. The disclosure of these relationships in the company's proxy statement may falsely imply that the shareholder proponent is allied with management and that the candidates nominated by the shareholder proponent are therefore endorsed by management.

#### E. Additional Safeguards to be Incorporated Into the Access Proposal

As discussed above, we do not believe the Commission should adopt the Access Proposal. If the Commission nevertheless proceeds, the threshold for shareholder access should be not less than 5% beneficial ownership, and a minimum one-year holding period should be required. Any access bylaw proposal should also include the following additional safeguards:

- Expressly limit the number of directors that shareholders could nominate, so that these procedures cannot be used as a mechanism for effecting a change of control of a company. We note, in this regard, that the Commission's access proposals in 2003 contained limits on who could nominate director candidates and on how many candidates could be nominated and included in the company's proxy statement.
- Require the shareholder proponent to disclose the proponent's total position in the company's stock, rather than just long positions. Disclosure should also be required of any arrangement that affects such proponent's voting or economic rights; given the possibility of

the de-coupling of economic interests from voting rights, other shareholders need to know this information regarding the proponent in order to obtain a clear and accurate understanding of the proponent's interest in the company.

### **Non-Binding Proposals under Rule 14a-8 and Other Proxy Process Issues**

In the Access Proposal, the Commission requests comments on a number of issues regarding non-binding proposals. Our companies have been faced by an increase in the number of precatory proposals over the past several years. These proposals require substantial time from issuers' managements and boards of directors, as well as that of the Commission staff. Accordingly, we support a review of Rule 14a-8, with a focus on the following issues:

#### **A. Eligibility Threshold**

Shareholder proposals have a financial impact on all shareholders. A single proposal – whether precatory or binding – can require substantial attention and resources of an issuer, including its in-house legal and investor relations staff, outside securities and state-law counsel, senior management, and the board of directors. As such, we believe the Commission should set the minimum threshold at a level that gives shareholders greater assurance that the submission of each proposal is motivated by a desire to advance significant and broad-based corporate issues rather than narrow concerns espoused by individuals with only a minimal investment in the issuer. Based on a review of the 2007 proxy statements of the Fortune 50, approximately 33% of proposals were submitted by shareholders owning less than 200 shares.

The Commission first established the minimum dollar requirement for submission of shareholder proposals at \$1,000 in 1983 and subsequently adjusted it to \$2,000 in 1997. We believe the Commission should now raise this threshold significantly. The Commission should also consider adopting a mechanism by which the eligibility threshold is periodically adjusted over time so that the threshold remains relevant and need not be revisited by the Commission in subsequent years.

#### **B. Holding Requirements**

We believe that the Commission should re-examine the holding period in the rule and refine the requirements so that proponents cannot “borrow” stock simply for the purpose of submitting a proposal. For example, as part of the submission process, a shareholder should be required to certify that he/she: understands and supports the proposal; takes responsibility for the proposal and the statement in support of the proposal to be included in the proxy; retains the ultimate decision-making authority with respect to the proposal, including decisions as to whether to withdraw; and is able and willing to participate in discussions with the company about the proposal. Such a requirement would not be burdensome or costly for a shareholder and would better align proposals and their proponents.

### C. Resubmission Threshold

Rule 14a-8(i)(12) provides a range of time periods during which a shareholder proposal may not be resubmitted, depending on the level of support an earlier similar proposal received. We believe these current thresholds are far too low when balanced against the issuer's cost to respond, the increasing influence of proxy advisory services on the vote as discussed below, and the minimal support a proposal must receive in order to be resubmitted the following year. As noted above, proposals require the issuer to devote the time and attention of internal legal and investor relations staff, senior management and the board of directors, as well as costs of outside securities and state-law counsel. An issuer and its shareholders should not be required to bear the costs of responding to a proposal that was rejected by 90 percent of shareholders. A review of proxy statements since 1996 provides evidence of multiple instances in which an issuer must respond to a proposal that continually fails to receive significant shareholder support. For example, one Fortune 500 company has been forced to respond to the same or similar proposal for ten years even though the proposal has never received support in excess of 17 percent. We question why the resources of the issuer must be devoted to such process following consecutive votes by shareholders in which their direction is unambiguous. For these reasons, we believe the resubmission thresholds of Rule 14a-8(i)(12)(i), (ii) and (iii) should be raised to 10 percent, 15 percent and 20 percent, respectively.

### D. Elimination of "Significant Social Policy" Exception

Although Rule 14a-8(i)(7) permits the exclusion of proposals that relate to a company's "ordinary business", the staff has permitted inclusion of proposals that involve a "significant social policy". However, there is no standard by which to determine when an issue has become one that raises a "significant social policy" – and thus, it has fallen to the staff to become the arbiter to determine if these types of proposals may or may not be excluded from the proxy. The result is that proposals that are – or are not – excluded from an issuer's proxy statement have shifted over time at the discretion of the staff. The distinction in treatment between ordinary business and significant social policy has no basis in state corporation law, and it serves to undercut significantly the "relevance" and "ordinary business operations" exclusions which were intended by the Commission to reflect the fact that state corporation law generally grants to the Board of Directors and management the authority to run the business and operations of the company. We therefore request that the Commission review its application of the significant social policy exception.

### E. Application of "Substantially Implemented" Exclusion

Under Rule 14c-8(i)(10), companies may exclude a proposal by a shareholder if that proposal has been "substantially implemented". As the Commission has stated on several occasions, the exclusion was intended to be available to the company even if the proposal had not been fully effected in every detail.

We believe this exclusion is important because it recognizes a basic corporate governance principle -- that the business and affairs of a company should be managed by, or under the direction of, its board of directors. Thus, once a company's board of directors has considered an issue that is the subject to a shareholder proposal and has taken steps that "substantially implement" the proposal, that issue should no longer be subject of a Rule 14a-8 proposal, even if the company has not adopted the precise procedures or taken exactly the same approach with respect to the issue as is being proposed by the shareholder. When the staff applies the exclusion in too narrow a manner, the result not only undermines the authority of a company's board of directors to determine what is in the best interests of the company and its shareholders, but also causes the company to spend time and expense on no-action requests to exclude the proposal or waste the shareholders time in having to vote on an issue that has already been addressed by the company.

We urge the staff to re-evaluate the standard it is applying to determine if a proposal may be excluded from a company's proxy statement as "substantially implemented." We believe that under our corporate governance system, a company's board of directors should be given deference to determine, with respect to the issue that is the subject of the proposal, the most appropriate way to address it.

### **Next Steps**

We believe that the Commission should adopt the Director Exclusion Proposal in advance of the 2008 proxy season. As we suggested in our comment letter in support of the roundtable process and in earlier correspondence on proxy-related matters, we believe that the Commission then should undertake further study and consider further rule-making on shareholder communication and the proxy process in its entirety including the following:

#### **A. Role of Proxy Advisory Services**

Proxy advisory services wield an enormous influence on United States capital markets and are able to influence voting in many corporate elections, but they are not subject to the disclosures or rules with respect to their ability to control the outcome of a vote. In 2006, Institutional Shareholder Services, an advisory firm with over 1,700 clients and equity assets of \$25.5 trillion, voted 7.6 million ballots representing 846 billion shares. *See* <http://www.issproxy.com/pdf/votingservices.pdf>.

Advisory firms have an inherent conflict of interest with the voting process because they also provide advisory services to issuers such as corporate governance ratings, corporate governance advice and other research-related services. Advisory firms charge issuers significant fees for these services. The advisory firms then advise institutional clients (e.g., institutional money managers) on how to vote on board nominees and proposals set forth on the proxy statements of their issuer clients. Some of these same institutional clients are the proponents of these shareholder proposals, which



creates another conflict of interest. While advisory firms may claim to have informational barriers and other procedures to deal with these conflicts, the procedures used by these firms nevertheless should be subject to regulatory scrutiny.

We believe that the Commission's recent set of rules covering credit rating agencies is a good model to consider with respect to the oversight of proxy advisory services.

#### B. Communications with Investors

The Commission should examine the current Non-Objecting Beneficial Owner/ Objecting Beneficial Owner (NOBO/OBO) system and propose rules that facilitate communication between issuers and their beneficial owners and reduce the costs of such communications.

#### C. Transparency of Ownership

With increased control exercised through short-term borrowings and hedge fund activity, requirements surrounding Section 13 beneficial ownership reports should be revisited to with respect to the timing of reports, the reporting persons required to make such reports and whether such reports sufficiently disclose the economic interests and intentions of the reporting persons. A reexamination of the NOBO/OBO rules also should promote transparency as well as communication. There are no longer compelling reasons for issuers to be denied transparency of their ownership structure.

#### D. The Vote of Individual Investors

The Commission should examine how to protect the vote of the individual investor, in particular how to handle unvoted shares. We note that institutional investors generally vote 100% of the time, facilitated by special electronic systems and aided by proxy advisory services. Individual investors have no similar advisory services or voting facilitators, and their voting power risks further reduction through proposed revisions to NYSE Rule 452.

Possibilities that the Commission should consider to protect the voting power of individual investors include proportional voting (based on the retail, rather than institutional, vote) and client-directed voting.

#### E. Electronic Shareholder Forum

While the concept of an electronic shareholder forum has merit, we believe that the concept should not be addressed as part of the Access Proposal, but rather, should be addressed as part of a study reviewing shareholder communication more generally.

## **Conclusion**

In summary, we support the Commission's confirmation of its long-standing interpretation under Rule 14a-8(i)(8) and its proposed clarification of the Rule to reflect this interpretation. We do not believe that the alternative shareholder access proposal should be adopted in its present form, nor should it be pursued at all in isolation from the other significant issues present in today's shareholder communications and proxy voting processes. The Commission has now, since 2003, published three completely disparate proposals on this specific matter and there are, of course, numerous other proposals and "solutions" that can be submitted on this matter. Each proposal would affect the overall universe of shareholder communication and proxy voting processes, and the capital markets, in numerous different ways not presently understood without further study and input from all relevant constituencies.

The recent roundtables on the proxy process were an appropriate start to understanding these interrelationships, with useful views and analyses gathered on a number of topics. Many of these topics are mentioned in supplemental questions in the Access Proposal, but they would be better placed in a comprehensive review of the proxy process, with an invitation to detailed comment on the numerous topics. As we have stated in the past, we believe the entire proxy process is so important, and so intertwined with the efficient operation and control of our capital markets, that the Commission should initiate a major, all-encompassing study as done in the past with, for example, the integrated disclosure system, the national market system and 1933 Act reform. At the very least, the Commission could examine the proxy process in conjunction with significant rulemaking proposals as outlined above, with time to invite input from all affected parties and to apply a holistic approach to future changes.

We appreciate the opportunity to comment on these important proposals and would be happy to provide you with further information to the extent you would find it useful.

Respectfully submitted,

Society of Corporate Secretaries and Governance Professionals

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