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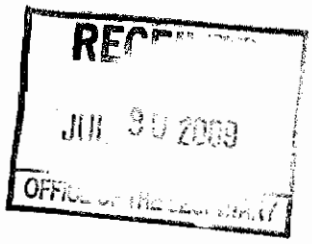
July 24, 2009



Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File Number S7-10-09

Ladies and Gentlemen:

I appreciate the opportunity to comment on the Commission's proposed proxy access rules. This letter is sent on my behalf, rather than on behalf of the firm or any firm client. I write in support of the proposed change to Rule 14a-8(i)(e) and in opposition to adoption of Rule 14a-11.

As the Commission continues its attempt to address the proxy access issue, one has to be impressed with the attention devoted to the task. Any release that runs two hundred and fifty pages in length, and propounds close to 500 questions for further consideration, speaks volumes. It is indeed ironic that such a magnum opus fails to address bedrock issues of corporate governance at the heart of the proxy access debate. An appropriate analogy would be to a house built with the finest materials and in elaborate detail but constructed on a weak foundation.

Few would challenge the Commission's starting point. We most assuredly have been in "one of the most serious economic crises of the past century." Nor would many dispute that the crisis raises serious concerns about the responsiveness of some boards of directors. An in-depth look at the duty of oversight of corporate boards and the complex issues of risk assessment and risk control are most certainly appropriate. But the suggested link between proxy access and improved risk assessment and control is tenuous at best.

The release also ties the economic crisis to the failure of boards to have been sufficiently responsive to shareholders and then puts forth mandated proxy access as a solution. In contrast to the clear link between the risk assessment and risk control issues and recent economic failures, the link between such failures and boards' alleged lack of responsiveness to shareholders is more suspect. In fact, many would argue that Enron, Worldcom and the recent problems with many of our financial institutions stem in part from an excessive focus on short-term results driven by intense pressure from hedge funds and other shareholders focused on short-term results. At least some of the blame lies with managers of hedge funds and other investment funds whose compensation is weighted in favor of short term gains that have the effect of discouraging long term investments and encouraging risk taking.[1]

In short, while the economic crisis does implicate corporate governance issues in a significant way, using the contention that proxy access would have mitigated the crisis as the foundation for the Commission's proposed action is not supported in the release or elsewhere. Nor in my opinion is it capable of being supported by objective evidence.

But that does not mean that proxy access, as one component of board-shareholder relationships, is not worthy of careful consideration. To the contrary, with the steady movement from individual to institutional ownership, the issue of the proper roles for boards and shareholders takes on increased complexity and importance. Some shareholders and shareholder agents are pushing for proxy access to increase the power of shareholders and weaken the power of the board, contending that directors are mere agents of the shareholders who must, therefore, be more responsive to shareholder demands. Notwithstanding, I believe that most members of the corporate governance community, including a majority of shareholders and their agents, continue to believe in a republican form of governance. They likely would agree that the lesson learned from the economic collapses is that boards need to be stronger, more involved and more clearly separate from both management and shareholders pushing short term returns. But even members of this latter camp would, in many cases, agree that, if boards are to have a more significant role, (i) shareholders should have a meaningful opportunity to have input in the selection of board members, and (ii) carefully crafted proxy access can be one means of providing that input.

I believe that the Commission's latest attempt to address the proxy access issue is flawed in three significant ways. First, the Commission proposes to impose unnecessarily a mandate with respect to a corporate governance issue that should be the province of each corporation's jurisdiction of incorporation and its governance documents, including its articles

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[1] See Remarks of John C. Bogle, Building a Fiduciary Society (Washington, D.C. Mar. 13, 2009). See also Iman Anabtawi & Lynn Stout, Fiduciary Duties for Activist Shareholders, 60 Stan. L. Rev. 1255 (2008).

of incorporation and bylaws. Second, by adopting a "one size fits all" mandate for proxy access, the Commission unnecessarily runs the risk of harming rather than improving corporate governance. Third, key components of the proposed mandate are lacking in logic or divorced from reality, thereby increasing the likelihood that adoption of the mandate will do more harm than good.

Governmental oversight of corporate governance in general, and the relationship between boards and shareholders in particular, has always been for each corporation the province of its jurisdiction of incorporation. As Justice Powell emphasized in CTS Corp. v. Dynamics Corp. of America: "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. See Restatement (Second) of Conflict of Laws § 304 (1971) (concluding that the law of the incorporating State generally should 'determine the right of a shareholder to participate in the administration of the affairs of the corporation')." [2]

On several occasions the release references the interface between the proposed rules and state corporate laws, but there never is any mention of the substance of those laws. Nor is there (i) acknowledgment of the primacy of those laws with respect to the relationship between boards and shareholders, including the voting and other rights of shareholders or (ii) discussion of the preemptive affect of proposed Rule 14a-11 on more restrictive proxy access provisions in charters and bylaws. There is no question that the issue of proxy access affects in a significant, albeit indirect, way the voting rights of shareholders. Even if you assume that a federal administrative agency can require proxy access without intruding illegally on the province of the various states of incorporation, you would expect that it would have the objective of keeping the intrusion to a minimum.

Noteworthy in this regard is the absence of any suggestion in the release, or, to my knowledge, elsewhere, that the states have failed to act responsibly with respect to corporate governance, in general, or more specifically with respect to the rights and responsibilities of boards and shareholders. To the contrary, there is plenty of evidence that the states have been addressing the issues raised by high profile economic failures that have occurred in the last decade. For example, in 2005 the Corporate Laws Committee of the American Bar Association's Section of Business Law amended the Model Business Corporation Act (the "Model Act") to recognize expressly that boards of public corporations have oversight responsibilities that include attention to: "(1) business performance and plans; (2) major risks to which the corporation is or may be exposed; (3) the performance and compensation of senior officers; (4) policies and practices to foster the corporation's compliance with law and ethical

[2] 481 U.S. 69, 89 (1987).

conduct; (5) preparation of the corporation's financial statements; (6) the effectiveness of the corporation's internal controls; (7) arrangements for providing adequate and timely information to directors; and (8) the composition of the board and its committees, taking into account the importance of independent directors."[3] And for the last two years, the Committee has been engaged in a "back to basics" examination of the roles of boards and shareholders. The proxy access changes to the Model Act discussed below stem from that review. The Model Act is the source of the corporation laws in approximately 30 states.

More recently, Delaware, the state of incorporation of a large percentage of public corporations, amended its corporate code to clarify that a corporation's bylaws can (i) include provisions granting shareholders access to the corporation's proxy statement and proxy forms for the purpose of nominating and promoting candidates for director and (ii) provide for shareholder reimbursement of expenses in promoting candidates for director.[4] And in June of 2009 the ABA's Corporate Laws Committee approved on second reading similar clarifications to the Model Act confirming the legality of shareholder access bylaws as well as provisions for reimbursement of expenses incurred in promoting director candidates.[5]

It is hard to understand why the foregoing corporate governance and, more specifically, proxy access developments at the state level are not discussed in the release announcing the proposed rules. With all of these developments, allowing the states to take the lead on proxy access makes sense from a legal perspective. And there is a second, perhaps more important reason for the Commission to show deference and take a minimalist approach to proxy access. Simply put, no one can say with confidence what the effect will be if the proposed rules are adopted. As was noted in a recent New York Times article, whether the new-found power of institutional shareholders "will be used wisely or irresponsibly, honestly or with ulterior motives, remains to be seen."[6] The lack of knowledge occurs in ascending levels of specificity and importance. How often will shareholders take the necessary steps to take advantage of the rules and submit nominations? Will shareholders who do so be interested in-long term performance or event- driven short-term results? Or will the field be dominated by individuals or organizations in pursuit of a particular social policy or other agenda? How will other shareholders respond to candidates nominated through proxy access? Equally important, how will boards and individual directors respond? Will the rules have a positive or negative effect on corporate performance? Will boards become stronger or weaker, more or less diverse, with

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[3] Model Business Corporation Act § 8.01(c).

[4] See Del. Gen. Corp. Law §§ 112, 113.

[5] See American Bar Association News Release, Corporate Laws Committee Takes Steps to Provide for Shareholder Access to the Nomination Process (June 29, 2009). It is noteworthy that these changes regarding proxy access were viewed as confirming existing law, rather than creating new law.

[6] Floyd Norris, With Power the Risk of Abuse, N.Y. Times, July 17, 2009.

more or less expertise? Will corporate governance be better or worse? Will the corporation be more or less successful in the generation of durable wealth for the shareholders?

The inability to anticipate the answers to any of the foregoing questions is critical. With the widely held belief that boards need to be stronger and more accountable, changes in the selection process that may or may not lead to a better board and better board performance should be taken cautiously. While giving shareholders rights sounds a lot like motherhood and apple pie, there is a real possibility that for some corporations significant negative consequences will flow from adoption of the proposed rules. Attacking corporate boards in today's environment is easy. But the fact remains that the process that should be, and in most instances is, followed in developing a corporate board is time-consuming and complex. Identifying the different qualifications that some or all directors should have, including for example, which fields of expertise need board representation, is always a challenge. Developing a team with good balance, taking into account important issues such as diversity, leadership skills and expertise, is not easy. Then finding and recruiting individuals who meet the criteria and who have the time and interest to participate is a seemingly ever-increasing challenge. This is not to say that once the team is in place, it should not be free from challenge. But it may well not be in the best interests of corporations and their shareholders if the use of proxy access and resulting contested elections become the norm, especially if compensated proxy advisors, as has been the practice in some cases, adopt a policy of automatically supporting at least some of the shareholder nominees in substantially every case.[7]

It is surprising that the Commission's release appears not to engage the issue of the likely extent to which shareholders might be expected to take advantage of proxy access, much less the potential negative consequences of extensive use of proxy access. Two possible explanations come to mind, both of which are important. One possibility is that the Commission believes that only good can come from proxy access, thereby eliminating the

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[7] In this connection, there is a potentially significant difference between a short slate election contest and a proxy access nomination. In the former, the dissident must identify the incumbent directors who are targeted for defeat. At a minimum, this allows the board to present its case with some particularity. In addition, it is likely that the dissident will take into account at least some of the qualifications that the corporation needs to have covered. For example, a dissident is not likely to target the corporation's sole financial expert, if its short slate does not include someone who also would qualify as a financial expert. In contrast, with proxy access the shareholder nominees will be running against all of the incumbents increasing the risk that following the election the corporation will be missing a critical board component in the form of lost expertise, lost diversity or lost leadership.

An interesting issue is whether a shareholder or group of shareholders should be allowed to use proxy access and thereafter engage in its own solicitation, which presumably would be subject to the proxy rules relating to short slates.

possibility that proxy access is subject to excessive or harmful exploitation.[8] In the absence of any discussion of the issue, one can only speculate as to the basis for the Commission's approach. Notwithstanding, the tone of the release leaves one with the impression that proxy access must be good not only because many directors are unattentive and unresponsive but also because an assumption is made that shareholders using proxy access will act in a manner that will be beneficial to all shareholders.

Such an assumption is fundamental and flawed. Only recently has the corporate governance community begun to pay attention to the question whether shareholder rights should be linked to shareholder responsibilities.[9] Few would dispute that the balance of power among management, boards and shareholders has shifted significantly towards shareholders as "ownership" has shifted from individuals to institutions. Logic would suggest that an increase in shareholder rights should be accompanied by an increase in responsibilities. And some are now arguing that significant shareholders should have more responsibilities imposed upon them.[10]

Notwithstanding, most members of the corporate governance community continue to support the view that, except in extreme cases of abuse, shareholders should be free to act in their own self-interest without any obligations to the corporation or its other shareholders. A logical corollary to that basic view would seem to be that any consideration of the rights of shareholders should take into account that shareholders in exercising those rights have no obligation to the corporation or their fellow shareholders. For example, in any consideration of shareholder rights should corporations be able to treat differently shareholders with special, or even conflicting, interests or to distinguish between shareholders who have committed to the corporation for the long-term versus day traders and other shareholders who focus on short-term results. One wonders whether the Commission has considered the possibility that proxy access as the tool of the wrong group of shareholders would harm the corporation and its other shareholders.

The second possible reason for the lack of any consideration in the release of the potential effects of mandated proxy access may have been the recognition that we have no experience with proxy access to serve as a basis for any meaningful assessment. It seems somewhat ironic that the principal reason we have no experience to rely on is that the existing

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8 The carve-out for change of control scenarios would appear to be the only exception recognized.

9 Even more fundamentally, increasing attention is now being paid to the definition of a shareholder. With greater institutional ownership has come increasingly attenuated links between the record holder and the individual or group that owns the economic interests. And, with borrowed shares and derivative securities, it has become increasingly harder to attribute real economic ownership.

10 See, e.g., Arabtawi & Stout, supra.

proxy rules have prevented shareholders from ever seeking proxy access. Amending Rule 14a-8 as proposed would eliminate the roadblock.

Taking that step while delaying taking action on proposed Rule 14a-11 would permit badly needed state by state, corporation or corporation experimentation with different forms of proxy access. Corporations and their shareholders would have the opportunity to use proxy access subject to a variety of different conditions. Over time a variety of best practices with respect to proxy access likely would develop. Requiring a majority, rather than a plurality, of the votes cast to elect a director would appear to be an excellent example of a significant corporate governance change currently being addressed state by state, corporation by corporation without the disadvantage of a one size fits all federal mandate.

Amending Rule 14a-8 while deferring action on Rule 14a-11 also would appear to have a number of other significant practical advantages. Speed of adoption would be enhanced since many of the propounded questions would become irrelevant. A united Commission might well be another result. The positive effects of a unanimous vote, as contrasted with a divisive 3-2 vote, should not be underestimated, especially in the face of turbulent economic times. Finally, it would reduce, if not eliminate, the risk that the rules change will face substantial legal challenges and remain in an uncertain state for years while being contested at every level of the federal court system.

If, notwithstanding the foregoing, the Commission elects to mandate proxy access, it is urged to reconsider several of the criteria set out in proposed Rule 14a-11.

(1) Raise the minimum ownership threshold. There are individuals and institutions, some for compensation, who are in the business of stirring the pot every proxy season. They attack multiple corporations every year. The specific strengths and weaknesses of each target is not of particular concern. With the low thresholds, there is a substantial likelihood that these individuals and institutions will, with ease, be able to act in concert to propose nominees every year for a significant number of companies. While the chances that they will succeed may not be great, if one or more proxy advisory firms holds to past practice and supports one or more shareholder nominees in substantially all contests, boards and management will, regardless of the merits of the shareholder nominees, have to defend themselves. That inevitably will mean significant diversion from the corporation's business, potentially for months at a time year after year. The thresholds should not be insurmountable, but 1% is a stimulant for overuse of

proxy access.[11] Here again, logic would suggest that the best approach would be to let boards and shareholders work out a minimum threshold for their corporation.[12]

(2) Get rid of the first in line rule. There is no link between the proponents' interest in the corporation and being first in line. Nor is there any link between being first in line and the quality or qualifications of the nominee or nominees. Linking the right to the greatest percentage ownership may not be ideal, but percentage ownership certainly is a more reliable indicator of interest in the corporation.

(3) Put more substance in the change of control exception. The Commission recognizes that the proposed mandate of proxy access should not be used as a pathway for effecting a change of control. There is a real risk that a substantial toe hold can be converted over time into a change in control to the detriment of the corporation and the other shareholders – – including the possibility that control can be acquired without having to pay the remaining shareholders the control premium to which they are entitled. The proposed rules require an initial certification that a control change is not intended. But there is no apparent remedy if, as the federal court found in last year's CSX Corporation proxy fight, the denial of intent to control proves to be false. Nor is there any disincentive to discourage or prevent the proposing shareholder or shareholders from having a change of mind at any time.

(4) Confirm that if a corporation, pursuant to the law of the state of incorporation, establishes qualifications for director, those qualifications also apply to any nominee submitted through proxy access. For example, if the bylaws state that no individual 70 years or older can stand for election, proxy access rules should not trump that restriction. Similarly, if a corporation has a diversity qualification in its bylaws, proxy access rules should not permit bypassing of that qualification. For example, take a corporation whose business is women's clothing. The corporation has a board of nine with staggered three year terms and a bylaw that requires that a majority of the directors be women. If you assume that of the five women directors, three are up for reelection, then any nominee of any shareholder using proxy access should have to be a woman.

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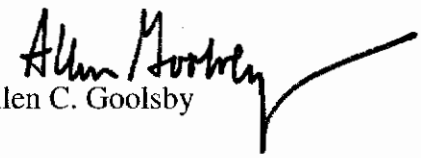
[11] You also have to wonder whether a shareholder or shareholders with special interests will not find occasion to take advantage of the low threshold to use the proxy access threat to pressure management or the board to yield to their special interests to the detriment of the other shareholders.

[12] See John C. Wilcox, A Struggle for the Soul of the Board, Corporate Governance Advisor, May/June 2007.

> While age and diversity issues would appear to have relevance for all corporations, they undoubtedly will be more critical for some corporations than others, providing another example why the best approach to proxy access is state by state, corporation by corporation.

I appreciate the opportunity to comment on the proposed rules.

Most sincerely,



Allen C. Goolsby