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October 2, 2007

VIA E-MAIL: rule-comments@sec.gov

Nancy M. Morris,
Secretary,
Securities and Exchange Commission,
100 F Street, NE,
Washington, D.C. 20549-9303.

Re: File No. S7-16-07 and S7-17-07
Release No. 34-56160; IC-27913 – Shareholder Proposals;
Release No. 34-56161; IC-27914 – Shareholder Proposals
Relating to the Election of Directors

Dear Ms. Morris:

We are pleased to respond to the request of the Securities and Exchange Commission (the “Commission”) to comment on Releases 34-56160 and 34-56161, which set forth mutually exclusive proposed rules concerning the right of shareholders to use an issuer’s proxy materials to nominate candidates for the issuer’s board of directors. Release No. 34-56161 contains the so-called “short proposal,” which would explicitly conform Rule 14a-8(i)(8) to the existing interpretation of the staff of the Commission of the current form of that rule. This would permit issuers to exclude shareholder access bylaw proposals that have been submitted under the Rule 14a-8 framework. Release 34-56160 contains the so-called “long proposal,” which is diametrically opposed to the short

proposal. It would amend Rule 14a-8 to permit binding shareholder access bylaw proposals in the issuer's proxy materials, would establish criteria to determine those eligible to make such proposals, and would require extensive additional disclosure both as to the proponents of such bylaws, as well as with respect to any nominations subsequently made under such bylaws. The long proposal also includes new rules to clarify the application of the federal securities laws to electronic shareholder forums.

I. Adoption of the Short Proposal

We strongly advocate the adoption of the short proposal. While “regulation of the proxy process is a core function of the Commission,”¹ we concur with the need to have the Commission “use its authority in a manner that does not conflict with the primary role of the states in establishing corporate governance rights.”² In considering the short and long proposals, it is essential to bear in mind that Rule 14a-8 varies in many very fundamental ways from state corporate law principles with respect to the making of shareholder proposals.

A. *Rule 14a-8 Is Inconsistent with State Law in Many Respects and Any Expansion Should Be Carefully Considered.*

For the reasons noted below, any expansion of Rule 14a-8 should be subject to great caution.

First and foremost, Rule 14a-8 is not necessary for shareholders to make proposals, and in particular, to amend bylaws and nominate directors – those rights exist

¹ See Releases 34-56160 and 34-56161.

² See Release 34-56160.

under state law without Rule 14a-8, subject to such reasonable constraints as corporations may impose in advance notice bylaws. Rather, Rule 14a-8 provides a subsidy – shareholders who comply with its requirements are able to use the corporation’s assets to promote their proposals by including them in the issuer’s proxy statement.³ State corporate law does not contemplate the use of such a subsidy, and any extension must be carefully considered, since subsidies encourage the subsidized behavior.⁴

Second, Rule 14a-8 permits shareholders to make certain proposals that would be ruled out of order under state law, most commonly those that are permitted under the Commission’s policy on proposals that raise sufficiently significant social policy issues.⁵

Third, undoubtedly to balance the fact that it subsidizes certain shareholders at all shareholders’ expense, Rule 14a-8 restricts shareholders’ ability to make proposals in ways that state law does not, most notably with respect to the requirements of share ownership (i.e., amount and period held), and limitations on the number of proposals submitted and resubmission of proposals. Moreover, there is relatively little state law on what is a proper matter for shareholder consideration, and the

³ See Transcript of Roundtable on the Federal Proxy Rules and State Corporation Law held on May 7, 2007, Roberta Romano at 29, R. Franklin Balotti at 40, John C. Coffee at 43, Donald C. Langevoort at 90.

⁴ See Transcript of May 7 Roundtable, Langevoort at 90, Larry E. Ribstein at 232.

⁵ State corporate law provides that the business and affairs are managed by or under the direction of the board (see, e.g., Delaware General Corporation Law § 141), not the shareholders.

exclusions enumerated in Rule 14a-8 may serve to exclude substantive proposals that, if made at a meeting, might ultimately be adjudicated to be proper under state law.⁶

Fourth, Rule 14a-8 has resulted in the proliferation of non-binding proposals, a concept that does not exist under state law.⁷ Such precatory proposals have arisen directly from the advice contained in the Note to Question 9 of Rule 14a-8 that “depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board take specified action are proper under state law.”

Finally, although this is not directly in conflict with state law, Rule 14a-8 has resulted in the “tyranny of the 100 share shareholder with a deep ideological commitment to a particular issue,” with perhaps the greatest cost being the proxy statement becoming unduly long,⁸ containing dozens of pages of little relevance or interest to most shareholders, and serving, in the worst instances, as a form of vanity publication for at least a few proponents.

Given that Rule 14a-8 through its subsidy encourages certain behavior, creates rights not existing under state law, while containing restrictions not found in state

⁶ See Transcript of May 7 Roundtable, Ribstein at 196: “Shareholders seem to have a lot more power to bring these kinds of proposals that would be indicated by the ways 14a-8 has been applied. So there doesn’t seem to be any basis in state law for the way the rule has been applied.” See also Transcript of Roundtable Discussion on Proposals for Shareholders, held on May 25, 2007, Damon Silvers at 8: “there are proposals that are valid under state law that have real effect that . . . at times the commission staff has not allowed to go through under 14a-8.”

⁷ See Transcript of May 7 Roundtable, Leo E. Strine, Jr. at 18: “We do not have imaginary voting.”

⁸ See Transcript of May 7 Roundtable, Coffee at 44, 52.

law, and forces all shareholders to bear the costs of a few, it cannot be viewed simply as a mechanism to “facilitate the exercise of shareholders’ rights under state law.”⁹

Accordingly, great caution should be given to expanding its role.

B. *Adoption of the Long Proposal Will Not Result in Substantial Savings, but Will Create Alternative Disclosure and Procedural Schemes for Election Contests.*

The short proposal maintains the Commission’s and the Staff’s consistent position for many years that Rule 14a-8 should not be used for the conduct of election contests. Permitting shareholder access bylaws to be proposed under Rule 14a-8 will inevitably result in the use of Rule 14a-8 to create election contests.

The proxy rules have been carefully crafted over many years to address election contests. Moreover, the proliferation of Internet use generally, together with Internet and telephonic voting and, most recently, new Commission rules relating to Internet availability of proxy materials have made it possible to largely reduce the costs of waging an election contest to that time and effort required to prepare the necessary disclosure. The case has simply not been made for the need to create an alternate method of nominating directors.¹⁰ Given the ability of proponents to circulate proxy materials on the Internet and the extensive disclosure obligations imposed by the long proposal (which exceed those imposed on “traditional” proxy contestants), an election contest conducted

⁹ Release 34-56160 at 15, stating “essential purpose” of the Commission’s proxy rules.

¹⁰ See Transcript of May 7 Roundtable, Ribstein at 198: “What if we didn’t have the shareholder proposal rule today . . .? Would anybody be proposing that we need some mechanism of shareholder coordination given ISS, given mutual funds, all kinds of institutional investors? Would anybody be thinking that shareholders are so weak today that we would need this kind of coordination mechanism?” See also Transcript of May 7 Roundtable, Amy Goodman at 150: . . . “we’re talking now in a time when there are so many more avenues of communication available. I think what Congress was concerned about with 14(a) was that there were things going on at meetings where shareholders didn’t have appropriate notice and opportunity to vote.”

under the long proposal mechanism would not appear to necessarily involve any substantial cost savings.

In addition, adoption of the long proposal would result in two inconsistent procedural and disclosure schemes with respect to election contests. The existing proxy rules would apply to nominations made by parties not using the issuer's proxy materials, and a different set of rules would apply to nominations made through the use of a stockholder access bylaw. In the latter case, the nominating shareholder would have to provide additional disclosure as to:

- involvement in pending or threatened litigation involving the issuer;
- ownership of stock in competitors of the issuer;
- discussions with proxy advisory firms;
- meetings and contacts with the company's management or directors;¹¹
- the identity of the person responsible for forming plans of the proponent (if not a natural person);
- how such person or persons are selected and whether such person or persons has a fiduciary duty to the equity holders of the proponent;
- such person's or persons' qualifications and background, and any interests or relationships of such person or persons, and of that proponent, that are not shared generally by the other shareholders of the issuer and that could have influenced the decision by such person or persons and the proponent to submit a . . . nomination; and
- more extensive disclosure concerning transactions and contractual interests between the proponent and the shareholder than is called for under the proxy rules for election contests.

¹¹ This disclosure requirement is contradictory to the views of several Roundtable participants who spoke of the beneficial effects of private conversations with issuers which often resulted in a mutually agreed course of action without requiring a shareholder proposal. See Transcript of May 7 Roundtable, Ted White at 97, John Wilcox at 100, Cary Klafter at 135, Goodman at 139. See also Transcript of May 25 Roundtable, William Mostyn at 24.

None of this additional information is required in a traditional election contest, or even in merger proxy statements, tender offers, or going-private transactions, which involve decisions of far greater economic impact to shareholders than the election of a director. Indeed, as drafted, the rules contained in the long proposal would only impose these additional disclosure obligations on parties nominating director candidates under a shareholder access bylaw that was adopted using the Rule 14a-8 mechanism. Nominations under an identical bylaw, but one which was adopted following a traditional proxy contest or with the issuer's acquiescence, would not attract any disclosure obligation, despite the presence of identical policy considerations.

New procedural requirements would also apply to the nominating shareholder and the issuer under the long proposal. Immediately after any shareholder formulated any plans or proposals regarding the submission of a nominee (which would include instances where the shareholder had only indicated an intent to management to submit a nomination), such shareholder would have to promptly provide all of the foregoing additional information to the issuer, who would then have to promptly post it on its web site. This would apply even if the nominating shareholder would not be subject to any disclosure obligations under either Schedule 13D or 13G. Contrast this with the existing proxy rules, which would remain applicable where the nominating shareholder does not seek to use the issuer's proxy materials or uses the issuer's proxy materials pursuant to a bylaw adopted otherwise than through the Rule 14a-8 mechanism, which require only the submission of much less extensive information at the time the

nominating party chooses to file preliminary proxy materials with the Commission (except as disclosure is required on a Schedule 13D).

There seems to be no logical reason why the amount of information required by shareholders in order to make an informed voting decision in an election contest should be substantially greater because the nominating shareholder uses the issuer's proxy statement. Lest the Commission decide to require this additional disclosure for all election contests, the disclosure requirements themselves raise substantial issues. For example, why does only a nominating shareholder, and not the issuer, have to disclose discussions with proxy advisory firms? Why only here, as opposed to the myriad actions that the Commission's jurisdiction (at least with respect to disclosure) covers, are issues such as the "qualifications and background" of decision makers and whether they have a fiduciary duty to their equity holders, raised? Do these additional disclosure requirements cast an inappropriate chilling effect on discussions that should be encouraged between issuers and investors? Is not "any interest or relationship . . . that could have influenced the decision . . . to submit a proposal or nomination" (emphasis added) far too vague and amorphous to create an appropriate disclosure standard?

C. *Adoption of the Long Proposal Would Result in a Regulatory Framework for a Single Shareholder Action When Many Actions of Comparable Impact are Unaffected.*

Adoption of the long proposal would have the anomalous result of creating an entire legal framework and disclosure scheme solely for one specific category of shareholder-proposed bylaw. No case has been made why a shareholder access bylaw

requires such extensive disclosure and rulemaking, while other shareholder proposals (including those proposed as binding bylaws) addressing (for example) poison pills, cumulative voting, majority election of directors, staggered boards, ability to call special meetings, director qualifications, mandatory reimbursement of election contest expenses, etc., do not. Even though many of the foregoing proposals may be framed as precatory proposals, we believe that even non-binding proposals may have substantive effects and should not be considered benign. This is because influential proxy advisory firms, such as Institutional Shareholder Services, Inc., take the position that votes for directors should be withheld if the issuer has ignored a precatory resolution that has been adopted by shareholders. In light of the widespread adoption of majority elections for directors, under which withheld votes may result in directors failing to be re-elected, these “advisory” votes may in fact result in significant changes to boards of directors.

D. *Adoption of the Long Proposal Would Result in Alternate Disclosure and Procedural Schemes for Election Contests Depending on the Issuer’s Jurisdiction of Incorporation and Constituent Documents.*

Finally, we note that two states, Maryland and Nevada, do not provide their shareholders an absolute right to amend bylaws. Accordingly, the procedures mandated by the long proposal would not be applicable to corporations incorporated in those states who have vested this right solely in the board of directors.

II. Comments on the Short Proposal

While we strongly support the adoption of the short proposal, we are concerned that the wording “or a procedure for such nomination or election” is unnecessarily broad. Cumulative voting and majority election of directors are both

procedures for the election of directors, and bylaws addressing qualifications of directors are clearly procedures for nominations, and these would all seem to be encompassed in such exception, despite the Commission's clear intent that they not be.¹² We would recommend instead "or a procedure for an election contest." As additional clarification, we think a Note should be added following this exclusion to the effect of the further clarification suggested on page 21 of the short proposal Release, with the "procedure for such nomination or election" revised to read "procedure for an election contest."

III. Comments on the Long Proposal

Because we believe the short proposal should be adopted, we have not commented specifically on the long proposal. Should the Commission not adopt the short proposal, we strongly urge that it study the long proposal further, rather than enacting it prior to the 2008 proxy season. As a part of such study, the Commission should consider:

- Whether the Commission should impose mandatory minimum qualifications on parties permitted to nominate directors pursuant to shareholder access bylaws, in light of the qualifications imposed by the long proposal on those who can propose such a bylaw. Absent reasonable constraints, annual meeting proxy statements may become an exercise in chaos, with a potentially vast number of nominations made each year. Rather than permitting the market to dictate who can use the issuer's proxy statement to make nominations, should that right not have the same limitations as the right to make an access bylaw proposal? This is particularly important given the far greater distraction to corporate management that arises from election contests, as compared to more typical shareholder proposals under Rule 14a-8. While we recognize that this suggestion (and some which follow below) raise questions regarding the Commission's statutory authority to impose such limitations on the form of a bylaw, we believe such limitations are essential.

¹² See Release 34-56161 at 18.

- Whether, in addition to limits on who can make nominations, there should be a limit on the number of directors any shareholder or group can nominate. In addition, should there be a cooling off period, where shareholders who have made a nomination cannot make another one with respect to the same issuer for a stated number of years?
- Whether there should be a limit on total nominees in any year, perhaps based on a first-come, first-served principle, or on the basis of the percentage of shares held. Given that nominations made by a shareholder access bylaw will necessarily involve the use of a “universal ballot,” the larger the number of nominees, the greater the potential for confusion and the greater the potential harm caused by “empty voting” and over-voting.
- What an issuer should do if more than one access bylaw is proposed for an annual meeting. May the issuer select the preferred form of bylaw from among those proposed?
- Addressing under what circumstances, if any, a shareholder or group with the requisite investment intent under the long proposal to propose a shareholder access bylaw would be able to subsequently nominate any person for director.
- What an issuer should do, or is free to do, if it disagrees with the description of meetings and contacts, or other relationships, that a shareholder proponent provides, which disclosure would presently be required under the long proposal to be included in the issuer’s own proxy materials and, in the case of a nomination, on its web page.
- That the presently proposed language “any interests or relationships . . . that are not shared generally by the other shareholders and that could have influenced the decision to submit a proposal or nomination” (emphasis added) needs to be revised and refined to provide more guidance on the kind of information the Commission is trying to elicit.
- What specific information is required to be included under “qualifications and background,” as opposed, for example, to the five-year employment history generally required.
- Whether proponents should be required to disclose what other proposals the proponent has pending or has made over a stated period of time with respect to both the issuer and other issuers, and what factors in common these issuers may share? We believe this information would be equally important to shareholders in assessing a proponent’s actions.

In addition, we have the following comments in response to the Release's specific requests for comments:

- We believe that shareholders who acquire shares with the intent to propose a bylaw amendment should be barred from filing on 13G, and the Commission should expressly state this. Bylaw amendments permitting shareholder access will inevitably lead to election contests, and to exclude this intent from the eligibility requirements to use Schedule 13G is antithetical to the principle underlying Schedule 13G (i.e., that Rule 13d-1 should require a lower disclosure standard where a shareholder has no intent to change or influence control).
- We believe the information provided by shareholders should not be deemed incorporated by reference into Securities Act and Exchange Act filings. We would note that merely by being compelled to include such information on its website and in its own filings, issuers are put in a position where they may feel compelled to correct inaccuracies in such statements, which they would otherwise ignore had they been contained in information filed only by the proponent.
- Finally, if shareholders are given access to the issuer's proxy statements to make nominations, these proxy statements should be filed on a preliminary basis with the Commission, as they will raise the same concerns as traditional election contests. We would further note that we believe this process will create a substantial additional burden on the Staff, as well as substantially complicating the printing and mailing process for the issuer.

* * *

We appreciate the opportunity to comment to the Commission on proposals, and would be pleased to discuss any questions the Commission may have with respect to this letter. Any questions about this letter may be directed to John T. Bostelman (212-558-3840) in our New York office, or Janet Geldzahler (202-956-7515) in our Washington D.C. office.

Very truly yours,

SULLIVAN & CROMWELL LLP