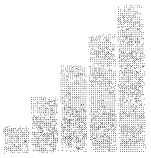
John Endean President



American
Business
Conference A Coalition of Growth Companies

Via Email

October 5, 2007

Nancy M. Morris
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Shareholder Proposals (File Number: S7-16-07) and Shareholder Proposals Relating to the Election of Directors (File Number: S7-17-07)

Dear Ms. Morris:

The American Business Conference (ABC) is a coalition of CEOs of midsize growth companies founded in 1981 by Arthur Levitt, Jr. ABC's current chairman is Alfred West, CEO of SEI Investments, Oaks, Pennsylvania.

We are writing to comment on the Securities and Exchange Commission's two releases, No. 34-56160 and No. 34-56161. These releases, issued in the wake of the Second Circuit decision in *AFSCME v. AIG* and informed by a series of Commission roundtables in which ABC participated, contain differing approaches to clarifying the Commission's application of Rule 14a-8(i)(8).

Rule 14a-8 allows shareholders to place a proposal in a company's proxy materials for a vote at an annual meeting of shareholders. In that overall context, the principal purpose of Rule 14a-8(i)(8) "is to make clear, with respect to corporate elections, that Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections" of corporate boards of directors.[1]

The effect of the Second Circuit's decision in *AFSCME v. AIG* was to limit this exclusion by permitting shareholder proposals that seek "to amend a

[1] Exchange Act Release No. 34-12598 (July 7, 1976).

1828 L Street, NW Suite 908 Washington, DC 20036 (202) 822-9300 Fax (202) 467-4070
Website: www.americanbusinessconference.org

company's bylaws to establish a procedure under which a company would be required, in specified circumstances, to include shareholder nominees for director in the company's proxy materials." The Commission has expressed concern, which ABC shares, that the Second Circuit's decision "has resulted in uncertainty and confusion" in regard to the application of Rule 14a-8(i)(8).[2]

As a result, the Commission has proposed two separate clarifying amendments to Rule 14a-8(i)(8). The first, contained in No. 34-56160, essentially accepts the Second Circuit's ruling and specifies certain conditions that, if met, would require that shareholder bylaw resolutions regarding procedures for nominating candidates to boards of directors be included in the company's proxy materials. The second, contained in No. 34-56161, affirms the current SEC interpretation of Rule 14a-8(i)(8) as it applies to the types of resolutions addressed in the AFSCME *v. AIG* decision.

ABC supports the Commission's proposal to affirm its current interpretation of Rule 14(a)8(i)(8). We oppose, therefore, mandatory inclusion in proxy materials of shareholder bylaw resolutions seeking to amend procedures for director nominations. In addition, ABC strongly supports the Commission's proposal to "facilitate greater online interaction among shareholders by removing obstacles in the current rules to the use of an electronic shareholder forum."

General Comments

ABC does not construe the Second Circuit's decision in *AFSCME v. AIG* as a step forward for shareholder empowerment. This is because, more generally, we do not believe that advisory, otherwise known as precatory, shareholder resolutions are an indispensable element of good corporate governance or shareholder democracy – quite to the contrary.

For one thing, most precatory resolutions are never considered by shareholders. Only about half of the 14a-8 proposals that have been submitted by the Teachers Insurance and Annuity Association of America and College Retirement Equities Fund (TIAA-CREF) have come to a vote.[3] Overall,

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[2] Release No. 34-56161, p. 10.

[3] Letter of John C. Wilcox , Senior Vice President and Hye-Won Choi, Vice President, TIAA-CREF to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, Re: File No. S7-16-07 and File No. S7-17-07, September 20, 2007 (Hereafter, "TIAA-CREF Letter")

seventy percent of precatory resolutions from all sources are withdrawn before a vote on them is taken.[4]

In fact, resolution sponsors do not seek a vote. TIAA-CREF has told the Commission that in its view "the purpose of Rule 14a-8" is "not to force change in a company, but to get the attention of its board and senior management" so as to "promote dialogue." The goal of this "engagement strategy" is to enlighten "the target company's" management and board so that they will and voluntarily alter their "policies or behavior." Of course, should the dialogue not yield the desired changes, TIAA-CREF can always wield the big stick of a shareholder referendum.[5]

In this specific sense, this "engagement strategy" resembles a strike suit. In a strike suit, plaintiff lawyers use the threat of a costly trial and the burden of discovery to force a settlement. With a precatory resolution, the goal is to achieve management acquiescence to a particular policy or practice as a means of avoiding a shareholder vote. In both cases, it is not so much about speaking truth to corporate power as it is about leverage pure and simple.

Proponents of precatory resolutions deny that such initiatives serve as a "promotional device" for special interests.[6] They point to many constructive reforms they say were brought about as a result of the dialogue precatory resolutions are meant to start. This misses the point. It confuses content with process. It focuses on the ends, which may be at times desirable, and ignores the means, which are not.

One can agree with certain changes the precatory resolution process has encouraged without losing sight of the fact that it is indeed a special interest device. After all, shareholders who offer precatory resolutions, while they may mean well and believe they are working for the higher good, have no fiduciary obligations to other shareholders. Further, when they enter into a negotiation with management, the door is closed. Shareholder proponents apparently believe that avoiding disclosure about their discussions with management is crucial for cutting a deal. Legally and functionally, then, they are, and seek to

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[4] Financial Planning, *New Proxy Rule Could Affect SRI*, (August 6, 2007) *available at* http://www.financial-planning.com/pubs/fpi/20070806101.html.

[5] TIAA-CREF letter.

[6] TIAA-CREF letter.

be, unaccountable to other shareholders. This is not a model of transparency or enhanced shareholder communication.[7]

While most shareholders are not invited to join in the precatory process, they are expected to pay for it. "Rule 14a-8 proposals offer significant advantages over other forms of engagement," TIAA-CREF has candidly written the Commission. First among these "advantages" is the "low cost (borne by the company and thus collectively by all shareholders.)"[8] At a minimum, these costs include legal and related fees as well as the opportunity costs resulting from the diversion of management time. These costs are "low" and advantageous only in the sense that they are distributed over a large cohort of shareholders who have nothing to do with launching a precatory proposal and are most likely unaware that they are footing the bill.

The Commission should not expand the flawed precatory process by adopting its proposal to permit submission of shareholder-sponsored proposals for bylaw amendments regarding procedures for director elections. Such an expansion would create even more leverage for the relatively few number of organizations that use precatory proposals. It would fortify the ability of such organizations to wring concessions from management that are important to them but not necessarily beneficial for all shareholders.

Instead, the Commission should approve the interpretation and clarification in Release 34-56161. By doing so, the Commission would end the uncertain regulatory climate created by the Second Circuit's decision in *AFSCME v. AIG*.

Finally, we urge the Commission to facilitate private sector experimentation with electronic shareholder forums. These forums, we believe, show immense promise:

- for greater transparency,
- for the broader dissemination of information among *all* shareholders instead of just resolution activists and management, and,

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[7] In its comment letter, for example, the International Brotherhood of Teamsters objects to Commission-contemplated disclosures of communications between a shareholder proponent and management on the grounds that such "burdensome" requirements "would discourage much of the informal dialogue that occurs throughout the filing process between proponents and management" thereby creating "a more adversarial relationship between proponents and companies." Letter of James P. Hoffa, General President, International Brotherhood of Teamsters to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, Re: File Numbers S7-16-07 and S7-17-07, August 30, 2007.

[8] TIAA-CREF letter.

- for the development of a true consensus among shareholders for reform and change.

We note the support for electronic shareholder forums among organizations and individuals who defend the precatory process. Their support is hedged, however, by an insistence that shareholder forums must supplement, not replace, the existing precatory process.[9]

It is understandable that proposal activists would not wish to replace a device that offers them a monopoly on a "dialogue" with management at very little cost. Nevertheless, it is not likely that electronic forums would be created as supplements to the precatory process. Activist investors would have no incentive to do so, nor would companies go to the expense and additional work to establish a shareholder forum so long as they are forced to wrestle with precatory proposals.

In order for electronic shareholder forums to have a fair trial, they must be, at least for a few proxy seasons at a few companies, the alternative to the current precatory proposal regime. Such a field test would, we believe, help the Commission to realize its long term goal of encouraging through technology "more robust communication with [a] company and among [its] shareholders."

For management and activist investors, a more robust and open communication that includes a greater number of participants with different points of view in a true marketplace of ideas will require some adjustment and compromise. Given the power struggle that now characterizes the hermetic world of the corporate governance community of big issuers and activist investors, we would welcome that change.

Sincerely,

John Endean

John Endean
President

[9] See, *e.g.*, Letter of the Honorable Carl Levin to Chairman Christopher Cox, U.S. Securities and Exchange Commission, Re: File Nos. S7-16-07 and S7-17-07, September 27, 2007. Senator Levin writes: "I would support the use of electronic forums as an adjunct to, but not a substitute for, shareholder resolutions."