S71607 624
S71707 196

CHRISTOPHER J. DODD, CONNECTICUT, CHAIRMAN
TIM JOHNSON, SOUTH DAKOTA
JACK REED, RHODE ISLAND
CHARLES E. SCHUMER, NEW YORK
EVAN BAYH, INDIANA
THOMAS R. CARPER, DELAWARE
ROBERT MENENDEZ, NEW JERSEY
DANIEL K. AKAKA, HAWAII
SHERROD BROWN, OHIO
ROBERT P. CASEY, JR., PENNSYLVANIA
JON TESTER, MONTANA
RICHARD C. SHELBY, ALABAMA
ROBERT F. BENNETT, UTAH
WAYNE ALLARD, COLORADO
MICHAEL B. ENZI, WYOMING
CHUCK HAGEL, NEBRASKA
JIM BUNNING, KENTUCKY
MICHAEL CRAPO, IDAHO
JOHN E. SUNUNU, NEW HAMPSHIRE
ELIZABETH DOLE, NORTH CAROLINA
MEL MARTINEZ, FLORIDA
SHAWN MAHER, STAFF DIRECTOR
WILLIAM D. DUHNKE, REPUBLICAN STAFF DIRECTOR AND COUNSEL

United States Senate
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS
WASHINGTON, DC 20510-6075

November 1, 2007

Honorable Christopher Cox
Chairman
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Dear Chairman Cox:

The regulation of the proxy process is a fundamental activity of the Commission. The Senate Committee on Banking and Currency in its Report on the Federal Securities Exchange Act of 1934 discussed the importance of proxies and said "[i]n order that the stockholder may have adequate knowledge as to the manner in which his interests are being served, it is essential that he be enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy which are decided at stockholders' meetings" (April 17, 1934, page 12).

As Members of the United States Senate Committee on Banking, Housing and Urban Affairs, we feel that shareholders' right to place their proposals on the proxies of the public companies they own is extremely important. It benefits both shareholders and the public companies they own.

Shareholders are the owners of a public company and have a right to meaningfully participate in electing directors without incurring an undue cost of a separate proxy solicitation. It is our view that shareholders should continue to have a right to propose a procedure for electing directors under the current Commission shareholder proposal process and should have a right to nominate alternative directors to those selected by management.

Accordingly, we are submitting to you our comments on the proposals set forth in Commission Release No. 34-56160, IC-27913, File No. S7-16-07 and Commission Release No. 34-56161, IC-27914, File No. S7-17-07, which relate to the proxy access and the shareholder proposal process. In our view, the current process and rules should be maintained and neither proposal should be adopted.

SHAREHOLDER ACCESS

It is our judgment that the securities markets and investors would best be served by adopting no new rule at this time; the Commission should not adopt either of the proposals. Instead, the Commission should allow shareholders to make proposals pursuant to its current rules and the standards set forth in the decision of the United States Circuit Court of Appeals for the Second Circuit in *American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group*, 462 F.3d 121 (2d Cir. 2006). The Court's ruling clarified that, absent a Commission restatement regarding the application of the rules, the current Commission rules allow investors to file proposals related to a process for providing shareholder access to the corporate proxy statement for inclusion in their companies' proxy materials. Permitting the post-AIG status quo to continue would protect shareholders' existing rights, which is an important consideration. This approach could enhance director performance and make directors more attentive to investor concerns and values.

We note that the Commission in 1976, when it last amended the substance of the shareholder proposal rule at issue, stated that the rule permitted shareholder proposals regarding the process for electing directors. We believe this is the appropriate interpretation of the rule. The Second Circuit Court of Appeals, in its review of this rule in *AFSCME v. AIG*, observed:

> The 1976 Statement clearly reflects the view that the election exclusion is limited to shareholder proposals used to oppose solicitations dealing with an identified board seat in an upcoming election and rejects the somewhat broader interpretation that the election exclusion applies to shareholder proposals that would institute procedures making such election contests more likely.

The Commission held this position for sixteen years, until the staff of the Division of Corporation Finance reversed it in a no-action letter in 1990 for reasons that it chose not to disclose. The Second Circuit Court of Appeals in *AFSCME v. AIG* stated the "SEC has not provided, nor to our knowledge has it or the Division ever provided, reasons for its changed position regarding the excludability of proxy access bylaw proposals."

The Court also said the Commission has a duty to explain its departure from prior norms and we agree. It is advisable that the Commission require the staff to maintain a transparent record and to explain material changes in agency interpretations they make in the no-action process. The implementation and monitoring of such a policy is necessary to preclude any perception of staff arbitrariness or favoritism towards certain proponents or their representatives.

If the Commission decides to consider the proposed changes to the existing regulatory scheme, we encourage thorough rulemaking. On this and other matters of great significance, we feel the Commission should proceed only after it has a full complement of Commissioners. Accordingly, we do not believe that shareholder access rules need to be completed in time for the 2008 proxy season. It is better to formulate a rule that is vetted thoroughly with all interested parties and subject to decision-making by five commissioners than to hastily complete a final rule.

Some have speculated that the Commission will adopt a new rule for the 2008 proxy season and reconsider other proposals next year. We think such a course of action would be disruptive, could lead to having public companies comply with three different regulatory schemes in two years, and is not advisable.

If the Commission, however, proceeds with rulemaking, we feel that it should reject the proposal in Release No. 34-56161 which would eliminate shareholder access. This proposal would strip shareholders of their rights as the company owners to propose amendments concerning the process for shareholder nomination of directors. It would undermine legitimate efforts by long-term investors who seek to have meaningful elections of corporate directors charged with protecting their interests and investments. In our view, the exclusion contained in Rule 14a-8(i)(8) should be limited to proposals that relate to a particular election of particular candidates.

If the Commission proceeds with rulemaking, it is also our view that the proposal in Release No. 34-56160 includes ownership thresholds and additional disclosure provisions that are excessive. We feel that shareholder proposals about director nomination procedures are similar in nature to shareholder proposals on other aspects of corporate governance. Shareholders wanting to exercise the right to initiate bylaw amendments concerning director nominations should not face higher hurdles than shareholders seeking to initiate other corporate governance changes.

The proposed rule requires that a proposal be submitted by a shareholder or group that owns more than five percent of a registrant's stock in order to be included in the proxy, which would effectively bar most shareholders from ever filing such proposals. Since an institution has a duty to diversify its portfolio, the level of it holdings in any one company would be relatively small and insufficient to meet this threshold. This threshold should be eliminated.

This proposal also would require additional disclosures by the shareholders or groups who offer such proposals. We view these as excessive. While shareholders need to know more information about those who own more than 5% of the stock of a public company and those who are nominated to fill a seat on the board, they do not need to know as much information about those who propose a procedure for changing the method of electing a director. The proposal itself is not a proxy contest and the

proponent who offers it may not even intend to use the right to proxy access himself. Further, if there are several shareholders who are joining in making the proposal, the paperwork would be considerable and, in our view, excessive.

NON-BINDING PROPOSALS

The shareholder proposal process is an important tool for interested shareholders to communicate with management and other shareholders about issues significant to the companies they own. Precatory shareholder proposals strengthen corporate accountability. Over the years, precatory proposals have called management's attention to important issues involving executive compensation, conflicts of interest, board composition, labor, human rights and other subjects. Some proposals have prompted management officials to enact reforms or policies that have enhanced corporate disclosure, governance and accountability, and have precluded potential lawsuits, enhanced corporate reputation and improved relations with customers or other constituents.

The Commission asked for comment about the possibility of eliminating the current Commission process of considering non-binding shareholder proposals. This step, if taken, would deprive the owners of public companies of an essential democratic shareholder right to speak to each other. Since most shareholders are unable to attend shareholder meetings in person, the proxy is the sole means to communicate as a group and with management and the board during the year. Furthermore, since precatory proposals are non-binding, their elimination from the proxy serves to muzzle the shareholders and insulate management from views of the owners of the companies they manage.

We are deeply concerned about the potential of the Commission to undermine the ability of shareholders to raise precatory proxy proposals and believe it would be inadvisable and disruptive. Precatory shareholder proposals are important tools for investors to communicate with management and with each other. We feel that the current process works reasonably well, is predictable and is affordable. Shareholders should continue to have the right to pursue such proposals and have the benefit of the Commission staff's participation and intervention in this process. This should not be changed.

THRESHOLDS FOR SUBMITTING SHAREHOLDER PROPOSALS

The Commission has asked for comment on the requirements for submitting a shareholder proposal. The current requirement that a shareholder own at least $2,000 worth of stock for at least one year has been in place for several years. In light of inflation which has occurred, it is our opinion that it would not offend the essential shareholder proposal scheme to increase modestly the value of the stock a shareholder must own to have his or her proposal included in the proxy. In addition,

it is our view that the interests of shareholders would not be unduly impacted if the holding period were modestly extended also.

THRESHOLDS FOR RESUBMITTING PROPOSALS

The Commission has also solicited comment on whether the voting thresholds for resubmitting resolutions should be increased by 100% to 200%, from requiring 3%, 6% and 10% of the vote in the first, second and third year of introduction, respectively, in order to be eligible for resubmission in the following year, to 10%, 15% and 20% of the vote. It is unclear to us that there is a compelling need to do this or that the current thresholds impose an undue burden on public companies.

The release does not identify the economic or mathematical analysis that may have led the Commission to consider increasing the thresholds to 10%, 15% and 20%. Such an analysis would be particularly important to justify doubling or tripling the thresholds. In the absence of such analysis, it seems difficult to predict the consequences of the proposed changes or to justify it. We feel it would be prudent for the Commission not to consider changing these thresholds prior to performing such analysis. In addition, we observe that the magnitude of the proposed increase of the thresholds is 100%-200%, which without evident analysis to support it seems extreme.

ELECTRONIC FORUM

The Commission asks for comment on an electronic shareholder forum to enhance communication between shareholders and management. While this idea has merit as a supplement to shareholder proposals and other existing rights, we do not see this as a substitute for the precatory shareholder proposal process. The current process requires a focused and structured discussion of issues and calls for a specific vote. An electronic bulletin board or chat room would not provide these same disciplines or provide the same focused guidance to management as shareholder proposals.

CONCLUSION

We ask the Commission to proceed with thorough analysis and extreme care in its regulation of the shareholder proposal process in order to protect the rights of shareholders and promote effective governance of public companies.

Thank you for considering these views.

Sincerely,

Christopher C. Dodd
Chairman
Committee on Banking, Housing
and Urban Affairs

Tim Johnson
Chairman
Subcommittee on Financial Institutions

Jack Reed
Chairman
Subcommittee on Securities,
Insurance and Investment

Charles E. Schumer
Chairman
Subcommittee on Housing, Transportation
and Community Development

Robert Menendez

Daniel K. Akaka

Sherrod Brown

Robert P. Casey

Jon Tester