



Remarks Of

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Proxy Reform - Guidelines for Review & Outlook

**The United Shareholders Association
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***/ The views expressed herein are those of Commissioner Roberts and do not necessarily represent those of the Commission, other Commissioners or the staff.**

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I. Introduction

During my confirmation process, I stressed the importance of strengthening shareholder confidence in our securities markets. I did not realize at that time what a daunting challenge that task would be. Now more than ever, Congress, regulators, members of the bar and industry professionals must be concerned about the expectations and perceptions of shareholders and the general public. We also must remind investors that their participation, through investment in U.S. securities markets is important and valued. The Commission continues to have an opportunity to enhance investor confidence by strengthening accountability to shareholders through its proposed reform of our proxy voting system.

The accountability of corporate management to the shareholder through a meaningful proxy voting process provides an incentive for equity investment. The absence of any such accountability would in my opinion impair the efficiency of our capital formation process to the detriment of our national economy.

II. Review of Proxy System

The Commission's current review of the proxy rules is timely and appropriate for two reasons. First, the staff's review will ultimately culminate in a comprehensive revision of the proxy rules. The last comprehensive revision resulted in the adoption of new rules around 1980, although a partial revision occurred in 1986 when the Commission adopted rules to streamline disclosure requirements and to add new requirements concerning independent public accountants.^{1/} Second, the review will address the changes in shareholder composition that have occurred in recent years. Even though individuals still own about 50 percent of American equity securities, about a year ago fewer than one in five trades were executed for individual investors. This "retreat" of the individual investor from direct equity investments has been accompanied by an increase in equity holdings by pension funds and other institutional investors. The 1990 New York Stock Exchange survey of "Shareownership" indicates that there are now over 25 million mutual-fund holders, nearly four times the total 1952 investor

^{1/} Securities Exchange Act Release 23,376, 35 SEC Docket 706 (1985); 23,789, 36 SEC Docket 1203 (1986).

population. The number of investors with mutual-fund holdings jumped by nearly 130% in the last five years, and by more than 400% in the last decade.

As a result of this dramatic change in equity ownership and the increasing shareholder activism in matters relating to the governance of public companies, the Commission has properly undertaken a review of the effectiveness of the federal proxy rules. This review includes, but is not limited to, numerous proposals for proxy reform that either have been submitted to the Commission by corporate, individual or institutional shareholders, and other participants in the proxy process, or are the subject of debate in Congress and the academic and legal communities. As such, the review encompasses all aspects of the proxy process, including contested and uncontested solicitations, the shareholder proposal system, and shareholder communications mechanisms.

In addition, the review will focus on actions taken by the states, self-regulatory organizations, or public issuers to disenfranchise shareholder voting. In this regard, the Commission has been apprised that potentially significant restraints may be placed on the exercise of voting rights by shareholders under certain circumstances. The Commission also will

consider investor concerns that its proxy rules erect unnecessary impediments to discussions among investors on the merits of various transactions.

III. Guidelines for Review

The Commission must, in my judgment, be mindful of four general principles in the context of its proxy review.

The first and guiding principle is the importance of the integrity and effectiveness of the shareholder franchise, not only within the framework of the federal proxy rules and the American system of corporate governance generally, but also, as I pointed out earlier, with respect to our national need for corporate equity investment. During my tenure on the Commission, I have consistently stressed the importance of effective shareholder participation in the proxy process as a means of encouraging equity investment, and thus enhancing the vitality of our securities markets and our nation's economy.

Second, the Commission must determine whether the current rules erect unintended and unnecessary obstacles to communications both among and with shareholders, as well as to shareholder voting.

Third, the Commission should focus on whether shareholder interests are being served adequately by the existing regulatory scheme.

Fourth, the Commission should address the issue of whether the costs of compliance with the federal proxy rules can be decreased for management and third-party solicitations without diminishing Congressionally mandated shareholder safeguards.

IV. Policy Discussion

With these guidelines in mind, it is my intention today to address a few of the more fundamental and perhaps controversial policy issues raised by some of the comment letters the Commission has received. These letters outline some provocative, policy oriented issues that shareholders and issuers should find relevant to the proxy reform debate. Many of the proposals focus on ways to reduce the costs and delays associated with compliance with the proxy rules. Some proposals call for the lifting of restrictions in the solicitation context on communications among shareholders or between shareholders and management. Some other proposals call for the liberalization of the rules only for large shareholders, which raises the question of whether some shareholders should be treated differently than others. There also has been some indication that "small", or individual, shareholders seek a change in the proxy rules to facilitate communication with one another in the solicitation context. Some shareholders have

asserted that the potential applicability of the proxy rules has prevented them from constructive information sharing when called upon to vote on a transaction such as a proposed merger. In an effort to address concerns raised by these shareholders, the Commission is considering, among other things, easing the rules regarding communications with and among investors and expanding investor access to lists of other investors, and I wish to come back to this point in a minute.

I believe that it is critical for the Commission to be mindful of the costs involved in shareholder communications and solicitations. Costs of a solicitation for a shareholder may include: hiring a lawyer; preparation of the solicitation documents; mailing or providing the documents; Commission filing fees; and responding to Commission inquiries or objections.

A major impediment to cost-effective solicitations cited by shareholder advocates of reform is the choice the Commission's proxy and tender offer rules now afford issuers to decide to mail insurgent proxy or tender offer material rather than furnish a shareholder list upon demand. Issuers often elect to mail proxies or tender offer materials to prevent direct solicitation of shareholders by a challenger. A bidder or insurgent's underlying right to the list is conferred by state law and recognized by Commission rules. Some

commentators urge amendments to the proxy and tender offer rules to eliminate the issuer's option to withhold the list and mail proxies, contending that management often chooses not to provide stockholder lists as a delaying tactic to force the challenger to litigate the issue in state court.

Along those same lines, I anticipate that the Commission will consider in the near future, possibly as early as next Thursday, several proposed amendments to its proxy rules. Among the proposals expected will be an amendment to shift the election of whether to provide the list or to mail from the issuer to the bidder. The proposal further would probably expand the required stockholder list information to include both the number of securities held by identified holders and certain specified information about beneficial ownership, to the extent that such information is reasonably available to the issuer. Also anticipated for Commission consideration in the near future would be a proposed amendment to the proxy rules that would provide that all proxy material, whether in preliminary or definitive form, would be public upon filing with the Commission.

Another significant area of the proxy review involves shareholder access to issuer proxy statements. The Commission has received submissions that suggest various revisions to the Commission's Exchange Act Rule 14a-8

which provides for such access by holders of at least 1% or \$1000 worth of issuer stock for a period of at least a year, among other requirements. Some letters, and several legislative proposals as well, call for revision of this Rule to permit holders of substantial percentages of issuer stock, fixed anywhere between 3 and 10 percent, to include not only the traditional shareholder proposals the Commission now receives, but also shareholder nominations of directors and statements opposing management proposals. Under current Rule 14a-8, shareholders may not use the shareholder proposal mechanism to comment on elections, nominate their own board candidates, or challenge management proposals. Instead, shareholders must conduct independent solicitations in support of such positions if their communications trigger the application of the proxy rules. Assuming small or individual shareholders could not aggregate their shares to reach these thresholds, the foregoing proposals raise important issues of whether large shareholders should be treated more favorably under the proxy rules than other investors. While there is some attraction for a threshold de minimis level to provide a degree of seriousness to the proposal, the concept of discriminating against small shareholders is a particularly troublesome one.

It goes without saying that the issue of proxy voting reform unearths a host of controversial matters which prove difficult to resolve on a consensus basis. While I personally am inclined to favor increased communications between shareholders, a reduction in proxy voting costs, confidential shareholder voting, independent voter tabulation, and shareholder approval of extraordinary business decisions such as chief executive compensation, golden parachutes and poison pills, I recognize that many in the issuer community are not so inclined. Further, some of these items may be either inappropriate for consideration by the Commission under the umbrella of a proxy voting reform or are outside the Commission's legal authority.

With respect to the thorny issues of confidential shareholder voting and independent voter tabulation, I would be inclined to favor a proposal, as both an interim solution and as a mechanism to obtain more information, that public companies be required to prominently disclose their voting procedures, and whether or not such procedures are confidential, and be required to prominently disclose their voter tabulation procedures, and whether or not such procedures are conducted in an independent manner.

I also wish to recommend that public companies engage in increased communication with their shareholders whether they be individuals or institutions. Companies that seek relief from the inevitable tension that exists between corporate management and corporate shareholders could discover solace in the process of negotiation.

V. Conclusion

I look forward to working toward a meaningful reform of the proxy voting system that will improve the efficiency of our capital formation process which should be of benefit to everyone.

However, I wish to mention that proxy voting reform, regardless of how meaningful it may become, has the potential of becoming instantly meaningless in the absence of shareholder voting rights. I would hope that everyone here will have on the top of their agenda the preservation of minimum shareholder voting rights standards for common stock owners throughout our major equity markets.