SOCIETY
of Corporate Secretaries
& Governance Professionals

February 17, 2015

SEC Investor Advisory Committee
Securities and Exchange Commission
100 F Street, NE
Washington, DC
20549

Re: Proxy Access

Dear Committee Members:

Founded in 1946, the Society of Corporate Secretaries and Governance Professionals is a professional membership association of more than 3,100 corporate secretaries, in-house counsel and other governance professionals who serve approximately 1,800 entities, including 1,100 public companies of almost every size and industry. The Society represents 75% of the S&P 500 and half of the Russell 1000 companies. Of the 100 or so companies that have a proxy access proposal this year, half are Society members.

What is the Problem We are Trying to Fix? The "Zombie" Director Problem

We understand that proxy access is being sought in response to the fact that some directors who have not received a majority vote nevertheless remain on the boards of their companies - the so-called “zombie" director.

In April 2013, FT reported that the $255 billion California Public Employees' Retirement System (CalPERS) identified 52 directors who failed to win shareholder votes, but either stayed in place or were subsequently reinstated. One example is David Bonderman, founder of private equity group, TPG. Mr. Bonderman failed to receive majority support as a director of property information group CoStar for three years, yet remains on the board. Anne Simpson, head of corporate governance for CalPERS, was quoted saying: “These zombie directors are the living dead case for why we need the proxy access that the SEC could not deliver.”

Proxy statements reveal that in 2010, 2011, and 2012, Mr. Bonderman did indeed receive fewer votes "FOR" his election than withhold votes. However, CoStar did not have a majority voting policy during those years. Under plurality voting, Mr. Bonderman was duly elected. Therefore, the inference that he remained on the board improperly is not correct.

In 2013, CoStar included a proposal on its ballot to amend its charter to allow majority voting, which passed. That year, Mr. Bonderman received 24 million votes "FOR" and 3 million withhold votes. In 2014, he fared even better – 26 million votes "FOR" and only 355,000 withhold votes. Therefore, he remains on the board. When you examine the shareholder composition in the relevant proxy statements over that period, as is not uncommon, the largest holders changed.

In July 2014, law firm Robbins Geller Rudman & Dowd's memo on zombie directors stated, "Since 2011, at least 121 directors have failed to gain a majority of votes cast by shareholders at 75 different companies and yet remain on their boards." [http://www.rgrdlaw.com/pp/news-Zombie-Directors-Board-Accountability-071614.pdf] Even assuming for the sake of discussion that all of these companies had majority voting (which they didn't - the article states that some had a plurality voting standard), that would equate to just 75 companies out of a total of 5,000 public companies (per the Wall Street Journal) - or 1.5% of companies - that are affected by this “zombie" director issue.

Another blog [http://fubarinc.blogspot.com/2013/08/zombies-in-boardroom.html?m=1] using a list from the Council of Institutional Investors (CII) states that of the 41 directors that CII regards as being, or having been, “zombies,” 33 of those are directors like Mr. Bonderman – at companies that had plurality voting rather than majority voting. Of the remaining eight directors who lost their elections at majority-voting companies, one company explained that the director in question had had poor attendance due to special circumstances but had committed to improving his attendance, and two companies (with five of the eight "zombie" directors) said nothing. In those cases, perhaps more disclosure should have been provided.

Is Proxy Access an Appropriate Fix?

Looking at the numbers again, the scope of the "zombie" directors problem is this: If there are 45,000 directors in the United States (assuming an average of 9 directors per company and 5,000 companies), there are 8 problem directors - 8 out of 45,000 total, which is .017%, or .00017. Is proxy access really the solution for a problem that occurs only .017% of the time in annual elections?

Even using the number of companies – i.e., 75 companies that had directors who didn’t receive a majority vote - that equates to only 1.5% of all public companies. This is a small problem. The public pension funds and the unions and the activists have thus been largely victorious on proxy access.

Multiple sources - including law firm Skadden Arps - state that majority voting is considered by most to be a best practice. And the Society agrees. A Skadden Arps memo further states that almost 90% of S&P 500 companies have a majority voting standard in director elections and/or a policy requiring resignation if a director fails to get majority support, and shareholder proposals on this topic received average shareholder support of 58% in 2013. However, this same memo states that while almost all S&P 500 companies have majority vote, only about 46 % of Russell 3000 companies do. [http://www.skadden.com/insights/us-corporate-governance-boards-directors-face-increased-scrutiny]

So, if “zombie” directors are the problem (in 1.5% of public companies - or .017% of public company directors) that requires fixing, then majority voting is the answer. In order to fix the problem, majority voting should be sought through the shareholder proposal process. And, if a company ignores the will of the shareholders on majority vote, then proxy access may be an appropriate tool for investors. And, for those companies that retain a director who did not receive a majority vote under a majority vote standard, proxy access also may be an appropriate solution for that lack of responsiveness. However, we should not be attempting to solve a majority voting problem with proxy access.

Proxy Access Must Be Addressed on a Case-by-Case Basis; Investor Views Are Varied

Putting aside that the "zombie" director problem is quite small, we have investors who nevertheless have a strong desire for a proxy access right more generally, and one that they believe should be adopted by all companies. Even if we do not believe proxy access is necessary to solve the problem, we will assume for the sake of discussion that proxy access is coming. In that case, we must ensure that any such right should appropriately balance the interests of all shareholders of a corporation and - at the same time - not be disruptive or wasteful of corporate resources. Nor should it distract management's attention from its focus on the business.

For this reason, the Society believes that any proxy access regime must be implemented on a case-by-case basis. Individual companies and their shareholders should determine for themselves the most appropriate approach. Investors are not a homogeneous group. They have different strategies and time frames. Likewise, individual companies have different shareholders for different time frames. A proxy access right therefore must be determined on a company-by-company basis on terms that a board determines is best for all of the particular company's shareholders.

Society members with a shareholder access proposal this year have conducted a great deal of outreach. They have talked to many of their shareholders and - not surprisingly - shareholders' views about proxy access vary. Shareholders (like companies) are diverse. A mutual fund is different from a hedge fund, which is different from a pension fund, which is different from a union fund. And a quant fund is different from an index fund which is different from a long only fund. Contrary to some of the rhetoric, not all shareholders want a 3%/3 years proxy access right at every company.

Society members have spoken with their investors and heard a variety of perspectives. Some investors have said that they don't want proxy access. Some have said that they don't really care—but wouldn't oppose it. Some have said they want it, but only from a group owning 5% of the company's shares. Some have said they strongly support it and want a threshold of 3% for 3 years, with the ability of more than one shareholder to join a group. And some have said they don't believe 3%/3years is right for every company, but will vote for a 3%/3 years proposal to send a message. There are a variety of views - and they evolve over time. These are real, current-day investor positions on proxy access. Given this divergence of views, what should a company do? Is there a right answer for all?

Responsible companies have taken the proposal to their boards for consideration. They have scrutinized their shareholder base and all of the other many relevant facts and circumstances. Many were or are prepared to propose or adopt an access scheme on terms they believe are in the best interests of the company and all of its shareholders. Now they are being penalized - or threatened to being penalized - for that.

How Proxy Access Would Work

The Society's comment letter in 2009 in response to the SEC's proxy access rule proposal is still instructive. Our letter raised a host of procedural and practical issues that are worthy of discussion.

Aggregation

We support the right of shareholders to aggregate their holdings for the purpose of nominating a director. However, we believe a shareholder should not be permitted to be a member of more than one nominating group. And companies do differ - and will differ - on how large the group should be based on their shareholder profile.

Holding Period Requirements

The percentage of shares that is appropriate will be different for different sized companies. And nominating shareholders must have held their shares for a long enough period of time to be "long-term." The period most often cited today is 3 years. Some companies prefer 5 years. That was not always the case. In 2003, the majority of commentators to the SEC rule supported a 2-year holding period. And again in 2009, the Society conducted a survey in which 44% of companies favored a 2-year holding period; another 22% favored 3 years; and 26% thought one year was appropriate.

In fact, if the ownership threshold goes up, the holding period could go down. The formula should reflect a balance between a shareholder's ability to participate more fully in the nomination and election process, and the potential cost and disruption to companies.

Defining "Ownership"

Ownership is net long beneficial ownership of the actual securities. We believe that any shareholder proposing an access nominee must have possession of the full voting and economic interest in the securities. The nominating shareholder(s) should specify that it, or the group, has a net long beneficial ownership position and has held such position continuously throughout the holding period for the purpose of submitting a nominee. The nominating shareholder(s) should also be required to prove that the continuous net long beneficial ownership requirement has been met.

The nominating shareholders should also hold shares through the date of the meeting and perhaps beyond for a period of time - again depending on the company and its strategy.

Nominating shareholders must certify that they are not seeking to change control of the company. Quite simply, if a group of shareholders is seeking to change control, they should wage a proxy contest, and file a Schedule 13D as a group. Most companies believe one director

- or 10%-15% of the board - in any one year, is sufficient, and would avoid any change in control issues.

Activists Should Render Access Rights Unavailable

Proxy access should not be available if a company becomes subject to a traditional proxy contest, or even if an activist is in the stock. Differing groups of shareholders who are simultaneously proposing different directors for presumably different purposes could lead to substantial confusion for shareholders, and substantial disruption to boards and management. Accordingly, at any time a company's board receives notice that an insurgent is planning to wage a proxy contest - or has been approached by an activist - proxy access should not be available.

Nominee Qualification Considerations

- Nominee should be independent of nominating shareholder

If the nominee is not independent of the nominating shareholder, we would have concerns about the possibility of "special interest" or "single issue" directors who would advance the interests of the nominating shareholder over the interests of all shareholders.

- Nominee must be independent for purposes of listing standards and meet other qualifications

The nominee must meet the objective criteria for director independence as set forth in the rules of the relevant exchange or national securities association. And, if a company has other non-discriminatory director qualifications in its bylaws - such as citizenship requirements, required security clearance, interlock prohibitions, or Clayton Act requirements, to name just a few - the nominee(s) should satisfy those as well.

- Nominee must comply with company-specific requirements

Once elected to the board, a candidate must comply with a company's guidelines such as mandatory retirement age, share ownership requirements and limits on the number of other boards on which he/she may serve.

All of the above requires that nominees be vetted, which takes time. This means that adequate notice provisions would be critical. In order to vet a nominee to determine whether he or she meets the independence and other requirements, proxy access shareholder nominees should be required to complete the company's standard director and officer questionnaire, which - for most companies - serves as a key internal control and is required by their disclosure controls and procedures. If the board determines that the nominee does not meet the applicable stock exchange's independence standards or the company's own corporate governance guidelines, the company should so state in the proxy statement.

Proxy Rules Should Require Specific Instructions for Access Candidates

We believe shareholders could be confused by a proxy card with more names than board seats available. For instance, some shareholders may mistakenly check all 11 boxes for 10 available seats - which would invalidate their proxy, and yet others may check some boxes - but not all.

To address this potential, we recommend a rule requiring a clear instruction in the proxy statement and on the proxy card of the company slate and the shareholder nominees. In addition, there should be included on the face of the proxy card in bold letters the following statement: “In order to vote for a shareholder nominee, you must check the box for that nominee and strike a candidate from the company slate.”

These are just some of the many issues that would need to be addressed and resolved - in a manner that respects the fact that companies are differently situated from one another in ways that warrant disparate treatment - for an access right to be implemented.

Where We Are Today

The SEC's current suspension of the Rule 14a-8(i)(9) proposal guidance in the middle of the proxy season has been quite problematic. It has put many companies in a no-win situation - not only for those with proxy access proposals, but also those with other proposals who were relying on long-standing precedent. Despite the continued availability of the rule from a technical standpoint and what we believe are sound bases for the SEC Staff's historical interpretation, companies that now elect to rely on it or seek relief from the courts to exclude a conflicting shareholder's proxy access proposal have been cautioned that they do so at their peril, and that shareholders will withhold votes from directors - and likely this year. This is the case even if management proposes its own binding bylaw proposal that is not identical to the shareholder's precatory proposal.

If a board – whether in response to a shareholder proposal or not —takes the time to consider its own binding proposal on proxy access, then it is properly exercising its right and responsibility to pursue a path it believes to be in the company's best interests.
Yet, boards that elect to exercise their judgment about what is in companies’ and shareholders' best interests based on the company's unique facts and circumstances (including, e.g., shareholder base, company and board size and maturity, near and long-term strategies) have now been cautioned that they will be subject to "vote no" campaigns. Similar “threats” have been made for companies that may choose to litigate.

Recent examples of how investor groups have responded include:

- CII has indicated that 3%/3 years is the formula that is "broadly favored" by shareholders (i.e., not its members - just shareholders in general). [http://www.cii.org/article_content.asp?edition=4&section=13&article=477]
- CII has stated that a 5% ownership threshold is "wildly at odds with” the approach to proxy access that U.S. shareholders broadly favor" [http://www.cii.org/article_content.asp?edition=4&section=13&article=477] - yet,

Vanguard's stated proxy access preference includes a 5% threshhold. [https://about.vanguard.com/vanguard-proxy-voting/voting-guidelines/]

- Most recently, CalSTRS indicated its intent to oppose any proxy access proposal in excess of 3%/3 years, and stated that it will also "urge fellow shareholders to withhold their votes from company directors who either exclude a three-and-three shareholder proposal from the proxy statement, or who deliberately preempt such a shareholder proposal with one of their own that establishes more excessive thresholds." [http://www.calstrs.com/news-release/calstrs-board-adopts-updated-corporate-governance-principles]
- NYC Comptroller Scott Stringer reportedly "warned that company boards allowing these proposals to be excluded will face opposition to their director nominees from institutional investors, including the city's pension funds." [http://www.nytimes.com/2015/01/20/business/sec-reversal-may-clear-way-for-shareholders-to-challenge-companies.html]

Yet, per our members' recent outreach efforts, some institutional investors have indicated that they are not in favor of proxy access at all, or favor it - but on different terms and/or subject to board discretion.

Today, therefore, companies are thus faced with these choices:

- Excluding a shareholder proposal in favor of their own, and facing the heightened risk of litigation with the proponent and investors' votes against directors
- Including both the shareholder and management proposal - risking confusion, ambiguity and inconsistencies among investors and issuers as to the voting alternatives and implications, and undermining the proxy process
- Seeking declaratory relief in the context of the court's inability to comprehend the meaning of the SEC's current stance to suspend its views on the applicability of the rule, and investors' threats to vote against directors at those companies that litigate
- Including only the shareholder's proposal and excluding management's proposal (but including the board's statement in opposition of the proposal)
- Adopting a proxy access bylaw in advance of the meeting and excluding the shareholder proposal on "substantially implemented" grounds

In Summary

In conclusion, it appears that we are trying to solve a board responsiveness problem that is better addressed by majority voting. Proxy access feels like a punishment for the vast majority of companies that have done nothing wrong. At a minimum, it is an inappropriate response to the problem in terms of the disruption it creates and complexity of the issues.

This situation is also extremely distracting, and is needlessly exacerbating or creating rifts between companies and their investors. Rather than focusing on issues related to running the business and improving performance, engagement with stakeholders, and oversight responsibilities, our members' boards and management and their counsel are spending significant time trying to determine next steps and, e.g., the differences between 3% and 5% based on their unique shareholder composition. They should instead be focused on cybersecurity threats, risk management, and strategy and other significant issues that affect the performance of all public companies – not just 1.5%.

Finally, this has shown once again that the shareholder proposal process is in need of repair. Rule 14a-8(i)(9) is only one of many problematic areas - like submission and re-submission thresholds, determining what constitutes ordinary business or a significant social policy---that we hope will be addressed in the near future. Proxy access is complicated. It is the wrong solution for a problem that affects relatively few companies, yet can be hugely disruptive to the business and extremely damaging to efforts to bridge gaps between investors and companies' management/boards.

Thank you very much for your consideration.

Sincerely,

Darla C. Stuckey

Darla C. Stuckey
President & CEO
Society of Corporate Secretaries and Governance Professionals