232

JONES DAY

222 EAST 41ST STREET • NEW YORK, NEW YORK 10017-6702
TELEPHONE: 212-326-3939 • FACSIMILE: 212-755-7306

RECEIVED
AUG 17 2009
OFFICE OF THE SECRETARY

JP657768:sdf
929500-109001

212.326.3800
raprofusek@jonesday.com

August 14, 2009

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

Re: File Reference No. S7-10-09,
Facilitating Shareholder Director Nominations
Release Nos. 33-9046; 34-60089

Ladies and Gentlemen:

Introduction:

We are writing to comment on the Commission's proposal that reporting companies be required to include Board nominees by 1+% shareholders in their annual proxy statements (the "Proxy Access Proposal").[1]

We are one of the world's largest law firms. In the regular course of our practice, we advise and observe the operation of Boards of Directors of hundreds of publicly traded companies, including in respect of matters pertaining to the election of directors.[2] We believe this positions us to comment on the Proxy Access Proposal on an informed basis.

Other commentators have already addressed the myriad technical issues that the Proxy Access Proposal presents, so we do not address them here.[3] Instead, we focus on two fundamental points that we believe require that the Commission take an alternative approach to proxy access at this time:

---

[1] SEC Release Nos. 33-9406; 34-60089 (June 18, 2009).

[2] The views expressed herein are solely those of Jones Day and not of any of the Firm's clients.

[3] The Proxy Access Proposal includes more than 170 specific requests for comment. In our view, this fact alone demonstrates the complexity of the issues and the magnitude of the effect that the Proposal will have. The myriad specific problems with the Proposal include the consequences of the race to propose particular candidates, the likelihood of annual proxy contests resulting from its adoption and resultant distraction of management, purposes for proxy access which are likely to be harmful to a company (such as nominees of single-focus or special-interest shareholders) and the inevitable short-term view that proxy access will foster.

- ***Proxy Access Should Not Be Considered in Isolation:*** There has been a paradigm shift in corporate governance over the past decade that we believe decries the need for an SEC-mandated requirement that shareholders have direct proxy access. However, we recognize that others disagree. We do not think that the SEC should take it upon itself to resolve the debate, particularly through a 60-day public comment process. Instead, as it has done in respect of other controversial issues, we urge the Commission to appoint a blue-ribbon panel to consider the issue and important related matters, such as the effective outsourcing of voting rights by a very substantial portion of the institutional investment community, and report back before the Commission acts.

- ***Regardless, This Is Not the Right Time For the Commission To Act:*** Congress has before it potentially important legislative proposals in this and related areas. State corporation statutes have recently been amended to deal with proxy access, and many companies will address the issue before the next proxy season. In our view, it would be wrong for the Commission to preempt the legislative and private ordering processes by seeking to mandate proxy access at this time. In all events, proxy access cannot be implemented for the 2010 proxy season, so the Commission should adjust its timeline for considering the matter.

In short, we urge the Commission to undertake a broader, more balanced approach to proxy access, and in all events stay its hand for now.

Proxy Access Should Not Be Considered In Isolation:

A confluence of factors has resulted in a paradigm shift in corporate governance over the course of the past decade. Some of the factors can be readily identified--Sarbanes-Oxley, SEC rule-making initiatives, new stock exchange requirements and the like. But others are less obvious, and far more fundamental, including the ease of electronic communication, the shift in vast segments of the institutional investment community away from investment and toward trading as their baseline investment approach,[4] the investment community's resultant obsession with short-term performance and the abandonment by many institutional investors of their obligation to thoughtfully exercise voting rights by effectively outsourcing this function to a handful of proxy advisory firms.

The effects of the paradigm shift are real and are not limited to small companies. Just this year alone, for example, a proxy contest was mounted in respect of a $30+

[4] According to the *NYSE Factbook* (2009), the average holding period for all NYSE–listed equity securities declined from almost three years in 1980 to 8 months today.

billion market cap company (Target) and the federal government compelled the reconfiguration of the Board of the nation's largest bank (Citicorp). Our experience indicates that truly independent, thoroughly engaged Boards of Directors are now the norm, not the exception, and shareholders are fully capable of causing changes to be made in the composition of the Board or its relationship with management when they deem such action to be appropriate (see, for example, Disney, Kerr-McGee and CSX).[5] That is, the notion that shareholders are disenfranchised, unable to cause change to be made where appropriate ignores the paradigm shift in corporate governance of U.S. companies during the past decade, much of which has been initiated or facilitated by the Commission itself.

We believe that the potential consequences of the Proxy Access Proposal are enormous, potentially both disruptive and, at least when single–focus nominees are advanced, not in the best interests of investors generally. Given this, and the resetting of the balance of power that has already occurred among shareholders, the Board and management, we believe that a far more substantial basis than mere *ipse dixit* is required to justify something like the Proxy Access Proposal. Instead, we believe that any action in this regard should only be taken based on clear and convincing evidence both that the assumed shareholder disenfranchisement that underlies the Proxy Access Proposal is real and that the consequences of implementing proxy access decisively outweigh the obvious risks.

It has become fashionable for politicians and pundits to advance purported failures in corporate governance as major contributing factors to the financial crisis and resultant global recession. Yet no such connection has been, or we believe can be, established in fact. Rather, the root causes of the events of the past 18 months, particularly the obsession with short-term performance and extraordinary volatility of the technology-enabled capital markets, would, in our view, be exacerbated, not mitigated, by radical actions like the Proxy Access Proposal.

At the very least, the Commission should establish a blue ribbon panel (as it has on other occasions) comprised of responsible representatives of all relevant perspectives and charge it with considering proxy access and related issues, such as institutional ownership, speculative rather than investment policies, the role of proxy advisory firms, empty voting and the like, before the Commission takes action as potentially far-reaching as that proposed here.[6] The publication of a 250-page proposal,

[5] There were 50 proxy contests during last year's proxy season, over 60% of which were won by dissidents. *See, e.g., The Deal*, May 22, 2008.

[6] The Commission has, of course, established blue ribbon commissions to study other significant issues prior to taking regulatory actions. *See, e.g., Final Report of the Advisory Committee on Improvements to the Financial Reporting to the United States Securities and Exchange Commission* (2008), available at http://www.sec.gov/about/offices/oca/acifr/acifr-finalreport.pdf (advisory committee on

with 171 separate specific requests for comment, over a 60-day public comment period surely is not the way to produce an adequate record upon which an issue of this magnitude may be properly judged.

This Is Not The Right Time For the Commission To Act:

We believe that it is a virtual certainty that the Commission's statutory authority to mandate proxy access would be challenged if the SEC were to adopt the Proxy Access Proposal without express statutory authority.[7] The key corporate governance bills presently before Congress come out in opposite ways as to whether proxy access should be required. Majority Leader Frank's bill, which was passed by the House of

(continued...)

making financial information more useful and understandable to investors); *NYSE/NASD IPO Advisory Committee: Report and Recommendations* (2003), available at http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p010373.pdr (advisory committee on enhancing the public's confidence in the integrity of the initial public offering process); *Report and Recommendations of the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committee Reports* (1999), reprinted in Bus. Law 1067 (1999) (advisory committee on the audit process).

[7] The courts have consistently interpreted the Exchange Act's "fundamental purpose [to be the implementation of] a philosophy of full disclosure." *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462, 478 (1977). The *Santa Fe* Court held that the Exchange Act does not implicitly extend beyond this "fundamental purpose," explaining that "[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation." *Id.* at 479 (internal quotations omitted) (emphasis in original).

Congress authorized the Commission to enhance disclosure and prevent fraud in securities transactions; authority to regulate corporate governance, on the other hand, was left to the states. The Supreme Court has been very clear on this point: " No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987).

Opponents of SEC action here will almost certainly argue that the legislative history of the Exchange Act proves that Congress did not intend to regulate the internal affairs of corporations. The Senate Banking and Currency Committee added a proposed Section 13(d) when considering the Exchange Act, providing that "[n]othing in this Act shall be construed as authorizing the Commission to interfere with the management of the affairs of an issuer." S. 3420, 73d Cong., 2d Sess. §13(d) (1934). The Conference Committee removed this provision, but only because it was "unnecessary, since it is not believed that the bill is open to misconstruction in this respect." H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. 35 (1934).

The point here is not that the Commission necessarily lacks rule-making power in this area, but rather that the SEC's authority is certainly unclear and can be expected to be challenged if the Commission acts while legislation on this very issue is pending in Congress.

Representatives on July 31, 2009,[8] would make many important changes in corporate governance, including requiring a non-binding shareholder "say or pay" and mandating other important corporate governance changes. But Majority Leader Frank's bill, which is substantially identical to the Obama Administration's proposal in this area,[9] does not mandate proxy access or authorize SEC rule-making that would require it. By contrast, Senator Schumer's very expansive corporate governance bill,[10] which was introduced before Majority Leader Frank's bill was passed by the House of Representatives, would require proxy access. The proposed legislation in this area is controversial.[11] While we believe that some federal legislation in the corporate governance area will be enacted in this session of Congress, it is not possible to predict what it will actually be.

---

[8] H.R. 3269, 111th Cong., 1st Sess. (July 29, 2009).

[9] *See* Dept. of Treas. July 16, 2009 press release.

[10] S. 1074, 111th Cong. 1st. Sess. (May 19, 2009).

[11] For example, the President of the United States Chamber of Commerce recently focused on union shareholder activism as raising serious policy issues relating to the proxy access provision in Senator Schumer's bill:

> Unions already employ shareholder activism to advance a special interest agenda, using the stock owned by their pension funds to support shareholder resolutions having little if any connection to the financial performance of the company. This includes repeated motions by the AFL-CIO to require pharmaceutical companies to disclose their drug reimportation policies and pressuring oil companies to reduce greenhouse gas emissions.
>
> They also have used their pension funds to force employers to negotiate union contracts or agree to specific demands. Richard Trumka, secretary-treasurer of the AFL-CIO, said in 2000 that the labor federation planned to use the "clout of union pension funds as major corporate stockholders to influence contract talks and organizing drives."
>
> . . .
>
> In addition, union members themselves don't want their retirement assets used for special interest crusades. A nationwide survey by Voter Consumer Research taken this spring found that 88% of union households agree that "the most important goal of union pension funds should be to manage pension funds so that they're financially secure and return the best retirement income for retirees." Just 9% thought funds should be managed to "advance the union's social and political goals."
>
> Workers should have the right to join or leave unions under fair rules, and unions have every right to represent their members on pay, benefits, and working conditions. But organized labors' attempts to use stock holdings to advance narrow agendas not in the best interest of all shareholders is unsound, and toying with their own members' retirement savings is indefensible.

http://online.wsj.com/article/SB10001424052970204619004574322333106626854.html

Given that the issue is now squarely joined in Congress, the Commission should defer action on this topic until Congress has acted or it becomes clear that Congress will not act. Moreover, as indicated above, even if, as contemplated by Senator Schumer's proposed legislation, the SEC were granted explicit rulemaking authority in this area, we strongly believe that the very important issues raised by proxy access should not be considered in isolation. In particular, as indicated earlier, it would be bad policy for the Commission to act on the Proxy Access Proposal before it has had the opportunity to fully explore other important problems affecting the U.S. director election system, including the effective abdication by mutual funds and other institutional investors of their duty to exercise voting rights by outsourcing decision-making in this important area to a small number of proxy advisory firms, at least without clear, direct disclosure to their owners or beneficiaries of the practice, its consequences and potential conflicts of interest on the part of the advisory firms.[12] In short, we respectfully suggest that this is the seldom-occurring circumstance where all of the relevant issues, considered together, call for tempering the pace of the regulatory process.

Regardless, as a practical matter, we do not see how proxy access can be put in place for the 2010 proxy season. The terms of the current Proposal clearly require revision—the 171 specific issues flagged by the Commission itself prove that. While we know that timing is in flux, we understand that current thinking is that the Proxy Access Proposal could not be considered by the Commission before November 2009. Even if it became effective immediately thereafter (which, of course, is not likely), it would not apply to the vast majority of companies that mailed their 2009 proxy statements in February or March 2009 due to the 120-day notice requirement in the Proposal (which, frankly, we believe should be even longer). Moreover, many companies are reviewing proxy access, including possible by-law changes based on recent amendments to Delaware law. As many other commentators have already explained, the Proposal should be modified away from a "one-size-fits-all" proscription to permit more tailored approaches. It is not realistic to expect these changes to be in place on a basis that would accommodate the timetable contemplated by the Proxy Access Proposal. Finally, the initial 60-day notice period raises serious issues under federal law due to the apparent lack of opportunity of the large number of interested parties to review and respond "in a meaningful way" to the more than 170 requests for comment.[13] Given

[12] The Director of the Division of Corporation Finance recently publicly stated that among the SEC's key priorities is a review of the proxy voting system and proxy advisory firms. *Corporate Accountability Report* at 968 (Aug. 27, 2009).

[13] *Conn. Light & Power Co. v. Nuclear Reg. Comm'n,* 673 F.2d 525, 528 (D.C. Cir. 1982). *See also Estate of Michael Patrick Smith v. Bowen,* 656 F. Supp. 1093, 1097-98 (D. Colo. 1987) (holding comment period of 60 days insufficient because of, among other factors, the inability of large number of interested parties to comment within notice period); *cf. Conn. Light & Power Co.*, 673 F.2d at 534 (novel proposed regulations require longer comment periods). Mindful of these concerns, the Commission has regularly extended the comment period for other proposed rules and, at a minimum, should do so in this instance.

this, the fact that the legislative process will almost certainly unfold in Congress this autumn and the need to consider related areas, we respectfully urge the SEC to readjust its timetable and not rush in a vain effort to implement radical change in time for the 2010 proxy season.

* * * * *

We appreciate the opportunity to comment on the proposed rules. If you wish to discuss our views in greater detail, please do not hesitate to contact Bob Profusek (telephone: 212.326.3800; email: raprofusek@jonesday.com), Lyle Ganske (telephone: 216.586.7264; email: lgganske@jonesday.com) or Lizanne Thomas (telephone: 404.581.8411; email: lthomas@jonesday.com), each of whom is a Partner in our Firm.

Thank you for considering our views.

Very truly yours,

Jones Day

Jones Day