Peter C. Clapman

Via Email:rule-comments@sec.gov

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

Re: File No. S7-1 *0-09 Release No. 34-60089*
Facilitating Shareholder Director Nominations

I am submitting this comment letter solely as an individual and my views should not be attributed to any organization with which I am associated. I have over 35 years experience in the field of corporate governance, both in the United States and the global arena. The first 32 years until my retirement in 2005 was as Chief Counsel for Investments at TIAA-CREF and manager of its corporate governance program. I was Chairman of the International Corporate Governance Network during the years 1999-2002 and continue to be active with that organization. My most recent article was published in "Directors & Boards" in 2008. In that article, I discussed the issue of shareholder access; my views have not substantially changed. This article is attached to my letter.

SUMMARY OF COMMENTS

To summarize my views:

1- Re Proposed Rule 14a-8: The SEC should amend Rule 14a-8 and otherwise interpret the rule in time for the 2010 proxy season to permit shareholder proposals on shareholder access. The SEC, however, should not constrain such proposals to fit the limits of proposed Rule 14a-11. In conjunction with the recent amendments under Delaware Corporation Law, shareholders should be able to decide what eligibility standards and other applicable rules would apply for shareholder access. Shareholder self-determination should be a guiding principle for the SEC in fashioning rules for shareholder access.

2- Re Proposed Rule 14a-11: Rather than "guess" as to standards on such a critical area of corporate governance, the SEC should utilize real expressions of opinions of shareholders as a whole, which are best derived from actual votes. Instead of any new Rule 14a-11 regime in the immediate future, the SEC should observe the actual voting results on shareholder nominations as a result of implementation of amended Rule 14a-8 as suggested above. Of course, the only way for actual voting results to be useful for this purpose is if the SEC makes clear that such results will be important in ultimately determining how the Rule 14a-11 process will be influenced by such results. This would serve as a proper basis for the Commission to subsequently see whether SEC mandated standards are appropriate and, if so, what they should be. This would be a true expression of self -determination by shareholders.

It naturally follows that any imposition of standards by the SEC regardless of what shareholders as a whole really want is contrary to shareholder self-determination. The SEC should not go in this direction.

3- Implicit in the preceding paragraph, the SEC should make clear that any rule as complicated and potentially risky for the securities markets as proposed Rule 14a-11 in its current form should not be implemented on the basis of a 60-day comment period. At a minimum, for the sake of credibility, the Commission should hold a series of roundtables and fine-tune subsequent rule proposals on this subject. I hope that the SEC will avoid taking action that violates shareholder self-determination.

DISCUSSION

There have been considerable positive developments in corporate governance since the prior SEC proposal on shareholder access in 2003. Among the notable changes are the increasing numbers of companies that have adopted majority vote as the standard for director elections, the effect of which will increase the accountability of directors to shareholders particularly after the recent SEC action with respect to NYSE rule 452.

Majority vote as the increasingly accepted standard for director elections was largely unknown in 2003 when the SEC proposed far more stringent tests for shareholder access. Even in 2005, when shareholder resolutions on shareholder access actually took place, far fewer companies had adopted majority vote. As best I can recall, shareholders in 2005 did not approve any such resolutions calling for shareholder access even with eligibility standards more difficult to obtain than this SEC proposal.

During 2009, there were a considerable number of proxy contests for board elections based on the willingness of some shareholders to bear the costs of such contests, presumably because they assessed the value of possible access as exceeding these costs. The notion that shareholder ability to launch proxy contests depends on adoption of the SEC current proposal is clearly belied by the facts.

The state of Delaware adopted amendments to its corporate law to enable shareholders and boards to work out the basis of shareholder access. As a result of current Delaware law, Delaware companies might have been willing to voluntarily work out a process for shareholder nominations in consultation with shareholders. If that could not be agreed, shareholders can utilize the shareholder proposal process to produce shareholder access, if that result is the decision of shareholders as a whole to do so. In my opinion, it would be a mistake for the SEC to restrict the parameters of what shareholders could seek. Almost surely, these arrangements would be different from the current SEC proposal.

If the Delaware process is permitted to move forward, the SEC will have a body of evidence indicating what shareholders actually want. An unfortunate result of the SEC current proposal is that the Delaware approach for determining shareholder access, mutually worked out by shareholder advocates, company representatives, and experienced professionals, has been essentially stopped in its tracks.

It is in this context that I have arrived at my views on the SEC proposals in question.

First, to take up the Rule 14a-8 proposal, there are currently no legal impediments in the way of the SEC permitting shareholder proposals to go forward. In the past there were concerns about state law, but now that these issues have been cleared up, resolutions can be utilized. As a matter of policy, the SEC can adopt rules to allow this process to go forward. In my view, the SEC should do so relatively quickly, in time for the 2010 proxy season.

Proposed Rule 14a-11 is much more complicated and presents far more risks, foreseen and unforeseen, to our system of corporate governance. To start with, the SEC has no factual basis upon which to know which tests for eligibility are appropriate. In my view, the "1% -1 year" test is clearly too easy to satisfy and likely would cause more harm and disruption to shareholders than its purported benefits.

Moreover, the SEC will have no factual basis either now or at the conclusion of the comment period to determine that shareholders as a whole actually want that eligibility test or any other specific test. The last voting experience with this issue back in 2005 resulted in shareholders rejecting shareholder resolutions that were more stringent than this proposal. Those results preceded the increased acceptance of majority vote. Until there is new factual data to the contrary, the prior results are the best indication of shareholder assessment of the benefits and costs of access.

In my view, the proposed Rule 14a-11 tests would substantially favor shareholders that have short-term business objectives rather than long-term shareholders. Short-term shareholders currently are quite prepared to spend their own money on a contest, and it is hard to see why all shareholders should now subsidize greater numbers of contests by such shareholders. Among the reasons that short-term shareholders are favored is the fact that they can more easily get nominees to run on their slates because they are prepared to pay such nominees. Thus, one likely consequence of the SEC's proposal is to greatly increase proxy contests launched by short-term investors.

There are very rational reasons why shareholders as a whole might want to reject such a system that produces such results. It is said that we should not worry about such results, because in a contest the shareholder nominees must achieve a majority of shares. This ignores the costs of the contest itself. Most boards in this situation will look for ways to settle the contest, perhaps giving in to the proponent in ways that are not in the long term interests of shareholders. At a minimum, boards will be diverted in their attention to the contest rather than to the proper duties of the board. Whether one agrees or disagrees with that logic, it should at least be respected as a risk for shareholders to be concerned about.

Another benefit of the suggested 14a-8 approach, rather than that of 14a-11, is that it avoids a "one size fits all" result. For example, shareholders might well decide to have different eligibility standards for companies that have adopted majority vote. My article in 2008 argues for that position, premised on the fact that different companies having different degrees of respect for shareholder views and accountability ought to be treated differently.

Finally, there is the inherent contradiction in proposed Rule 14a-11 as to the ability of shareholders to determine their best interests. The SEC has stated that shareholders can be relied upon to exercise sound judgment in their voting when confronted with competing slates. Why, then, are these same shareholders not capable of exercising sound judgment in determining which eligibility standards and other rules for shareholder access ought to apply. In my view, shareholders as a whole are capable of exercising sound judgment on all such questions, and this is a strong argument against the current SEC proposal.

If concerns about the SEC proposal are fundamental, such concerns cannot be cured at this stage by merely changing the numbers. Fortunately, the SEC can rely on actual voting experience once the Rule 14a-8 changes as suggested above begin to produce such information. These results will be available soon enough.

This brings us back to the philosophical basis for SEC action in this area. In my view, the SEC should facilitate the ability of shareholders to determine the appropriate standards for allowing shareholder nominees to be placed on company proxy statements. The SEC decidedly should not mandate or impose standards which may well be against the majority views of shareholders. No one will know what these views are until we see what shareholders do when they have the opportunity to vote.

In short, the proper role of the SEC should be to enable shareholders to have full self-determination as would occur under my suggested application of Rule 14a-8. It is contrary to self-determination for the SEC to mandate standards and tests without evidence that these are what shareholders want.

CONCLUSION

I fully appreciate that the SEC wishes to finally settle the issue of shareholder access and is well motivated in trying to obtain the views of all parties concerned. My conclusion, however, is that a 60 day comment period is no substitute for basing judgment on actual voting by shareholders as a whole. This would not take long since one proxy season may well be illuminating and the SEC could reconsider the Rule 14a-11 option at that point. Given the unpredictability as to the effects of adoption of this rule and the inevitable unforeseen consequences, the SEC should avoid taking such action when there is a logical and positive alternative that would better serve the interests of shareholder rights.

I hope that the SEC proposal is not the end of the debate, but rather the beginning. If so, I would want to participate further in that debate.

Respectfully submitted,

Signed: Peter C. Clapman

Peter C. Clapman

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Next steps? Be careful what you wish for

In the name of advancing shareholder rights, let's not harm shareholder interests.

By Peter C. Clapman

In 2004, as head of the corporate governance program at TIAA-CREF, I wrote in its *Policy Statement on Corporate Governance* the following: "Good corporate governance should maintain the appropriate balance between the rights of shareholders — the owners of the corporations — and the needs of the board and management to direct and manage effectively the corporation's affairs." At that time, relationships among shareholders, boards, and management were not balanced, with authority heavily skewed towards management. While some company boards understood their proper role, many did not — resulting in CEO domination.

I am convinced that this same approach to specific issues continues applicable in 2008. However, I now challenge a premise that I previously took for granted: that increasing shareholder powers is always in the long-term interests of shareholders.

A changed scene

Significant strides made in the U.S. to improve corporate governance, including providing shareholders with a considerable array of new rights, have changed the scene, as have the positive changes in boardroom practices under new regulatory and legislative standards. Unfortunately, it took the scandals of 2001-2003, and the market collapse that ensued, to produce these changes. The results, however, were highly productive.

The SEC and Congress, as well as the private sector, examined laws, regulations, and business culture with a goal to restore confidence in the U.S. markets. As time passes, we can appreciate the extraordinary governance changes brought about through Sarbanes-Oxley and other regulatory changes, the stock exchange listing requirements, increased board member understanding of their responsibilities, and more open dialogue between shareholders and managements.

Most importantly, we found a private-sector solution to one of the more significant barriers to better board performance: the broad consensus across constituencies that board members should be elected by majority vote of shareholders. This last change now gives boards a legitimacy that previously was lacking.

Of all of the changes in actual practice, aside from majority vote, the most significant governance advances result from the new stock exchange listing requirements. Foremost among them: boards must meet in executive session without management. As a result, companies have to designate an independent lead (or presiding) director, not only to run the executive sessions but also to have the responsibility of assuring that the board exercises independent board leadership. Another sea change brought about by the new listing requirements is the shift of control from the CEO to the corporate governance committee in the selection of new board members.

In the compensation area, new regulations required shareholder approval of equity compensation plans that could significantly dilute current shareholder interests (early "say on pay"); new regulations also required expensing of stock

Continued on page 48

Peter C. Clapman retired as senior vice president and chief counsel for TIAA-CREF in 2005 after 32 years with the retirement funds investment organization, where he headed the corporate governance program. He currently is a partner of Governance for Owners LLP, a U.K.-based investment organization that offers global investment and governance products and services to institutional investors, and is president and CEO of its U.S. corporate governance operations. In 2007 he authored "The Clapman Report," a set of best practice principles for managing pension, endowment, and charitable funds, an initiative of the Stanford Law School Institutional Investor Forum, for which he chairs its Committee on Institutional Investor Governance.

Next steps?

Continued from page 6

options. These have undoubtedly influenced how executive compensation is fashioned.

Where to go from here?

We need to look at the corporate governance environment in 2008 and assess what additional changes are appropriate. We need to acknowledge that taking the reforms, singularly and cumulatively, over the past few years, there has been a major shift away from management domination in favor of both the board and shareholders. In short, the balance needed for good corporate governance is much closer to where it should be. I question whether radical shifts in the current balance are desirable.

The key to good governance has always been to promote higher quality performance by the board of directors. Although boardroom practice is far more professional and responsive to shareholder concerns than ever before, board quality is a moving target. We cannot merely affirm the status quo. We should be careful, however, that any further changes do not produce more problems than they purport to solve — that, in the name of advancing shareholder rights, we do not harm shareholder interests.

There are a number of current issues being debated that raise these concerns. First, there is shareholder proxy access, a concept that was proposed by the SEC in 2003. This idea was considered for close to two years before being put aside by the commission, and then given new impetus by a court decision that permitted shareholder resolutions in 2007. None of these resolutions passed, although some received significant minority support. A new rule of the SEC essentially removed the issue for the 2008 proxy season, but it is likely that the issue will reemerge for consideration.

A power shift has occurred

It is important to remember that the SEC proposal on shareholder access occurred before majority vote was even considered, let alone implemented. Majority vote as a requirement for board elections is now the norm in most of the larger companies in the U.S. As compiled in a study by Claudia Allen of Neal, Gerber and Eisenberg LLP, currently about two-thirds of the companies in the S&P 500 have adopted majority vote and more are expected to do so during the 2008 proxy season. Majority vote could well be the universal standard in the near future as smaller companies are increasingly adopting it. Majority vote for elections means that shareholders, if dissatisfied with board performance, can have a practical means to exercise their opinion. A nonperforming board can be rejected if sufficient shareholder opposition develops. Boards recognize this possibility, and they become more accountable.

We are at a relatively early stage in understanding the full impact majority vote will have on board-shareholder relationships. It would be hard to deny, however, that a significant power shift to shareholders has occurred. The acceptance of majority vote by corporate managements and boards strongly influences my views on shareholder access.

In my view, the debate over proxy access in 2008 should be very different than it was in 2003, prior to widespread adoption of majority vote. Some advocates continue to press for proxy access, potentially at all companies. They argue that proxy access would not be abused or cause dysfunction because a shareholder nominee would need to defeat the board nominee. A problem with that logic is that it ignores the practical effect the contest itself would have on a board. A board contest inevitably distracts a board from its appropriate responsibilities. Furthermore, although few companies may actually confront a proxy contest, every company will have the concern that they will be among those chosen, and perhaps for wrong reasons.

We are at a relatively early stage in understanding the full impact majority vote will have on board-shareholder relationships.

Thus, in contrast to majority vote, which favors consensus, proxy access remains an issue where confrontation and charged rhetoric prevail. Weighing all these arguments, I have written a comment letter to the SEC. It concludes that proxy access should not apply to companies that adopt majority vote, unless such companies ignore vote results that reject its board nominees, and that at least 5 percent of shareholders be required, a figure that should assure a reasonably broad shareholder consensus as to the appropriateness of such a contest. I continue to believe that this approach will strike the proper balance.

Whether shareholders should have an advisory vote on compensation and at which companies — the so-called say on pay — also raises these concerns. One approach, which I favor, would be for shareholders to utilize the shareholder proposal process in selective cases at companies that have demonstrated poor practices. The other approach would be to require such a vote at all companies, as is the practice in the U.K. Congressional legislation to require such votes at all companies has been introduced.

Problems with say on pay

In my view, universally applied say on pay is more problematic than helpful. For all practical purposes, a shareholder right to say on pay already exists, since the option of withholding votes from compensation committee members is not only available but is being widely exercised. Thus, there is a link between this issue and majority vote. Compensation disclosure under recent SEC rules is increasingly complex and lengthy. Considerable work is needed to intelligently assess such disclosure in individual company proxy statements. There is a fair likelihood that companies would begin to standardize pay practices for ease of disclosure, rather than to exercise appropriate judgment as to the particular factors that should best apply to their compensation practices.

If applied to a universe of 10,000-plus public companies in the U.S. (in contrast to far fewer companies in the U.K.), most shareholders simply will not devote the necessary staff resources to vote intelligently as individual shareholders and will outsource the voting decision. The inevitable consequence would be to transfer considerable discretionary power over individual company compensation practices to the proxy advisory firms. I question that such an approach will serve the long-term best interests of shareholders.

My conclusions on current-day issues of corporate governance stem from my beginning premise that "good corporate governance" means working to achieve the right balance among management, boards, and shareholders. That balance may mean that adding new shareholder powers does not necessarily equate to advancing shareholder interests. For long-term shareholders, adding new shareholder powers that go too far may actually be contrary to good corporate governance. At some point, by eroding the authority of boards, we risk lessening rather than enhancing boardroom accountability.

The key to good governance has always been to promote higher quality performance by the board.

Grounded in mutual respect

If adding new shareholder powers may be problematical, what is the best application of shareholder initiatives? Responsible shareholders still need to focus on increasing the quality of board performance. Even with the great strides that have been made, shareholders need to press for wider application of "best practices" in such areas as independent board leadership, board education, board self-assessment, succession planning, and board engagement with long-term shareholders. Within the improvements that have taken place in U.S. corporate governance, there are more than enough shareholders rights to take on these issues. We can start with the responsible use of the proxy vote on director elections and other major issues. For this task to be performed well, more shareholders must devote sufficient resources to make intelligent individualized decisions.

Two other thoughts: U.S. institutions should go beyond just voting — by engaging in more direct dialogue on governance issues with corporate managements and board members, a practice that is now established and working well in England. Further, governance professionals should work with their investment staffs on governance issues to better integrate governance into the investment process.

We must also appreciate that successful implementation of objectives depends on the willing acceptance of such ideas by the corporate community leaders who recognize legitimate shareholder concerns. At some point there will be understandable resistance from the business community if shareholders fail to recognize the positive governance developments they have achieved, and insist on an ever-expanding concept of shareholder rights.

It's a different environment

Additionally, there is a real concern that private equity and hedge fund investors with short-term horizons can use shareholder rights to destabilize companies in furtherance of their goals, to the detriment of long-term shareholders. In such cases, long-term shareholders may need the board to have the ability to resist short-term investor pressures. As private equity and hedge fund investors become more powerful, this is another good reason long-term shareholders should be very careful about tilting the governance balance away too much from directors.

Going forward, we should engage in analysis and debate of complex issues with full appreciation that we are in a very different governance environment than even a few years ago. We collectively can accomplish more to further improve our corporate governance. This can best be accomplished by mutual respect among boards, management, and shareholders. Without such respect, dialogue can easily lapse into confrontation and inflamed rhetoric, all of which would be contrary to the interests of both corporate leadership and shareholders. ■

The author can be contacted at pclapman@optonline.net.