CLEARY GOTTLIEB STEEN & HAMILTON LLP

ONE LIBERTY PLAZA
NEW YORK, NY 10006-1470
(212) 225-2000
FACSIMILE (212) 225-3999
WWW.CLEARYGOTTLIEB.COM

WASHINGTON, DC • PARIS • BRUSSELS
LONDON • MOSCOW • FRANKFURT • COLOGNE
ROME • MILAN • HONG KONG • BEIJING

Writer's Direct Dial: +1 212 225 2000

November 4, 2010

Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Attention: Ms. Elizabeth M. Murphy, Secretary

Re: File No. S-7-14-10
Release Nos. 34-62495; IA-3052; IC-29340
Concept Release on the U.S. Proxy System

Ladies and Gentlemen:

We are responding to the request of the Securities and Exchange Commission for comments on its July 14, 2010, Concept Release referred to above. We appreciate the opportunity to comment and welcome the comprehensive review of the U.S. proxy system that the Commission has begun with the Concept Release.

We believe an examination of the proxy system will be most effective if it is framed within a clear understanding of the goals to be advanced. Accordingly, a substantial portion of our letter outlines broad objectives and presents our recommendations, as well as other steps the Commission should consider, to advance those objectives. We believe these objectives, recommendations and other steps support the Commission's missions to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

The current system, which in its essential elements dates back to the 1970s and 1980s, has achieved many of its intended benefits, in particular by providing a largely reliable system for distributing proxy materials to a vast universe of registered and beneficial owners on a timely basis. We note at the outset, however, that a number of observers have suggested there are imperfections in the current system, many of which are discussed in the Concept Release. Our suggestions in this letter for improving the system take a middle-ground, incremental approach that neither calls for a "zero-based" analysis that would start from scratch to build a new system, nor gives excessive deference to the status quo just because it is what we have currently. On the latter point, we would observe that while there are numerous actors who now play, and are almost certain to continue to play, important roles in the system, we believe the Commission's priorities should be to ensure that the system works optimally to protect investors and to facilitate interactions between issuers and investors and among investors. They are the two groups with the biggest stakes in the successful operation of the proxy system.

Many of our suggestions would involve greater use of electronic communications and less reliance on paper-based transmissions, which we believe, as a general matter, is key to enabling the fullest range of future enhancements.

Finally, we would observe that while a significant number of the matters raised in the Concept Release and addressed below might require consideration of revisions to various parts of a complicated and inter-connected system of proxy mechanics, some changes can be considered on a standalone basis. If the Commission determines that one or more of these potential standalone changes is worthwhile, they can be made before proceeding to more comprehensive reform. Among the subjects we believe are suitable for this standalone analysis, all discussed below, are further regulation of proxy advisory firms, enhanced disclosure regarding the decoupling of voting and economic interests by those soliciting proxies, adoption of a universal ballot, delivery of the proxy card with the meeting notice under the "notice and access" model, and facilitating the use of dual record dates.

A. Appropriately address misalignment of voting power and economic interest

Misalignment between voting power and economic interest raises difficult questions, and we welcome the Commission's effort to examine ways in which its regulations may contribute to such misalignment.

1. Require greater transparency regarding proxy advisory firms' objectives, procedures and potential conflicts.

Proxy advisory firms occupy an important place in the corporate governance community and can shape corporate governance practices as well as influence voting outcomes. We agree with the concerns about the role of proxy advisory firms expressed by commentators and articulated in the Concept Release. Based on anecdotal evidence, it appears that such firms' recommendations are sometimes based on factually inaccurate information and that, when this happens, companies often do not succeed in obtaining correction. In addition, as the Concept Release describes, the business models of proxy advisory firms can create actual or potential

conflicts of interest. In our view, these concerns are manifestations of the basic problem that proxy advisory firms can significantly influence voting outcomes in which they hold no economic interest. We therefore agree with the Commission that the role of proxy advisory firms should be evaluated in the context of potential misalignment of voting power and economic interest.

Proxy advisory firms formulate recommendations on matters that affect the economic and operational performance of companies, such as employee compensation arrangements. These recommendations typically reflect general principles and models developed by the proxy advisory firm and may not reflect a deep understanding of a company's particular circumstances. Even in the absence of a shareholder vote, the general voting policies of proxy advisory firms can shape corporate behavior on a range of other matters, such as takeover defenses, and those policies are by their nature "one size fits all." Because proxy advisory firms do not own shares in the companies affected, there is no obvious reason to assume that their recommendations or voting policies will change if they have negative consequences for those companies. In effect, a beneficial owner may find itself investing in a company where voting outcomes are very substantially influenced by a party that does not have a corresponding economic stake and therefore may not have the necessary incentive to really understand what makes sense for that particular company. We recognize that proxy advisory firms may develop and modify their recommendations partly in response to the views of their investor clients. However, this feedback mechanism cannot fully address the concern.

We do not believe it would be practical or appropriate for the Commission to regulate what constitutes a legitimate motivation for voting, or advising an investor to vote, a particular way. However, greater transparency regarding proxy advisory firms' objectives, procedures and potential conflicts would be appropriate, so that investors can have better opportunities to make an informed decision about whether to follow a given recommendation. Such informed decisions are essential to maintain an alignment between voting behavior and the economic interests of beneficial owners.

The Concept Release discusses two potential means of enhancing the regulation of proxy advisory firms within the existing regulatory framework – by revising or providing interpretive guidance on the exemption contained in Rule 14a-2(b)(3) under the Exchange Act, or in connection with requiring such firms to register as investment advisors. In addition, we believe that, under either of these regulatory regimes, the Commission has the authority to consider whether a regulatory approach targeted at the specific circumstances of the proxy advisory firms is appropriate. As was the case with credit rating agencies even before legislative action provided increasing degrees of specialized authority, we believe the Commission under either the Investment Advisers Act of 1940 or the proxy solicitation rules can recognize the special position held, and issues raised, by proxy advisory firms and engage in appropriately responsive rulemaking.

Consistent with that view and regardless of the specific regulatory mechanism, we believe proxy advisory firms should be required to provide meaningful, specific and detailed

disclosure covering at least the following topics: (1) the objective of any advice or recommendation; (2) the procedures and controls used to ensure that such advice or recommendation is based on factually accurate information and otherwise developed with due care; (3) the processes, if any, through which companies and other interested parties are encouraged or permitted to verify or comment on the information used to develop the advice or recommendation and by which any mistakes are corrected; (4) the expected connection between the recommendation or advice and the stated objectives; (5) the monitoring processes, if any, used to test whether and to what extent such advice or recommendation in fact achieves the stated objectives over time; and (6) any relevant conflicts of interest. In addition, requiring proxy advisory firms to publicly disclose their models for evaluating executive compensation or other matters (or at least the material principles and inputs used in those models) may also be appropriate. This step would provide additional transparency to enable examination of whether a proxy advisory firm's recommendations are developed with due care and otherwise well-founded in light of those recommendations' stated objectives.

Finally, regulation under either the Investment Advisers Act of 1940 or the proxy solicitation rules would permit application of anti-fraud rules to the disclosures and related conduct of the proxy advisory firms. We believe this result would be desirable both as a matter of regulation of an important group of actors in the proxy system and as a matter of increasing confidence in the system's integrity.

2. Remove regulatory impediments to setting a voting record date closer in time to the shareholder vote.

The Concept Release usefully describes the ways in which the Commission's regulations may prevent an issuer from setting the record date to determine shareholders entitled to vote close in time to the occurrence of that vote. Partly as a result of these regulations, the record date typically occurs at least 30 calendar days before the vote date. The resulting misalignment between voting power and economic interest that occurs when shares are traded between the record date and the vote date, as well as the potential effects on voting, are well understood. When the investor with voting rights no longer has an economic interest in the company, it generally has no incentive to exercise those rights (and may, in some cases, have economic incentives interests contrary to those of the company's investors). This can make quorums more difficult to achieve. Where the standard for shareholder approval is a majority or super-majority of outstanding shares, as is frequently the case for mergers, this effect also can make approval harder to obtain even if a majority of those voting support the proposal. The problem is amplified to the extent arbitrage activity causes significant turnover among shareholders as the merger vote date approaches.

The benefits of setting a voting record date closer in time to the occurrence of the vote will vary on a case-by-case basis, depending on factors such as the nature of the matters being voted on and expected turnover in share ownership leading up to the vote date, among others. Absent rule changes, however, we believe very few companies will use state law provisions, such as Section 213(a) of the Delaware General Corporation Law, that permit the setting of a

notice record date and a subsequent, separate voting record date. We believe that the Commission's regulations should not impede the setting of a later voting record date where applicable state law provides the flexibility to do so.

We agree with the Commission that the benefits of additional flexibility must be weighed against the need to ensure investors are provided with appropriate information on a timeframe that permits informed voting decisions. It is also important to note that the benefits of facilitating a later voting record date, in terms of reducing potential misalignment between voting power and economic interest, increase as the voting record date is moved closer in time to the occurrence of the vote. Accordingly, we believe any rule changes should seek both (1) to ensure that information about the matters to be voted on is available sufficiently in advance of the vote date, as is the case under the current rules, and (2) to maximize the ability to close the gap in time between the voting record date and the vote itself, to the extent doing so is consistent with maintaining an accurate and reliable system for voting. We further believe that, of the two general models outlined in the Concept Release, a model that focuses principally on the notice record date is better suited to achieve those goals than one focused principally on the voting record date. As noted in the Concept Release, a model focused on the notice record date also would be consistent with Section 213(a) of the Delaware General Corporation Law.

In particular, in a time when distribution through the media and electronic means is generally relied on to reach investors and other market participants, we would prefer that the Commission focus on broad information availability rather than delivery to investors as the key element in facilitating use of dual record dates where state law permits it and companies elect to proceed in that fashion. Consistent with this view, we believe it would be appropriate to amend the Commission's regulations to provide that, where the issuer sets a voting record date that will occur after the notice record date, disclosure requirements under the applicable rules and forms[1] would be deemed satisfied by delivery (or by making the requisite disclosure document available electronically, together with broad and effective public notice) to security holders as of the notice record date. The disclosure document would be required to include information about the voting record date and the fact that only holders of shares as of the voting record date would be entitled to vote.

Under such an approach, the principal barriers to enabling a voting record date that occurs very close in time to the vote itself would appear to be logistical (and the costs of removing logistical barriers would of course need to be considered before any changes are made). We agree with the concerns articulated in the Concept Release regarding the potential for confusion if votes are able to be cast before the occurrence of the record date that determines who is entitled to vote. Those concerns would be eliminated if proxy cards, voting instruction forms or other means of voting were not provided until after the occurrence of the voting record date. In any case, however, a mechanism would be needed for communicating means of voting

---

[1] As the Concept Release notes, changes that would be needed include amendments to Rule 14a-16(a)(1), Rule 14c-2(b), and the instructions to Schedule 14A, Form S-4 and Form F-4.

to investors as of the voting record date (either to only those investors that had not previously received a proxy card or voting instruction form or, under our preferred approach, to all investors). In addition, time would be needed for proxies or voting instructions to be transmitted after the voting record date. As a result, how close in time to the shareholder vote the voting record date can occur would depend greatly on three factors: how quickly a list of beneficial owners as of the record date can be created; how quickly the means of voting can be communicated to those beneficial owners; and how quickly proxies or voting instructions can be transmitted to the vote tabulator.

We believe that, to achieve the possible benefits of a dual record date system, any modifications to the existing requirements should seek to enable a voting record date to occur no more than 5 business days before the vote date. Given the logistical constraints outlined above, achieving such a result likely would require that the means of voting be communicated to beneficial owners as of the voting record date through email or some other electronic means. Accordingly, we believe that, where an issuer sets a subsequent record date, it should be required to provide online and telephonic means for beneficial owners to vote pursuant to the proxy authority granted by bank or broker intermediaries (in a direct voting system) or provide voting instructions to a bank or broker (under the current system). The disclosure document would explain how to use these mechanisms. The grant of proxy authority or the voting instruction form also would be transmitted electronically to beneficial owners. These means of voting would be required to be sent, to all beneficial owners as of the voting record date, at least a specified number of days before the vote date. The issuer would be required to issue a press release on the voting record date, announcing the occurrence of the voting record date and explaining how to access solicitation materials (including the instructions for voting contained in the disclosure document) online.[2]

In addition, Exchange Act Rule 14a-13(a) would be amended to require inquiries be directed only to record holders as of the notice record date, with no further inquiry required with respect to holders as of any subsequent voting record date. More generally, we also believe Rule 14a-13(a) should be amended to substantially shorten the requirement to make inquiries of bank and broker intermediaries 20 business days before the record date for the meeting, as well as the time periods for intermediaries to respond to the company's inquiries. The twenty-business-day requirement was adopted in 1986 and reflected concerns about the time required for bank intermediaries in particular to process proxy-related inquiries through a multi-layered ownership chain. The logistical situation is extremely different today, given technological advances that have enabled vastly quicker response times; we understand that generally no more than a day or two is now required to generate a beneficial owner count.

---

[2] The rules of self-regulatory organizations also would require amendment to the extent inconsistent with this approach. For example, as noted in the Concept Release, Section 401.03 of the New York Stock Exchange Listed Issuer Manual recommends a minimum of 30 days between the record date and meeting date.

The twenty-business-day requirement is not only unnecessary, it also can have substantive effects in proxy contests. If, for example, the company wishes to move an upcoming meeting to an earlier date or announce a special meeting without giving an indication of that plan before setting a record date, Rule 14a-13(a) effectively prevents the company from doing so. Claiming violation of Rule 14a-13(a) can be used tactically in a proxy contest to force postponement of a shareholder meeting, a step that often benefits one party without a corresponding policy justification. As a general matter, we believe whether companies are required to disclose, in advance, the anticipated setting of a record date is best regulated by state law, which governs the closely related matters of notice of shareholder meetings and setting of record dates. Regardless of the source of regulation, however, we do not believe it is sensible to require significant advance disclosure as a side effect of the outdated time periods in Rule 14a-13(a). This conclusion is supported, in our view, by the purpose of Rule 14a-13, which is the comparatively modest one of providing companies with information about how many copies of proxy materials will be needed. Accordingly, we believe it would be appropriate to make the time periods under the rule considerably shorter, and that corresponding changes would be appropriate to the rules of self-regulatory organizations (such as Section 401.02 of the New York Stock Exchange Listed Issuer Manual, which requires listed companies to provide at least 10 days' notice prior to setting a record date for a shareholder meeting).

We also do not believe that the proxy rules should be amended to require companies to publish a detailed agenda before an initial proxy statement is filed by the company or another person soliciting proxies in connection with the vote. As discussed above, we believe state law is best-suited to regulate whether record dates may be set without advance notice. We also believe that requiring companies to publish a detailed agenda in advance of filing a proxy statement could effectively require companies to disclose sensitive or contentious matters prematurely, possibly harming the interests of the company's investors. We note that use of dual record dates would give lenders of securities notice of the matters subject to upcoming votes in time to recall the securities if they wish to vote on those matters. On the other hand, with respect to facilitating the recall of loaned securities generally, we believe possible negative effects on the stock loan market should be carefully considered before any changes are pursued. In addition, we note that while notice of matters to be voted on prior to the voting record date might assist institutional securities lenders to recall shares if they wish to vote them, no corresponding ability would flow to retail investors whose shares are held in margin accounts and subject to being loaned.

3. Increase transparency regarding decoupling of voting power and economic rights through disclosure requirements.

As discussed in the Concept Release, a basic premise underlying state law voting rights and the Commission's proxy rules is that shareholders generally have both voting rights and an economic interest in the company. Decoupling of voting power from economic interest puts pressure on this basic understanding. We agree with the Commission that more robust disclosure regarding circumstances that may lead to empty voting would be valuable to issuers and investors. Such additional disclosure could also give insight into the scope of potential empty

voting and the arrangements that create it, which could help the Commission and state courts and legislatures craft potential responses where appropriate. We believe state law, however, should remain the primary regulator of substantive voting rights, and the proxy voting system should, to the greatest possible extent, avoid constraining state law flexibility to evolve responses to new developments such as empty voting.

We understand the staff is engaged in a separate project to consider changes to disclosure rules under Exchange Act Section 13(d), and our letter does not address those matters. In relation to the proxy rules specifically, we believe it would be useful to investors and issuers if any participant in a solicitation were expressly required to provide the same disclosure required by Item 6 of Schedule 13D and to update such information to disclose any material changes prior to the shareholder vote. This requirement generally would not apply to exempt solicitations, but in the case of a solicitation of 10 or fewer persons, disclosure should be required to the persons solicited. Similarly, we believe the disclosures mandated under new Schedule 14N should be expanded to clearly cover equivalent information. Given the special issues that can arise in the context of a merger or other acquisition, equivalent disclosure should be required with respect to arrangements involving any counterparty if the shareholder vote relates to a merger or other transaction. Such information would help shareholders evaluate the extent to which their economic interests may or may not be shared by those seeking proxy authority.

B. Facilitate direct communications with and among beneficial owners.

We believe both issuers and investors could benefit from facilitating direct communications between companies or others seeking to solicit proxies[3] and their beneficial owners, as well as among beneficial owners. We believe facilitating such communications is important in light of the fundamental changes in the corporate governance landscape in recent years, which have given shareholders a greater voice in companies' governance. These changes have created an environment in which two basic principles must operate together – shareholders' enlarged role, and directors' continued and clear responsibility to direct and oversee the management of the company. Providing investors and companies with enhanced ability to create dialogue is a key element of strengthening this governance model.

In addition, steps to facilitate direct communications could pave the way for further changes to advance other important goals, such as enhancing the accuracy and transparency of the proxy voting process and raising voting participation rates, especially among retail investors. We discuss our recommendations in these areas below. Our first recommendation, providing an exception to OBO status at record dates for shareholder action, could result in further reforms that we believe hold much promise to improve the functioning of the proxy voting system in a variety of ways.

---

[3] We use the term "proxies" to encompass both proxies and voting instructions, except in the discussion of direct voting below.

1. Provide an exception to OBO status at record dates for shareholder action.

A crucial change to facilitate direct communications, especially to retail investors, would be to change the "objecting beneficial owner" or "OBO" system, under which issuers are not able to identify or communicate directly with beneficial owners that elect OBO status. The inability to contact OBOs directly hampers communication with a segment of the beneficial owner universe. As noted in the Concept Release, more than 75% of street name investors are OBOs,[4] amounting to approximately 52-60% of the shares of U.S. publicly traded corporations.[5] While there have been some suggestions that the percentage of OBOs is greater among institutional investors than retail investors[6] and that companies can effectively communicate with their institutional shareholder base irrespective of OBO status, the fact remains that the number of retail investors that are OBOs is significant and that as a general matter the inability to identify beneficial owners is an obstacle to effective communications. As shareholders are asked to vote on more matters, and as shareholder votes grow more frequent and more meaningful, companies' interest in identifying and communicating with all of their beneficial owners grows accordingly. Corporate governance has shifted to encourage more shareholder involvement in companies' governance. It is not surprising that companies therefore feel a greater need to know who their shareholders are. The interest in communicating is also shared by others who may seek to solicit proxies or encourage voting.

We recognize that interests in communication must be balanced against the privacy interests of investors, and we appreciate that our expertise does not extend to weighing the importance of privacy interests. Nonetheless, given the importance of dialogue under the current governance model, with its enlarged role for shareholders, we believe there is a very substantial interest in favor of limiting or eliminating OBO status to the extent necessary to permit effective direct communications at times when shareholders are called on to participate in the governance process by voting. Accordingly, we believe there should be an exception to OBO status, at least at each record date for shareholder action, so that a complete list of beneficial owners would be available to the company and others seeking to solicit proxies for the upcoming meeting or action. By eliminating OBO status only at record dates, we believe many investor privacy concerns would be substantially addressed. This approach should limit the risk that beneficial owners could receive communications throughout the year or that companies or others could use beneficial ownership lists to track an investor's trading strategies. Privacy concerns that arise from even a limited ability of third parties to access information can, we believe, be addressed in other ways. For example, investors that may wish to keep holdings fully confidential could use a

---

[4] *See* Report and Recommendations of the Proxy Working Group to the New York Stock Exchange 11 (2006), *available at* http://www.nyse.com/pdfs/PWG_REPORT.pdf.

[5] Bus. Roundtable, Request for Rulemaking Concerning Shareholder Communications, Petition 4-493, Apr. 12, 2004, at n.2, http://www.sec.gov/rules/petitions/petn4-493.htm.

[6] *See* SIFMA, *Report on the Shareholder Communications Process with Street Name Holders, and the NOBO-OBO Mechanism* (June 10, 2010), at 7.

nominee account to maintain privacy, shifting the cost of anonymity from the company (and therefore shareholders generally) to the particular investor. Eliminating OBO status only at record dates should also alleviate concerns about the ability of banks and brokers to maintain an accurate list of all beneficial owners in actively traded stocks.

Bank and broker intermediaries also have a legitimate interest in maintaining the confidentiality of their customer lists as to both current OBOs and NOBOs. Even if OBO status were limited as we recommend, agents, including Broadridge Financial Solutions Inc. ("Broadridge"), could still be engaged (as is currently the practice) to compile the list of a company's beneficial owners as of the record date. This should permit intermediaries' customer lists to remain confidential. Preparation by a third party should also help mitigate any concerns that a shareholder seeking to solicit proxies might be disadvantaged by a system in which the company prepares and controls access to the list. In our view, however, state law has provided, and is likely to continue to provide, adequate protection to shareholders in any event. Delaware courts, for example, have held that solicitation of proxies is a "proper purpose" justifying access to books and records under Section 220(b) of the Delaware General Corporation Law.[7]

If OBO status were not eliminated at record dates for shareholder action, there are other steps that could discourage shareholders from electing OBO status – such as charging a fee to select and maintain OBO status. However, we believe such an intermediate approach is likely to be more cumbersome to implement, less effective, and therefore less preferable.

Providing an exception to OBO status at record dates for shareholder action would enable companies and others soliciting proxies to craft and implement more broad-based outreach to shareholders in connection with shareholder votes, including through direct solicitation. It would also facilitate efforts to encourage voting that are outcome neutral, further discussed below. In either case, it is only logical to infer that direct communication will increase voter participation.[8] In addition, this change would give companies and others soliciting proxies the choice whether or not to engage in direct solicitations, depending on the issue at hand, the perceived closeness of a vote, considerations of cost effectiveness in relation to anticipated results of solicitation, and other factors. The Commission would thus be playing an important role in eliminating regulatory obstacles to facilitate communications while not mandating particular processes or outcomes.

2. Permit proxy materials, as well as other communications, to be sent directly to beneficial owners.

---

[7] *See, e.g.*, *Hatleigh Corp. v. Lane Bryant, Inc.*, 428 A.2d 350, 352 (Del. Ch. 1981).

[8] *See, e.g.*, The Altman Group, Practical Solutions to Improve the Proxy Voting System, Oct. 21, 2009, at 8, *available at* http://www.altmangroup.com/pdf/PracticalSolutionTAG.pdf.

Providing an exception to OBO status as described above would be significant progress toward removing obstacles to communications. This would be the case whether or not the Commission also adopted a second, related change – allowing companies to send initial proxy materials directly to beneficial owners. Currently, because the Commission requires that companies rely on intermediaries or their agents to send initial proxy materials to all street name beneficial owners, companies are not permitted to send proxy materials directly even to NOBOs. Maintaining this requirement is, we believe, inconsistent with the objective that obstacles to communications should be eliminated.

We recognize that the existing system – in which securities intermediaries, and Broadridge, as their agent, handle the distribution of virtually all proxy materials to "street name" investors – is generally viewed as reliable and efficient in achieving distribution of initial proxy materials on a timely basis. (Indeed, we understand that many companies use Broadridge to distribute initial proxy materials to registered holders.[9]) Caution is appropriate before making changes to that system. The practical and logistical implications of permitting companies to distribute proxy materials directly are outside our competence but should be carefully evaluated. As a general matter, the very significant advances in technology since the Commission determined in 1983 to require distribution of initial proxy materials through intermediaries suggest that direct distribution could be enabled without sacrificing reliability or timeliness of delivery.

Importantly, we do not advocate requiring that companies or others soliciting proxies send initial proxy materials directly to beneficial owners, only that they be permitted to do so. Given this responsibility, it seems likely that many companies would elect to continue to use intermediaries and Broadridge or other agents. We believe companies and other participants in the proxy system should make those decisions. We do believe it is time to re-examine whether there should be a Commission-dictated regulatory outcome on this point. We would also observe that permitting direct communications could initiate a more competitive landscape for services related to the distribution of proxy materials.

C. Enhance the accuracy and transparency of the proxy voting system, and promote the perception that such accuracy and transparency exist.

Like any form of voting, shareholder voting is authoritative only if outcomes are accurate. As discussed in the Concept Release, shareholder votes have grown more meaningful in light of developments such as changes to NYSE Rule 452 and the increased adoption of majority voting in uncontested director elections. We agree with the Commission that some issuers and investors believe the current proxy system lacks transparency and sometimes results in or contributes to inaccuracies in the voting process. To the extent such beliefs exist, they

---

[9] *See* Compass Lexecon, An Analysis of Beneficial Proxy Delivery Services, May 11, 2010, at n.28, *available at* http://www.broadridgeinfo.com/ADPFiles/Compass%20Lexecon%20Report%20Final%2005-14-10.pdf.

undercut the legitimacy of voting outcomes. Therefore, as a conceptual matter, we believe the accuracy and transparency of the existing system, and confidence among companies, investors and other system participants, could be meaningfully enhanced and promoted if the following conditions existed:

- *End-to-end audits*. A single entity, either a regulatory authority or an entity subject to regulatory scrutiny, had available to it as a matter of course all of the information necessary to perform an end-to-end audit of the process by which voting rights were allocated to beneficial owners and the votes cast by those beneficial owners were recorded and tabulated.

- *Vote confirmations*. Each beneficial owner were able to obtain, upon request or as a matter of course, a confirmation that the votes cast by that beneficial owner were received and accurately recorded by the vote tabulator. A corollary to this condition would of course be that each beneficial owner is informed, before voting, of the number of votes the beneficial owner is entitled to cast, after taking into account stock loans and other arrangements.

Taken together, these conditions, again as a conceptual matter, would greatly increase the transparency of the proxy voting process, including the ability to confirm its accuracy. This could translate into greater confidence in the system's integrity. In order to determine whether these conceptual advances will translate into real advances, the Commission would need to determine the degree to which inaccuracy of voting is a current problem and the degree to which investors and companies are concerned about accuracy and are interested in a system involving enhanced access to confirmations and audits. The Commission then would need to determine the costs and burdens of the changes to the system that these steps would entail. Again, we recognize that we do not have the expertise or information needed to make these judgments, but we believe the potential objectives are important enough to warrant serious consideration of modifying the current system.

1. Implement a direct voting system.

We believe end-to-end audits, and perhaps vote confirmations, would be most effectively facilitated if the current proxy system were modified so that direct voting authority is transmitted, through a cascade of executed proxies, from the registered owner to the beneficial owner. Under such an approach, DTC would, as it does now, execute an omnibus proxy in favor of its participant broker and bank intermediaries, but then the intermediaries would execute an omnibus proxy entitling those customers holding shares through the intermediaries to vote, and so forth down the chain of ownership until the proxies reached beneficial owners. (This process contrasts with the current system where, in most cases, intermediaries issue requests for voting instructions, which are then processed by the intermediary, which votes the omnibus proxy provided by DTC.) At the end of the modified process that we recommend, a beneficial owner

would receive a proxy card that it had full authority to vote.[10] The beneficial owner would complete and return the proxy card directly to the company. Providing an exception to OBO status at record dates for shareholder action, as we recommend above, is integrally related to establishing a direct voting system of this type.

The practical implications, including costs, of moving to a direct voting system should of course be evaluated. As a general matter, however, the existing infrastructure necessary to identify the beneficial owners ultimately entitled to give voting instructions would seem to support a process of transmitting proxy voting authority along the same chain of ownership.[11]

2. Vote confirmations and audit trail.

As noted above, we believe confidence in the accuracy of the proxy system would be enhanced if independent, end-to-end audits were readily achievable. We believe a direct voting system would facilitate the creation of an end-to-end audit trail which would cover the transmittal of voting authority from DTC through intermediaries to beneficial owners and the transmittal of votes from beneficial owners to the vote tabulator – and which, as important, would be available for scrutiny under whatever legal or regulatory process is applicable, including by the Commission. The ability to conduct end-to-end audits of this kind, and to subject such audits to effective regulatory oversight, should help ensure and improve the accuracy of the proxy and voting processes, in addition to increasing confidence in the system's integrity.

We also believe that establishment of a direct voting framework could simplify the process of making vote confirmations available to beneficial owners. For example, the vote tabulator could send to a beneficial owner, upon request, an extract of the voting record showing the relevant proxy card identification number, the number of votes, and how they were cast. The cost of providing such a confirmation and the allocation of such cost of course would need to be determined. However, in a direct voting system, the confirmation would involve verification of only a single step – whether the proxy card completed by the beneficial owner was received and properly tabulated.

---

[10] We note that Rule 14b-2(b)(3)(i) already contemplates this alternative process for bank intermediaries.

[11] We also observe that direct voting of proxies by beneficial owners is entirely consistent with the overall proxy system framework that the Commission has created and its impact on beneficial owner voting rights. State corporate law, as a general matter, provides voting rights only to registered owners. As a result, the Commission through its proxy rules not only has established the system whereby beneficial owners exercise their voting rights through use of proxies, but also effectively created those voting rights through the proxy process. The step of establishing a process whereby beneficial owners receive and vote direct proxies is consistent with, and even furthers, the underlying purpose of the Commission's proxy framework, which relays to beneficial owners the voting rights held by registered owners.

Further, it appears to us that the Commission can have a high degree of confidence that such a system would achieve the objectives of enabling verifiable vote confirmations and end-to-end audits. It may be possible to accomplish similar objectives without moving to a direct voting framework. Doing so within the existing system would, however, require greater transparency and at least a more complex system of regulatory oversight than is currently the case. In particular, we believe any solution would necessarily involve requiring securities intermediaries to ensure that they can obtain as a matter of course, from Broadridge and other third parties that currently handle distribution of proxy materials and collection of voting instructions, the records and information required to conduct end-to-end audits and deliver vote confirmations. While this may be achievable as a theoretical regulatory matter, the need to pull together a number of different strands of information from multiple actors and then integrate them suggests to us that, as a practical matter, the process is likely to be complex and the results in at least some cases not as satisfactory as those that can be obtained through a direct voting system.

3. Transparency of voting rights.

As discussed in the Concept Release, we understand that, under the present system, some brokers and banks use pre-reconciliation to avoid over-voting, while others use post-reconciliation or some hybrid of the two approaches. The existing system thus lacks a consistent, principled approach to allocating votes among beneficial owners. We believe this deficiency, particularly combined with a lack of disclosure to beneficial owners, may undercut confidence in the integrity of the voting system. The consistent use of a single allocation method would have the advantage of increasing clarity and certainty (although not necessarily accuracy, since the misallocation of voting rights among DTC participants would continue to occur). Uniform use of pre-reconciliation would further support the proxy voting system's accuracy and transparency (and investors' perceptions of its accuracy and transparency) by ensuring that beneficial owners would be informed of how many votes they are, in fact, entitled to cast prior to voting. Requiring bank and broker intermediaries to disclose how votes are allocated, and the possible effects on customers' voting rights, could also increase transparency and certainty.

Under a direct voting framework, in which intermediaries would be required to transmit direct voting authority to beneficial owners, some form of pre-reconciliation seemingly would be required. The Concept Release discusses some potential disadvantages to pre-reconciliation, insofar as (compared to post-reconciliation) it may be more costly and may result in the allocation of more votes to investors that do not cast them. In principle, the lack of accuracy and transparency associated with post-reconciliation seems to us inconsistent with the goal of promoting confidence in the accuracy and integrity of the proxy voting system. However, the costs and other implications of using a single reconciliation method would need to be examined and weighed against potential benefits. Accordingly, we agree with the Commission that it is worth gathering additional empirical data on the prevalence and impact of under-voting and over-voting; such information would be useful in designing any mandatory system of allocation and evaluating the costs and benefits of moving to a direct voting system.

D. Promote voting by all categories of investors, particularly retail investors.

We agree with the Commission that greater voting participation by all types of investors is desirable, particularly among retail investors, whose participation levels are typically low.[12] We believe the existing system creates some structural and practical impediments to shareholder voting that could be reduced or eliminated without impairing investor protection.

As discussed above, we believe significant improvement can be achieved by facilitating direct communications to beneficial owners by issuers and others soliciting proxies or otherwise interested in the outcome of a vote. Anecdotally, there is reason to believe that retail investor voting can be meaningfully increased through telephone solicitations, and that issuers and others interested in the outcome of a vote are most likely to engage in such efforts when the outcome is both important and close. Such votes are precisely the ones in which it is most desirable to have broad-based participation. In this regard, we believe it would be useful for the Commission to seek additional data that might provide insight into what means are effective to raise voting participation. For example, it would be of interest to identify a sample of shareholder votes in which direct telephone solicitations were used, and to measure retail investor participation levels in those votes as compared to votes at the same companies in which no telephone solicitations were used. If it were not possible to identify when telephone solicitations were used, possible surrogates include shareholder votes decided by a relatively small margin and director elections in which "vote no" or "withhold" campaigns were conducted. While not a perfect measure, evaluating retail investor participation levels in those votes as compared to "normal" votes could offer some insight into how effective direct telephone solicitations have been in past shareholder votes. To the extent such an existing mechanism is effective today, that may suggest that providing the OBO exception we describe above around shareholder votes could yield real improvement.

In addition, we believe other changes could make voting more appealing and easier, and thereby encourage retail investor participation. Any changes must of course be consistent with the Commission's mandate of investor protection. We believe the Commission should consider, as an initial matter, whether changes are appropriate to the regulatory model that governs solicitations of proxies and efforts to encourage voting. Some proposed mechanisms to encourage voting by retail investors, particularly advance voting instructions (which we discuss below), raise questions of whether investors' voting decisions would precede the availability of detailed proxy disclosure, whether investors would make informed voting decisions, and to what extent investors' voting instructions would reflect engagement with the specific issue being voted on. The Concept Release describes some of these considerations. We believe the

---

[12] Historically, fewer than half of retail beneficial owners participate in proxy voting, and even fewer – only 4.5% – do so when companies use the "notice-only" method for delivery of proxy materials. Broadridge Financial Solutions, Notice and Access — Statistical Overview of Use with Beneficial Owners (June 30, 2010), *available at* http://www.broadridge.com/notice-and-access/FY10_full_year.pdf; SEC Rel. No. 33-9073, Comment File, Letter from Robert Schifellite, Broadridge Financial Solutions, to Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n (Nov. 23, 2009).

regulatory model governing the solicitation of proxies should focus on ensuring that appropriate information is available to investors before a voting decision is made, or perhaps before it becomes final. In contrast, we believe the model should not focus on whether an investor has actually reviewed and understood information bearing on a voting topic or whether the investor has actively engaged with a given voting decision. Such matters are difficult or impossible to evaluate accurately and consistently. Moreover, we would contrast the regulatory model for investment decisions, where the Commission has consistently focused on whether disclosure is available before an investment decision is made or becomes final, and indeed has long taken the position that seeking assurances that an investor has reviewed material or is informed may constitute a request for an impermissible waiver under the securities laws. We also believe that efforts to encourage voting independent of any particular outcome ("we don't care how you vote, but please vote") do not necessarily raise the same issues as solicitation of proxies or other solicitations to vote for or against an outcome. A regulatory model that provides more scope for outcome-neutral efforts to encourage voting generally would, we believe, be appropriate.

1. Simplify proxy statement disclosure and adopt a universal ballot.

A core principle of the Commission's proxy rules is that investors should be provided with the disclosure necessary to enable an informed voting decision. This goal is best furthered when disclosure is meaningful and concise, and when information is presented so as to make clear its relation to a particular item being voted on. We believe proxy materials could be made less confusing and more accessible, without imposing significant burdens on companies or others. For example, a table of contents could be required, making it easier to find discussion of particular matters. Providing investors with a summary would provide context for better understanding proxy statement disclosures, which are lengthy and sometimes complex, and how those disclosures relate to each matter on the agenda. We believe it would aid investors if the document mailed or made available electronically to investors contained only a summary explanation of the matters being voted on, with cross-references directing readers to more detailed information available elsewhere, such as on the company's website. In an electronic environment, the summary could contain hyperlinks permitting immediate access to this more detailed information.

However, we do not believe data-tagging of proxy statement disclosures is likely to be useful in increasing voting or engagement. In contrast to public company financial statements prepared in accordance with applicable accounting standards, only a small portion of the information contained in proxy statements is susceptible to the kind of apples-to-apples comparison data-tagging is designed to facilitate. Further, the immediate issue of retail investor participation levels relates in part to seeking to encourage online access by investors, a far more basic problem than having investors undertake the sort of analysis that data-tagging would make possible. We do not address whether institutional investors would find data-tagging of certain material in proxy statements to be useful. We would observe, however, that there has not been widespread suggestion by institutional investors or others that this is the case. In addition, anecdotal reports suggest that existing requirements for data tagging reports filed with the

Commission have raised technical hurdles for issuers in terms of time constraints as well as expense.

Finally, we believe use of a universal ballot in proxy contests should be explored. A universal ballot approach could facilitate greater shareholder participation in the election of directors by reducing potential confusion associated with director elections involving multiple ballots. A universal ballot also fosters investor choice by allowing shareholders to choose from among all nominees, rather than only between two slates.

2. Permit physical delivery of proxy cards with the required notice when proxy materials are available electronically.

We believe voting by retail investors would be facilitated if companies were permitted to include a proxy card or voting instruction form with the Notice of Internet Availability of Proxy Materials first sent to shareholders. We recognize the concern, articulated by some observers, that this practice would decouple the means of voting from the detailed disclosures that permit an investor to make an informed voting decision. However, as discussed above, we believe regulation should focus on whether the requisite information has been made available.

We are not aware of any analysis as to whether retail investors who access an online proxy card or voting instruction form take more or less advantage of the available disclosure than those who receive hard copies. Anecdotes about hard copies of proxy statements "going straight into the wastebasket" are common, but form no useful basis for Commission decision-making. We do believe that making online proxy materials more user-friendly, through layering, hyperlinks within the materials, searchable documents and the like is more likely to increase investor interest in proxy materials than continuing to mandate coupled delivery of those materials and proxy cards or voting instruction forms. We also believe the Commission has successfully implemented a system of online information availability that can usefully be followed. Except in the case of preliminary prospectuses in initial public offerings (and, under the Commission's proposals, certain asset-backed offerings), online availability of disclosure, combined with the ability to obtain hard copies, has become the disclosure model for investment decisions.[13] We believe an analogous model would be appropriate for proxy disclosure and voting proxies.

3. Increased use of online platforms.

Web-based platforms appear to offer numerous opportunities to increase shareholder engagement and make voting more appealing and convenient. The Concept Release discusses the possibility that online brokers' platforms could be enhanced so that investors may receive

---

[13] *See* SEC Release Nos. 33-8591; 34-52056; IC-26993 (July 19, 2005), at 243 - 249. The proposed disclosure rulres relating to certain asset-backed offerings can be found in Release Nos. 33-9117; 34-61858; File No. S7-08-10 (Apr. 7, 2010).

notification about upcoming votes, access proxy materials, and give voting instructions. Since retail investors may visit broker sites on a regular basis already, this approach seems to us to be promising as a means to streamline and make more appealing the process of accessing materials. Presumably proxy materials and voting mechanisms could be made available by linking from the broker's website to other sites, minimizing the amount of new infrastructure that would need to be created. Coding proxy statement disclosures so that they can be accessed through hyperlinks, as discussed above, could allow the link to vote on an agenda item to be presented alongside a link to the relevant portion of the proxy statement. Increased use of online voting mechanisms would also facilitate dual record dates, as discussed above.

4. Advance voting instructions.

We believe advance voting instructions hold promise as a way to increase voting participation by retail investors and therefore merit serious consideration. To the extent retail investors fail to vote due to time constraints or confusion about the voting process, advance voting instructions seem well-suited to address the problem by streamlining voting. As the Concept Release notes, a model that permits retail investors to "mirror" the recommendations or voting behavior of a third party, such as a proxy advisory firm, would give those investors access to a type of service that is currently available to institutional investors. Presumably, at least some retail investors would find such services helpful.

However, we agree with the Commission that advance voting instructions raise many questions, as to both logistics and policy. Most critically, under any system of advance voting instructions, the investor might establish tentative voting instructions before the particular matters to be voted upon for a particular company are known, and certainly before information about those matters has been disclosed. There is considerable tension between such an approach and a long-standing principle of the Commission's proxy rules – that disclosure must be made available before investors may be asked to vote. (It is the case that in most versions of advance voting instructions that have been suggested, shareholders would have the ability to override a previous advance instruction after detailed proxy statement disclosure is available and before the vote becomes final. It is also the case that some institutional investors effectively use voting guidelines to establish analogous tentative voting positions prior to matters being identified and disclosure being made available in respect of particular companies.) The contours of an acceptable framework for advance voting instructions will depend on how the Commission resolves those tensions. Models that would allow shareholders to "mirror" the recommendations or voting behavior of third parties pose additional logistical and regulatory challenges, many of which are discussed in the Concept Release. It is also difficult to evaluate the potential benefits of advance voting instructions in the absence of good information about potential costs to implement the system and the extent of retail investor demand.

While a framework for advance voting instructions could be helpful in facilitating voting by retail investors and it is worth continuing to explore how such a framework might operate, we believe, given the preliminary stage of thinking about advance voting instructions and the significant number of issues involved, that this solution should not be pursued to the exclusion of

other ideas. In particular, we believe the regulatory changes outlined above are likely to improve participation among retail investors more quickly.

* * *

We commend the Commission for seeking to improve the proxy solicitation and voting process. We would be pleased to respond to any inquiries you may have regarding this letter or our views on the Concept Release more generally. Inquiries may be directed to Alan L. Beller, Victor I. Lewkow or Daniel S. Sternberg at (212) 225-2000.

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

cc: Securities and Exchange Commission
Hon. Mary L. Schapiro, Chairman
Hon. Kathleen L. Casey, Commissioner
Hon. Elisse B. Walter, Commissioner
Hon. Luis A. Aguilar, Commissioner
Hon. Troy A. Paredes, Commissioner

Securities and Exchange Commission – Division of Corporate Finance
Ms. Meredith Cross