CFA INSTITUTE | Centre for Financial Market Integrity

2 October 2007

Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Shareholder Proposals—File No. S7-16-07

Dear Ms. Morris:

The CFA Institute Centre for Financial Market Integrity (CFA Institute Centre)[1] appreciates the opportunity to comment on proposals in this release that would change certain federal securities proxy rules pertaining to shareholder rights. Most importantly, the proposal would provide shareholders the ability to propose changes to the company's by-laws that would establish procedures for shareholder nominations for directors. We also comment below on aspects of the release relating to electronic shareholder forums and non-binding shareholder proposals.

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Summary of Positions

Shareholder amendment of by-laws. We strongly support reasonable measures that allow shareholders a more active voice in corporate governance matters. Thus, we generally support a proposal that would require companies to include in their proxy materials shareholder proposals for by-law amendments establishing procedures for shareholder-nominated directors. However, this proposal requires shareholders to meet a number of conditions that not only are excessive relative to other requirements but are unnecessary and unwarranted.

[1] The CFA Institute Centre for Financial Market Integrity is part of CFA Institute. With headquarters in Charlottesville, VA, and regional offices in New York, Hong Kong, and London, CFA Institute is a global, not-for-profit professional association of more than 95,300 investment analysts, portfolio managers, investment advisors, and other investment professionals in 133 countries, of whom more than 79,800 are holders of the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 135 member societies in 56 countries and territories.

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Electronic shareholder forums. Electronic shareholder forums are a timely response to today's technology and shareholder communication needs. We support proposals to exempt communications in these forums from the proxy solicitation rules.

Non-binding proposals. Finally, we believe that non-binding proposals serve a useful purpose in the dialogue between shareholders and the company. We thus support the easing of restrictions on shareholders' ability to submit them. We would not, however, support an approach that limits the submission of shareholder resolutions to shareholder chat rooms.

These positions are discussed in more detail below.

I. Shareholders' Right to Propose Amendments to Company By-laws to Establish Procedures for Shareholder-Nominated Directors

General Comments

The primary tool of governance for shareholders is the Board of Directors. As a matter of good corporate governance, we have long supported measures to give shareholders a more active voice in matters that affect shareholder interests. This is especially so when shareholders become convinced that the Board is not acting in their best interests or the proxy process appears to have become ineffective in addressing shareholder concerns.

We have in the past supported reforms that would provide shareholders a mechanism for meaningful engagement in the proxy process by allowing them a means through which to directly nominate directors.[2] We recognize, however that such access must be tempered with certain safeguards that minimize disruption to the board functions and that thwart use of the proxy system to advance personal agendas.

We also appreciate the challenge of crafting a proposal that balances shareholder rights under federal securities laws with well-defined state law rights. This proposal attempts to advance the rights of shareholders to participate more actively in the nomination process by providing them a means for setting in motion a process for eventual nomination of candidates to the board. However, as discussed below, we believe that the types and amount of disclosure required by shareholders proposing by-law amendments do not strike the appropriate balance and are not commensurate with what is required of the company. Whatever benefits these disclosures would serve are far outweighed by the burdens imposed upon shareholders.

A. Shareholder Actions to Change By-laws

As proposed, a company would have to include in its proxy materials a proposal for a by-law amendment submitted by shareholder(s) only if they meet certain threshold ownership and eligibility requirements tied to the filing of Schedule 13G. We do not support this as the appropriate benchmark.

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[2] See 21 September 2006 letter to SEC Chairman Christopher Cox from Jeff Diermeier; see also 2 July 2003 letter to Jonathan G. Katz from Deborah A. Lamb and Linda Rittenhouse re: Solicitation of Public Views Regarding Possible Changes to Proxy Rules—File S7-10-03; and 22 December 2003 letter to Jonathan G. Katz from James W. Vitalone and Linda Rittenhouse re: Security Holder Director Nominations—File No. S7-19-03.

Ownership requirements

We agree that requiring some type of ownership requirement is advisable as a way to filter out shareholders who may not have a vested interest in the company. However, we question mandating a 5% ownership requirement.

In response to questions raised in this proposal, we do not support basing an ownership requirement on the eligibility to file Schedule 13G. Tying the ownership requirement to Schedule 13G filing requirements can deter "legitimate" shareholders or shareholder groups from being able to take action, in direct contravention of what this proposal purports to do. The difficulty certain shareholder groups may have in resolving issues of who will speak for the group, take a lead in creating an agenda, or exercising control is not insignificant and should not be underestimated. In some instances, while the ownership percentage may be met, the failure to meet the other requirements of 13G filing eligibility would bump out groups that could otherwise demonstrate a legitimate basis for proposing the by-law amendment.

Moreover, we question the need for a 5% threshold generally, particularly given that this is the first stage of a bifurcated process to allow shareholders to directly nominate directors. We understand the need for a system that will filter out shareholders who may seek to nominate directors for self-interested or "renegade" agendas. But we urge review of requirements for this first stage where shareholders *seek to introduce* an action that may result in the ability of a shareholder to *then propose* a candidate for director.

Given the two-stage process that needs to occur (both requiring shareholder approval), requiring a 5% ownership interest at the "preliminary" stage seems unwarranted. We note in this regard the 2003 SEC proxy access proposal that would have provided shareholders direct access to nominating shareholders on only a showing of 3% ownership/holdings.

In response to another question raised in the proposal, we recommend that ownership requirements not be based on a tiered approach conditioned on company size. As registration and filing requirements change, these distinctions will likely disappear, rendering this approach obsolete.

Holding period

Like an ownership requirement, a holding period requirement helps to ensure that shareholders participating in this process have a vested interest in the outcome. We support the proposed one-year holding period as reasonable, especially given that it is in keeping with the requirement under rule 14a-8(b)(1) to submit other shareholder proposals

Disclosure requirements

We disagree with the scope of disclosures required under additional Schedule 13G provisions and under Regulation 14A. Requiring this range of disclosures of those seeking to propose by-law changes is unreasonable and will serve to deter legitimate efforts by shareholders to effect changes in the current proxy system for director nominations.

Discussion in the proposal initially ties the eligibility requirements for proposing amendments to the by-laws to Schedule 13G eligibility and filing requirements. This in and of itself may have been reasonable. However,

even if Schedule 13G were the appropriate benchmark, the enhanced disclosures required of proposing shareholders far exceed the current Schedule 13G filing requirements. The unreasonable range of information called for, as well as the specificity of this information, together impose an onerous burden on interested shareholders and make it unreasonably difficult to form groups to qualify for filing. Moreover, the lack of clarity relating to the call for disclosure would have a deterring effect in itself as proponents may shy from any action that could seem to violate the provisions.

For example, requiring the disclosure by shareholders within the 12-month period "prior to the formation of any plans or proposals" then begs the question of exactly when a plan was "formed". Did it occur at the time a shareholder felt dissatisfied with corporate decisions, or first voiced those concerns even casually to another shareholder (even if without any thought as to engaging in the process)? Would remarks to individuals that they have the experience to lead a certain company equal the initial formation of a plan? Or would the exploration of director alternatives, even without researching or being aware of the existence of any process for change, be seen in hindsight as the initial stage of a plan?

The disclosure required by the company under the proposal when compared with what is required of the shareholder lacks balance... Instead, the amount of "enhanced" disclosure required of proposing shareholders not only is overreaching when compared with what is required of the company, but is not warranted when considering that it applies to those who are only proposing the by-law amendment—not actually nominating candidates for director positions. In other words, this can be seen as only the "preliminary" step or condition precedent that may lead to the right of shareholders to nominate directors. A higher level of disclosure by shareholders may be warranted at the stage when shareholders are actually proposing a candidate. However, the proposed breadth and scope proposed for this first stage is not appropriate.

Eligibility requirements

The eligibility to file a Schedule 13G is available only for those who have acquired and continue to hold the securities without "a purposed or effect of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect." We do not support this approach.

First, we question whether intent at this stage should be a factor in allowing shareholders to propose a by-law amendment. If the proxy process is actually going to be opened to shareholders, the "qualifying" conditions that shareholders must meet at this stage must be reasonable in terms of their breadth and scope. Having to meet a requisite showing of non-intent just to propose a by-law amendment reaches beyond what is reasonable.

Second, requiring a showing of non-intent may seem disingenuous. Some shareholders who propose amending the by-laws to allow shareholder nominations of directors arguably want to change or influence control of the issuer on some level. If the SEC's interpretation is that such shareholder action, without more, constitutes such intent, it needs to provide this clarification in any final rule adopting this approach.

Moreover, we believe that determining intent is subject to interpretation and difficult to discern. Does a shareholder who has in mind a strong candidate for director (assuming eventual changes in company by-laws to allow this) have an intent to influence control of the company or does he just want to be able to nominate a viable candidate?

In keeping with our comments above that certain requirements may be appropriate when shareholders can actually nominate director candidates, we strongly encourage that a showing of intent not be a factor in disqualifying a shareholder who seeks a by-law amendment.

B. Shareholder Actions to Nominate Directors in Accordance with By-law Changes

We also question the proposed disclosure requirements under new rule 14a-7 for when shareholders nominate candidates for directors. We believe the new disclosure requirements under rule 14a-7 place the heavier disclosure burden on the shareholder who seeks to nominate a director to the board.

We also question the requirement that disclosures should be required at the time the shareholder forms any plan or proposals relating to the submission of a nominee's name to be included in the proxy materials. Defining the time of any intent on the part of the shareholder may be so imprecise as to evade detection. Would it be measured at the time of a first conversation with other shareholders? A conversation with individuals about their interest in being nominated? At the time when dissatisfaction with the current board or its actions is first discussed?

II. Electronic Shareholder Forums

We support reasonable measures to increase meaningful communication among shareholders, and between shareholders and the company. Thus, we support the SEC's proposal to allow the use of electronic forums without evoking provisions of the proxy rules. Such an approach provides added flexibility that could significantly aid shareholder communications and increase a shareholder-company dialogue on important issues that are relevant to shareholder interests.

We also support the approach in the proposal that does not seek to dictate the form an electronic shareholder forum must take, but instead seeks to remove existing impediments to creating such a forum. This provides needed flexibility on the part f both shareholders and the company. We strongly believe that the submission of advisory proposals should not be limited to electronic shareholder forums but retain the current flexibility. We thus recommend that the final rule clarify that the use of shareholder forums is not seen as a substitute for, but instead an alternative to, the submission of non-binding proposals under rule 14a-8.

III. Non-Binding Proposals

We believe that non-binding or advisory proposals by shareholders serve a useful purpose in advising the company of shareholder interests and increasing the dialogue between company and shareholders. A number of issues that have resulted in significant corporate governance reform over the last 20 years stem directing from the original non-binding proposals made by shareholders. We therefore support the continuation of mechanisms that advance this form of communication. We strongly believe that maintaining the current system under rule 14a-8 is the best way to accomplish this and urge the Commission to forego consideration of the proposed a two-step process.

Given the relative success that the process for allowing non-binding proposals has enjoyed under 14a-8, now adopting rules that take a step back from direct action would be a step in the wrong direction. Thus, we cannot support a regulatory approach that would require shareholders to first submit a proposal to adopt by-laws to

establish the procedures for including non-binding proposals in the company's proxy materials. If creating a two-stage process for submitting non-binding proposals is being used as a *quid pro quo* for formalizing a shareholder access process, we respectfully urge the Commission to instead recognize that both are needed and not to create additional burdens for the non-binding proposal system.

If the Commission determines, however, to proceed with a two-stage system by requiring shareholders to first propose by-law changes to accommodate the submission of non-binding proposals, we recommend that requirements not be based on the same Schedule 13G requirements that are being proposed for shareholder by-law amendments. Consistent with our comments above, we believe that these requirements are unwarranted for shareholder actions that in and of themselves provide only the first of two stages in broadening the proxy process. The amount and types of disclosures that would be required seem particularly unwarranted in the case where ultimate shareholder approval of procedures for including non-binding proposals in company proxy materials would still not require direct company action.

We do favor a one-year holding period for shareholders proposing by-law amendments relating to non-binding proposals as a safeguard in determining shareholders who have a vested interest in the company. Similarly, we believe a reasonable share ownership requirement is warranted, and suggest use of a 3% holdings requirement.

Finally, we urge an expanded word limit than that used under rule 14a-8 for shareholder submissions of proposed by-law amendments to establish procedures for non-binding proposals. In order to allow shareholders to provide a more thorough description of the framework being proposed, we suggest that the word limit be increased to at least 3,000 words.

Conclusion

We strongly support measures to provide shareholders a meaningful voice in corporate governance measures. In particular, allowing shareholders a meaningful voice in the election and removal of directors remains a concern and a particular shortcoming of the US system. In that regard, we feel that moving to a majority voting standard for director elections is the most efficient and least disruptive route.

Notwithstanding that preference, if the direction instead is shareholder access, we recognize that providing shareholders access to the proxy system for nominating directors must be balanced against potential disruptions to the corporate boardroom. To that end, we support reasonable conditions intended to ensure that involved shareholders are serious and are not simply promoting renegade agendas.

We appreciate the movement that this SEC proposal brings to opening up the proxy arena to shareholders by allowing certain shareholders to propose by-law changes to create a process for shareholder-driven director nominations. In many instances, however, this proposal creates disclosure requirements and qualifying conditions that not only would thwart reasonable attempts to use the process for what it is intended, but also are unwarranted in light of the stage at which these disclosure and qualifications would be required. We believe that a more balanced approach in what is required of shareholders would better serve the objectives at which this proposal is purportedly aimed. We thus respectfully urge the SEC to considerably scale back the disclosure requirements and base eligibility and other qualifying conditions on something other than Schedule 13G requirements.

We appreciate the opportunity to comment on this important proposal and would be happy to meet with SEC staff to further discuss its implications. If you have questions, need additional information, or would like to schedule a meeting, please contact Kurt Schacht at 212.756.7728 or by e-mail at kurt.schacht@cfainstitute.org or Linda Rittenhouse at 434.951.5333 or by e-mail at linda.rittenhouse@cfainstitute.org.

Sincerely,

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