



SOCIETY OF CORPORATE SECRETARIES
& GOVERNANCE PROFESSIONALS

May 11, 2007

Securities and Exchange Commission
100 F St., N.E.
Washington, D.C. 20549
Attention: Nancy M. Morris, Secretary

Re: File No. 4-537
Roundtables Regarding Stockholder Rights and the Federal Proxy Rules
Proxy Voting Issues: Voting Integrity

Ladies and Gentlemen:

The Society of Corporate Secretaries & Governance Professionals (the “Society”) appreciates the opportunity to provide comments related to topics to be discussed at the roundtables hosted by the Securities and Exchange Commission (the “Commission”) to address stockholder rights and the federal proxy rules. The Society applauds the Commission’s decision to hold these roundtables and to conduct a broad review of the federal proxy rules. This letter is limited to our concerns with respect to the integrity of the voting process, which we understand is to be the topic of the May 24 roundtable. We anticipate providing additional comments on some of the other issues addressed, or to be addressed, at the Commission’s roundtables in the future.

The Society, founded in 1946 as the American Society of Corporate Secretaries, has over 3,800 members representing approximately 2,600 companies, most of which are issuers of publicly-traded securities. Our members are directly involved in and routinely manage the preparation and distribution of proxy materials and the conduct of stockholder meetings on behalf of their companies. Because stockholder votes have a direct impact on our companies’ operations (including the election of directors, ratification of auditors, approval of equity plans, and approval of mergers and acquisitions, to name a few), it is critical that the voting system be accurate and fairly represent the interests of our stockholders. We believe, however, that there are deficiencies in the voting system that call into question:

- the accuracy of vote counts;
- the connection between long-term economic ownership and voting rights; and
- fairness to individual investors.

We have addressed these issues below, as well as some proposed steps to consider as part of a comprehensive review of the voting system.

I. OVERVIEW

The proxy system developed from record ownership that assumed a long-term interest in the company and low trading volatility; i.e. owners hold shares over the “record” date and continue to hold them through the annual meeting. The system assumed the importance of economic ownership by providing “one share, one vote.” In the past, voting was generally a routine event at annual meetings, with most director elections and company proposals receiving a high percentage (often as much as 90%-plus) positive votes without the need for special solicitation efforts. Stockholder proposals typically received less than 10% positive votes. Significant exceptions to this environment involved the rare contest for corporate control with opposing slates of Board nominees. The proxy voting process, developed in this relatively stable environment, tolerated defect and ambiguity because there were very few close, contested votes.

Today’s voting environment is completely different from the former condition. Most shares are held in “street” name by beneficial owners who are many layers removed from record ownership. Shares may be held for a short period of time or loaned over the record date, and banks and brokers may have multiple positions in the same security. Shareholder activists have increasingly used proposals under Rule 14a-8 to influence corporate governance change, and the outcome on those stockholder proposals is increasingly close. Many companies are moving to a majority vote standard for the election of their directors. Institutional investors often follow the recommendations of proxy advisory services, whose analyses have a significant, and often decisive, effect on the outcome of the vote. As stockholder activism, the numbers and types of governance proposals, and the move to majority voting, all increase, the proxy voting process will come under additional pressure.

II. THE IMPORTANCE OF REFORM

With closer elections and increasing shareholder activism, it is important that votes are counted accurately and fairly represent the long-term interests of all stockholders. Important changes in the governance area, as part of this increased activism, will magnify the importance of integrity in the voting process. These changes include:

- majority voting for director nominees;
- the possibility of eliminating broker votes under New York Stock Exchange (NYSE) Rule 452;
- the possibility of annual votes on overall executive compensation, in addition to the present mandatory votes on equity compensation plans;
- demands for “shareholder access” which, if mandated by the SEC, would authorize the routine use of the company’s proxy statement for competing director slates; and
- the use of stockholder proposals with binding, rather than precatory, effect.

In addition to these changes, there are likely to be more changes in the future. For example, the ability of issuers to exclude proposals under Rule 14a-8 has been significantly reduced over time, as the concept of “significant social policy” is used to prevent the exclusion of many proposals under the “ordinary course of business/relevance” exclusions. Issuers expect that the number of controversial -- and thus, perhaps, the number of close and contested voting results -- will increase.

Although “every vote counts” is an important precept, it is also clear that numerous developments in the marketplace are serving to reduce and marginalize the non-institutional “retail” vote. At the same time

institutional votes, and the recommendations of the services that advise them, have magnified in importance, there is no effort, and very little ability, to “get out the vote” on the retail side. Issuers lack the ability to communicate with a substantial number of retail holders, and the retail vote (which is, in significant degree, represented by discretionary broker voting), would be largely suppressed if NYSE Rule 452 is eliminated. The voice of the individual investor must be taken into account when evaluating areas of reform.

III. ISSUES THAT CALL INTO QUESTION THE INTEGRITY OF THE PROXY VOTING SYSTEM

A. Inaccuracy of Vote Counts

1. Loaned Shares and Over-voting

Shares may be loaned over the record date. Loans may arise for a variety of reasons: e.g., the shares may be held in a margin account and lent to other brokers to cover short sales or to facilitate settlement, or they may be lent by an institutional investor to increase the return on an investment portfolio. When shares are loaned, the rights incidental to ownership generally are transferred to the borrower. Those rights include the right to vote, as well as to transfer the loaned securities to others. Master Securities Loan Agreements used by broker/dealers provide that the lender waives the right to vote with respect to the loaned securities if the record date or deadline for such vote falls during the term of the loan.

While the right to vote generally transfers to the borrower, the NYSE requires member firms to send proxy materials and request voting instructions to the beneficial owner on the record date for shares in the brokers’ “possession or control.” Although loaned shares are no longer in the lending broker’s possession or control, the NYSE took the position in response to a Congressional inquiry that NYSE Rule 451 still requires the dissemination of proxy materials and the requesting of voting instructions with respect to those shares (and those instructions can be assigned to unvoted shares in the broker’s possession, provided that there is no “over-vote;” i.e. more voting instructions have been received than are in the position).

While brokers and tabulators should not count votes that exceed the total number of shares held in a position, there have been situations in which instructions received by tabulators have resulted in an over-vote. In an over-voting situation, the broker must decide which votes not to submit to the tabulator. The ultimate methodology of deciding how to reduce the votes will vary, depending on the methodology the firm uses (e.g., by reducing the vote by the same proportion as the voting tally of all shares counted for that position, or by a lottery system).

Even if a firm’s position is not in an over-voting situation, the counting of voting instructions for loaned shares and assigning them to unvoted shares calls into question the integrity of the vote. Some shares may be voted multiple times, and others not at all. What shares are counted, and how they are counted, are not based on any methodology that ensures accuracy, fairness, and appropriate representation.

2. Complexity and Lack of Accountability

Most shares are held in “street” name, which adds layers of intermediaries that make difficult to track and verify votes. Unlike the registered side, in which owners are directly listed as owners on the books of the company, the stock certificates on the street side are held in the name of the Depository Trust Company’s (DTC) nominee, Cede and Co. DTC transfers its voting rights to participant brokers and banks through an “omnibus proxy.” Banks may hold shares directly for customers or as a nominee for other banks (for which they in turn are required to execute an omnibus proxy). Most banks and brokers engage Broadridge (formerly the Investor Communications Division of Automatic Data Processing, Inc.) to distribute proxy materials to their beneficial holders and tabulate votes, and they transfer the proxy authority they receive from DTC (via omnibus proxy) to Broadridge via powers of attorney.

While the street system addressed a need to reduce back office paperwork and facilitate the transfer and settlement of shares, it has produced a voting system that is neither transparent nor verifiable. Issuers do not have the ability to know who the beneficial owners are of their stock and must rely both on DTC (for the list of participant holdings) and Broadridge (for the number of proxies and cards to be sent to each participant). There is no verifiable audit trail for votes, nor any guarantee that the materials will be sent to the ultimate beneficial owners or that their votes will be counted.

B. Divorce of Long-Term Economic Ownership from Voting Rights

While the proxy voting system has its origins in a stable environment that favored long-term economic ownership, the fluidity of today’s markets and the low cost pursuant to which shares may be borrowed have eroded the relationship between long-term economic ownership and voting rights. Lending agreements generally assign voting rights to the borrower, but there is an inherent conflict in the logic behind this arrangement: is the investor who borrowed shares to cover short sales the appropriate person to make decisions regarding the long-term direction of the company?

“Empty voting” is the circumstance in which the person voting does not have an economic interest in the company. Empty voting can result from a random assignment of voting power to shares on loan, as in the examples discussed above in over-voting situations. Empty voting may also have a pernicious effect, when borrowing is used to influence the outcome an election, as appears to have occurred in the proposed acquisition by Mylan Laboratories of King Pharmaceuticals. (In that case, a hedge fund that held a significant stake in King, the proposed target, acquired an empty voting position in Mylan to offset a position taken by Carl Icahn, who opposed the Mylan’s acquisition on the grounds that it was too costly.) Because shares may be borrowed at a low cost, it is possible to obtain significant voting power for a short time over the record date. The low cost of borrowing, together with the difficulty tracing and verifying share ownership, make the manipulation of the voting system a very real threat.

C. Disenfranchisement of Individual Investors

Unlike institutional investors, many of which have a fiduciary duty to vote their shares (emphasized by the Department of Labor and the Commission), there is very little communication to remind individual investors of the importance of their vote (other than in the proxy materials that they receive). The voice of the individual investor has been increasingly marginalized, and there are a number of events that appear to reduce further the importance of the retail vote:

1. Inability of issuers to communicate with retail shareholders

The current NOBO-OBO system, originally established by the Commission in the mid-1980s, is a major impediment to efficiency in the process. Issuers do not know who their owners are, and NOBO-OBO is a major reason why there is this virtually complete lack of transparency in ownership of companies by retail investors. NOBO-OBO increases costs to issuers, retards stockholder communications efforts, assists in the marginalization of the retail vote and, in an era of enhanced disclosure, advanced technology and public reporting, may be an obsolescent public policy. The Society is part of a Shareholder Communications Coalition (also including the Business Roundtable, National Association of Corporate Directors, National Investor Relations Institute and Securities Transfer Association, Inc.) that previously has urged the Commission to undertake an expeditious review of the shareholder communications system (see our July 29, 2005 comment letter, SEC File No. 4-493).

2. Role of Intermediaries

The presence and operations of proxy advisory services has had a dramatic impact on the proxy process and has provided leverage to institutional investors in garnering support for their stockholder proposals. Proxy advisory services allow institutions to out-source voting analysis and execution. The advent of the proxy advisory industry has had a material impact on issuers, since the recommendations of Institutional Shareholder Services and others now routinely have a material effect on voting results. Despite the significant role played by proxy advisory services in the corporate governance process, they are basically unregulated and unsupervised, and they often are not transparent with regard to standards, methods, compensation arrangements and conflicts of interest.

The influence of these proxy advisory services is exacerbated because pension funds and registered investment companies are compelled to vote as a result of regulators' views of fiduciary duty and the necessity of publishing vote activity. Special electronic voting arrangements for institutions facilitate the act of voting for multiple portfolios and multiple positions. As a practical matter, institutional investors vote their holdings 100% of the time, while the same outreach and services are not available to retail investors.

3. Possible Changes to NYSE Rule 452

While an individual investor who did not vote still had the possibility of some representation (at least for quorum purposes, and for votes on routine matters), changes to NYSE Rule 452, which have been proposed by the NYSE, will further serve to reduce the voice of retail investors.

4. Lack of Transparency Regarding the Voting Process

Surveys show that retail brokerage customers are generally not aware of how the standard brokerage account agreement affects the voting process: they do not know what happens to their votes if they do not vote, they are not aware of the implications of their holdings being loaned out of margin accounts they do not know their NOBO-OBO status and they have no idea how brokerage firms deal with cases of over-voting.

5. Expense of Proxy Solicitation

Proxy solicitations of all stockholders are very expensive due to the lack of any meaningful competition in the process with regard to the provision of solicitation activity and the NOBO-OBO system. Rate-making by the NYSE through its Rule 465 fixes the prices that issuers pay for most solicitation activity. In addition, most proxy solicitation work is done through a single entity, which brokerage firms choose as their agent. The excessive costs in the process reduce the willingness and opportunity for issuers to engage in supplemental solicitations to retail investors.

While the new e-proxy rules have the potential to reduce overall solicitation costs, we do not believe the rules will significantly reduce costs to solicit retail investors, and they may in fact have the unintended consequence of further reducing the retail vote. The rules permit proponents to limit their solicitations to inexpensive electronic solicitations of institutional investors, thereby perhaps excluding the more expensive retail vote from such solicitations and depriving retail investors of important information, such as in contested elections. In addition, the lack of meaningful competition for proxy solicitation services is likely to keep costs high.

IV. PROPOSED NEXT STEPS

The proxy voting process has been put together, and amended, in bits and pieces over many years. We believe that it is time for a close examination and consideration of significant changes. There have been significant advances in technology, and in systems and processes developed in other countries, that warrant study. For example, other countries have developed processes which link beneficial owners and issuer more closely, reducing intermediation and cost, and offering efficiencies through the availability of competing service providers.

Some of the areas that we believe merit close scrutiny as part of this review include:

A. Communications with Individual Investors

The NOBO-OBO distinction should be re-evaluated to determine whether it is still relevant or necessary to the proxy voting system. The primary rationale for the system is to protect investors who wish to keep their names and addresses from being disclosed to issuers. However, the system is costly and impedes effective communication with beneficial owners regarding important voting decisions. In addition, there is an apparent lack of transparency in the NOBO-OBO rules, with apparent confusion among investors as to the effect of OBO status.

B. Transparency of Ownership

The value of the Section 13 beneficial ownership reports has lessened over time as they fail to capture these new developments. As a result, required Section 13 reporting deadlines fall further and further behind the deadlines for other filings and their accuracy is severely diminished. To the extent it is important to understand the beneficial ownership of a company -- and we believe it is -- the whole reporting system related to beneficial ownership needs to be reviewed.

C. Architecture

The processes and related systems were created prior to the advent of today's technology, including the Internet. As a result, the process is only tentatively, and haphazardly, "modern" in its operations. While the process has achieved an uneasy balance in an environment with little stress, as discussed above, stress on the voting process is increasing. Accordingly, the voting and communication process needs to be evaluated in the light of today's technology and the stresses anticipated to be placed on the system.

The process is very expensive for what it delivers. It is based on record ownership of shares and on low volatility between record date and meeting date. This results in a complicated, multi-layered, system routed primarily through brokerage firms and banks that are not the economic/beneficial owners of the shares. Issuers are required to pay for almost all the cost in the process, but both the cost and the service providers are decided upon by others; there is virtually no competition in the delivery of services and little impetus for any of the parties (save the issuers who have the least authority of all) to be more efficient and to reduce costs. Furthermore, the process is significantly oriented to the interests of brokerage firms and banks with regard to their customer relations rather than being oriented to effective communication between issuers and other soliciting parties with regard to the stockholder communications and voting processes. As one example, the current process for enrolling stockholders to receive electronic delivery of stockholder communications requires a stockholder to grant a blanket approval covering all holdings in the person's brokerage account; the stockholder does not even know which issuers will be providing information electronically.

D. Voting Mechanics

During the roundtable discussion, the Commission may hear a variety of ways to "fix" the current voting system, including suggestions such as:

- Reduce instances of over-voting through a lottery system or by a proportional reduction (according to the proportion of how all the shares have voted);
- Force brokers to keep a record of which shares are on loan at any particular time, so voting rights are not assigned to those shares;
- Strip the right to vote from shares on loan and keep the right with the lender.
- Continue to allow broker voting but through a default that permits the broker to vote based upon standing directions from clients.

However, we caution against focusing on a single "fix" to voting mechanics at this time -- although we believe that discussion of all these possibilities is valuable and important. Voting mechanics are inextricably tied to the policy and substantive decisions that will be made concerning the proxy voting process itself. Accordingly, we believe that potential voting mechanics solutions should be evaluated in light of the Commission's comprehensive review of the overall proxy process.

E. Framework for Proxy System Review

The four areas listed above – communications with individual investors, transparency of ownership, architecture, and voting mechanics – are ones that we believe merit particular attention. However, we believe that attention to these areas should be undertaken as part of a comprehensive review of the

overall proxy system. In the Commission's review of stockholder rights and the federal proxy rules, we believe that the following analytical framework of the issues will be helpful:

- the role of institutional and retail investors, issuers, intermediaries, advisory services and others in the proxy/voting process;
- the extent to which the process affects the balance of power between parties;
- the role of the company proxy statement and the ability of others to solicit proxies;
- the role of state law in the process and the extent to which changes ought to be made at both federal and state levels; and
- the role and availability of modern technology in affecting cost, efficiency and the voting process.

We look forward to working with the Commission and its staff on these important issues. If you have any questions, please feel free to call Neila B. Radin, Associate General Counsel, JPMorgan Chase & Co. at 212-270-0938.

Respectfully submitted,

Society of Corporate Secretaries and Governance Professionals, Inc.

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