John Endean *President*

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American
Business
Conference *A Coalition of Growth Companies*

VIA MESSENGER

March 31, 2004

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, NW
Washington, D.C. 20549-0609

Re: Security Holder Director Nominations (Release No. 34-48626, File No. S7-19-03)

Dear Mr. Katz:

The American Business Conference (ABC) is a coalition of CEOs of midsize growth companies founded in 1981. ABC's current chairman is Alfred West, Chairman CEO of SEI Investments, Oaks, Pennsylvania.

ABC promotes an array of public policies designed to insure a sound regulatory and economic environment consistent with an overall goal of economic growth and a higher standard of living for Americans. Several years ago, ABC merged with the Association of Publicly Traded Companies (APTC) a group of mostly small public companies with a particular focus on capital markets regulation. ABC, in its own right and as heir to the APTC role, has a significant interest in any rule proposals in regard to security holder director nominations, particularly insofar as such reforms affect midsize and smaller publicly traded firms.

This letter represents ABC's first written public comment on the Commission's proposed rules. Much of this letter is based upon themes raised in the Commission's March 10, 2004 roundtable on the rules and their potential impact. As an aside, we congratulate the Commission for its decision to host

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the March roundtable. If the United States is truly becoming a nation of stockholders, such meetings present a great opportunity for public education about key regulatory matters affecting the equities markets.

General Observations

The proxy system is not a broken instrument. Most of the time, it functions well. Despite its many attributes, however, the current proxy system can undermine, in certain circumstances and in certain companies, the perceived legitimacy of board elections. This is so because the current system permits the election of directors based on pluralities, without regard to the number of proxies withheld. Significant shareholder dissent can be procedurally smothered.

The proxy system should be improved, not replaced. It is this incremental approach that the Commission has wisely adopted. If the Commission can devise a workable means of ensuring greater shareholder participation in the process for nominating board members, ABC will support it. ABC CEOs are themselves, after all, long-term and significant shareholders in their own companies.

As the Commission goes about its task, we would urge caution so as to avoid unintended and counter-productive consequences. For example, it is easy to forget that for small public companies, the costs of an annual meeting, particularly in terms of the administrative expense attendant to the proxy process, is not small change. Therefore, any modifications in the means by which shareholders express their views or otherwise participate in the proxy process must be accomplished with due consideration of cost and administrative efficiency.

In a larger sense, the Commission's suggestions for providing some form of direct access to the issuer proxy would unquestionably provide shareholder groups with greater leverage vis-à-vis corporate boards and top management. Presumably that is the whole point of this exercise. That said, we do not wholly discount the anxiety of representatives of large corporations, such as the Business Roundtable, in regard to the use that new direct access rules could be put by groups with aims far removed from and perhaps in conflict with the creation of greater shareholder value. (Obviously, the smaller the market capitalization of a company, the easier it would be for mischievous special interest groups to amass the requisite holdings to promote their particular agenda.)

Companies participating in the three-year pilot program

ABC recommends that the Commission implement any change in proxy access on a pilot basis and defer its application for all but the largest of issuers. ("Defer" is not a synonym for "exempt.")

The long controversy over the accountability of board members and managers to shareholders has focused on the governance of the very largest issuers. Along these lines, it is notable that proxy contests are a rarity within the largest companies.

While proxy contests are more and more common among midsize and smaller companies, last year's proxy season saw only *two* S&P 500 companies facing such contests.[1] This suggests that such contests are not a practical recourse for shareholders of larger firms. Add to this the fact that shareholder frustrations usually arise in reference to the very largest companies, and it becomes clear that the problems of ineffective proxy process or putatively unresponsive boards is directly related to the size of the issuer. In sum, it seems wise to provide a simple deferral, pending further information and experience, for the thousands of companies that do not seem to be part of this controversy.

On its face, this would seem consistent with the Commission's concept, contained in the proposing Release, that a new rule should be implemented in a way that avoids "disproportionate burdens of regulation that the proposed procedure may impose on smaller companies." It is consistent, too, with the Commission's desire to "allow our staff and the markets to gain experience with the proposed rule in an initial stage in which the rule applied only to *larger companies*" while retain[ing] the ability to expand the rule's application to all companies after gaining this experience."[2] We disagree, however, with the Commission's tentative definition of a "large company."

The universe of companies that the Commission has proposed to test its proposals for more direct proxy access is far too large. The proposed universe of "accelerated filers" includes "approximately 3,159 of the 14,484 companies filing periodic reports under the Exchange Act."[3]

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[1] Rajeev Kumar, "Postseason Report: Proxy Battles Rise Again, and So Do Stock Prices," Institutional Shareholder Services, August 22, 2003.
[2] Proposing Release, part II.A.1.b. (emphasis added)
[3] *Ibid.*

In other words, this is a universe roughly equivalent to the Russell 3000, which represents, approximately 98% of the U.S. Market.[4] The largest company in the Russell 3000 is unquestionably large, boasting a market capitalization of $325 billion. However, the Russell 3000 also includes companies with a market capitalization of a mere $20 million. Indeed, the median market capitalization is only $854 million, a number many would consider "small cap," and none would say amounted to a large publicly traded company. While we concede that there are many thousands of SEC *registrants* that are not among the 3159 accelerated filers, we doubt that there are many truly "publicly traded" companies that are not.

Given a median market capitalization of $854 million, at least half of the Commission's chosen universe consists of companies in the mid-cap to small-cap sector of the public market. No one has suggested that these latter companies provide difficulties of such compelling and singular urgency that they should be included in the initial testing of the Commission's proposals. Why, then, should the Commission ask such smaller firms to dedicate additional resources for that purpose?

ABC believes that an appropriate test of the Commission's proposals could be made with the participation of the largest 200 companies in terms of market capitalization. This cohort would represent nearly 10% of the total market capitalization of the Russell 3000. (In terms of company size, the Russell 200 includes companies with a market capitalization ranging down to less than $1 billion.)

A cohort of these 200 large companies would also capture a test group in which virtually all institutional investors have the vast bulk of their holdings. This is especially true of indexed holdings. It is in the nature of index holdings, institutional investors claim, that oblige them to seek to change companies because they cannot change their index portfolios.

The experience of issuers and shareholders in this large sample should provide the Commission's staff with an abundance of data and anecdotal observations over the proposed three-year evaluation period to evaluate the efficacy of the Commission's proposals for all companies. This limitation to 200 large companies would be consistent with the stated purpose of using the experience with large companies to determine the right way to accomplish the purpose of the new rule for all companies and all shareholders.

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[4] Data on the Russell 3000 can be found at: www.russell.com/US/Indexes.

Broker Vote

In regard to so-called routine matters, proxies for shares held in street name that are not returned are usually cast in favor of management's recommendations. This is the so-called broker vote rule. The current rule on broker votes has served to save companies and their shareholders time and money for many years.

For thousands of mid cap and small cap companies, the percentage of street name proxies returned is less than 60 percent. The return percentages are much lower for companies with fewer than 1000 street name shareholders. A key reason for the low return rate is that long-term individual shareholders, who often are the dominant shareholder group in smaller companies, do not see the need to return their proxies in order to vote affirmatively on matters they regard as routine.

Given this voting profile, the broker vote rule has vastly facilitated the ability of smaller companies to conduct their annual meetings expeditiously. It has also meant important savings for smaller companies by minimizing the use of proxy solicitors, phone banks, paper, printing, and postage.

During the March roundtable, some participants argued that, in board elections, broker votes should not count. The Commission's proposed rule indicates that each percentage measure associated with the triggering events in the rule is of "votes cast," exclusive of broker votes.

We believe that the elimination of the broker vote will be onerous for smaller publicly traded companies and their shareholders. Indeed, the proposed rule is likely to eliminate all the benefits of the broker vote for every company subject to the rule.

Some shareholder advisory services have standard recommendations that affect certain board members and withhold campaigns can be conducted without notice to the company. It may be necessary, therefore, for many companies to assume the expense of educating shareholders and soliciting their proxies even in cases where there is only a hint of an effort by shareholder groups to reach the proposed rule's 35% trigger of withheld votes for one nominee. This would be an unproductive use of shareholders assets, but wholly prudent under the rule as proposed.

The effect of refusing to count any of the broker votes will be to require companies faced with a "withhold vote" campaign on any director nominee to spend thousands, or tens of thousands of dollars to validate the fact that a majority of non-returned proxies would have been voted for the board's nominees. Once shareholders have been contacted in order to advise them of the need to return their proxies, the net result will be the same, but the added cost will be significant. The only beneficiaries of this will be proxy solicitation firms and mail houses. The significant cost savings that have come from efforts to streamline the proxy process over the past several years, on the other hand, may well be squandered.

Controversy over the broker vote is not new. This same issue arose most recently in 2002 when the New York Stock Exchange proposed to eliminate broker votes for management resolutions to approve stock option plans. Now, as then, ABC does not argue for maintaining the s*tatus quo.*[5] We accept the logic of those who criticize the current application of the broker vote whereby *all* unreturned street name proxies are cast for the company's nominees. However, an expensive new procedure compelling the company to spend shareholders' dollars to remind them to return their proxies is not the answer.

We believe that a modified broker vote on director nominations is a sensible solution. There is much merit in the concept of an "echo" or "mirror" vote – defining an accurate "proxy" for the uninstructed shares and voting them proportionately. This approach would allow uninstructed shares of street name holders to be voted in proportion to an appropriate cohort of voted shares. It would allow for fairer results on votes like contested nominations without the attendant cost of counting only "votes cast."

The cohort most like non-voting shareholders is the group of shareholders who returned voting instructions to each individual broker who holds the shares in street name. In other words, if half of the clients of XYZ Securities Firm who choose to return their proxies vote in favor of each nominee and half vote to "withhold," the uninstructed shares would be voted in the same proportion. This would result in fair treatment of all shareholders without an expensive and wasteful exercise for every director vote.

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[5] See letter of John Endean, President, American Business Conference to Jonathan Katz, Secretary, U.S. Securities and Exchange Commission, regarding Release No. 34-466620; File No. SR-NYSE-2002-46, October 31, 2002.

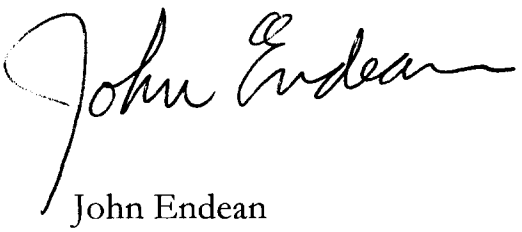
Others may argue that all shares voted would be a better proxy against which to mirror the uninstructed votes. This, however, ignores the difference between the voting profiles of typical individual shareholders and institutional holders. Mirroring uninstructed, broker-represented shares with similar shareholders – *i.e.*, the clients of the same firm -- will produce the most accurate estimate of the tally for uninstructed shares.

We believe that the broker vote has worked well, especially for smaller companies and their shareholders, in facilitating quorums and approving routine nominations of directors. It has also helped to reduce for these smaller companies onerous and wasteful costs attendant to the proxy process. Therefore, if director elections are to no longer be deemed routine, the proper response is not to eliminate the broker vote, but to count it in proportion to the votes cast by the clients of the same street-name broker.

For these reasons, ABC strongly recommends that any provisions of the rule that depend on percentages of votes consider broker votes for or withheld in proportion to votes cast by the best mirror of those shareholders.

Please feel free to contact me if you have any questions about the points raised in this comment letter.

Sincerely,



John Endean
President