

July 17, 2003

SEC Staff Recommends Proxy Access for Shareholder Nominees

On July 15, the staff of the Securities and Exchange Commission recommended that the SEC propose proxy rule amendments that would give shareholders the ability to run a director election contest through the company's proxy statement. The recommendation contemplates that this right would be available only after a "triggering event", such as the board's failure to abide by a majority shareholder vote on a Rule 14a-8 shareholder resolution, and would be available to large, long-term shareholders. The SEC expects to publish specific rule proposals and solicit public comment on them in September. The staff also recommended that the SEC propose amendments to increase the required disclosure with respect to the company's own nominating process and with respect to the manner in which shareholders may communicate with directors. The SEC expects to publish proposals and seek comments on these two topics in August.

We believe that giving shareholders the ability to run an election contest through the company's proxy statement would be a serious mistake, and we submitted a comment letter to the SEC outlining our reasons for this view. The staff report, however, states that "the vast majority of commenters supported modifying the proxy rules and regulations related to the nomination and election of directors." Shareholder activists led a campaign that resulted in comments from 424 individuals and 165 unions, pension funds and other institutional investors (out of a total of 690 comment letters). In contrast, comments (mostly in opposition) were submitted by only 18 law firms and attorneys, 16 associations, and 10 corporations and corporate executives. While the comments supporting these changes often consisted of only one paragraph, and some even followed a preset form, the numbers clearly had an impact on the staff. Now that the SEC is working on specific rule proposals, those who believe it would be a mistake to open the company's proxy statement to election contests may wish to make their views known.

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