



ICGN

International Corporate Governance Network

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Re: ICGN Support for File Number S7-10-09 ‘Facilitating Shareholder Director Nominations’

Dear Ms Murphy,

We are writing on behalf of the International Corporate Governance Network (ICGN) to give our initial, high level response to the United States Securities and Exchange Commission’s (SEC) proposal on Facilitating Shareholder Director Nominations (File Number S7-10-09ICGN). This initial letter of high level support will be followed up by a more detailed response before the comment deadline in relation to the specific questions raised in the proposal.

By way of introduction, the ICGN is a global membership organisation of around 450 leaders in corporate governance based in 45 countries with a mission to raise standards of corporate governance worldwide. ICGN members are largely institutional investors who collectively represent funds under management of around US\$9.5 trillion. The breadth and expertise of ICGN members from investment, business, the professions and policymaking extends across global capital markets. Accordingly, we are keen proponents of responsible share ownership and effective shareholder rights.

The ICGN welcomes the latest initiative of the SEC to enable shareholders to appoint directors to the boards of US companies, so called “proxy access”, in your recent proposal.

The ICGN believes strongly that board directors, collectively and individually, are fiduciaries and ought to be accountable to all shareholders. In our view, this means that shareholders should be able to influence the composition of the board through the appointment and removal of directors. We are encouraged by the gradual adoption of majority voting for director elections by US companies although we would prefer that this was a requirement rather than voluntary best practice. We also welcome the SEC’s recent decision to prevent brokers voting uninstructed ballots on director elections after January 2010; this ought to help ensure that considered voting by responsible shareholders has maximum impact. The economic crisis has further highlighted the need for enhanced accountability of boards and investors for their stewardship responsibilities.

These significant developments make this an ideal time to revisit the proposals by which proxy access can best be achieved and we acknowledge the thought and breadth of consultation reflected in the SEC’s latest proposal. We welcome the apparent intention of the SEC to keep the rules as simple as possible given that experience suggests that as complexity increases, loopholes expand.

Going back to first principles, if it is accepted that directors are the agents of shareholders then shareholders should be able, with minimum impediment, to nominate directors to the board.

We support the SEC's proposal to impose an ownership threshold sufficient to limit frivolous nominations but believe that this should be the only qualifying requirement. The ICGN agrees that the proposed tiered beneficial ownership thresholds are a pragmatic approach. Shareholders collectively or individually with those respective levels of ownership have sufficient economic interest in the company to justify the expense and time involved in putting forward a director nominee. However, we believe that all shareholders with the necessary threshold interest should be able to participate, regardless of how long they have been or intend to be invested, and for their own reasons, not because of some predetermined trigger. In our view, the ultimate protection from weak or biased director nominees, should they get on the ballot, is that they still need to get at least 50 per cent plus one vote to be elected to the board. Shareholders, many of whom are fiduciaries themselves, are not going to act against the interests of the companies in which they invest very large sums of capital.

The ICGN supports and promotes the premise that normally the board should identify and nominate directors who have the appropriate skills, experience and working style to achieve a goodness of fit with the existing group. There is an interesting paradox, particularly in relation to director nomination and election, in that having certain rights can lessen the need to use them. In many British Commonwealth countries, for instance, shareholders representing five per cent of the issued capital can propose resolutions and with ten per cent can call extraordinary general meetings, yet it is very rare for shareholders to use these rights to remove directors. Directors aware that they have lost shareholder support tend to resign of their own volition, protecting both the company's and the director's reputations. Equally, in the Continental European markets where even one share entitles a shareholder to file a resolution or a counter motion, spurious proposals are spurned by mainstream, responsible shareholders.

It is even rarer for shareholders to use their rights to nominate their own candidates to the board. Experience in markets where shareholders have the "reserve power" to nominate and to remove directors suggests that it is rarely used because it acts as a powerful incentive for communication and consultation between companies and their shareholders. Boards that wish to maintain good relations with shareholders make real efforts to engage on issues that might otherwise lead to shareholder dissent or shareholder proposed resolutions. The strong preference is to ensure that there is a board nomination process on which shareholders can rely and that may, if circumstances dictate, enable some shareholder input at an early stage.

A straw poll yesterday of 422 international delegates at our annual meeting in Sydney Australia indicated that 92.9% of respondents consider the ability to nominate, appoint and remove directors the most important shareholder right. Thus, it seems that the US is currently an outlier in relation to this important shareholder right and needs promptly to take remedial action. We encourage the SEC to do everything in its power to bring an effective rule into force in time for it to be actionable in the 2010 proxy season.

On a related point, the ICGN believes that the SEC's proposal achieves a balance between state and federal interest and in our view appears to have succeeded in articulating an approach that will allow for private ordering under state law whilst establishing a federal minimum standard to protect the fundamental right of shareholders (indeed, a right rooted in state law) to nominate and elect directors.

In summary, the ICGN supports the SEC's efforts to facilitate shareholder director nominations. We believe that the fact of this right will spur boards and shareholders to engage more actively with one another on concerns around board composition and effectiveness. We would encourage the SEC to keep the rules as simple as possible with as few impediments to proxy access as can strike the balance between ease of access and minimisation of time wasting, frivolous nominations. We would further encourage the SEC to promote the cause of mandatory majority voting, which goes hand in hand with proxy access. It provides the meaningful warning signal to boards that shareholders are concerned about performance which can in turn prompt change from within. We believe that the SEC's commitment to facilitating the exercise of shareholders' rights is instrumental to the strengthening of the US capital markets. For its part, the ICGN will encourage its members to use those rights

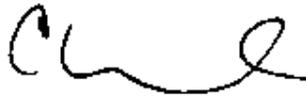
selectively, actively and responsibly in the long-term interests of their fiduciaries and the companies in which they invest.

We trust that you find these comments helpful in your deliberations. Please contact Christianna Wood, ICGN Board member, by email at secretariat@icgn.org or by phone 0044 (0) 207 612 7098, if you would like to discuss them further.

Yours sincerely,



Peter Montagnon
ICGN Chairman



Christianna Wood
ICGN Chairman Designate



Michelle Edkins
ICGN Chair of Shareholder
Rights Committee