



August 14, 2009

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

Re: Facilitating Shareholder Director Nominations -- File No. S7-10-09

Dear Ms. Murphy:

On behalf of Pax World Management Corp. (Pax World), adviser to Pax World Funds, with over \$2.3 billion in assets under management, I am writing to provide comments on the Securities and Exchange Commission's (SEC) proposed rule entitled *Facilitating Shareholder Director Nominations* (Proposed Rule). Pax World strongly supports the intent of the Proposed Rule, otherwise known as "proxy access," which seeks to facilitate and strengthen shareholders' most important right—that of nominating directors to serve as their representatives on corporate boards.

At least since 1942, the Commission has considered whether shareowners should be allowed to include director candidates in corporate proxy materials. This reform, which has been studied and considered meticulously by the SEC during the past six years, is long overdue. Its adoption would be a significant change to U.S. corporate governance, compelling directors to act more independently of management—not merely striving for independence as defined by Self-Regulatory Organizations' guidance. These reforms are critical if boards of directors are to be accountable to whom they ultimately represent: a diverse and often global group of investors that have both long- and short-term investment objectives.

There is no need to remind the SEC or its staff of the broad governance failures leading up to our most recent economic crisis. But it is important for the Commission to consider the role that investors can play in preventing such crises from occurring in the future. Tangible shareowner oversight can improve corporate governance and financial market performance, but in order to play this critically important role, shareholders need to have the appropriate tools at their disposal. Reforms that allow investors to serve as a fair check on board performance are vital. Prudent proxy access is one of those reforms.

The SEC touched on a significant theme in its Proposed Rule that has rarely been discussed these past six years of robust proxy access discussions—that of replicating the intent of actual annual meetings of shareholders. The Commission notes that "refining the proxy process so that it replicates, as nearly as possible, the annual meeting is particularly important given that the proxy process has become the primary way for shareholders to learn about the matters to be decided by

the shareholders and to make their views known to company management.”¹ “Based on the feedback we have received over the last few years, it appears that the federal proxy process may not be adequately replicating conditions of the shareholder meeting.”² Because institutional and individual investors rarely travel to each company’s shareholder meeting today, and because the majority of all proxy voting is done remotely and beforehand, the Commission needs to address this gap of real representation and accountability by directors to owners of the corporation. While it is true that a small handful of investors do attend annual meetings when they are particularly concerned about acts of the board, or the strategic course of their investment, this is the exception rather than the rule. Many institutional investors – Pax World among them – own hundreds or even thousands of companies; it is often no longer practical to attend all annual meetings. As for individual investors, it is almost impossible.

Therefore, procedures for replicating that physical accountability of the board to its shareowners are crucial if directors are to fully understand their role and recognize that loyalties should run to shareholders, not to management. Being a director means being a steward of other people’s investments and ultimately, of their financial security. Such responsibility should come with appropriate measures of accountability. Yet today’s corporate directors rarely appear accountable to shareholders. Consider what is often the process of electing those directors in the first place: an uncontested slate of management-preferred candidates, plurality voting, uninstructed broker voting, and the fact that management can spend as much of shareholders’ monies as it sees fit to ensure its preferred slate is elected. There has been no effective way to date for shareholders to even nominate candidates for corporate boards – without an impractical, expensive proxy fight – let alone hold them accountable once elected.

The SEC Needs to Respond to the Regulatory Shift on Access

Pax World is encouraged by recent regulatory and legal changes which provide shareholders with greater means for holding directors accountable. These include the recently amended Delaware General Corporation Law, Section 112, clarifying that the bylaws of a Delaware company may stipulate that a corporation may be required to include one or more individuals nominated by a shareholder in the solicitation materials, in addition to those nominated by the board of directors. Delaware also added new Section 113—spurred in part by the shareholder activism of Harvard Law Professor Lucian Bebchuk—which allows a Delaware corporation’s bylaws to provide that, under certain circumstances, the company will reimburse a shareholder for the expenses of soliciting proxies in connection with an election of directors. The American Bar Association’s Committee on Corporate Laws is also considering similar changes to the Model Business Corporation Act.

In 2007, North Dakota amended its corporate law to permit proxy access rights to shareholders owning five percent or more of the company’s shares. Since then, several shareholder proposals have been filed with companies seeking their reincorporation in North Dakota, to provide proxy access and other shareholder-friendly provisions. This is in addition to other national reforms in recent years focused on spurring director accountability, including guidelines for better

¹ *Facilitating Shareholder Director Nominations* (File No. S7-10-09), p. 9.

² *ibid*, p. 14.

communication between shareholders and boards, e-proxy provisions, and the inclusion of nominating committees on most boards.

However, shareholders still rarely have a nominee proposed on a corporation's ballot unless the shareholder intends some change-in-control. The fact that so few shareholders use their nominal power to advance their own candidates for directorships is almost always about cost or management influence over the process. It can cost millions of dollars to send a dissident proxy card to the shareholders of just one company, and without assurance of reimbursement, most shareholders cannot afford to do this unless they stand to gain significant (and exclusive) financial rewards, such as a change-in-control. Shareholders whose only agenda is to improve corporate governance have no such potential payback from a proxy contest.

In our experience, shareowner-suggested candidates submitted to board nominating committees are also rarely given serious consideration, even when investors have taken considerable time to find well-qualified, independent, value-adding directors.

The Prospect of Access is Important in Its Own Right

Pax World believes shareholder access to corporate proxy materials would address some of the more significant problems surrounding director elections in the U.S. Yet the mere prospect of investors using such a tool is as important as the tool itself. In the U.K. market, investors do have proxy access rights, along with "say on pay" mechanisms, and boards there tend to have more productive relations with shareowners, compensation schemes tend to be less egregious than here in the U.S., and far fewer shareholder proposals are filed at U.K. companies because investors have easier and more direct ways of communicating with boards and their mostly independent chairs. The comments of the International Corporate Governance Network to the SEC (July 15, 2009) describe the difference in relations between U.S. and U.K. investors and their boards:

"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."

It appears that the mere prospect of investors using their access rights helps keep companies more responsive to shareowners and more thoughtful about whom they nominate to serve as directors, and generally helps keep directors more vigilant in their fiduciary responsibilities.

Mechanics of the Proposed Rule

In terms of amendments to the current proxy process, and mechanisms for access prescribed in the Proposed Rule, Pax World supports the following:

- **Implementation of direct access rights across all U.S. public companies, as described by proposed Rule 14a-11.** In other words, we do not support amendments to Rule 14a-8(i)(8) by themselves to improve proxy access mechanisms. Our strong view, instead, is that shareholders should have the ability to propose candidates for a board if they meet the established nominator criteria, and they should have the reserved right to amend a company's bylaws or put forward non-binding shareholder proposals to amend certain details of the director election process when that process does not work optimally and for the benefit of a majority of shareowners of a company. Effective proxy access is not an either/or; it is vital to create a nominating rights "floor" while still giving shareholders and boards some discretion in crafting process rules that benefit all involved.
- **Full and accurate information about nominators and their board nominees.** Shareholder nominators should adhere to the same SEC rules governing disclosure requirements and the prohibition on false and misleading statements that currently apply to proxy contests for board seats. Shareholder nominators should not be held to a higher standard than investors nominating one or more directors in a change-in-control situation. The Proposed Rule is generally consistent with our view that shareowner nominees for director should qualify as independent under relevant stock exchange (SRO) listing standards, as well as meeting other fiduciary standards (such as financial expertise). We also agree with the Commission that the nominating shareowners should be required to affirm that no relationships or agreements between the nominee or the nominating shareowner(s) and the company and its management exist.
- **The prompt implementation of a final rule** in order for it to take effect for the 2010 proxy season. We understand that the final access rule will have to carefully manage SEC authority as it relates to existing states' rights provisions and state corporate law, but we encourage the Commission to finalize a rule promptly for the benefit of all shareholders in U.S. markets.
- **The 1%, 3%, and 5% thresholds proposed for large-, medium-, and small-sized companies.** After examining the various nominating thresholds suggested over the years regarding access, we believe the Commission has come up with an acceptable balance at present. However, there are still some details the Commission will need to clarify regarding how to affirm these thresholds, whether securities lending impacts these rights, whether nominators continuously hold the equity until the time of the annual meeting, and other factors.

- **That shareowners be allowed to aggregate their holdings in order to meet the ownership eligibility requirement** to nominate directors. Although Pax World is an active owner, we are smaller than many state pension funds and mutual fund families and would rarely be able to meet the nominating ownership requirements by ourselves. Likewise, some institutional investors may have trouble meeting the proposed ownership thresholds alone for large cap companies, in some part because their own risk controls may prohibit owning larger stakes in listed entities. Yet we all have the same interests in the quality of corporate governance. Aggregation of shareholdings is critical to active owners being included in the proxy access process.
- **That shareholders seeking to nominate candidates for the board maintain their equity investment for at least one year continuously prior to the nomination.** We believe the interests of long-term investors tend to be in line with that of investors more broadly, and support the Commission in its efforts to encourage longer-term holders to use the access mechanisms. One-year ownership seems to be an appropriate balance put forward between both long- and short-term investors. Pax World would not object to a two-year holding requirement should the Commission later conclude that its proxy access rules were being misused for shorter-term “value stripping” means.
- **That shareowners using proxy access be able to nominate just less than a majority of directors standing for election,** in order that the proxy access provisions not be abused for change-in-control purposes. We disagree with the Commission’s proposed 25 percent nominee limit, because – particularly for small cap companies – that would often limit shareowners to one nominee for boards that may be in dire need of reform.
- **That the SEC also institute majority voting for the election of directors** in general, in order to strengthen the proposed proxy access mechanisms. We support having majority voting election provisions instituted across all public equities regulated by the SEC when director elections are uncontested, so that poorly performing directors can be more easily replaced when they fail to earn majority support. Where shareholders take advantage of proxy access, and there are more directors being proposed than seats available (i.e., when elections are contested), then we would recommend companies default to a plurality standard.
- **Equal treatment and space for qualifications of every nominee in the proxy.** Shareholders’ candidates should be on a level playing field with board-nominated candidates in the company’s proxy materials, in terms of word limits, images, and other descriptors. Shareholders should have the ability to know as much about investor-nominated candidates as the board reveals about its own slate, and treatment of both sets of candidates should be fair and equitable for the proxy ballot.

Pax World opposes the following provisions or topics of discussion in the Proposed Rule:

- **Including any triggering events in the final rule,** as this would overly complicate the proxy access mechanism, and discourage shareowners from acting quickly if they have concerns with current board performance. Moreover, by requiring a triggering event, the

Commission would be assuring that shareholders are only able to take a more active role in reshaping corporate governance *after* a significant failure had occurred. We believe that shareholder access should be used to improve corporate governance before failures occur, and indeed, that it can help prevent such failures from happening in the first place.

- **Smaller issuers having a longer timeframe for implementing the new access regime.** The costs of including shareowner director candidates on management's proxy as proposed are minimal and should not disproportionately burden smaller issuers, particularly given the higher shareowner eligibility criteria for those companies with net assets of less than \$75 million.
- **Additional limitations on a nominee's eligibility beyond those currently featured in the Commission's proposal** would undermine the stated purposes of the Proposed Rule by imposing unnecessary burdens on the nominating shareowner(s).
- **Requiring shareowner-suggested nominees to be independent of the nominating shareowner or group.** Instead, we agree with the proposal of the Council of Institutional Investors (in its August 4, 2009 comment letter on the Proposed Rule), which recommends requiring companies and nominating shareowners to fully disclose all relationships between director candidates and the company, company executives, and in the case of candidates nominated by shareowners, the nominating shareowners. Corporate concerns over "special interest" representation are exaggerated in our view, since candidates will ultimately only be elected to boards if they have the faith of the majority of investors behind them. Full and meaningful information about each candidate will ensure that shareowners can make reasoned, informed voting decisions.
- **The proposal for which nominees move forward onto the ballot needs refining.** There are two chief ideas being debated in the Proposed Rule and in investor comment letters that relate to which investor nominees make it to the ballot when more than one shareholder or group of shareholders proposes a candidate. One is which shareholder(s) submits nominees first. The second approach focuses on the shareholder(s) with the largest equity stake backing a candidate. Both pose problems in our view. The first-filer approach could trigger a less-than-productive race to be the first to submit names. We are concerned about this approach because the quality of candidates, or the overall strength of a short slate, might be affected as investors hurry to submit candidates.

While making valid points, we also disagree with the proposal that only the candidates backed by the largest beneficial owners be considered. In reviewing the SEC's analysis of companies and their largest shareholders, we are concerned by the fact that the investors with the largest equity stakes sometimes are the least active in corporate governance, executive compensation reform, and in challenging the performance of an existing set of directors. We would encourage the SEC to explore other options for determining whose candidates are placed on the proxy if multiple shareowners (or groups thereof) nominate directors at the same time.

Pax World supports multiple investors being allowed to nominate candidates, so long as they meet the criteria and the total number of candidates does not surpass a majority of nominees put forward. We welcome other ideas put forward by the Commission in determining how best to sort out which nominees eventually make it to the proxy.

Finally, Pax World believes that adoption of the proposed Rule 14a-11 would help remove many impediments to shareholders exercising their rights to nominate and elect directors to company boards. We further support amending Rule 14a-8(i)(8) to allow for elections procedure shareholder proposals, as a supplement to Rule 14a-11. In our view, investors should be permitted the opportunity to pursue non-binding proposals or mandatory bylaw amendments that support stronger proxy access provisions, when appropriate, than are provided in the baseline rights under proposed Rule 14a-11. We further support the Commission keeping submission thresholds (3, 6, and 10 percent) and investment amounts (\$2,000 or 1 percent) for such director election proposals at the level of other proposals filed under Rule 14-a8.

We thank the Commission for the opportunity to comment on this important regulatory reform, and hope that the SEC will craft and implement a rule that creates a fair and legitimate right for investors to decide who will represent them on corporate boards.

Sincerely,



Joseph F. Keefe
President & CEO
Pax World Management Corp.