



VIA COURIER

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

AND VIA EMAIL

TO: Elizabeth M. Murphy c/o rule-comments@sec.gov
RE: File Number S7-10-09
FR: National Association of Corporate Directors

August 17, 2009

Dear Ms. Murphy:

The National Association of Corporate Directors is the nation's leading membership organization for independent directors. On behalf of our 10,000 members, we appreciate the request for comment on your proposal, **Facilitating Shareholder Director Nominations**, also known as "proxy access."

Since this proposed rule involves the nomination of directors—the group NACD has represented for more than 30 years—we feel an historic obligation to comment, as we have on three previous occasions dating back to 2003.

NACD'S POSITION ON THE CURRENT PROPOSED RULE

Rather than imposing a federal, one-size-fits-all mandate for proxy access at this time, it is clear to us that proxy access bylaws permitted under state law should be allowed to work and can be facilitated by the proposed Rule 14a-8 amendment which we support. We think that, if private ordering is given a reasonable opportunity to work, the needs of each company and its shareholders for meaningful proxy access suitable for that particular company will be accomplished. If that happens there will be no need for a federal mandate of the kind that proposed Rule 14a-11 would impose on all reporting public companies. If private ordering is later found not to have worked, then Rule 14a-11 might be reconsidered. The reason for taking this process one step at a time is that various corporations and their investors are likely to reach a variety of differing but responsible opinions concerning good corporate governance solutions (and that would include proxy access bylaws), depending on a host of varying circumstances unique to each company. **Therefore, NACD does not support proposed Rule 14a-11, but we do support the proposed amendments to Rule 14a-8.**

REASONS FOR NACD'S POSITION

Shareholders have invested capital in the expectation of a financial return, so they have a vested interest in the financial success of the corporation. As such, their suggestions for nominees can be extremely valuable. However, we believe that the current allowable means, combined with the proposed amendments to Rule 14a-8, can be used to achieve the end of facilitating shareholder input into the director nominations process.

New legal developments regarding proxy access, such as the recent amendments to Delaware corporate law allowing shareholders and boards to adopt proxy access and proxy reimbursement bylaws, similar changes that the American Bar Association is considering to the Model Business Corporation Act, and the new North Dakota corporations statute, should be permitted to work before the SEC takes action to adopt a federal proxy access right. In addition, access already occurs whenever nominating committees accept candidates proposed by shareholders.

More broadly, NACD believes in the inherent value of the checks and balances structure of the U.S. corporate governance process. The board of directors hires/fires and compensates the CEO, and sets policy; the CEO and management team run the company under the oversight of the board; and the shareholders elect the board of directors.

We believe that when this system works most effectively, the financial results and the ethical character of the company are enhanced for the benefit of shareholders and other stakeholders. Because we believe boards of directors are an integral part of the governance process, NACD's mission is to help directors do their jobs most effectively and efficiently. To that end, over the years, NACD has provided director education, publications, and research to improve the work of the board in every dimension: risk oversight, strategy, board composition, executive compensation, board evaluation, director orientation, and ongoing education, among many other key areas.

One of the areas where NACD has developed important guidance is precisely the area of director competency. Our widely cited landmark *Report of the NACD Blue Ribbon Commission on Director Professionalism*, published over 20 years ago, emphasized the need for independent, qualified directors. This important message has carried through many of our publications, including a handbook and a Blue Ribbon Commission report on the work of the governance committee. Our three annual governance surveys and many of our 30-plus publications also focus on director selection and board composition.

Recently, NACD published its Key Agreed Principles to Strengthen Corporate Governance in U.S. Publicly Traded Companies. The purpose was to find common ground among the director, management, and institutional shareholder communities. Our Key Agreed Principles included three principles that specifically relate to director nominations, as summarized below:

- *Principle III. Director Competency & Commitment* - Governance structures and practices should be designed to ensure the competency and commitment of directors.
- *Principle VIII. Protection Against Board Entrenchment* - Governance structures and practices should encourage the board to refresh itself.

- *Principle IX. Shareholder Input in Director Selection* - Governance structures and practices should be designed to encourage meaningful shareholder involvement in the selection of directors.

Our Key Agreed Principles were published to provide a blueprint for boards to help improve the quality of discussion and debate about governance issues moving forward.

FOUR KEY POINTS

We expect that state-level initiatives will achieve the desired effects in providing shareholder access to the proxy. Consequently, a one-size-fits-all federal mandate is neither needed nor desired.

However, we believe that no matter how proxy access is achieved, certain matters are particularly important, and should be considered by shareholders and companies: ownership percentage, aggregation, holding period, and candidate vetting. Our recommendations on these matters are based on questions you asked at **C.6**, **C.14**, **C.19**, and **D.7** of the proposing release.

* ***Ownership of at least 5 percent – and preferably more (re C.6.)*** NACD believes that a 5-percent threshold is best. In microcap companies, we believe the percentage should be even higher—10 percent or more. Regarding the 5-percent standard, this has an established history as a level of ownership that indicates serious engagement. For example, current SEC rules require that any shareholder who acquires more than 5 percent of a company’s stock file a so-called beneficial ownership report on Schedule 13D or Schedule 13G. The same logic used in that standard could be used to justify a 5-percent minimum.

* ***A holding period of two years, preferably longer (re C.14).*** NACD believes that a period of two years or more is the most appropriate holding period. The longer an investor holds stock in a company, the more that investor knows and cares about the company and its future. Short-term special interest considerations are rarely, if ever, conducive to the long-term sustainability of a company. Knowledge and commitment are valuable prerequisites to director nominations. The most recent NACD governance survey shows that directors currently serving on boards have served for an average of seven years. The same survey also shows that directors consider oversight of corporate strategy to be the single most important issue facing them. The continuity and strategic focus of directors puts them at some advantage in the selection of nominees to the board.

* ***No aggregation for the purpose of meeting the ownership threshold (re C.19).*** NACD does not support aggregation, as this could defeat the purpose of any ownership threshold. Even aggregation with limits, while it may sound feasible, could open the door to abuse by special interests. Certainly it would require more staff time to administer, wasting valuable Commission resources.

* ***Vetting by the nominating committee (re D.7.)*** NACD believes there should be a mechanism by which the nominating/governance committee can make a recommendation on any candidates proposed by shareholders. One way to do this would be to explicitly allow the nominating/governance committee the ability to comment on the shareholder-nominated candidates, just as they comment on their own candidates. The statement would simply say whether the candidate, based on qualifications asserted by the nominators, fits the strategic goals of the company. Any expanded disclosure rules should apply to all nominees. (We are referring

to the proposed rule on Proxy Disclosure and Solicitation Enhancements, as proposed by the SEC on July 1, 2009: <http://sec.gov/news/press/2009/2009-147.htm>. NACD will be commenting separately on that proposed rule.)

Vetting by the nominating/governance committee can also help to ensure some measure of collegiality, which is vitally important for boards. It is a generally accepted principle of social science that groups are more effective when they have candor and trust. NACD is concerned that proxy access could politicize elections, potentially leading to a more factionalized board with special interests represented. Further, constituent directors representing their own interests could violate the fiduciary duty of loyalty to the corporation as a whole, by failing to represent all shareholders.

CONCLUSION

We welcome this opportunity to comment on this important proposed rule. We urge the Commission and all of its constituents to consider the merits of a revision to Rule 14a-8 as the first and most important step in improving board composition, a worthy goal we all share.



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