Quis comprimet ipsos custodes?™

September 7, 2009

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

Regarding: Facilitating Shareholder Director Nominations; Release Nos. 33-9046; 34-60089; IC-28765; File No. S7-10-09 (June 10, 2009)

Dear Ms. Murphy:

Thank you for the opportunity to comment on this important initiative. This response is in addition to the detailed letter that I have co-signed with Glyn Holton of Proxy Exchange, Robert Monks and others. However, all opinions in this response are entirely my own and do not represent the views of any other individual or entity.

Lemonjuice.biz is a forthcoming website that will focus on shareholder awareness and corporate governance. I am an entrepreneur and an editor of Lemonjuice.biz. My articles and papers on corporate governance have appeared in the World Bank's newsletter *Beyond Transition* and the OECD Corporate Governance pages, among others.

Among the multitude of responses already submitted to the SEC there are excellent suggestions for improving the proposed rule 14a-11 both from the proponents and from skeptics of this rule. Without detracting from the good substance of the comments, I would like to merely point out a few common fallacies that seem to be reappearing in some of the responses:

Fallacy 1: *The Proposed rule 14a-11 tramples on the private ordering between the shareholders and companies in place today.*

On the contrary, this rule facilitates private ordering by leveling the playing field between entrenched boards and the shareholders. Unquestionably, it would have been preferable if even this basic right of share ownership to nominate directors had developed on its own, without regulatory intervention. However, in the thirty years since the first time SEC considered a similar rule, the market did not develop it because insiders use corporate resources to fight against any attempt to even propose a company-level proxy access regime. Consequently, today far less than 1% of public companies in the United States provide any choice of board members at all on their proxies.

Of course, corporate insiders justify this by saying that the boards have good nomination and corporate governance committees that take care of this for shareholders. However, this is the opposite of choice, which is required for private ordering. This is an entrenched board nominating itself.

There is one point about private ordering that I must concede: one size does not fit all, even in proxy access rules. I believe that in order to ultimately optimize proxy access mechanics, shareholders should be able to modify the rule once it is in place. However, because corporate insiders have been so successful in using shareholders' funds for protecting themselves from shareholders, the initial basic rule now has to come from the SEC. After that, the management or shareholders should be able to propose changes to fit the nature of the company. However, to assure true choice, the shareholder voting has to be meaningful with non-voting broker shares staying out of this important decision and the boards abiding by the majority of shareholder vote.

Fallacy 2: *The proxy access proposal for director nominations tramples on the private ordering between shareholders and states/ state law.*

As they should, state legislatures are not driven by market consideration, but by political considerations. There is no private ordering in the state legislature just as there is no private ordering on the federal level.

Fallacy 3: *Proxy access shifts proxy expense from specific shareholders to the companies.*

Proxy access actually eliminates a considerable expense related to registering, mailing and defending a competing proxy. Adding names to the announcements that will go out regardless does not create additional material cost. In fact, it is not clear at all what free market philosophical reasoning can possibly support allowing titular directors to use company resources to secure and defend their own entrenchment, while at the same time not allowing owners to add nominations to the company's proxy material.

Most institutional shareholders, who could in theory spend funds registering, mailing and defending their proxies against inevitable management lawsuits, cannot do so by their mandate. This means that the only economic agents who can exercise the right to nominate board members are corporate raiders, seeking to change control. A famous corporate raider, Carl Icahn, refers to this state of affairs as the "Absurdity of Corporate Board Elections."

Just as in the case where Sears sued Robert Monks, alleging that he had ulterior motive of promoting his new book when he exercised his right to register a proxy, boards and management frequently and consistently spend company funds to defend themselves against shareholder choice. That is why the playing field needs to be leveled for private ordering to ensue.

Fallacy 4: *Proxy access is costly because it distracts board members from their jobs to have to answer and defend from shareholder nominations.*

Anyone who ever had a boss or a client knows all about this distracting, pesky thing of having to defend and report on your progress, activity and achievement. Who wouldn't like to be left alone to be a maverick? It is absolutely absurd, but also telling that titular managers and board members feel that defending their record is an unnecessary distraction.

In discussing "who will guard the guardians," Socratic Letters suggested that the city-state guardians are told a "Noble Lie" that they are better than anyone else. This will compel them to guard themselves. The feeling in corporations today is that of true and unequivocal belief in the "Noble Lie." The boards and the management nominate each other, decide their own rules of governance and pay themselves just enough to suggest that despite having to entrench, they are still better than anyone else. Carl Icahn had a different name for this. He called this "incestuous relationship."

No one decided that the incumbents are really better than others because there was never a choice. This is why proxy access will go a long way toward replacing the Socratic "Noble Lie" with Milton Friedman's "Power of Choice" in corporate governance.

Falacy 5: *Proxy access will allow single-issue or union candidates to influence corporations in unpredictable ways.*

In order for a single-issue candidate to actually become a board member (one of a dozen or so), the majority of the shareholders will have to vote for him or her. Counter-arguments have been made that because of uncertainty of proxy advisors' and shareholders' views, the boards will have fiduciary duties to expand considerable effort to campaign against the candidate. However, that's quite cynical of private ordering. Shareholders will act and vote in their own interests. The idea that the shareholders need to be advised by incumbents on how to vote is aching to the belief in the "Noble Lie," not in private ordering.

The proposed rule 14a-11 needs to be optimized to first of all allow for the market to work. A lot can be gained from all parties in the debate. Let's hope that the process of refining this rule does not end up in a chase after a red herring, and instead stays focused on the true details of corporate governance mechanics.

Kind Regards,

Alex Krakovsky

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