M E M O R A N D U M

To	**:**	**Commission File No. S7-10-09**
From	**:**	**Lillian Brown** **Senior Special Counsel** **Division of Corporation Finance** **U.S. Securities and Exchange Commission**
Re	**:**	**Facilitating Shareholder Director Nominations** **Release No. 34-60089**
Date	**:**	**June 29, 2010**

On May 7, 2010, Brian Breheny, Deputy Director of the Division of Corporation Finance, spoke at the Atlanta meeting of the Society of Corporate Secretaries and Governance Professionals. Following the meeting, David Wisniewski, an attendee at the meeting, provided the attached comments addressing the Commission's proposals concerning shareholder director nominations via email to Brian Breheny.

Comments of David Wisniewski on Proxy Access Rulemaking

What Should the SEC do on Proxy Access?

- Issuers obviously want to limit proxy access to meaningful shareholders. A pension fund that has been a long term holder would probably be appropriate, but a hedge fun with a hit and run or short term strategy might not appropriate even if their position is large.
- Instead of focusing on the size and duration of ownership, the SEC instead should look at shareholders in connection with the rational basis the Commission has for passing a rule which has the force of law.
- On its surface, the rational basis appears to be to allow any shareholder the right to nominate directors and use the Company's proxy statement. But this is the mere appearance, and not reality. That is because since January 1, 2004 SEC rules have required companies to explain to shareholders in their proxy statements how a shareholder can nominate a director. (SEC Rel. No. 33-8340; Reg. SK Item 407(c)(2)(iv)).So the rational basis for this law is really much more narrow since shareholders mostly already had this right. Instead, it is really just to allow a shareholder-nomination via the proxy statement at companies that either did not allow this under state law or which rejected a shareholder-originated nominee.
- So the SEC should limit proxy access to (1) shareholders of companies which do not allow shareholder nominations under state law, and (2) shareholders who in the past (say 3 years) actually exercised their right to make a nomination but their nominee was not included in the Company's proxy statement. Shareholders who didn't avail themselves of their existing rights shouldn't be granted additional rights. Stated differently, if the Commission's proxy access rule goes beyond this, then the proposed proxy access rule really is a solution in search of a problem that doesn't exist.
- To the extent the SEC allows proxy access based on a standard unrelated to the rational basis for the rule, for example, allows proxy access to a shareholder with at least *x* % of the company's shares and a holding period of at least *y* years, without regard to whether the shareholder can presently make a nomination that would be included in the company's proxy statement, then I believe the Commission is really not trying to remove obstacles to such nominations but rather trying to increase the voting power of large shareholders. That's inappropriate and unconstitutional. And it amounts to basically a Trojan horse.
- This aspect of the rule proposal – purporting to be about a legitimate corporate governance concern but really designed to increase the power of institutional shareholders – makes proxy access as currently proposed similar to majority voting in my mind. Majority voting appears to treat all shareholders equally, but in reality has transferred substantial power to advisory firms and institutional shareholders. This is because proxy advisory firms such as ISS tie their recommendations to an ever expanding list of rules, the violation of which trigger a WITHOLD recommendation. The list of such items includes relatively minor offenses as simultaneously serving on 4 audit committees, or a CEO serving on more than 2 outside boards. The vast majority of voters view these concerns as not warranting the replacement of a director, but the potential for a failed election causes many companies to tow the ISS line. As a result, this gives ISS the power to become an effective regulator of a long list of corporate governance practices – those for which it will issue a 'withhold' recommendation – which are only tangentially related to the election of a director. So the Commission should consider the likely affects of proxy access and how it will likely further shift the balance of power from retail investors to institutional shareholders.

David Wisniewski