ICGN
International Corporate Governance Network

By web submission: www.sec.gov

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

11 October 2010

Dear Ms. Murphy,

Re: File Number S7-14-10 (Concept Release on the U.S. Proxy System)

The undersigned are writing on behalf of the International Corporate Governance Network (ICGN) in response to the request of the United States Securities and Exchange Commission (the Commission, the SEC) for comment on its Release No. 34-62495, File Number S7-14-10, relating to the U.S. proxy system (the Release).

Background

The ICGN is a global membership organisation of over 500 institutional and private investors, corporations and advisors from 50 countries. Our investor members are responsible for global assets of US$9.5 trillion. Our mission is to contribute meaningfully to the continuous improvement of corporate governance best practices through the exchange of ideas and information across borders. Information about the ICGN, its members and its activities is available on our website www.icgn.org.

The ICGN and its members strongly support the Commission's goal of improving the accuracy, reliability, transparency and accountability of the U.S. proxy system. Share voting is the primary tool for shareholders to exercise their rights, enforce governance standards and hold corporate boards and managers accountable. During the past 20 years share voting has gained in importance because of changes in shareholder demographics, advances in communications technology, establishment of corporate governance rules and proliferation of complicated global investment strategies and financial products. In light of these developments, we believe that share voting systems worldwide are overdue for review and updating. We are encouraged that the Commission is conducting a comprehensive review of the U.S. proxy system as a whole rather than taking a piecemeal approach.

We acknowledge that the U.S. proxy system has many positive and unique features that contribute to the country's active culture of "shareholder democracy." These features include: high quorum requirements; the legal obligation of issuers to pay the costs of shareholder meetings and share voting (including intermediary expenses and other indirect costs); detailed disclosure requirements; comprehensive distribution requirements for annual reports and proxy materials; and a dedicated rule governing the submission of shareholder resolutions. We recognize that these attributes have fostered a business culture that is generally supportive of the shareholder franchise. The result is an extraordinarily high level of participation at shareholder meetings of U.S. companies. Despite these core strengths, we agree

with the Commission that the U.S. proxy system is showing its age and is in need of a tune-up.

Issues not covered by the Release

While we strongly endorse the Commission's approach and goals, we would like to call your attention to several issues of importance to the ICGN that are not fully covered by the Release.

Global perspective. ICGN members are deeply concerned about the complexities, inefficiencies and costs associated with cross-border communications and share voting. An important goal of the ICGN is to eliminate these problems by encouraging harmonization of proxy systems in different markets where our members invest around the world. While we recognize that the Commission cannot exercise jurisdiction over systemic problems arising from conflicting rules and practices outside the United States, we believe that reform of the U.S. proxy system should support the long-term goal of global harmonization. This is particularly relevant to the development of new technology, electronic communications and share voting platforms and procedures with potential global reach. We urge the Commission to consider ways to align the U.S. proxy system with the Market Standards on General Meetings (MSGM) approved on September 9, 2010 by the Joint Working Group on General Meetings, a private sector initiative undertaken to facilitate implementation of the Shareholder Rights Directive of the European Commission (DIRECTIVE 2007/36/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007).

Dematerialization. The United States utilizes a system where equity securities are immobilized in a central depository rather than being fully dematerialized. Failure to dematerialize shares of U.S. companies will inhibit efficient use of electronic technology, encumber share transfer and voting procedures and prevent harmonization of U.S. procedures with jurisdictions where dematerialization is in effect. We urge the Commission to seek ways to require the dematerialization of U.S. equity securities. This reform by itself would go a long way toward improving transparency and eliminating many of the delays, costs and inefficiencies that are the focus of the Release.

Duties and responsibilities of institutional investors, agents and intermediaries. The ICGN was one of the first organizations to issue a Policy Statement on Institutional Shareholder Responsibilities (2007). We would like to see the Commission establish guidelines governing transparency, disclosure and share voting by institutional investors under its authority who are acting in a fiduciary capacity as well as by their agents and intermediaries. Opaqueness and lack of accountability in the complex ownership chain is one of the major sources of proxy system inefficiencies. The U.S. Department of Labor set early standards in this respect for ERISA funds through its 1988 Avon Letter, though we note that the Department indicated in June 2010 that these standards are to be reviewed for updating. To achieve this goal, it would also be helpful for the Commission to establish guidelines for identifying the beneficial owner or "ultimate investor" entitled to exercise voting rights. As mentioned below (section V.A), we support the Commission's attention to the standards and practices of proxy advisory firms, but we think a wider effort to include other agents and participants in the voting system would be appropriate.

Majority vote standard in director elections. Clause 2.9 of the ICGN's Global Corporate Governance Principles (2009) states: *"Shareholders should have a separate vote on the election of each director, with each candidate approved by a simple majority of shares voted . . . ."* We believe that the majority vote standard in

director elections is a cornerstone of good corporate governance that should be applicable to all U.S. issuers. Although this is a governance issue, rather than a matter of proxy "plumbing", we urge the Commission to explore ways to implement this critical standard at the federal level so that it is applicable to all issuers regardless of their state of incorporation. We note that the SEC's Investor Advisory Committee's Investor as Owner subcommittee recently voted unanimously in support of a similar stance.

Commentary on the Release
(For ease of reference we have adopted the numbering system used in the Release.)

III. A. Over-Voting and Under-Voting

In 2007 the ICGN membership approved the Securities Lending Code of Best Practice (available at www.icgn.org). The key principles outlined in the Code are (1) transparency in securities lending policies and practices, (2) consistency in recall procedures and decisions and (3) responsibility in linking vote decisions to economic goals. We urge the Commission to examine the provisions of the ICGN Code, many of which are directly relevant to the questions raised in the Release.

We agree that greater transparency should be required of brokers with respect to their lending policies and practices. Customers should be advised of these practices at the time the account is established and whenever shares are loaned from a customer account. Lending fees should also be disclosed to customers.

While we are uncomfortable with the allocation and reconciliation practices described in the Release, we believe that disclosure is an essential first step to eliminating the problems that result from fungibility of shares and from the inability of the U.S. clearance and settlement system to assign particular shares to individual customers. We believe that record-keeping systems can be upgraded and that the degree of accuracy achieved for dividend payments and corporate actions should be achieved for share voting as well.

Given the importance of share voting, we believe the Commission should give serious consideration to adopting a uniform vote tracking procedure that would be applicable to all brokers, banks, custodians and intermediaries. Procedural uniformity would be critical to the establishment of a credible system for the audit of votes cast by these agents on behalf of customers– an important goal of proxy system reform.

III.B. Vote confirmation

Vote confirmation is a benefit that has long been sought by both investors and issuers. The integrity of share voting results cannot be established without a rigorous system of vote confirmation supported by a transparent audit trail. We agree with the Commission's statement that "both record owners and beneficial owners should be able to confirm that the votes they cast have been timely received and accurately recorded and included in the tabulation of votes and issuers should be able to confirm that the votes they receive from securities intermediaries . . . properly reflect the votes of . . . beneficial owners."

We believe that votes could be confirmed and audited by assigning a unique identification code for the account of each beneficial owner or vote decision-maker. The code, preferably administered by a central entity such as the Depository Trust Company, would allow the vote to be confirmed along the entire chain of intermediaries without compromising the privacy of beneficial owners or their right to

preserve their anonymity. Privacy arrangements could be established through the use of numbered accounts and dedicated nominees. However, we recommend that the cost of privacy arrangements should be borne by the beneficial owners who use them or the agents who provide them, not by the members of the general shareholder population. We think these privacy costs could be minimized or eliminated by standardization of client account options at brokerage firms and banks. Instead of selecting "OBO" status, a customer would opt to create a dedicated nominee account to ensure privacy.

III.C. Institutional Securities Lenders

As indicated below (section V.B), we support the establishment of dual record dates for U.S. companies (notice record date and voting record date). We agree that disclosure of a shareholder meeting agenda on the notice record date should be sufficiently timely and detailed to enable lenders to determine whether loaned shares should be recalled for voting pursuant to their share recall policy. (See section III.A above.)

We strongly recommend regulation to ensure that voting record dates do not coincide with dividend record dates. It is clear that temporary, short-term ownership changes resulting from tax-driven dividend capture strategies have the effect of substantially reducing vote participation when a dividend record date coincides with a voting record date. Separation of these record dates by at least a week or 10 days would eliminate this conflict.

In cases where a meeting agenda must be changed subsequent to the notice record date, we recommend a minimum 10 calendar days between the revised notice and the voting record date.

We support disclosure of voting by institutional investors and custodial banks, including the actual number of shares for which proxies were voted as well as the number of shares not voted and an explanation of reasons for failure to vote or for voting differently from the investor's published voting policies. (See our discussion in section V.B, below.)

We urge the Commission to consider whether these disclosure requirements should be applicable to all financial intermediaries acting on behalf of beneficial owners.

III.D. Proxy Distribution Fees

One of the most effective features of the U.S. proxy system is the legal requirement for issuers to reimburse the costs related to shareholder meetings and share voting. This arrangement disperses costs equitably among all shareholders of a company in proportion to their ownership. We recognize the advantages of the U.S. reimbursement system and the detailed proxy rules that compel users of the proxy system to fulfil their responsibilities (a problem in jurisdictions outside the U.S. where costs are not reimbursed). At the same time, we recognize that the current fees may be excessive and overly rigid and that the reimbursement infrastructure may be inhibiting development of new, more efficient, less costly technology.

From the perspective of the ICGN and its global membership, we support the Commission's goal of reducing costs, increasing efficiency, eliminating outdated paper-based procedures and encouraging the development of electronic technology needed to ultimately promote harmonization of proxy systems globally.
We support the electronic notice and access delivery process.

We agree that issuers should have more control over the selection and payment of intermediaries and service providers.

We note that these reforms would be more easily implemented if shares were dematerialized (See discussion at section B. 2 above) and if issuers were able to identify and communicate directly with beneficial owners. (See discussion below at section C. IV. A) These changes would enable issuers to measure the actual benefits of the reimbursement costs they incur in connection with shareholder meetings and share voting.

IV.A. Issuer Communications with Shareholders

We support abolition of the NOBO/OBO system of classification for beneficial owners of securities held in broker and bank name. This complicated and costly system, created by the Commission in the early 1980s when takeover abuses were a primary focus of concern, represented a compromise intended to partially satisfy issuers' pleas for more information about beneficial owners while still preserving confidentiality demanded by brokers to protect their client lists and their customers' privacy. The flaws and burdensome consequences of the NOBO/OBO classification system are widely known and well documented in the Release. Indeed, most developed markets operate effectively without this structure. We agree that the NOBO/OBO system has outlived its usefulness now that transparency, corporate governance, share voting and improved technology for communications between issuers and shareholders have taken priority over takeover concerns.

In our view, direct communication between issuers and beneficial owners should be implemented. A number of suggestions, including proposals by the Shareholder Communications Coalition and the Business Roundtable, explain in detail how direct communication could be implemented without disrupting current arrangements for clearance, settlement and record-keeping. If direct communication were adopted, those beneficial owners who want to remain anonymous could do so by setting up dedicated nominee accounts or numbered accounts with their bank or broker, but at their own expense and subject to vote confirmation and audit procedures.

We support the suggestion to eliminate brokers, banks and intermediaries from an active role in the voting process, thereby reducing costs and increasing efficiency.

We remind the Commission that dematerialization would greatly facilitate the implementation of direct communication.

IV.B. Means to Facilitate Retail Investor Participation

The ICGN supports investor education programs sponsored by issuers, SROs, regulators and other organizations. Many of these programs utilize websites and social networking techniques to educate and inform shareholders and familiarize them with the mechanics of electronic voting. We believe these techniques are well suited to facilitate global information flow and share voting.

We strongly support the use of electronic communications to reach retail investors. Institutional investors have been using electronic communications for decades. It is the norm for information distribution, data collection, disclosure, communications and share voting at the institutional level and should also become the norm for retail investors.

We do not support "Client Directed Voting" (CDV) or "Advance Voting Instructions" in any of the restricted formats that would essentially duplicate discretionary broker voting formerly permitted under NYSE Rule 452. The ICGN supported the abolition of Rule 452 and would oppose any effort to resurrect prescriptive, standardized voting systems that "dumb down" the voting process or promote default to one-size-fits-all voting. As we have mentioned (section B.3, above and section V.A, below), ICGN principles call for customized vote review and decision-making that reflects "the specific circumstances of the case." However, we would support further development of an approach known within the industry as "open CDV" (See the comment letter of VoterMedia.Org), which would offer a flexible platform enabling individual shareholders to construct customized voting procedures that draw upon a wide range of resources, policies and research. We also support the recommendations for retail investor participation that are outlined in the comment letter of ShareOwners.Org.

IV.C. Data Tagging Proxy-Related Materials

The ICGN supports data-tagging. It represents an important tool for enabling shareholders to access information they need to analyze and compare the policies, practices and performance of portfolio companies and to make informed voting decisions. In addition, we believe that data tagging would improve accuracy and reduce errors in the analyses and reports prepared by proxy advisory firms.

V.A. Proxy Advisory Firms

The ICGN generally takes the view that proxy advisory firms can provide a useful service to our members. Many institutional investors manage large portfolios containing the equity securities of thousands of different companies from around the world. They have come to rely on proxy advisors' research, data, analyses and voting recommendations as an important tool they can utilize to implement their voting policies. The advisory firms' centralized research and voting analytics can benefit the investor community, which is charged with making informed votes, and can also benefit issuers whose proxy materials might not otherwise receive the attention they deserve.

We know of no research that confirms the views expressed by some critics that institutional investors passively accept the vote recommendations of proxy advisors or that proxy advisors exercise too much power by "controlling" a large percentage of institutional votes. In any case, if these claims were verified, responsibility would rest with the investors themselves rather than with the proxy advisory firms. The ICGN Statement of Principles on Institutional Shareholder Responsibilities, adopted in 2007 (section 4.4.iii, Voting) states that shareholders should develop and publish voting policies, vote "in a considered way" in line with their "stewardship obligation to promote value creation" and make voting decisions that reflect the "specific circumstances" of the case. It is clear these Principles do not advocate blanket delegations of voting authority or passive, one-size-fits-all voting. The ICGN is of the opinion that the investor is ultimately accountable for votes cast in the investor's name.

Despite our view that proxy advisors play a limited role and that shareholders should be responsible for their voting decisions, we agree with the Commission's concern about conflicts of interest that may arise when a proxy advisory firm provides a service to issuers or has a significant interest in an issuer. "Chinese walls" and current generalized disclosures about such conflicts are inadequate. We agree that the Commission should give careful consideration to adopting regulations that would increase the transparency of proxy advisory firms, eliminate or reduce their conflicts of interest and establish detailed disclosure requirements relating to their fees, client

relationships, conflicts and research procedures. We would welcome additional information about the Commission's proposals: (1) requiring proxy advisory firms to register as investment advisers; and (2) regulating proxy advisory firms in a manner similar to credit rating agencies (NRSROs).

We do not believe that regulatory controls or detailed rules relating to the accuracy of proxy advisory firms' research data would be effective. Guidance on proxy advisory firms' duty of care could deal with this concern.

V.B. Dual Record Dates

We support the use of dual record dates by U.S. companies. Separate "notice" and "voting" record dates, as outlined in the Release, provide a practical solution to the problems that currently arise from the long time period between the record and meeting dates. We agree that the Commission should eliminate from its rules and regulations any time requirements that would conflict with the proposed system of dual record dates.

We feel strongly that the interests of shareholders are best served by establishing a voting record date as close to the meeting date as technologically possible, thereby ensuring that voting rights are exercised by shareholders who own stock on the meeting date.

We agree that an early notice record date, traditional in U.S. practice, preserves the benefit of extra time for distribution of proxy materials and informed voting by shareholders.

We think that issuers should be required to continue distributing printed proxy materials to shareholders who purchase shares after the notice record date up to 10 calendar days before the meeting date. Shareholders who purchase shares nine or fewer calendar days before the meeting date should bear the burden of accessing the notice, agenda and related proxy materials electronically from the issuer's web site and arranging to vote either electronically, by proxy or in person. (See our discussion in section III.C, above.)

We assume that technology is currently available to conduct rapid and continuous reconciliation of share records up through the meeting date, thereby permitting an accurate voting record date to be set close to the meeting date. As noted earlier, dematerialization and elimination of the NOBO/OBO system would reduce many of the logistical problems of record-keeping, distribution of proxy materials and vote tabulation described in this section of the Release.

V.C. "Empty Voting" and Related "Decoupling" Issues

The ICGN shares the Commission's concern about the separation of voting rights from economic interest in shares through "empty voting," "decoupling," "buying votes," and certain hedging strategies and derivatives. The Release convincingly outlines the dangers to the integrity of share voting and the entire corporate governance system. We agree with the Commission's view that "significant decoupling of voting rights from economic interest could potentially undermine investor confidence in the public capital markets."

We support the Commission's recommendation that transparency should be required and that new rules should be adopted mandating disclosure of economic interest and prohibiting empty voting.

We note that adoption of rules permitting voting record dates to be set close to meeting dates would eliminate some of the conditions that currently lead to empty voting and decoupling practices.

We urge the Commission to conduct additional research on the nature and scope of the practices that give rise to empty voting and decoupling. We welcome further discourse on this topic, particularly with respect to the technical disclosure requirements that should be coordinated with supervision of investment practices.

Conclusion

The Securities and Exchange Commission's review of the U.S. proxy system offers an opportunity to find solutions to problems that have been of concern to both issuers and shareholders for more than two decades. The International Corporate Governance Network's Cross-Border Voting Practices Committee has been in existence for a decade – an indication of how long these issues have been under scrutiny by our membership.

We are encouraged by the potential regulatory responses outlined in the Release. Reforms ultimately adopted by the Commission pursuant to this Release will have impact not only in the U.S. but in the global marketplace as well. We hope that these changes will lead to a harmonized global proxy system with the following characteristics:

- prompt and full disclosure of all relevant voting information and documents by issuers, both on the internet and through the voting pipeline well in advance of a shareholder meeting;
- a seamless flow of the packet of voting rights which speeds directly to the designated party with voting control, organized by individual account rather than through opaque pooled accounts;
- prompt vote confirmation directly to the vote decision-maker from the tabulator or inspector of election;
- full transparency of the voting chain subject to independent confirmation and audit;
- clear allocation of costs to issuers and other responsible parties;
- dematerialization of equity securities globally;
- harmonized technology and processes among the primary global financial centres;
- rules and guidelines setting forth the fiduciary duties and responsibilities of investors and financial intermediaries.

The Release marks an important step towards achievement of these ambitious goals.

Respectfully submitted,

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