



JAMES P. GHIGLIERI, JR.  
*Chairman*

CYNTHIA BLANKENSHIP  
*Chairman-Elect*

R. MICHAEL MENZIES  
*Vice Chairman*

KEN F. PARSONS, SR.  
*Treasurer*

WILLIAM C. ROSACKER  
*Secretary*

TERRY J. JORDE  
*Immediate Past Chairman*

CAMDEN R. FINE  
*President and CEO*

October 2, 2007

Nancy M. Morris  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549-1090

Re: File No. S7-16-07 Regarding Shareholder Proposals and File No. S7-17-07  
Regarding Shareholder Proposals Relating to the Election of Directors

Dear Ms. Morris:

The Independent Community Bankers of America (ICBA)<sup>1</sup> appreciates the opportunity to offer comments in connection with the Securities and Exchange Commission's (SEC) proposed amendment to the Rule 14a-8 of the Securities Exchange Act of 1934 (the "Exchange Act") that would enable shareholders to include in company proxy materials their proposals for bylaw amendments regarding the procedures for nominating candidates to the board of directors (the "Shareholder Access Proposal"). ICBA is also commenting on the SEC's companion proposal to clarify the exclusion contained in Rule 14a-8(i)(8) for shareholder proposals related to the election of directors (the "Shareholder Proposal Release").

### **Summary of ICBA's Position**

ICBA opposes giving shareholders access to the company's proxy statement for director nominations or for proposals that relate to the election of directors. We believe that such access would facilitate the election of dissident and special interest directors and will

---

<sup>1</sup>*The Independent Community Bankers of America represents 5,000 community banks of all sizes and charter types throughout the United States and is dedicated exclusively to representing the interests of the community banking industry and the communities and customers we serve. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever-changing marketplace.*

*With nearly 5,000 members, representing more than 18,000 locations nationwide and employing over 268,000 Americans, ICBA members hold more than \$908 billion in assets, \$726 billion in deposits, and more than \$619 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at [www.icba.org](http://www.icba.org).*

make it more difficult for publicly held commercial banks and other companies to recruit high quality directors. We also agree with the SEC that Rule 14a-8 should not be a mechanism for conducting contested elections. We therefore oppose the Shareholder Access Proposal and support the SEC's position in the Shareholder Proposal Release regarding the exclusion of shareholder proposals from the proxy statement that relate to the election of directors.

## **Background**

Rule 14a-8 of the Exchange Act requires a company to include a shareholder proposal in its proxy materials that are distributed in connection with an annual or special shareholder meeting if the shareholder proposal meets certain procedural requirements and does not fall within one of thirteen enumerated exclusions. One of those thirteen exclusions, which is found in Rule 14a-8(i)(8), provides that a company need not include a proposal that “relates to an election for membership on the company’s board of directors or analogous governing body.”

In light of a recent decision by the U.S. Court of Appeals for the Second Circuit in *American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group, Inc.*<sup>2</sup>, the SEC is now clarifying this exclusion. In the Shareholder Proposal Release, the SEC states that a shareholder proposal may be excluded from a proxy statement under Rule 14a-8(i)(8) if it would result in an immediate election contest (e.g., by making or opposing a director nomination for a particular meeting) or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders’ director nominees in the company’s proxy materials for subsequent years. The SEC says that this clarification is fully consistent with past interpretations of the exclusion and implements the SEC’s policy of not allowing shareholders access to the proxy statement for the purpose of conducting campaigns or effecting reforms in board elections.

However, in contrast to the Shareholder Proposal Release, the SEC is proposing in its Shareholder Access Proposal a broad exception from its position that shareholder proposals dealing with board nominations are excludable from the proxy statement. Under the SEC’s Shareholder Access Proposal, a company would be required to include a bylaw proposal regarding shareholder director nomination procedures in its proxy materials if (1) the proposal was submitted by a shareholder who owned more than 5% of the company’s voting securities for at least one year, (2) the shareholder submitting the proposal was eligible to file a Schedule 13G under the Exchange Act and filed a Schedule 13G that included specified public disclosures regarding the shareholder’s background and its interactions with the company, and (3) the proposal otherwise satisfies the requirements of Rule 14a-8.

## **ICBA’s Position**

**ICBA supports the Shareholder Proposal Release but opposes the Shareholder Access Proposal. We oppose giving shareholders—even those with 5% or more of**

<sup>2</sup> 462 F. 3d 121 (2d Cir. 2006)

**the company's voting securities-- access to company proxy materials for director nominations.** We believe that such access would facilitate the election of dissident and special interest directors. Directors nominated by these special interests will be beholden to such groups and will press their short term goals and agenda at the expense of the long-term interests of a corporation. This will lead to board divisiveness and an eventual breakdown in communications among directors and between management and the board, resulting in the so-called "balkanization of the board."

We also believe that giving shareholder access to company proxy materials will increase the incidence of election contests and will likely exacerbate the difficulties publicly held banks and other companies currently face in recruiting and retaining high quality directors for their boards. The regulatory burdens and the increase in liability that have resulted from the passage of the Sarbanes Oxley Act of 2002 have already dampened the interests of many potential directors. The prospect of long and protracted proxy contests if the Shareholder Access Proposal is adopted will further discourage potential board members.

Furthermore, there appears to be no compelling evidence to support the adoption of the Shareholder Access Proposal. Proxy contests have been increasing, not decreasing, and the nominating process is more transparent today due to proxy disclosure rules that were adopted by the SEC in 2003 concerning nominating committees and the procedures for nominating directors. Shareholders already have mechanism for conducting proxy contests by filing their own proxy materials and using their separate proxy statement to solicit votes for their nominees. While this mechanism is more expensive than using the company's proxy materials, we believe these costs will go down with the SEC's new rules regarding the electronic dissemination of proxy materials. Furthermore, requiring shareholders to file and distribute their own proxy materials enhances clarity and promotes accountability. With the proliferation of hedge funds and other activist investors, we believe that a policy that encourages rather than discourages proxy contests will only make the director elections more disruptive to corporations, resulting in increased regulatory burdens for management and a substantial diversion of corporate resources.

While ICBA opposes the SEC's Shareholder Access Proposal, we support the SEC's Shareholder Proposal Release which would codify the SEC's position on excluding shareholder access to proxy statements for purposes of Rule 14a-8. We agree with the SEC that Rule 14a-8 was not intended to be a substitute, or additional, mechanism for conducting contested elections. If a shareholder wants to nominate a director and solicit proxies, then the shareholder should do so using separate proxy materials that comply with Rule 14a-3 or Rule 14a-11 and that are subject to the liability provisions of Rule 14a-9. There should not be a separate procedure under Rule 14a-8 that allows a shareholder to wage an election contest without conducting a separate proxy solicitation and without providing the disclosures required by the SEC governing such contests.

## Conclusion

For the reasons stated above, ICBA opposes giving shareholders access to the company's proxy statement for director nominations. We therefore oppose the Shareholder Access Proposal and support the SEC's codification of its past position in the Shareholder Proposal Release concerning the Rule 14a-8(i)(8) exclusion for shareholder proposals that relate to the election of directors.

ICBA appreciates the opportunity to offer comments in connection with the SEC's proposals regarding shareholder access to the company's proxy statement. If you have any questions about our letter, please do not hesitate to contact me at 202-659-8111 or [Chris.Cole@icba.org](mailto:Chris.Cole@icba.org).

Sincerely,



Christopher Cole

Regulatory Counsel