

NCANS

National Coalition Against Naked Short Selling

Thank you for the opportunity to comment on S7-10-05 - the proposal to make proxy materials available to shareholders via the Internet, thereby enhancing delivery and presumably lowering distribution costs.

This seems like a good and logical step, as the Internet is an efficient delivery system for written materials, and the efficiencies of web-based distribution over hard copy distribution are obvious. This does, however, highlight a problem in the proxy/voting system which the Commission should focus on, given that proxies and voting rights are essential to the US equities markets.

Most understand that the device used to establish the right to vote is a share of stock - an artificial construct representing a segment of equity in the issuing company, along with an associated package of rights - containing, among others, the right to vote.

In NASAA's November 30, 2005 meeting in Washington, DC, organized to discuss Naked Short Selling, and the danger that practice presents to the markets, the issue of voting/proxies came up, and was a major discussion point with the august panel of industry experts participating in that meeting. Specifically, the violation of the basic and fundamental protection of the "one share, one vote" principle was the topic of an animated exchange, which can be reviewed in the transcript of the meeting, available at NCANS.net/files/NASAAtrans.pdf - the discussion commences on page 43 of that document, between Mr. Ralph Lambiase, the CT securities regulator, and Ms. Suzanne Trimbath, an industry expert and ex-DTCC official.

That exchange highlights a fundamental flaw in the manner in which the system deals with proxies - specifically, for shares lent from margin accounts to short sellers, or lent via the NSCC's Stock Borrow Program, or Failed To Deliver (FTD) shares (for which the clearance portion of the transaction has been processed, but no shares have been delivered to the buyer), or for institutions that have lent their shares (in order to generate additional revenue).

In these instances (except the latter), the buyer/owner of the shares believes that he has beneficial ownership over his shares - say 100 shares of ABC Corp. In point of fact, once the shares are lent (or in the case of FTDs, until they are delivered), the shareholder has no voting rights - his ownership right and entitlement to the parcel of rights encapsulated in a share is absent, as he doesn't own shares. He owns "chits", or "book entries", which represent a promise to obtain shares at some undefined future date.

The issue is that the participants (brokers) represent to all customers - be they legitimate shareholders with fully paid, 100%-owned shares, or those with no ownership rights (due to lending or failed delivery) - that they have voting rights, and further have put mechanisms in place to allow all of these investors to vote, whether they are entitled to or not.

This results in two obvious, critical problems.

The first is that holders of "chits/book entries" are misled into believing that they have the right to vote - I maintain that this is fraud, as they clearly do not have that right - only owners of share do, not holders of "chits". The reason that the industry allows this fraud to be perpetuated is because it does not want to have to level with customers and

tell them that they don't have any voting rights, as they don't own shares, but rather that they own non-voting IOUs of questionable pedigree and collectability.

The naive investor who paid his money for 100 shares of ABC Corp, bought out of his margin account, is told via his brokerage statement and his Internet brokerage account that he owns the shares, and is sent his proxy for 100 shares to vote at the appropriate time - which brings us to problem number two.

Problem number two is that once he takes the time to vote his 100 shares, and sends the proxy into his broker, his votes count for nothing - or rather, they count for an indeterminate percentage of something/nothing. Different brokers have different mechanisms to perpetuate the voting rights fraud - some will net the customers 100 shares of hypothetical "no" votes against the 200 shares of legitimately-owned, genuine "yes" votes, and deliver 100 "yes" votes to the company. Others will assign a percentage of "yes" and "no" votes loosely based on their customers' wishes, and send those to the company. Still others will ignore the voting wishes, and vote however they like.

In all instances the fundamental tenet of "one share, one vote" is violated.

The harm is to the owner of genuine shares, whose vote is diluted by the non-owner's votes, and to the "chit" holder, who erroneously believes that he has voting rights. Additional harm is caused to the issuing corporation, which receives votes that don't accurately reflect the actual votes of its owners.

Imagine the case of a famous corporate raider, who is attempting to force the board of a large corporation to follow certain directions, based upon his voting position. If that raider has lent his shares to generate additional revenue (likely if invested through/in a hedge fund), he in fact has NO voting rights - the corporation is being misled as to his legitimacy as an owner, and thus the merit of his claim to direct their activity. Additionally, genuine holders of shares are being subverted by this pretender's voicing of rights he in fact does not have. This is one example of why "one share, one vote" is an essential fundamental for fair markets.

As an aside, a share's parcel of rights extends to the right to legal redress. If the shareholder in fact loses his voting rights, he doesn't own the parcel of rights constituting a share, thus doesn't have any entitlement to participate in class actions suits against the issuing company. He isn't an owner, and thus has no right to redress from the company - at best, he has a contractual dispute with his broker. This calls into question the legal standing of every plaintiff in every class action suit leveled against any company with a large short interest, or tenure on the Reg SHO Threshold list. How does the company know that the people suing it have the right to do so? Not by the brokerage statements - those are NOT evidence of ownership, as highlighted by the voting/proxy issue. This situation places virtually every class action suit in the country leveled against Reg SHO Threshold List companies in jeopardy of being without claim - any defense attorney is guilty of malpractice, in my opinion, if they do not demand definitive proof of right to redress from the lead plaintiffs in these actions, given what we now know from the NASAA meeting.

Back to voting/proxies, one could argue that the broker has no requirement to vote the shares according to the customer's wishes, given that the customer doesn't actually own shares - but that is a secondary issue. The point is that the customer believes that he owns the shares, and ownership is what is represented to him on his brokerage statement, and yet he doesn't - thus a fraud is perpetuated against the company (which isn't getting an accurate count from actual legitimate shareholders), as well as the legitimate shareholders (as their one share, one vote is diluted in an unknown, unspecified and undisclosed manner) and the defrauded "chit" holders (who have no voting rights and yet are told that they do, implicitly, by their broker).

The sanctity of the "one vote, one share" principle is violated by the intermediation of the broker in the voting process, which abrogates the shareholders right to vote and

interjects the broker as final arbitrator of how the votes are cast - a circumstance that is egregiously un-American, and violates a central cornerstone principle imperative for faith in the integrity of the US equities markets. As Mr. Lambiase pointed out in the aforementioned NASAA transcript (on page 45): "We fight wars over the concept of we want people to have one vote."

So the question is why Wall Street, and the SEC, have allowed a situation to develop where that critical and elemental principle is violated with 100% regularity, and that violation is condoned by the SEC - whose charter is supposedly to protect investors, including the sanctity of their right to vote. That it is violated as a daily aspect of the market's functioning is not in dispute - it wasn't disputed in the NASAA conference, where the SEC's Mr. Brigagliano was available for comment, and where the entire panel of experts agreed as to the manner in which it is violated.

I would propose that as the Commission considers the merits of Internet-based distribution of materials for voting in corporate matters, that it also consider that those votes aren't worth the paper they are printed on at the present time - there is no integrity to the system's processing of votes, thus any consideration of the processing and distribution of the proxies used to generate those meaningless votes, is misguided.

In closing, I would propose that the Commission faces a simple, clear challenge to investor confidence in the integrity of our equities markets: shareholder votes are being diluted to an unknown degree, by participants who were never intended to be surrogates for shareholder voting. Observation of the "one vote, one share" principle is non-existent. Investors are being defrauded by participant representations that they own the parcel of rights inherent in a genuine share, when in fact they don't. And the current netting mechanisms are nothing more than an industry-sanctioned mechanism for perpetuating this simple, easy-to-understand fraud on investors.

If the industry told investors the truth - that they paid their money but didn't receive their shares, or alternatively, that they don't own their shares (as their broker lent them out to a short seller) - then there would be widespread investor outrage. That is why the elaborate obfuscation mechanism is necessary, to create a facsimile of legitimacy, and fool investors into believing that they are receiving the right to vote, when they don't have that right.

That is an artifice to defraud, in my opinion, to trick investors into believing something is true which clearly isn't, and I would welcome anyone to challenge that simple, easy-to-understand apprehension of the situation.

One share, one vote. Simple. The current system makes a mockery of that fundamental right. I would suggest that the commission fix that, before debating the merits of paper versus pixels.

Respectfully,

Bob OBrien
www.NCANS.net