

December 19, 2003

Mr. Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
450 Fifth Street, NW  
Washington, DC 20549

Re: SEC Release No. 34-48626

Dear Mr. Katz:

On October 14, 2003, in the above-referenced release (the "Release"), the Securities and Exchange Commission (the "Commission") proposed new rules (the "Proposed Rules") which would under certain circumstances require companies to include in their proxy materials security holder nominees for election as director. Set forth below are our comments regarding the relationship between Maryland law and the Proposed Rules. In addition to our comments regarding Maryland law, we have included certain general comments with respect to the Proposed Rules.

#### I. MARYLAND COMMENTS

1. Proposed §240.14a-11(a) requires that, if either of two triggering events occurs, then: "In connection with an annual meeting of security holders . . . at which directors are elected," a registrant must "include in its proxy statement and form of proxy the name of a person or persons nominated by a security holder or group of security holders for election to the board of directors and include in its proxy statement [certain] disclosure about such nominee or nominees and the nominating security holder or holders . . ." Like every other state of which we are aware, Maryland permits holders of preferred stock to elect directors. *See, e.g.*, Maryland General Corporation Law ("MGCL") §§2-105(a)(7), 3-803(f). In this regard, it is unclear how the Proposed Rules will affect elections for director by security holders who own preferred securities entitled to elect one or more directors separately as a class upon the occurrence of an event specified in the terms of their security, *e.g.*, non-payment of a dividend.

2. It is unclear what the effect of proposed §240.14a-11(a) would be on investment companies that are incorporated in Maryland and registered under the Investment

Mr. Jonathan G. Katz  
December 19, 2003  
Page 2

Company Act of 1940 (the "1940 Act") and that have in their charters or bylaws a provision, permitted by Section 2-501(b) of the MGCL, stating that the corporation is not required to hold an annual meeting in any year in which the election of directors is not required under the 1940 Act.

3. Proposed §240.14a-11(a)(2)(i) provides that the first triggering event is the receipt, by at least one of the registrant's nominees for director for whom the registrant solicited proxies, of "withhold" votes from more than 35% of the votes cast" at the meeting (the "First Trigger"). It is unclear how the percentage of "withhold votes" will be calculated. First, as a matter of vocabulary, we assume that by "withhold" the Commission means a vote to withhold authority from the proxy holder to vote for that nominee. Thus, it is unclear how votes cast by a security holder *in person* at a meeting of security holders will be treated. Second, although Instruction 2 to §240.14a-11(a) excludes abstentions for purposes of the second triggering event (discussed below), it is unclear whether abstentions will be counted as "votes cast" for the First Trigger and, if so, as "withhold votes." Under Maryland law, an abstention is not a vote cast, *see Larkin v. Baltimore Bancorp*, 769 F. Supp. 919, 921 n.1 (D. Md), *aff'd*, 948 F.2d 1281 (4<sup>th</sup> Cir. 1991), but the New York Stock Exchange takes the position that an abstention is a vote cast for purposes of its Rule 312.07.

4. Proposed §240.14a-11(a)(3) provides that a security holder's nominee will not be required to be included on the registrant's proxy card in four situations, the first of which is that the nominee's candidacy or service would violate "controlling state law or federal law or rules of a national securities exchange . . ." These exceptions to the direct access proposal do not clearly address the question of qualifications for election as a director, as specifically authorized by Section 2-403 of the MGCL, which requires each director "to have the qualifications required by the charter or bylaws of the corporation." This same issue also appears in proposed §240.14a-11(c)(1). Statutes authorizing director qualifications in the charter or bylaws are common in other states. *See, e.g.*, Delaware General Corporation Law ("DGCL") §141(b); Model Business Corporation Act ("MBCA") §8.02. We urge that the long-standing power of corporations under state law to establish qualifications for election and service as a director should remain unimpaired by the Proposed Rules. In addition, we urge that if the Proposed Rules are adopted, a requirement should be added to proposed §240.14a-11(c) that the nominating security holder's notice must include representations by the nominating security holder and by the nominee that the nominee meets any applicable qualifications for election and service as a director contained in the registrant's charter or bylaws.

Mr. Jonathan G. Katz  
December 19, 2003  
Page 3

Related to the question of individual director qualifications discussed in the prior paragraph is the question of aggregate qualifications, *e.g.*, a requirement in the charter or bylaws that a majority of the board be United States citizens. It is unclear under the Proposed Rules whether the registrant may exclude a nominee whose election would cause the registrant to violate any aggregate qualification requirement for the composition of its board of directors.

5. It is unclear how the Proposed Rules would affect advance notice requirements for stockholder proposals of nominees for director of the type specifically authorized by Section 2-504(e) of the MGCL. Advance notice provisions in bylaws generally include both a minimum and maximum prior time for proposal of a nominee and are very common among publicly held companies incorporated in Maryland, Delaware and elsewhere. *See, e.g., Nomad Acquisition Corp. v. Damon Corp.*, CA No. 10173 (Del. Ch. Sept. 16, 1988), *revised*, Sept. 20, 1988; *Hubbard v. Hollywood Park Realty Enters., Inc.*, CA No. 11779 (Del. Ch. Jan. 14, 1991); *International Bank Note Co. v. Muller*, 713 F. Supp. 612 (S.D.N.Y. 1989). These provisions often require submission of certain information concerning the nominee and the proponent.

In particular, it is unclear how proposed §240.14a-11(c), which would permit a security holder to provide notice to the registrant of its intent to require that the registrant include that security holder's nominee on the registrant's proxy card up to the 80<sup>th</sup> day before the first anniversary of the date that the registrant mailed its proxy materials for the prior year's annual meeting, would affect advance notice provisions that contain a different deadline for proposal of a nominee. Because Section 2-504(e) of the MGCL specifically authorizes the charter or bylaws of a Maryland corporation to provide for minimum advance notice of up to 90 days, which may run from the anniversary of the prior year's meeting, the anniversary of the mailing of notice for the prior year's meeting or another time specified in the charter or bylaws, many publicly held, Maryland-chartered companies have adopted bylaws that require shareholders to provide notice of director nominations no later than 90 days prior to the first anniversary of the mailing date of the notice for the prior year's annual meeting. These companies have determined that 90 days is typically necessary to evaluate proposals, draft a proxy statement and submit it to the Commission, receive and respond to comments and mail the notice and proxy statements.

6. The Commission has requested comment on a possible third trigger, based on non-implementation by the registrant of a security holder proposal (other than a direct access proposal) that receives support from a majority of the votes cast (the "Third Trigger").

Mr. Jonathan G. Katz  
December 19, 2003  
Page 4

First, it is inaccurate to say, as the Commission does in II. A, 3b of the Release, that non-implementation of a shareholder proposal approved by a majority of votes cast “is an indication of ineffectiveness in, or dissatisfaction with, the proxy process.” There is simply no logical nexus between the two. This is especially true given the fact, as noted below, that there are many reasons why a board of directors may decide in the proper exercise of its business judgment not to implement a proposal.

Second, the Third Trigger is inconsistent with long-standing state law, in Maryland, Delaware and elsewhere, on the power and duties of the board of directors.

Section 2-401(a) of the MGCL provides that “[t]he business and affairs of a [Maryland] corporation shall be managed under the direction of a board of directors.” *See also* DGCL §141(a); MBCA §8.01(a). Section 2-401(b) confers on the board “[a]ll powers of the corporation . . . except as conferred on or reserved to the stockholders by law . . . .” In discharging their duties, Section 2-405.1(a) of the MGCL requires the director of a Maryland corporation to act “[i]n good faith,” “[i]n a manner he [or she] reasonably believes to be in the best interests of the corporation,” and “[w]ith the care that an ordinarily prudent person in a like position would use under similar circumstances.”

The United States District Court for the District of Maryland, in a case involving a Maryland corporation, has held that there is no duty under Maryland law requiring a board to follow the wishes of holders of a majority of the shares. *See Martin Marietta Corp. v. Bendix Corp.*, 549 F. Supp. 623, 633 n.5 (D. Md. 1982), *quoted in Mountin Manor Realty, Inc. v. Buccheri*, 55 Md. App. 185, 197-98, 461 A.2d 45, 52-53 (1983). The court there rejected the contention that an earlier Maryland case, *Cummings v. United Artists Theatre Circuit, Inc.*, 237 Md. 1, 204 A.2d 795 (1964), prohibits the board of directors of a Maryland corporation from taking actions that it knows are disapproved by a majority of the stockholders. *Martin Marietta*, 549 F. Supp. at 633 n.5. Instead, the court held that “there is no reason to believe that a Maryland corporation’s directors, even [when] faced with a request from a majority shareholder, must always accede to that request.” *Id.* Moreover, the Court of Appeals of Maryland, our highest state court, has held: “As a general rule, the stockholders cannot act in relation to the ordinary business of the corporation, nor can they control the directors in the exercise of the judgment vested in them by virtue of their office.” *Warren v. Fitzgerald*, 189 Md. 476, 489, 56 A.2d 827, 833 (1948) (*quoting People ex rel. Manice v. Powell*, 201 N.Y. 194, 201, 94 N.E. 634, 637 (1911)). Even earlier, the Court of Appeals held that a resolution purporting to express “the will of the members” is not binding on the directors. *Mutual Fire Ins. Co. v. Farquhar*, 86 Md. 668, 674-75, 39 A. 527, 529 (1898). *See also* James J. Hanks, Jr., MARYLAND CORPORATION LAW §§ 6.1a and 7.1 (Aspen Publishers Supp. 2003).

Mr. Jonathan G. Katz  
December 19, 2003  
Page 5

We believe that these cases necessarily follow from Section 2-401(a)'s delegation of power to the board to oversee the management of the corporation's business and affairs. The law in Delaware is the same. In *Paramount Communications, Inc. v. Time Inc.*, C.A. Nos. 10866, 10670 and 10935, 1989 WL 79880, at \*30 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140, 1154 (Del. 1989), the Delaware Chancery Court held that: "The corporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to follow the wishes of a majority of shares." Moreover, the general rule in Delaware is that corporate directors do not owe duties to any particular group or constituency of shareholders. See *Phillips v. Insituform of North America, Inc.*, C.A. No. 9173 (Del. Ch. Aug. 27, 1987); *American International Rent A Car, Inc. v. Cross*, C.A. No. 7583 (Del. Ch. May 9, 1984); *State ex rel. Farber v. Seiberling Rubber Co.*, 168 A.2d 310 (Del. Super. Ct. 1961).

Thus, in both Maryland and Delaware, the board has no obligation to implement a shareholder-approved precatory resolution. Indeed, the well developed law in this area recognizes that, in the case of almost every shareholder proposal, even those approved by substantial margins, there is a wide range of reasons why the board, in the good-faith exercise of its business judgment, might choose not to implement the proposal. This being the case, we believe that it is inappropriate for direct access to the registrant's proxy process to turn on whether the board of directors has failed to implement a shareholder-approved proposal.

In addition to the foregoing considerations, there are, as the Commission recognizes in the Release, *see* II, A, 3b, significant issues concerning what would constitute "implementation" of the proposal within the specified time. The Commission's continuing resolution of these issues, on a company-by-company basis, would inevitably draw the Commission deeply into the internal deliberations of boards of directors and the business operations of registrants.\* These difficulties would not be lessened by the fact that many shareholder proposals are advanced by groups or individuals seeking a forum for publicizing particular social or political causes.

## II. GENERAL COMMENTS

We generally do not think that the Proposed Rules are necessary or helpful. In particular, we note that, while a shareholder proposing a nominee for election as director has very few, if any, duties to the corporation or the other shareholders, a board of directors or

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\* We note that it appears that the words "the first anniversary of" should be added after the words "the 120<sup>th</sup> day prior to" in the third bullet in II, A, 3b of the Release.

Mr. Jonathan G. Katz  
December 19, 2003  
Page 6

nominating committee must satisfy various state law and an increasing number of federal law requirements in connection with its determination of individuals to recommend for election as director in the corporation's proxy materials. In this regard, it seems inappropriate for shareholder nominees to be included in the same proxy materials as the registrant's nominees, whose nominations will have been subject to much greater scrutiny in accordance with state and federal law than any nomination submitted by a security holder or group of security holders.

Nevertheless, if the Commission does adopt the Proposed Rules, it should take account of the following issues:

1. It is unclear how the Proposed Rules "improve disclosure to security holders to enhance their ability to participate meaningfully in the proxy process for the nomination and election of directors." *See* Release, Summary. These rules are not disclosure rules but, rather, substantive regulation of the type customarily found in state corporation statutes. Moreover, while there is probably no question about Congress' power to legislate in this area, there may be substantial question about the power of the Commission to adopt the Proposed Rules under existing federal securities statutes. We are not aware of any situation in which the Commission has prescribed a vote requirement for the taking of any action by a registrant's shareholders.

2. The First Trigger is inappropriate because:

(a) There are many reasons why shareholders may withhold authority from the proxy holder to vote for a particular nominee that are unrelated to whether management has been, in the words of the Summary of the Proposed Rules, "unresponsive to security holder concerns as they relate to the proxy process"; and

(b) The First Trigger will inevitably encourage short-term security holders to campaign to withhold authority against a single nominee, regardless of his or her qualifications, as a means of accessing the registrant's proxy materials that is faster and easier than pursuing either (i) the second trigger, which would require a vote of 50% of the votes cast on a proposal that the registrant become subject to §240.14a-11 submitted pursuant to §240.14a-8 by a holder or a group of holders of more than one percent of the securities entitled to vote on the proposal (the "Second Trigger"), or (ii) the possible Third Trigger.

3. In proposed §240.14a-11(a)(2)(i), the computation of "votes cast" is unclear. In an election for directors where there is more than one directorship up for election,

Mr. Jonathan G. Katz  
December 19, 2003  
Page 7

the maximum number of votes that may be cast (assuming one vote per share) is typically the number of shares entitled to be voted in the election of directors multiplied by the number of directors to be elected. Thus, in an election with 100 shares outstanding, each entitled to one vote in the election of directors, and five directorships to be filled, there may be as many as 500 votes cast. Thus, under a "plain meaning interpretation" of "votes cast," it would be very unlikely that the 35% requirement could be met under the First Trigger.

4. In view of the direct access proposal's significant intrusion into the governance of registrants, we believe that a higher vote than a mere majority of votes cast is appropriate. We believe that the vote required under applicable state law and the registrant's charter for amendment of the charter (other than amendments for which stockholder approval is not required) - typically, a majority or higher percentage of votes entitled to be cast on the matter - is appropriate for adoption of such a fundamental change as direct access. Such a vote requirement would be an appropriate deference to state corporation law in keeping with long-standing federal securities legislation and regulation.

5. In connection with the one percent requirement of proposed §240.14a-11(a)(2)(ii) and the five percent requirement of proposed §240.14a-11(b)(1) and (2), the registrant should be permitted to require more effective verification of securities ownership than the means of verification permitted for compliance with existing Rule 14a-8, which is typically a recent brokerage account statement. *See* §240.14a-8(b)(2)(i). The Proposed Rules represent a far deeper invasion of the governance of registrants than shareholder proposals under existing Rule 14a-8 and, thus, more reliable verification of requisite levels of securities ownership is appropriate.

6. The First Trigger should not apply if, before the deadline for submission of nominees under proposed §240.14a-11(c), (a) the nominee receiving 35% votes withheld resigns or otherwise ceases to be a director or (b) the registrant announces that the nominee will not be a nominee of the registrant at the next meeting of security holders at which the nominee's term as a director would end.

7. In proposed §240.14a-11(c), it appears that words such as "the first anniversary of" should be inserted after the words "80 days before". It appears that the same words should be added in existing Rule 14a-4(c)(1), 8(e)(2).

8. In connection with, *inter alia*, proposed §240.14a-11(a) and proposed §240.14a-101 - Schedule A, Item 7(i), it is unclear what constitutes "a statement supporting the registrant's nominee(s) and/or opposing the security holder nominee or nominees . . . ."

Mr. Jonathan G. Katz  
December 19, 2003  
Page 8

Likewise, for purposes of Instruction 4 to proposed § 240.14a-11(a), it is unclear what is “disclosure supporting the registrant’s nominees . . . .” Under these provisions, it appears that, for example, typical biographical information about the registrant’s nominees (including information required by the existing Proxy Rules) or the equally typical recommendation by the board to vote for the registrant’s nominees would constitute such a statement or disclosure.

We appreciate the opportunity to provide you with comments on the Proposed Rules and are available to discuss any questions that you may have with respect to our comments.

Very truly yours,

Venable LLP

By:

  
James J. Hanks, Jr., Partner

cc: Hon. William H. Donaldson, Chairman  
Hon. Cynthia A. Glassman, Commissioner  
Hon. Harvey J. Goldschmid, Commissioner  
Hon. Paul S. Atkins, Commissioner  
Hon. Roel C. Campos, Commissioner