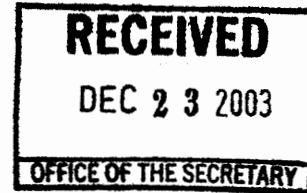


482

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Douglas J. McCarron
General President



December 22, 2003

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: File No. S7-19-03

Dear Secretary Katz:

The United Brotherhood of Carpenters and Joiners of America ("UBC") commends the U.S. Securities and Exchange Commission ("SEC") for again initiating a review of the corporate director nomination and election processes in its proposed rule release captioned "Security Holder Director Nominations" [Release Nos. 34-48626; IC -26206: File No. S7-19-03]. UBC pension funds ("UBC Funds") that represent the retirement security of over 600,000 working men and women and their families have been leading shareholder activists for nearly two decades, protecting and strengthening the health of our members' retirement funds through the advocacy of sound corporate governance principles¹. As a leading shareowner activist, we comment in opposition to the proposed director nomination proxy access right. Despite the apparent attractiveness of the suggested access right, we urge the Commission to pursue alternative reforms that will stimulate more broad-based and productive shareowner participation in corporate governance processes generally. The proposed access right is the wrong answer to legitimate shareholder concerns about corporate unresponsiveness to expressions of shareholder will.

In a June 13, 2003 comment submission to the Commission, the UBC urged the Commission to pursue broad nomination and election reforms, including a new limited proxy access right for shareholders to advance board candidates. The goal of any proxy

¹ Georgeson Study: "Annual Corporate Governance Review – Shareholder Proposals and Proxy Contests 2003," – Georgeson Shareholder Division. Study indicates that UBC pension funds were the most active shareholder proposal proponents with the largest number of voted proposals. UBC and allied fund option expensing proposals received majority votes at 26 companies.

access right should be to provide a tool for shareholders to “address long-term performance problems” being experienced by a company. In our submission, we stated:

Companies that over a three to five year period have failed to meet peer group performance levels as judged by a variety of operational metrics should be challenged to rethink their basic corporate strategy and enhance the capabilities of their board and management team. The proxy access right should be designed to promote shareholder-director/manager dialogue on important issues of corporate strategy and performance. The deliberative nature of the access right should provide ample opportunity for shareholders and director/managers acting in good faith to seek a meeting of the minds on areas of contention. The proxy access right should be designed to stimulate shareholders to take a more active role in corporate performance monitoring. Only those shareholders willing to roll up their sleeves and invest time and energy in working for corporate change should be assisted by the access right.

Ownership activism is evolving and it is in the interest of the country, the economy, corporations, shareowners, and other important corporate constituents that new avenues for responsible activism continue to develop. Shareholder access to the proxy to run limited slates of director nominees is not the logical next step in the evolution of shareholder rights. The proposed access right may in fact inhibit responsible shareholder activism that requires diligence, consistency, a long-term ownership perspective, and clear attention to the activism goal of enhancing corporate value through responsible corporate behavior.

Our opposition to the proposed proxy access right is informed by two decades of ownership activism, and a serious concern that the access right, even if structured for long-term holders, will serve to reinforce the short-term investment and management perspectives so common today. UBC and allied pension funds have been leading opponents of management entrenchment, while challenging the premise that management accountability is attained only through the promotion of an active market for corporate control. An access right built on “non-implementation” and “withhold” vote triggers will only promote the pursuit of short-term stock price goals. For example, the overwhelming number of recent majority votes have been in favor of proposals that have requested the declassification of boards of directors or the redemption of “poison pills” plans². The prominence of these proposals suggests shareholder activism that has often been reflexive and simplistic, too often offering formulaic governance proposals that fail to address the root causes of corporate performance shortcomings.

Indeed, the UBC and its funds have been longstanding critics of the corporate nomination and election process and strong advocates for reform. On December 16, 1986, the UBC commented in a SEC hearing on the issue of one-share one-vote:

²The major exception to this is the 26 majority votes recorded in 2003 in favor of option expensing proposals submitted by UBC and allied funds. As we discuss below, there are better means of addressing problems related to company actions in response to majority votes.

So-called “shareholder democracy” has become a euphemism for a proxy voting system that is as democratic as Soviet-style “elections” -- the voters receive a “ballot” listing only one slate of candidates... The Commission’s prescription should include an increased dose of accountability accomplished by revitalizing the moribund mechanisms of corporate democracy. Making the corporate governance system truly accountable requires steps beyond preserving the democratic minimum of equal voting rights. Shareholders should have an equal ability to nominate directors and all eligible candidates should have equal access to the proxy statement to present their statement of candidacy. Without input and influence in the process of corporate governance and business decision-making, even the largest shareholders inevitably treat corporations as commodities instead of as social systems.

Although we continue to see serious deficiencies in the proxy voting system, we believe that the proposed rule will promote activism that advances this simplistic, short-term activism perspective to the ultimate detriment of the corporation and its committed long-term shareholders.

The Commission has on several occasions over a broad span of years addressed the issue of shareholder access to the company proxy statement to advance non-management supported board candidates, but decided on alternative reforms. We urge the Commission to once again pursue alternative reforms that will more effectively promote the Commission’s goals and the goals of Section 14 of the Commission’s rules to “help facilitate the full and informed exercise of existing security holder nomination and voting rights through the proxy process...” The logical next step is to provide enhanced disclosure that will arm interested and committed long-term shareholders with information that will enable informed shareholder monitoring of corporations and encourage new broad-based, albeit less formal, participation in the director nomination and election processes.

Unlike many who oppose the proposed access right, we do not recommend a wait and see approach as new statutory and regulatory governance prescriptions are implemented. More needs to be done now. We suggest a series of new mandated corporate disclosure requirements and related reforms discussed below as an alternative to the proposed proxy access. It is our belief that appropriate reforms would help spur widespread activism by a broad universe of shareholders that would be focused on governance systems, corporate financial performance, and responsible corporate behavior. We recommend new disclosure requirements, outlined below, that relate to board nomination and election processes, as well as other aspects of corporate board operations.

Build on Commission’s recent Nominating Committee Disclosure Rulemaking

The Commission’s recent nominating committee rulemaking (Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and

Boards of Directors) is a very solid development. New disclosure requirements will ensure that shareholders will regularly receive information on the director nomination process, shareholder director nomination rights and processes, director minimum qualifications, the role of third parties in the nomination process, and the identification of shareholder candidate sponsors and shareholder candidates under certain circumstances. We recommend that the requirement to provide the identification of the candidate and the security holder or security holder group that recommended the candidate and related disclosure concerning the processing of that candidate should apply to circumstances when the sponsoring shareholder or group holds 1% of the company's voting stock, not 5% as prescribed by the rulemaking.

As one of the arguments raised against a proxy access right is the failure of shareholders to avail themselves of current nomination rights, shareholders are challenged to use this information and their organizational skills to regularly avail themselves of their rights in corporate nominating processes. In conjunction with our advocacy for a shareholder proposal calling for the creation of a proxy access right in 1999, most company representatives indicated that a shareholder-sponsored director nominee with the support of a shareholder or shareholders with a significant ownership position, such as a 2%-5% ownership in the company, would receive strong consideration for management support. Most assured that, at a minimum, such a candidacy would facilitate a communication process including high-level corporate officials focused on the issues prompting the candidacy. Systematic non-responsive corporate reactions to compelling shareholder-supported board candidates would lay the groundwork for formal proxy access reform. Conversely, positive responses by corporations will enable shareholder-sponsored candidates to join corporate boards to promote positive strategic change.

Enhanced Director Election Vote Threshold Disclosure

In addition to these disclosure requirements, there should be enhanced disclosure regarding the vote required for the election of directors. At present, companies are required to provide information regarding the level of vote necessary to pass any matter coming before the meeting. But often, disclosure regarding the necessary vote to be elected director is incomplete. Companies should be required to describe in detail the standard for a nominee to be elected director, whatever vote standard is utilized. Companies should explain whether the director election vote standard used is required or simply permitted by the law of the state of incorporation and what provisions of the company's articles or by-laws establish the vote standard.

We believe special disclosure is necessary when a company utilizes the plurality vote standard and only management-sponsored candidates are standing for election. For instance, the disclosure could be required to note that in an uncontested election, directors can be elected or re-elected with as little as a single vote. Also, it should be clearly stated that no level of "withhold" votes would have any consequence if the candidate receives a single vote. The Commission could develop standard disclosure language for each of the varying director election vote threshold standards.

Additionally, a straightforward new disclosure requirement related to director elections would be to require proxy statement publication of the level of “withhold” votes received by each director in the previous year’s election. Further, those directors that receive a “withhold” vote of greater than 20% for instance would be required to include a statement in the proxy statement addressing the withhold vote. This director statement disclosure requirement would apply to a director even if he or she were not standing for re-election in the year following a qualifying “withhold” vote due to a classified board structure. In short, directors that generate significant “withhold” votes would be required to begin to defend their candidacies and their board positions.

We agree that large “withhold” votes indicate shareholder dissatisfaction and should have meaningful consequences. Rather than triggering a limited shareholder proxy access right, we believe that directors who receive less than a majority of votes cast by shareholders should suffer some consequence. UBC Funds have begun a shareholder advocacy effort to urge companies to raise the threshold vote required for the election of directors. Corporations in Delaware and most other states can implement higher vote thresholds above the minimum requirements of a plurality vote. The disclosures suggested above would provide important information that would enhance shareholder activism designed to impose accountability in corporate elections.

Others have suggested programs designed to provide meaningful consequences to high levels of “withhold” votes. Former SEC Commissioner Joseph A. Grundfest has advanced an “advice and consent” process as an alternative mechanism for shareholder participation in the nomination and election process that envisions imposing “material disabilities” on directors that receive a majority of “withhold” votes³. The Commission could address additional disclosure requirements in such circumstances as well as address appropriate “material disabilities” a director might suffer. Likewise, shareholders, through varied advocacy processes, could be very instrumental in constructing these “material disabilities,” such as exclusions from participation on board committees, in the effort to enhance director accountability.

Disclosure of Board and Corporate Actions on Majority Vote Shareholder Proposals

The Commission’s rulemaking asks for comment on whether to include a third nomination procedure triggering event premised on a company not implementing a security holder proposal submitted in accordance with Exchange Act Rule 14a-8. As with the other triggering events, the “non-implementation” trigger is presented as possible evidence of the ineffectiveness of, or security holder dissatisfaction with, a particular company’s proxy process. We do not believe that non-implementation of precatory proposals should trigger an access right. It is our belief that more than any other factor, the failure of companies to implement the increasing number of majority-vote precatory proposals is at the root of the call for a proxy access right. Security holder anger and frustration has been created by companies that refuse to act on majority vote

³ “Advice and Consent: An Alternative Mechanism for Shareholder Participation in the Nomination and Election of Corporate Directors,” 2003, Joseph A. Grundfest, Stanford Law School.

shareholder proposals or even to provide security holders with a board's rationale for not implementing the actions called for by the proposal. A board may have legitimate reasons for not taking the action called for by a majority vote of the security holders, but the board has an obligation to security holders to explain its actions or failure to act. The failure of corporations to implement majority vote proposals has heightened tensions between investors and boards and has fueled the call for proxy access and enhanced board accountability. Clear disclosure by a board of its responsive actions or inaction in response to a majority shareholder proposal vote would be a constructive step in ensuring a greater level of management accountability and fostering better security holder understanding of a board's position on an important governance issue.

A company should be required to report to security holders what actions, if any, the board of directors has taken with regards to any shareholder proposal that received a majority shareholder vote at the corporation's annual meeting. The disclosure should include a description of the proposal issue and the specific actions, if any, that the board has taken or will take regarding implementation of the proposal. Board meetings at which the majority vote proposal is considered or is scheduled for action should be described and the board's reasons for its decision whether or not to implement the proposal should be outlined. This information should be included in the form 10-Q quarterly report issued following the annual meeting at which the majority vote was recorded. Subsequent 10-Q and proxy statement disclosure should also be required.

Reporting on Director Duties & Responsibilities

In addition to the disclosure proposed in the rulemaking, there should be required proxy statement disclosure by the board of those board duties that investors generally consider to be of paramount importance. Director involvement in corporate strategy development and succession planning are two important board duties that are universally cited by business, academic and investor studies of corporate boards. Despite the importance of these board duties to the overall success of the corporation, they receive little or no mention in proxy materials.

Current proxy disclosure requirements provide security holders a range of useful information on important duties performed by the board of directors in the area of executive compensation and the retention and supervision of a company's independent audit firm. The Commission's new nominating committee disclosure rules will now provide more information about nominating committee activities. But little or no disclosure is required on the critically important board roles in the setting and monitoring of corporate strategy and succession planning for senior executives. Proxy material disclosure on these important board duties would help address investor concerns that have prompted the call for an enhanced role in director elections. Just as directors monitor management, security holders have the right and duty to monitor directors. In addition to detailed information concerning the process for nominating directors, security holders also need information about the directors' substantive performance. Most importantly, security holders would be better able to effectively monitor corporate and

board performance in these crucial areas. Disclosure on these matters would serve to both elevate and temper the discourse between investors and corporate boards.

In order to provide security holders important information on these vitally important board roles, proxy material disclosure should include the following: (1) A statement of the important board duties identified by the board of directors; (2) A description of the board's role in the development and monitoring of the company's long-term strategic plan, including: (a) A description of the Company's corporate strategy development process and related timelines; (b) An outline of the specific tasks performed by the Board in the strategy development and the compliance monitoring processes, and (c) A description of the mechanisms in place to ensure director access to pertinent information for informed director participation in the strategy development and monitoring processes; and (3) A description of the processes and actions taken by the board or its committees concerning the issue of chief executive officer succession planning; and the identification of any third parties utilized by the board or its committees in performing its strategic planning and succession planning roles.

Again, we would like to thank the Commission for providing us an opportunity to comment on the important issues raised in the Commission's proposed rulemaking. While we do not support the creation of a formal proxy access right at this point in time, we support continued reform efforts designed to enhance the activities of long-term shareholders interested in exercising their ownership rights and responsibilities. We urge the Commission to consider the formation of an advisory committee of shareholders and other governance experts to continue to explore means of enhancing the operations of corporate nomination and election processes.

Sincerely,

A handwritten signature in cursive script that reads "Ed Durkin".

Edward J. Durkin
Director, Corporate Affairs Department
United Brotherhood of Carpenters