

August 17, 2004

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Mr. Alan L. Beller, Director
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

57-19-03

Dear Mr. Beller:

Over the past few months, I have followed the SEC's consideration of giving shareholders the ability to have director nominees included on the proxy ballots of public companies. Last October, the SEC proposed a nomination-procedure trigger related to the level of withheld director votes. In amending the proposal or adopting such a rule, I urge you to focus not only on specific thresholds and the consequences of such thresholds, but also on the definition of what constitutes a withheld vote.

In particular, withheld votes include what are known as "broker votes". Unbeknownst to many investors, state and federal securities laws and the rules of the securities exchanges classify management proposals that are included on proxy ballots as either "routine" or "nonroutine." If proposals are classified as routine, then brokers may vote shares held in "street name" if investors fail to vote their shares within 10 days of the annual meeting. Brokers vote these shares almost always in favor of management. Routine matters include the ratification of external audit firms and the election of corporate directors. If, however, proposals are classified as nonroutine, brokers cannot vote street name shares and firms report "broker nonvotes." Nonroutine issues include major corporate events, such as mergers and acquisitions, significant asset sales, shareholder proposals, and, with recent rule changes, most stock option plans.

Permitting or prohibiting broker votes from being counted as withheld shares could affect shareholders' potential for increased access to corporate ballots. In a recent study of S&P 1,500 firms that had annual meetings during the 1998 proxy season,¹ Stuart Gillan and I found some interesting results. First, brokers are responsible, on average, for voting 13 percent of shares on routine management issues, and in some cases as much as 30 or 40 percent. In a number of instances, our findings suggest that broker votes may have been pivotal in voting outcomes—that is, the broker vote swung a proposal's passage in management's favor. Our results suggest that allowing broker votes to be counted as

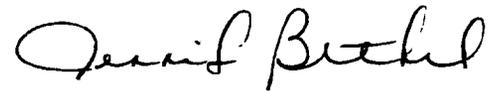
¹ Please see Jennifer Bethel and Stuart Gillan, "The Impact of the Institutional and Regulatory Environment on Shareholder Voting," *Financial Management*, Volume 31, Number 4, Winter 2002, p. 29-54.

withheld shares would be at best arbitrary, and would at worst potentially undermine the purpose of a new rule.

More recently, the potential impact of broker votes was highlighted by Michael Eisner's reelection to Disney's board of directors. At its last annual meeting, only 992 million or 48 percent of the 2.046 million total eligible votes were cast in favor of re-electing Eisner to the board. Of these affirmative votes, we estimate that brokers cast approximately 300 million or one-third on behalf of shareholders that failed to vote (based on the reported broker nonvotes for nonroutine proposals on Disney's ballot).² Excluding shares voted by brokers, less than 34 percent of all eligible votes at Disney were cast by shareholders in favor of Eisner! Depending on the threshold, prohibiting or permitting broker votes to be counted as withheld votes could make a difference in whether shareholders have access to corporate ballots.

I appreciate the opportunity to comment on what I believe to be an important issue. If you have questions about this letter or copies of the enclosed articles, please feel free to contact me directly.

Sincerely,



Jennifer Bethel

encl Jennifer Bethel and Stuart Gillan, "The Impact of the Institutional and Regulatory Environment on Shareholder Voting," *Financial Management*, Volume 31, Number 4, Winter 2002, p. 29-54.

Jennifer Bethel and Stuart Gillan, "Corporate Voting's Dimpled Chad? The Broker Vote and Beyond," *IRRC Corporate Governance Bulletin*, March-May 2004, p. 10-12.

cc Chairman William H. Donaldson
Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Harvey J. Goldschmid
Dr. Chester Spatt

² Please see Jennifer Bethel and Stuart Gillan, "Corporate Voting's Dimpled Chad? The Broker Vote and Beyond," *IRRC Corporate Governance Bulletin*, March-May 2004, p. 10-12.