

The following document is offered to PBI faculty as a sample of good written materials.

We are proud of the reputation of our “yellow books.” They are often the starting point in tackling a novel issue.

From 18th Annual Business Lawyers’ Institute

PBI Course #7506

Published November 2012

Copyright 2012 PBI and the author. All rights reserved.

Chapter C

Hot Topics in Corporate Governance

William H. Clark, Jr., Esq.
F. Douglas Raymond, Esq.
Drinker Biddle & Reath LLP
Philadelphia

SAMPLE

SAMPLE

Table of Contents

Chapter C:

Hot Topics in Corporate Governances

William H. Clark, Jr., Esq. and F. Douglas Raymond, Esq.

Topic 1: Shareholders Proposals	C-5
Topic 2: Proxy Access	7
Topic 3: Independence Rules for Compensation Committees	9
Topic 4: Broker Non-Voters	9
Topic 5: 2012 ISS Changes in Policy Updates	10
Topic 6: Activist Investing Impact	10
Topic 7: <i>Seinfeld v. Slager</i>	11
Annex A — Topic 1: Shareholder Proposals (Special Meetings Called by Shareholders)	13
Annex B — Topic 1: Shareholder Proposals (Political Spending)	14
Annex C — Topic 2: Proxy Access (Proposals under Rule 14a-8)	19
Annex D — Topic 4: Broker Non-Votes	61

SAMPLE

HOT TOPICS IN CORPORATE GOVERNANCE

William H. Clark, Jr.
F. Douglas Raymond
Drinker Biddle & Reath LLP
One Logan Square
Philadelphia, PA 19103
(215) 988-2700

Topic 1: Shareholder Proposals

A. Independent Chair

1. Some shareholders believe that having the CEO or another member of management serve as the chairperson of the board undermines its independence. Proposals that the roles be separated had been popular at bigger companies for many years. Recently, such proposals were on the wane, as the issue was largely addressed by the development of lead independent directors. ISS policies and exchange rules reflected this consensus. See, e.g., 2011 ISS U.S. Proxy Voting Guidelines Summary at 19 (recommending a vote for independent chair proposals except if the board has, among other things, a designated lead independent director).
2. 2012, however, saw a resurgence of independent chair proposals (38 among the S&P 500, 50% higher than 2011), led by an effort of activist investors. While the proposals received significant support from shareholders (average favorable vote of 35% in 2012), they rarely passed.
3. Nevertheless, more attention is being devoted to these proposals. For example, while ISS had equated companies' appointing an independent lead director who could consult and review board materials with appointing one who actually approved such materials, ISS has now reversed that policy. Further, ISS favors independent chair proposals for companies with problematic governance issues or poor shareholder return (bottom half of GICS industry group). 2012 ISS U.S. Proxy Voting Guidelines Summary at 20.

B. Special Meetings Called by Shareholders

1. A majority of S&P 500 companies currently allow shareholders to call special meetings, mostly due to shareholder proposals for such rights. Shareholder proposals generally require 10% ownership for the right to call a special meeting. Management, however, may exclude such shareholder proposals if it puts forth its own proposal. For this reason, the current state of shareholders' rights to call special meetings largely reflects management proposals. Not surprisingly, these proposals have a higher threshold: the most common threshold is around 25%. ISS recommends a

threshold of 15% or lower, and shareholder proposals to lower the threshold can, and do, continue to occur after companies adopt proposals with higher thresholds.

2. The details involved in shareholders' rights to call special meetings continue to progress. Many companies define ownership as record ownership rather than beneficial, which introduces another administrative obstacle for shareholders who own equity through securities intermediaries. Some have blackout periods on both sides of the annual meeting to prevent duplicative meetings. There may also be requirements set as to how long the owner must have held the required number of shares. See Annex A for examples.

C. Political Spending

1. Before *Citizens United*¹, there were around 20 shareholder proposals a year related to the political spending of a company. After the case was decided and protected corporate contributions to advertisements supporting certain federal candidates or political parties, there were 36 such proposals in 2010, 40 in 2011, and over 100 in 2012.
2. Proposals have included:
 - a. the establishment of a comprehensive review by independent members of the board of corporate political spending;
 - b. the publication of a semiannual report on the issuer's website for trade association membership policies;
 - c. the disclosure of the titles of individuals involved in the decisions to make political expenditures;
 - d. the publication of an accounting of all political contributions made in the year prior in two national newspapers and periodicals in nine cities;
 - e. and the annual publication on the company's proxy statement of political action committee contribution policies and an accounting and rationale for anticipated political spending in the upcoming year, as well as a shareholder advisory vote of such spending.

See Annex B for examples.

3. ISS generally recommends voting for any proposal that requests greater disclosure, but against more specific proposals, including an affirmation of a nonpartisan workplace, barring the company from political spending,

¹ *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S. Ct. 876 (2010).

disclosing all executives or advisors with prior government service. ISS recommends voting case-by-case for proposals that ask for information on the company's lobbying activities. 2012 ISS U.S. Proxy Voting Guidelines Summary at 63-64.

D. Exclusive Forum

1. Vice Chancellor Laster, in *In re Revlon, Inc. Shareholder Litigation*, 990 A.2d 940 (Del. Ch. 2010), suggested that Delaware corporations could protect themselves from shareholder suits in other jurisdictions by amending their charters to include an exclusive forum provision. More than 200 companies have done so; they typically bind shareholders to the Delaware Chancery Court as the exclusive forum for certain shareholder actions, including derivative actions, fiduciary duties claims, and any claim under Delaware law.
2. In 2012, four companies received shareholder proposals to remove exclusive forum provisions that had been unilaterally adopted by the board. Two went to a vote and failed. In addition, of the six management proposals to add an exclusive forum, four passed with a majority of votes outstanding and five received a majority of the votes cast.
3. ISS changed its policy in 2012 from a positive recommendation of the shareholder proposals to a more neutral case-by-case analysis, based on whether the company has good governance features and whether the company has been harmed by shareholder litigation outside the jurisdiction of the company's incorporation. Nevertheless, ISS ultimately recommended voting for all shareholder proposals removing the exclusive forum provision and against all management proposals to adopt the provisions.
4. Several actions are pending in the Delaware Court of Chancery alleging that exclusive forum provisions are invalid. The only court to rule on it, the Northern District of California, declined to dismiss a derivative action against Oracle for a Delaware exclusive forum provision in its bylaws, noting in particular that the provision was "unilaterally adopted by the directors who are defendants in this action, after the majority of the purported wrongdoing is alleged to have occurred, and without the consent of existing shareholders who acquired their shares when so such bylaw was in effect." *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174 (2011).

Topic 2: Proxy Access

A. Rule 14a-11

1. Because the expensive process of using proxy materials is the method by which most directors are currently elected, a shareholder right to nominate

directors in the company's proxy materials is one way to provide a realistic opportunity for shareholder nominees to be elected. In August 2010, the SEC adopted mandatory proxy access Rule 14a-11, which was designed to allow shareholders or groups of shareholders who held 3% of the voting securities of the company for at least three years to include director nominees in the company's proxy materials. In July 2011, however, the U.S. Court of Appeals for the D.C. Circuit vacated the rule in its entirety as "arbitrary and capricious." *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011). Instead of appealing, the SEC sought to respond by amending Rule 14a-8 to allow shareholder proposals seeking proxy access.

B. Proposals under Rule 14a-8

1. Norges Bank: The Norwegian government pension fund submitted proposals in 2012 for proxy access for shareholders who own 1% of the company for one year, with a cap of 25% of the elected directors. See Annex C. The SEC denied most companies' exclusion requests because the information supplied by Norges in its filings (including external information provided by web site referenced in the filings) provided sufficient information. The proposal failed in all companies, tallying 31-38% of the vote and receiving ISS recommendation.
2. U.S. Proxy Exchange: The shareholder advocate created a model proposal that has been the most common form of shareholder proposal in 2012. It proposes a 1%/two-year threshold, or one hundred shareholders who invest \$2,000 for one year as required by Rule 14a-8. See Annex C. The proposal has failed twice, with 13 and 32% of votes cast. ISS recommended against the rule, as the 100 shareholder provision could ostensibly be triggered by shareholders with as little as \$200,000 invested, a negligible percentage at many companies.
3. Rule 14a-11 Terms: Some U.S. pension funds have supported proposals that mirror the SEC's vacated Rule 14a-11 3%/three-year threshold at companies widely scrutinized for their governance issues (Nabors Industries and Chesapeake Energy). The proposals passed (with 56% and 60% of the votes cast) at both companies, but it is uncertain whether they would have done so at a more soundly governed company. A similar proposal was made at Hewlett-Packard, but withdrawn when the company made its own 3%/three-year proposal for the 2013 proxy season.

C. 2013 Considerations

1. Companies may avoid proxy access proposals by shareholders in a number of ways. If poor governance policies in general have made the company a target of investors, then these should be amended before proposals are submitted. Companies can also preempt and exclude shareholder

proposals with their own proxy access proposals, although the lack of a consensus in the market as to the thresholds limits these benefits. Finally, engaging with large shareholders allows companies to respond to any concerns related to proxy access.

Topic 3: Independence rules for compensation committees

A. Proposed rules for 2014:

1. The NYSE and NASDAQ have filed proposed rules regarding compensation committee independence. Under both sets of proposed rules, smaller reporting companies will be exempt from independence requirements. Where NASDAQ currently allows independent directors to approve compensation without a committee, under the proposed rules a committee is required, and the committee must be at least two directors. Both sets of rules allow directors who own a large amount of shares to sit on the committee, recognizing the alignment of shareholder interest.
2. Both sets of proposed rules clearly allow the compensation committee to select consultants and the company must make appropriate funding for such compensation consultants. Advisors must be independent, which should be determined by the committee, per the NYSE, according to six factors:
 - a. the advisor's provision of other services to the company,
 - b. the amount of fees received as a percentage of the total revenue of the person who employs the advisor,
 - c. the conflict of interest policies of the person who employs the advisor,
 - d. any business or personal relationship between the advisor and any member of the compensation committee,
 - e. any securities of the company owned by the advisor, and
 - f. any business or personal relationship between the advisor or the person who employs the advisor and any executive officer of the company.

Topic 4: Broker Non-Votes

- A. Under NYSE Rule 452, member organizations may direct the vote of shares for clients who provide no instructions on how to vote as long as it is a "routine" matter. Historically, "routine" matters were broadly defined.

- B. In 2010, the election of directors and executive compensation were newly defined as “non-routine” matters.
- C. In January 2012, the following governance matters were declared by NYSE to be “non-routine” as well (see Annex D):
 1. declassifying a company’s board of directors,
 2. majority voting in the election of directors,
 3. eliminating super majority voting requirements,
 4. providing for the use of written consent of shareholders,
 5. providing rights to shareholders to call special meetings, and
 6. certain anti-takeover provision overrides.

Topic 5: 2012 ISS changes in policy updates

- A. Pay for Performance Analysis: For Russell 3000 companies, ISS now uses two equally weighted tests to measure the alignment of CEO compensation with shareholder return. For relative alignment, ISS reviews the degree of alignment between total compensation and the company’s total shareholder return within ISS-defined peer groups over one- and three-year periods (weighted 40%/60%) and the multiple of the total compensation relative to the median of the group. For absolute alignment, ISS measures compensation against the company’s total shareholder return, based on trends in compensation and return in the prior five years. ISS will recommend voting for the compensation package if alignment is strong or satisfactory. Unsatisfactory alignment results in a further review of performance ratios, disclosure practices and any special circumstances.
- B. Board Response to Say-on-Pay Votes: If a company’s say-on-pay proposal garnered less than the support of 70% of votes cast, ISS will advise to withhold vote or against compensation committee members (or even the entire board), although it will take into account the company’s response to the vote. Application of this policy is unclear, although companies should at least adhere to the SEC’s requirement of disclosure of the vote in its CD&A. Companies with failed votes may have to disclose its engagement policy with larger shareholders, and perhaps its private communications with them.

Topic 6: Activist investing impact

- A. New studies have analyzed the impact delivered to companies by activist investors. One study, by Cunat, Gine and Guadalupe², focused on activist

² Cunat, Vicente, Gine, Mireia, and Guadalupe, Maria, “The Vote is Cast: The Effect of Corporate Governance on Shareholder Value,” *Journal of Finance*, Vol. 97, No. 5., pp. 1943, October 2012.

proposals that won by a narrow margin, which they posit isolates the impact of the proposal from other variables. With this method, they found that approving a proposal increases companies' equity value by 1.3%, while implementing the proposal results in a 2.3% increase.

- B. Professor Bebchuk and co-authors analyzed the relationship between governance and equity returns.³ From 1990 to 1999, there was a positive relationship between better governance and better returns, but there was no such relationship from 2000 to 2008. Professor Bebchuk explains that by 2000, investors had learned to distinguish between good and poor governance, incorporating this knowledge into the pricing of companies' equity values, thus negating the correlation.

Topic 7: *Seinfeld v. Slager*⁴

- A. The plaintiff was a shareholder in Republic Services, Inc., a Delaware corporation engaged in the waste management industry. The plaintiff filed suit against the directors of the company, alleging, among other things, that the directors breached their duty of loyalty and wasted corporate assets by awarding a certain type of stock option to themselves.
- B. In 2009, the directors awarded themselves time-vesting restricted stock units worth \$743,700, which raised their individual annual compensation to between \$843,000 and \$891,000. In 2010, the directors again awarded themselves units, which raised their annual compensation to between \$320,000 and \$345,000. The plaintiff contended that the company's annual compensation of its directors, owing to the awards, far exceeded the compensation of directors of one of its peers.
- C. The plaintiff claimed that the awards were granted in self-interest and constituted waste because they were unreasonable and not tax-deductible. The directors responded that, because the awards were made pursuant to a stock plan, the provisions of which were approved by the shareholders, the awards were subject to the business judgment rule.
- D. The court disagreed with the directors, finding that the stock plan lacked defined parameters to merit a review under the business judgment rule. Generally, if awards are granted pursuant to a shareholder approved plan with sufficiently defined terms, the business judgment rule applies even to self-interested transactions under that plan. Here, the court found no meaningful limit imposed by the shareholders on the board for the plan to receive the blessing of the business judgment rule. The court noted that the directors had sole discretion in making the awards, limited only to total shares and shares per year which, in

³ Bebchuk, Lucian A., Cohen, Alma and Wang, Charles C. Y., *Learning and the Disappearing Association Between Governance and Returns* (June 1, 2011 working paper).

⁴ *Seinfeld v. Slager*, C.A. No. 6462-VCG (Del. Ch. June 29, 2012).

practice, amounted to a total limit to each director of over \$21 million and a total value of over \$260 million. This constituted a shareholder approved *carte blanche*, and as such the self-interested transaction must be reviewed under an entire fairness standard rather than the business judgment rule.

- E.** The most important question arising from the case is what a board of directors may do to minimize litigation risk when determining its own compensation. The court pointed to the company's stock plan as one point on a continuum of plans that, on one end, were sufficiently defined to receive business judgment rule protection and, on the other, had no meaningful limits imposed on the board and therefore was subject to an entire fairness standard. The court stated explicitly: "The more definite a plan, the more likely that a board's compensation decision will be labeled disinterested and qualify for protection under the business judgment rule. If a board is free to use its absolute discretion under even a stockholder-approved plan, with little guidance as to the *total* pay that can be awarded, a board will ultimately have to show that the transaction is entirely fair." Thus, the most apparent recommendation for companies is to provide explicit definitions in its stock plans of the limits imposed on the board's awarding itself stock.

SAMPLE

Annex A

Topic 1: Shareholder Proposals (Special Meetings Called by Shareholders)

Record ownership – The bylaws of Morgan Stanley, for example, include the following language: “A special meeting of stockholders shall be called by the Secretary of the Corporation at the written request or requests . . . of **holders of record** Owing (as defined below) at least 25% of the voting power of the outstanding capital stock of the Corporation entitled to vote on the matter or matters to be brought before the proposed special meeting.” § 2.02(b)(i) (emphasis added).

Blackout periods – The bylaws of Pfizer, Inc., for example, include the following language: “[A] special meeting requested by stockholders shall not be held if . . . the Board of Directors has called or calls for an annual meeting of stockholders to be held within ninety (90) days after the Secretary receives the request for the special meeting and the Board of Directors determines in good faith that the business of such annual meeting includes (among any other matters properly brought before the annual meeting) the business specified in the stockholder's request.” Art. I, § 9.

Period of Ownership – The bylaws of McDonald’s Corporation, for example, include the following language: “Special meetings of stockholders of the Corporation may be called only by the Board of Directors pursuant to a resolution approved by a majority of the Board of Directors or by the Secretary of the Corporation at the written request of record stockholders who have, or who are acting on behalf of beneficial owners who have, an aggregate ‘net long position’ of not less than 25% of the outstanding shares of Common Stock of the Corporation as of the record date fixed in accordance with these By-Laws (as amended from time to time) to determine who may deliver a written request to call such special meeting; provided that each such record stockholder, or beneficial owner directing such record stockholder, must have held such individual’s ‘net long position’ included in such aggregate amount continuously for the one-year period ending on such record date and must continue to hold such ‘net long position’ through the date of the conclusion of the special meeting (such aggregate ‘net long position’ held for the requisite period, the ‘Required Percentage’). Such record stockholder’s or beneficial owner’s ‘net long position’ shall be determined in the manner set forth in the Certificate of Incorporation of the Corporation.” Art. II, § 8.

Annex B

Topic 1: Shareholder Proposals (Political Spending)

Examples

- See the attached Shareholder Proposal Regarding a Report on Political Contributions from Goldman Sachs' Proxy Statement for 2011 Annual Meeting of Shareholders.
- See the attached Shareholder Proposal for Occidental Petroleum Corporation.
- See the attached Shareholder Proposal for Pfizer, Inc.

SAMPLE

Item 10. Shareholder Proposal Regarding a Report on Political Contributions

In accordance with SEC rules, we have set forth below a shareholder proposal, along with the supporting statement of the shareholder proponent, for which we and our Board accept no responsibility. The shareholder proposal is required to be voted upon at our Annual Meeting only if properly presented at our Annual Meeting. As explained below, our Board unanimously recommends that you vote AGAINST the shareholder proposal.

Domini Social Investments, 532 Broadway, 9th Floor, New York, New York 10012, beneficial owner of at least \$2,000 in market value of shares of Common Stock, is the proponent of the following shareholder proposal. Domini Social Investments has advised us that a representative will present the proposal and related supporting statement at our Annual Meeting.

Resolved, that the shareholders of Goldman Sachs (“Company”) hereby request that the Company provide a report, updated semi-annually, disclosing the Company’s:

1. Policies and procedures for expenditures made with corporate funds to trade associations and other tax-exempt entities that are used for political purposes (“indirect” political contributions or expenditures).
2. Indirect monetary and non-monetary expenditures used to participate or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, and used in any attempt to influence the general public, or segments thereof, with respect to elections or referenda.

The report shall include:

- a. An accounting through an itemized report that includes the identity of the recipient as well as the amount paid to each recipient of the Company’s funds that are used for political contributions or expenditures as described above; and
- b. The title(s) of the person(s) in the Company who participated in making the decisions to make the political contribution or expenditure.

The report shall be presented to the board of directors’ audit committee or other relevant oversight committee and posted on the Company’s website.

Supporting Statement: As long-term shareholders of Goldman Sachs, we support transparency and accountability in corporate political spending. These activities include direct and indirect political contributions to candidates, political parties or political organizations; independent expenditures; or electioneering communications on behalf of a federal, state or local candidate.

Disclosure is consistent with sound public policy, in the best interest of the company and its shareholders, and critical for compliance with federal ethics laws. Absent a system of accountability, company assets can be used for policy objectives that may be inimical to the long-term interests of the company and its shareholders, and may pose risks to both.

Goldman Sachs adopted a policy prohibiting the use of corporate funds for political contributions and electioneering communications. Indirect political spending, however, presents the same risks that led Goldman Sachs to adopt policies prohibiting direct political spending. In fact, these risks may be greater, because the company exercises no control over how these organizations spend its money.

Without disclosure, trade associations and other tax exempt entities often engage in political activities without the knowledge of their corporate funders, and without any oversight. They are free to use corporate funds as they see fit, and potentially at odds with their corporate funders’ policies, practices and interests. The proposal therefore asks the Company to disclose all of its payments to trade associations and other tax exempt organizations used for political purposes. More than half of the S&P 100 has committed to adopting the model of political transparency and accountability we are seeking, including Microsoft, American Express and Merck.

The Company’s Board and its shareholders need complete disclosure to be able to fully evaluate the political use of corporate assets. We urge your support for this critical corporate governance reform.

Resolved, that the shareholders of Occidental Petroleum (“Company”) hereby request that the Company provide a report, updated semiannually, disclosing the Company’s:

1. Policies and procedures for political contributions and expenditures (both direct and indirect) made with corporate funds.
2. Monetary and non-monetary contributions and expenditures (direct and indirect) used to participate or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, and used in any attempt to influence the general public, or segments thereof, with respect to elections or referenda. The report shall include:
 - a. An accounting through an itemized report that includes the identity of the recipient as well as the amount paid to each recipient of the Company’s funds that are used for political contributions or expenditures as described above; and
 - b. The title(s) of the person(s) in the Company responsible for the decision(s) to make the political contributions or expenditures.

The report shall be presented to the Board of Directors or relevant board oversight committee and posted on the Company’s website.

Stockholder Supporting Statement

As long-term shareholders of Occidental Petroleum, we support transparency and accountability in corporate spending on political activities. These include any activities considered intervention in any political campaign under the Internal Revenue Code, such as direct and indirect political contributions to candidates, political parties, or political organizations; independent expenditures; or electioneering communications on behalf of federal, state or local candidates.

Disclosure is consistent with public policy, in the best interest of the company and its shareholders, and critical for compliance with federal ethics laws. Moreover, the Supreme Court’s *Citizens United* decision recognized the importance of political spending disclosure for shareholders when it stated “[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” Gaps in transparency and accountability may expose the company to reputational and business risks that could threaten long-term shareholder value.

Occidental Petroleum contributed at least \$11.6 million in corporate funds since the 2002 election cycle. (CQ: <http://moneyline.cq.com/pml/home.do> and National Institute on Money in State Politics: <http://www.followthemoney.org/index.phtml>.)

However, relying on publicly available data does not provide a complete picture of the Company’s political spending. For example, the Company’s payments to trade associations used for political activities are undisclosed and unknown. In some cases, even management does not know how trade associations use their company’s money politically. The proposal asks the Company to disclose all of its political spending, including payments to trade associations and other tax exempt organizations used for political purposes. This would bring our Company in line with a growing number of leading companies, including Exelon, Merck and Microsoft that support political disclosure and accountability and present this information on their websites.

The Company’s Board and its shareholders need comprehensive disclosure to be able to fully evaluate the political use of corporate assets. We urge your support for this critical governance reform.

EVELYN Y. DAVIS
EDITOR
HIGHLIGHTS AND LOWLIGHTS
WATERGATE OFFICE BUILDING
2600 VIRGINIA AVE. N.W. SUITE 215
WASHINGTON, DC 20037

CERTIFIED RETURN
RECEIPT REQUESTED

Ian Reid, CEO
PFIZER
NYC, N.Y.

July 22, 2011

(202) 737-7755 OR

FOX 212-309-0567

Dear Ian:

This is a formal notice to the management of Pfizer that Mrs. Evelyn Y. Davis, who is the owner of 1200 shares of common stock plans to introduce the following resolution at the forthcoming Annual Meeting of 2012. I ask that my name and address be printed in the proxy statement, together with the text of the resolution and reasons for its introduction. I also ask that the substance of the resolution be included in the notice of the meeting:

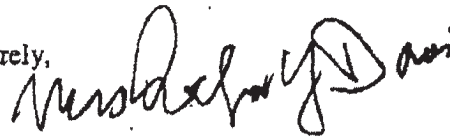
RESOLVED: "That the stockholders recommend that the Board direct management that within five days after approval by the shareholders of this proposal, the management shall publish in newspapers of general circulation in the cities of New York, Washington, D.C., Detroit, Chicago, San Francisco, Los Angeles, Dallas, Houston and Miami, and in the Wall Street Journal and U.S.A. Today, a detailed statement of each contribution made by the Company, either directly or indirectly, within the immediately preceding fiscal year, in respect of a political campaign, political party, referendum or citizens' initiative, or attempts to influence legislation, specifying the date and amount of each such contribution, and the person or organization to whom the contribution was made. Subsequent to this initial disclosure, the management shall cause like data to be included in each succeeding report to shareholders." "And if no such disbursements were made, to have that fact publicized in the same manner."

REASONS: "This proposal, if adopted, would require the management to advise the shareholders how many corporate dollars are being spent for political purposes and to specify what political causes the management seeks to promote with those funds. It is therefore no more than a requirement that the shareholders be given a more detailed accounting of these special purpose expenditures that they now receive. These political contributions are made with dollars that belong to the shareholders as a group and they are entitled to know how they are being spent."

Last year tthe owners of.....*voted FOR this proposal."

"If you AGREE, please mark your proxy FOR this resolution."

Sincerely,



Mrs. Evelyn Y. Davis

.....* Please fill in correct figure

CC: SEC in D.C.

Ian please acknowledge receipt of this resolution yourself

SAMPLE

Proxy Access: Staples, Inc.

Norges Bank Investment Management submitted the following shareholder proposal for inclusion in Staples' 2012 proxy statement:

The corporation's bylaws are hereby amended as follows:

The following shall be added as Article I, Section 7.4.1:

The corporation shall include in its proxy materials for a meeting of stockholders at which any director is to be elected the name, together with the Disclosure and Statement(s) (both defined below), of any person nominated for election as a director by a stockholder or group thereof that satisfied the requirements of this Section 7.4.1 (the "Nominator"), and allow stockholders to vote with respect to such nominee on the corporation's proxy card. Each Nominator may designate nominees representing up to 25% of the total number of the corporation's directors.

To be eligible to make a nomination, a Nominator must:

(a) have beneficially owned 1% or more of the corporation's outstanding common stock (the "Required Shares") continuously for 1 year prior to the submission of its nomination, and shall represent that it intends to hold such shares through the date of the meeting;

(b) provide written notice received by the corporation's secretary within the time period specified in Section 7.2 (for annual meetings) or 7.3 (for special meetings): (i) with respect to the nominee, the information required under Section 7.4(a) (the "Disclosure"); and (ii) with respect to the Nominator, proof of ownership of the Required Shares in satisfaction of SEC Rule 14a-8, without regard to any other information listed in Section 7.4(b); and

(c) execute an undertaking that it agrees: (i) to assume all liability for any violation of law or regulation arising out of the Nominator's communications with stockholders, including the Disclosure; and (ii) to the extent it uses soliciting material other than the corporation's proxy materials, to comply with all laws and regulations relating thereto.

The Nominator shall have the option to furnish a statement, not exceeding 500 words, in support of each nominee's candidacy (the

"Statement(s)"), at the time the Disclosure is submitted to the corporation's secretary. The board of directors shall adopt a procedure for timely resolving disputes over whether notice was timely given and whether the Disclosure and Statement(s) comply with this Section 7.4.1 and the rules under the Exchange Act.

The following shall be added to ARTICLE I, Section 5.3:

Notwithstanding the foregoing, the total number of directors elected at any meeting may include candidates nominated under the procedures set forth in ARTICLE I, Section 7.4.1 representing no more than 25% of the total number of the corporation's directors.

Shareholders' right to nominate board candidates is a fundamental principle of good corporate governance and board accountability.

This proposal would enable shareholders to nominate director candidates subject to reasonable limitations, including a 1% / 1 year holding requirement for nominators, permitting nominators to nominate no more than 25% of the company's directors, and providing that, in any election, candidates nominated by shareholders under this procedure can be elected to fill no more than 25% of the Board seats.

For more information see <http://www.nbim.no/StaplesProxyAccessProposal>

Please vote FOR this proposal.

A. Our Goal

Shareholders' right to nominate candidates for election to the board of directors is a fundamental principle of good corporate governance and board accountability. Norges Bank Investment Management (NBIM) proposes amending the Staples, Inc. (the "Company" or "Staples") bylaws in order to enable shareholders to nominate board candidates other than those selected by the Company itself. At the same time, we recognize the importance of shareholder nominations and board continuity. As a result, we have included important procedural requirements to help ensure appropriate use of the proposed procedures, and have structured our proposal to work incrementally within the Company's current bylaws to help promote responsive corporate governance and improved Company and Board performance.

B. Why the Proposed Amendments are Necessary

NBIM believes that Staples' corporate governance practices are in need of improvement and that shareholder rights must be enhanced. The right of Staples' shareholders to nominate directors is particularly important since the Company has not met our expectations with regard to key aspects of corporate governance and performance. Specific examples of

instances and issues where Staples' corporate governance practices are not in line with NBIM's expectations include the following:

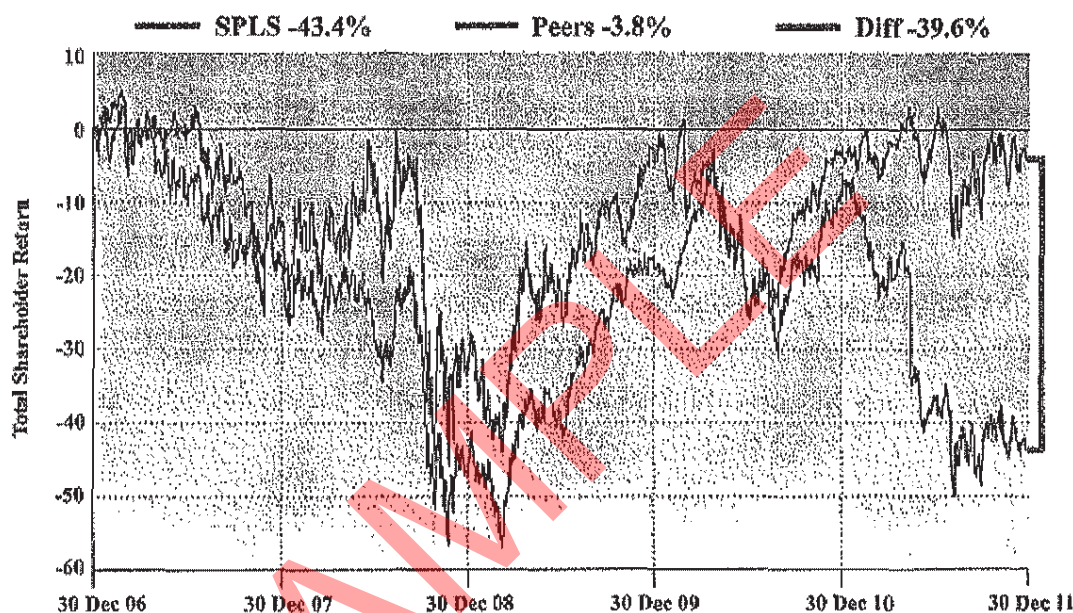
- Staples' shareholders must collectively own more than 25% of the outstanding common stock in order to call for an extraordinary general meeting of shareholders. A shareholder proposal in 2008 asking for a 10% threshold to call an extraordinary general meeting received support from 66.7% of votes cast. The Board did not follow shareholder will when it subsequently amended the bylaws to include a stricter threshold of 25%. Furthermore, the special meeting provision implemented by Staples contains language that is more restrictive than what was approved by the shareholders; and
- Staples' shareholders cannot act by written consent outside the general meeting. A majority of votes cast at Staples' shareholders meetings in both 2010 and 2011 supported shareholder proposals that would have permitted shareholders to act by majority written consent. Despite these shareholder votes, the Board has not implemented this shareholder proposal; and
- The Board has the ability to amend the Company's bylaws without shareholder approval, while a majority vote of outstanding shares is needed for shareholders to amend the Company's bylaws; and
- Under the Company's Articles of Incorporation the Board can issue shares of a new series of preferred stock with voting rights that can be used as a potential takeover defense in the event of an attempted corporate acquisition (sometimes referred to as "blank check preferred stock"); and
- The Board has combined the roles of CEO and Chairman of the Board. We believe the two roles are fundamentally different and that the Chairman should, at minimum, be independent of the Company's management. Our view is supported by the Chairmen's Forum, in association with Yale School of Management, in its 2009 policy statement "Chairing the Board: The Case for Independent Leadership in Corporate America." An increasing number of S&P500 companies have chosen to separate these two roles. In 2004, 27% of these companies had split the CEO and Chairman roles, while by 2011 the percentage rose to 40%; and
- In its 2011 proxy statement, Staples' identified a group of 20 peer companies for purposes of executive compensation.¹ Comparing total shareholder return for Staples and its identified peer companies, using

¹ The peer companies identified are: Amazon.com, Inc.; Best Buy Co., Inc.; Costco Wholesale Corp.; FedEx Corp.; Gap Inc.; Home Depot, Inc.; J.C. Penney Co., Inc.; Kohl's Corp.; Limited Brands, Inc.; Lowe's Companies, Inc.; Macy's, Inc.; Office Depot, Inc.; OfficeMax Inc.; Safeway, Inc.; Starbucks Corp.; Sysco Corp.; Target Corp.; The TJX Companies, Inc.; Walgreen Co.; and Xerox Corp.

information available from FactSet Research Systems Inc. for the five year period December 30, 2006 through December 30, 2011, shows that Staples' significantly underperformed its peers. Staples' total shareholder return was -43.4%, while its peers' total shareholder return was -3.8%

Staples Inc.

TSR FactSet graph 5 Year



NBIM's proxy access proposal is designed to allow shareholder nomination of board candidates with the goal of electing a more responsive Staples Board.

C. How the Proposed Amendments Operate

NBIM's shareholder proposal asks that Staples' proxy materials include nominees for election to the board of directors submitted by a shareholder, or group of shareholders, who satisfy the requirements set forth in the proposed bylaw. The current proposal is drafted to work within the framework of the Company's current bylaws. The shareholder(s) must have held 1% of the Company's outstanding common stock for 1 year prior to submitting the nomination. In addition, the shareholder(s) must submit the same nominee disclosure information currently required by the Company's bylaws for shareholder nominations. Any individual shareholder or shareholder group may designate nominees representing up to 25% of the total number of the Company's directors.

We propose the 1% / 1 year requirement to ensure substantial and stable shareholder interests support the candidates for board election, and yet open the possibility for qualified shareholders to make use of proxy access rights. One percent of Staples' common stock was

valued at approximately \$97 million as of December 31, 2011 and is therefore a substantial capital investment. These thresholds are intended to avoid inappropriate use of proxy access rights.

In addition, we propose a voting procedure that integrates the current system of majority voting with a plurality carve-out in case of contested elections. A shareholder nominated candidate will be elected if he or she receives more votes than at least one of the Board's candidates, subject to a limitation that no more than 25% of the Board seats can be filled by shareholder nominees in any election. These limitations are designed to give shareholder candidates a material influence on the Board, but will not result in a disruptive change of control of the Board.

A practical example of how the board nomination and election process would work under the current proposal is as follows. The example is provided for illustrative purposes only and is not intended to represent the Company's current proxy statement with respect to electing directors:

1. Hypothetical Overview of Board / Nominees

- Staples' Board has 12 seats
- Any shareholder may nominate directors up to 25% of the board seats. With 12 seats, this is a maximum of 3 nominees per shareholder or shareholder group.
- The company nominates 12 candidates
- Two shareholders or groups nominate 3 candidates each
- The company's ballot will include 18 nominees, consisting of the 12 company nominees and the 6 shareholder nominees
- Each shareholder may vote FOR a maximum of 12 candidates and against as many candidates it wants

2. Example Vote Outcomes Based on Above Nominations

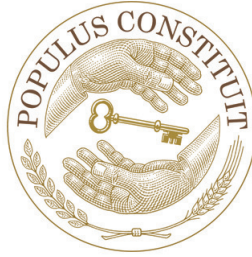
- If one shareholder nominee receives more votes than the company nominee receiving the fewest votes, then that shareholder nominee would be elected to the board along with the other 11 company nominees.
- If 2 or 3 shareholder nominees receive more votes than the company nominees receiving the fewest votes, then those 2 or 3 shareholder nominees would be elected to the board along with the 10 or 9, respectively, company nominees who received greater shareholder support.
- HOWEVER, if 4 or more shareholder nominees receive more votes than certain of the candidates nominated by the company, the 25% cap is triggered and ONLY the 3 shareholder nominees receiving the greatest number of votes would be elected to the board. The resulting board, therefore, would consist of the 3 shareholder nominated

candidates who received the greatest number of votes and the 9 company nominated candidates who received the greatest number of votes.

D. Conclusion

NBIM questions the effectiveness of Staples' corporate governance systems and the independence of the Board's decision making process in serving the shareholders' interests. In order for shareholders to have a greater opportunity to remedy these governance weaknesses, we urge shareholders to vote FOR this proposal.

SAMPLE



United States Proxy Exchange

proxyexchange.org

Model Shareowner Proposal for Proxy Access

http://proxyexchange.org/standard_003.pdf

November 10, 2011

This document presents a model shareowner proposal that can be presented to corporations for a shareowner vote under SEC Rule 14a-8 to ensure that long-term shareowners have a reasonable, but not necessarily easy, means for including board nominations in the proxy materials those corporations distribute—so called “proxy access”. The document explains the Model Proposal’s various provisions and places it in the context of recent efforts to achieve proxy access.

Text of the Model Proposal

[** insert company name **: Rule 14a-8 Proposal, ** insert date **]
Proxy Access

WHEREAS, Most long-term shareowners have no reasonable means to make board nominations; this is a standard “proxy access” proposal, as described at http://proxyexchange.org/standard_003.pdf; and **** Opening statement may be customized for individual companies’ specific circumstances by adding no more than 75 additional words. ****

RESOLVED, Shareowners ask our board, to the fullest extent permitted by law, to amend our bylaws and governing documents to allow shareowners to make board nominations as follows:

1. The Company proxy statement, form of proxy, and voting instruction forms, shall include nominees of:
 - a. Any party of one or more shareowners that has held continuously, for two years, 1% of the Company’s securities eligible to vote for the election of directors, and/or
 - b. Any party of shareowners of whom one hundred or more satisfy SEC Rule 14a-8(b) eligibility requirements.

2. Any such party may make one nomination or, if greater, a number of nominations equal to 12% of the current number of board members, rounding down.
3. For any board election, no shareowner may be a member of more than one such nominating party. Board members, named executives under Regulation S-K, and Rule 13d filers seeking a change in control, may not be a member of any such party.
4. All members of any party satisfying item 1(a), and at least one hundred members of any party satisfying item 1(b) who meet Rule 14a-8(b) eligibility requirements, must affirm in writing that they are not aware, and have no reason to suspect, that any member of their party has an explicit or implicit, direct or indirect, agreement or understanding either to nominate or regarding the nature of any nomination, with anyone not a member of their party.
5. All board candidates and members originally nominated under these provisions shall be afforded fair treatment, equivalent to that of the board's nominees. Nominees may include in the proxy statement a 500 word supporting statement. All board candidates shall be presented together, alphabetically by last name.
6. Any election resulting in a majority of board seats being filled by individuals nominated by the board and/or by parties nominating under these provisions shall be considered to not be a change in control by the Company, its board and officers.
7. Each proxy statement or special meeting notice to elect board members shall include instructions for nominating under these provisions, fully explaining all legal requirements for nominators and nominees under federal law, state law and company bylaws.

Instructions for Submitting the Proposal

Submit the proposal as you would any other precatory proposal under Rule 14a-8. You can cut and paste the text for the proposal from a text file at:

http://proxyexchange.org/standard_003.txt

Portions of the text need to be edited. These are highlighted in yellow in the copy of the model proposal above:

1. Insert, where indicated in the header, the name of the corporation to which the proposal is being submitted.
2. Insert, where indicated in the header, the date on which the proposal is submitted.

3. Insert, where indicated at the end of the first paragraph, a discussion of issues at the corporation that might warrant the sort of shareowner intervention that proxy access facilitates. Issues that might be mentioned include, a dramatic fall in the share price, excessive executive compensation, or a proposal that was passed by shareowners but never implemented by the board. *This additional text may not exceed 75 words*, because proposals may not exceed 500 words in total.

Members of the United States Proxy Exchange (USPX) believe proxy access should be a universal right of shareowners. From that perspective, there should be no need to identify problems at a corporation to which a proxy access proposal is submitted. However, not all institutional investors agree. In the current environment, proxy access proposals are more likely to receive majority votes at corporations with significant governance or performance issues identified in the proposal's preamble.

Historical Background

Proxy statements are by law company documents, not management's personal documents. As such, access to the proxy for the purpose of listing director nominees should be available to shareowners, not just the board's nominating committee.

In 1977 the SEC held a number of hearings to address corporate scandals. At that time, the Business Roundtable (BRT) recommended amendments to Rule 14a-8 that would allow access proposals, noting such amendments

... would do no more than allow the establishment of machinery to enable shareholders to exercise rights acknowledged to exist under state law.

Soon, we saw several proposals. In 1980 Unicare Services included a proposal to allow any three shareowners to nominate and place candidates on the proxy. Shareowners at Mobil proposed a "reasonable number," while those at Union Oil proposed a threshold of "500 or more shareholders" to place nominees on corporate proxies.

One company argued that placing a minimum threshold on access would discriminate "in favor of large stockholders and to the detriment of small stockholders," violating equal treatment principles. CalPERS participated in the movement, submitting a proposal in 1988 but withdrawing it when Texaco agreed to include their nominee.

These early attempts to win proxy access through shareowner proposals met with the same fate as most proposals in those days. As of 1986, only two proposals of hundreds submitted had ever been approved—but the tides of change were turning. A 1987 proposal by Lewis Gilbert to allow shareowners to ratify the choice of auditors won a majority vote at Chock Full O'Nuts Corporation and in 1988 Richard Foley's proposal to redeem a poison pill won a majority vote at the Santa Fe Southern Pacific Corporation.

In 1990, without public discussion or a rule change, the SEC began issuing a series of no-action letters on access proposals. The SEC's about-face may have been prompted by fear that "private ordering," through shareowner proposals, was about to begin in earnest.

Tensions over this giant leap backward rose until *AFSCME v AIG* (2006). That case involved a 2004 bylaw proposal submitted by the American Federation of State, County & Municipal Employees (AFSCME) to the American International Group (AIG) requiring that specified nominees be included in the proxy. AIG excluded the proposal after receiving a no-action letter from the SEC and AFSCME filed suit.

The court ruled the prohibition on shareowner elections contained in Rule 14a-8 applied only to proposals “used to oppose solicitations dealing with an identified board seat in an upcoming election” (also known as contested elections).

The SEC subsequently adopted a rule banning proposals aimed at prospective elections. But in 2010, the commission adopted both a new Rule 14a-11, specifying a minimum proxy access requirement for all public corporations, and amendments to Rule 14a-8(i)(8) to allow shareowners to submit proposals for more robust proxy access at corporations in which they own shares.

The US Court of Appeals for the DC Circuit found the economic analysis of the new Rule 14a-11 “arbitrary and capricious”, in part, because the SEC failed to properly estimate how much boards would authorize companies to spend to keep themselves entrenched. The Court decision means shareowners’ only current option for achieving proxy access is through proposals filed on a company by company basis under the amended Rule 14a-8.

Need for a Model Proxy Access Proposal

While ostensibly providing proxy access at public corporations, Rule 14a-11 was anti-democratic. Two particularly objectionable aspects of the rule were:

1. A high ownership threshold of 3% of a corporation’s outstanding shares in order to nominate. This disenfranchised most shareowners.
2. A hard cap on the total number of shareowner nominations was set equal to the greater of one nominee or 25% of the number of board members, which ensured Rule 14a-11 would never have more than token impact.

While USPX members object to these provisions of Rule 14a-11, we applaud the SEC for amendments to Rule 14a-8 to allow shareowners to submit their own proposals for alternative—and presumably better—forms of proxy access at individual corporations. This “private ordering” approach to proxy access should allow shareowners to experiment with different approaches to proxy access at individual firms, to see what works.

With Rule 14a-11 vacated, prospects for private ordering experimentation dimmed. Several large institutional investors planned to submit proxy access proposals based on the vacated Rule 14a-11, rather than advancing innovative alternatives. In doing so, they would resurrect the two objectionable aspects of that rule mentioned above.

The USPX has developed the *Model Proxy Access Proposal* as a means of stimulating debate and experimentation with alternative approaches to proxy access. Implemented as-is, it will provide a reasonable—but not necessarily easy—means for *most long-term shareowners* to participate in nominating directors. It imposes no hard cap on the total number of shareowner nominations, although it provides safeguards that obstruct parties from seeking a change in control through proxy access.

We encourage shareowners to submit the *Model Proposal* or to use it as a starting point in developing their own proposals. We hope that shareowners will also submit completely different proposals of their own design. The discussion of issues presented below should assist shareowners in that process. The success of proxy access depends on experimentation to find what works. This entails risk, of course. Democracy always does. The USPX intends to fully support the process.

Safeguarding Against a Change in Control

Rule 405 defines “control” as:

... the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise

where “person” is broadly understood to include artificial persons, such as corporations.

A change in control occurs in a board election when some party, other than the existing board, nominates candidates over which that party has control, and a majority of board seats are won by those candidates. That circumstance is different from one in which the board’s nominees merely fail to win a majority of seats. If no one party has control over a majority of a new board’s members, there is not a change in control.

While there is nothing necessarily wrong with a change in control, there is a perception that parties seeking a change in control should do so through the traditional mechanism of a competing proxy solicitation. They should not be allowed to do so through proxy access, which is designed to emphasize simplicity over safeguards.

The SEC’s vacated Rule 14a-11 would have prevented changes in control with the astonishingly blunt mechanism of capping the total number of proxy access nominations at¹

... no more than one shareholder nominee or the number of nominees that represents 25% of the company’s board of directors, whichever is greater.

Furthermore, careful wording ensured that, even after several years of elections, no more than 25% of board seats would ever be filled by proxy access nominees.

¹ SEC (2011). *Facilitating Shareowner Director Nominations* (<http://www.sec.gov/rules/final/2010/33-9136.pdf>) p. 138.

This was supposedly intended to prevent proxy access from being used to achieve a change in control. It also happened to gut proxy access. *An election isn't democratic if it is conducted under rules guaranteeing that candidates nominated by incumbents win a supermajority of seats.* For decades, corporate elections in the United States have tended to resemble Politburo elections in the former Soviet Union. The SEC's hard cap on the total number of proxy access nominations confirmed for many shareowners that the SEC is committed to keeping things that way.

USPX members support the notion that changes in control should be pursued through independent proxy solicitations and not through proxy access. The *Model Proposal* achieves this by erecting a variety of impediments to parties who might use proxy access to achieve a change in control. These are not intended to make it impossible to achieve a change in control through proxy access. Rather, they are designed to ensure that, compared to the option of organizing an independent proxy solicitation, proxy access is an unattractive alternative.

Various items in the *Model Proposal* work together to achieve this goal. In the next section, we describe the seven items that comprise the *Model Proposal*. Where relevant, we point out how individual items contribute to obstructing changes in control.

Discussion of Individual Items of the Model Proposal

Below we discuss the seven individual items in the *Model Proposal*.

Model Proposal – Item 1

1. The Company proxy statement, form of proxy, and voting instruction forms, shall include nominees of:

- a. Any party of one or more shareowners that has held continuously, for two years, one percent of the Company's securities eligible to vote for the election of directors, and/or*
- b. Any party of shareowners of whom one hundred or more satisfy SEC Rule 14a-8(b) eligibility requirements.*

This item specifies eligibility requirements that make it possible—but not necessarily easy—for shareowners to nominate. The requirements of Item 1(a) are mostly suited to large shareowners. Those of Item 1(b) are mostly suited for smaller shareowners.

The Need for Eligibility Requirements

Traditionally, rules of procedure make it easy to nominate candidates for elective office. Under *Roberts Rules*, a single person may nominate, and the nomination requires no “second.” The reasoning would appear to be that the challenge of being elected should lie in the election itself and not in the nomination.

One reason for eligibility requirements, at least for the purpose of proxy access, is to prevent changes in control. On their own, eligibility requirements are ineffective for that purpose, unless they are prohibitively onerous. But in combination with Item 2, the Item 1 eligibility requirements effectively obstruct changes in control. We shall explain how in our discussion of Item 2 shortly.

Four other reasons to impose eligibility requirements on those who might nominate are:

1. Ensuring the quality of nominations. If effort or a long-term commitment to owning a substantial stake in the company are required to nominate, nominators will be likely to put effort into deciding whom to nominate.
2. Avoiding a “dilution” effect of numerous shareowner nominees competing for a limited pool of “opposition” votes, making it difficult for any of them to best board nominees.
3. Avoiding frivolous or nuisance nominations. Otherwise, for example, certain “activist” investment funds might conclude that media attention from submitting numerous nominations might help their marketing.
4. Keeping nominations to a manageable number for convenience or to limit election costs.

We have listed the above goals in more or less descending order, from most compelling to least. All must be balanced against the tendency for eligibility requirements to disenfranchise. In this regard, the fourth goal is often questionable. Preventing certain parties from nominating for the purposes of convenience or limiting election costs should be rejected in all but the most pressing of circumstances. Yet, that is the justification the SEC gave for onerous eligibility requirement—3% of outstanding shares held for three years—in the vacated Rule 14a-11. In the SEC’s 451 page description of that rule, the only explicit justification provided for a 3% ownership threshold was:²

... we believe that the 3% ownership threshold—combined with the other requirements of the rule—properly addresses the potential practical difficulties of requiring inclusion of shareholder director nominations in a company’s proxy materials ...

That ownership threshold—combined with the other requirements of Rule 14a-11—ensured that, at most medium- or large-cap corporations, only the largest of institutional shareowners could participate in nominating. The degree of disenfranchisement the SEC was willing to impose to achieve unspecified cost savings, relating primarily to printing and distributing proxy materials, is breathtaking. It suggests that the SEC might have been motivated by another unstated goal. Unlike the four possible goals mentioned above, this one is not justified:

² *ibid*, p. 81.

5. Limiting nominations to certain parties, such as the existing board or influential shareowners, based on a belief that they have a greater right to nominate.

This goal is unacceptable because it violates a basic tenet of rules of democratic procedure, including *Roberts Rules*. That tenet is:

The majority decides, but the minority is heard.

Voting is when the majority decides. Nominations are when the minority is heard. For that reason, it is undemocratic to impose eligibility requirements for the purpose of suppressing nominations from “unimportant” parties, such as individual shareowners or small institutional shareowners.

This is more than an issue of fairness. Deliberative bodies tend to make better decisions when all opinions—not just those of a chosen few—are heard. Based on experience with Rule 14a-8 shareowner proposals, where individual shareowners and small institutional shareowners have routinely shown successful leadership, we have every reason to believe that nominations by those same shareowners, if permitted, will benefit corporations.

As explained below, the eligibility requirements of the *Model Proposal* are designed to achieve legitimate goals while ensuring a maximum opportunity for all long-term shareowners to participate in nominating.

Item 1(a) Eligibility Requirement

The first of the *Model Proposal's* two eligibility requirements, Item 1(a), specifies that any shareowner, or group of shareowners, that has continuously held 1% of a company's shares for two years may nominate.

This eligibility requirement is intended primarily for large institutional shareowners. However, at small-cap companies, many individual shareowners may also qualify. For example, founders or angel investors often have long-term holdings in excess of 1% of a small company's outstanding shares. A group of five or ten shareowners, each possessing less than 1% of shares, might together control shares in excess of 1%.

The philosophy of this particular eligibility requirement is that shareowners with a demonstrated long-term commitment to holding a substantial stake in the company will be motivated to nominate quality candidates for the board. Its purpose is to achieve the first of the goals described above while also facilitating the other three justifiable goals. On its own, it might also facilitate the fifth, unjustifiable goal mentioned above. However, in combination with the *Model Proposal's* second eligibility requirement—tailored to the needs of smaller shareowners—it will not do so.

Holding periods are an accepted means for ensuring “long-term commitment” of nominators. But how long is reasonable? Given today's frenetic level of share trading, a holding period long enough to demonstrate that shares are not held as part of an “active management” strategy should be sufficient. Actively managed institutional portfolios

routinely have annual turnover of 75% or higher. Few shares in an actively managed portfolio are held for two years, which suggests that a two-year holding period might be reasonable.

A longer holding period, such as three years, would indicate long-term commitment even more strongly, but this advantage must be weighed against the disenfranchisement it would entail. The pool of investors who have held 1% of a given corporation's shares continuously for two years, and has the inclination to make nominations, is extremely small. Why narrow it even further?

We believe shareowners that have held 1% of a company's shares for two years will be highly motivated to make quality nominations, and that requiring that they hold the shares for an additional year will add little to that motivation. Since quality nominations are the primary goal of our eligibility requirements, and since other legitimate goals can be fully advanced with a two-year holding period, we settled on that holding period as reasonable in order to avoid unnecessary disenfranchisement.

The second component of the Item 1(a) eligibility requirement—an ownership threshold of 1% of outstanding shares—represents an even larger step back from Rule 14a-11. Ownership thresholds have greater potential to disenfranchise than do holding periods, as shareowners can more easily hold stock for an extended period than they can increase the size of their holdings. A strategy of holding larger positions in fewer stocks can only be taken so far before diversification becomes an issue. A 3% threshold would ensure that, at most medium- or large-cap firms, only a handful of the largest of institutions could nominate. Even then, they would likely have to pool their holdings to meet the threshold.

A 1% threshold opens up nominating to a larger, but still small, swath of shareowners. One study of S&P 500 companies cited by the SEC³ found that, assuming no holding period, 14 institutional investors could, on their own, satisfy a 1% threshold at more than 100 companies, eight could meet that threshold at over 200 companies, five could meet it at over 300 companies, and three could meet it at 499 of the 500. Add a two-year holding period, and those numbers would drop dramatically.

A 1% threshold certainly satisfies the criteria of representing a significant stake in a corporation, which is its purpose with regard to ensuring quality nominations. With that goal in mind, and the need to avoid needless disenfranchisement, we settled on a 1% ownership threshold.

Item 1(b) Eligibility Requirement

The second of the *Model Proposal's* two eligibility requirements, Item 1(b), specifies that any party of shareowners, of whom one hundred or more satisfy SEC Rule 14a-8(b) eligibility requirements, may nominate. In the vast majority of cases, the relevant Rule 14a-8 requirement will be that a shareowner have held, continuously for one year, \$2,000 of a company's stock.

³ *ibid*, p.90.

This eligibility requirement is intended primarily for individual shareowners of medium- or large-cap corporations, but it will also facilitate nominations by small and medium sized institutional shareowners of such corporations.

The philosophy of this eligibility requirement is fundamentally different from that of our Item 1(a) eligibility requirement, discussed above. It needs to be understood in that light. Both eligibility requirements share the primary goal of ensuring quality nominations, but they do so in different ways. The philosophy of Item 1(a) is that shareowners with a demonstrated long-term commitment to holding a substantial stake in a company will be motivated to nominate quality candidates for its board. The philosophy of Item 1(b) is that shareowners who must invest considerable effort to nominate will tend to also invest effort in selecting quality nominees.

Item 1(b) embraces this philosophy with a requirement that shareowners form groups to nominate, and that at least 100 members of each such group satisfy the Rule 14a-8 eligibility requirements. Forming such groups will require considerable effort, so those who take on the challenge should be motivated to not squander their time on frivolous or poorly researched nominations.

This different philosophy is necessary if smaller shareowners are to not be disenfranchised. Ownership thresholds designed to ensure shareowners have a “significant stake” in a corporation do not work for them, because a stake that is significant for one small shareowner will be trivial for another.

In designing this eligibility requirement, we sought precedents, looking especially to experiences in other countries. In Australia, a group of 100 shareowners may nominate, and there is no holding period requirement. In the UK, groups of 100 shareowners may submit proposals. These are two examples of eligibility requirements based on a philosophy that requiring effort will ensure quality nominations (or quality proposals, in the case of the UK). In both cases, a group size of 100 individuals was deemed reasonable. In practice, such groups have rarely formed.

One shortcoming of eligibility requirements based on a philosophy that significant effort will ensure quality nominations is that “quality” must be assessed relative to the nominating party’s intentions. For example, if a group of short sellers put a lot of effort into arranging a nomination, they would likely do so with the goal of damaging the corporation. A “quality” nominee for them might not be a “quality” nominee in other shareowners’ eyes.

This problem should not arise with nominations under Item 1(a), as shareowners with a significant long-term stake in a company can be expected to act with the company’s— and other shareowners’—best interests in mind. We address the issue in Item 1(b) with the requirement that 100 members of a nominating group satisfy the Rule 14a-8 eligibility requirements. Short sellers or speculative traders don’t typically satisfy Rule 14a-8 requirements, and their strategies are sufficiently opportunistic as to make it

unlikely that they could arrange to do so, for a particular target company, a year in advance.

Items 2, 3 and 4 of the *Model Proposal* also address this issue. For example, Item 2 limits nominating groups to making (in most cases) a single nomination. Shareowners acting with the company's best interests in mind might put in the effort required to form a group and nominate out of a sense of cooperation with other shareowners who are presumably organizing for the same purpose. On the other hand, shareowners who might organize a nominating group for some purpose that conflicts with the company's best interests would have to confront the fact that making a single nomination—even if their nominee did manage to win a board seat—would be unlikely to materially impact the company. And they couldn't pursue their private agenda out of a sense of cooperation with other shareowners presumed to be organizing for the same purpose. Who else would be organizing nominating groups to cooperate with their hidden agenda? That would require collusion, which is barred by Item 4.

In summary, to avoid disenfranchising smaller shareowners—i.e. the vast majority of shareowners—the *Model Proposal* embraces the Item 1(b) eligibility requirement based on a philosophy that requiring effort on the part of nominators will ensure quality nominations. That same philosophy is evident in Australian and UK rules allowing groups of 100 shareowners to nominate or, in the case of the UK, submit a proposal. Item 1(b) adopts that same model of 100-member groups. To ensure such nominating groups are motivated by the best interests of the company, it requires that 100 members of such groups satisfy Rule 14a-8 eligibility requirements. It also relies on the safeguards of Items 2, 3 and 4.

Because Item 1(a) and Item 1(b) eligibility requirements are based on different philosophies, they achieve their purposes through entirely different mechanisms. We should not expect or intend that their provisions be aligned or made somehow “compatible.”

For example, Item 1(a) requires a two-year holding period whereas Item 1(b) requires only a one-year holding period. This is reasonable because those holding periods serve different purposes. For Item 1(a), the holding period is intended to ensure nominators have a substantial long-term stake in a company. In item 1(b), its purpose is more to disqualify speculators or short sellers. Because that can be achieved with a one-year holding period, there is no reason to disenfranchise small shareowners with a more onerous two-year holding period.

Model Proposal – Item 2

Any such party may make one nomination or, if greater, a number of nominations equal to twelve percent of the current number of board members, rounding down.

As a practical matter, this item is intended to limit nominating groups to one nomination each. Because we expect that entrenched boards will respond to proxy access by increasing the number of seats on boards, we added the following provision:

... or, if greater, a number of nominations equal to 12% of the current number of board members, rounding down.

This will dissuade boards from growing beyond sixteen members.

Item 2 facilitates many of the goals we have already identified for eligibility requirements. For example, by limiting nominating groups to one nominee each, it focuses them on “quality not quantity.”

Item 2 is primarily intended, in combination with Item 1, to prevent proxy access from being used by parties seeking a change in control. Item 1 places significant hurdles before parties who might nominate. Item 2 limits those parties to (in most cases) one nominee each.

Any party seeking to use proxy access to achieve a change in control would need to organize nominating groups equal in number to a majority of the board. That would be a significant undertaking, especially given Item 4’s safeguards against collusion among nominating groups.

Model Proposal – Item 3

For any board election, no shareowner may be a member of more than one such nominating party. Board members, named executives under Regulation S-K, and Rule 13d filers seeking a change in control, may not be a member of any such party.

Item 3 is necessary if Item 2 is to be effective. Limiting nominating groups to one nominee each would accomplish nothing if shareowners could form and participate in multiple groups.

Barring board members and named executives from joining nominating groups is merely a recognition that they are already able to participate in nominating through their presumed access to the board’s nominating committee.

Rule 13d filers are individual shareowners or groups that own 5% of a corporation’s voting shares. Item 3 bars Rule 13d filers seeking a change in control from submitting nominations through proxy access. The reasoning is that they should pursue the change of control exclusively through an independent proxy solicitation.

Model Proposal – Item 4

4. All members of any party satisfying item 1(a), and at least one hundred members of any party satisfying item 1(b) who meet Rule 14a-8(b) eligibility requirements, must affirm in writing that they are not aware, and have no reason to suspect, that any member of their party has an explicit or implicit, direct or indirect, agreement or understanding either to nominate or regarding the nature of any nomination, with anyone not a member of their party.

The purpose of this provision is to obstruct parties who seek a change in control, or have some purpose counter to a company's best interests, from organizing several colluding nominating groups.

Let's illustrate with an example. Suppose a board has fourteen members, and some party wants to exploit proxy access to achieve a change in control. Conceivably, they could do so by forming eight nominating groups of 100 shareowners each. That would require 800 shareowners, all of whom satisfy Rule 14a-8 eligibility requirements and all of whom are willing to dishonestly sign a statement confirming that they are "not aware, and have no reason to suspect" that there is collusion. That would be a monumental task, and it would entail considerable legal risk, as any one of those 800 shareowners could be a whistleblower.

Model Proposal – Item 5

All board candidates and members originally nominated under these provisions shall be afforded fair treatment, equivalent to that of the board's nominees. Nominees may include in the proxy statement a 500 word supporting statement. All board candidates shall be presented together, alphabetically by last name.

Item 5 is just a fairness provision designed to ensure that shareowner nominees are afforded the same treatment as board nominees, both during the election and once (if) they are elected to the board.

Because poorly—or "creatively"—designed ballots are known to sway elections, Item 5 sets basic requirements for how nominees are presented to voting shareowners.

Model Proposal – Item 6

Any election resulting in a majority of board seats being filled by individuals nominated by the board and/or by parties nominating under these provisions shall be considered to not be a change in control by the Company, its board and officers.

Item 6 states what is legally obvious: The mere fact that a majority of board seats are won by individuals who are not board nominees does not mean there was a change in control. The purpose of proxy access is to allow shareowners to nominate individual board

candidates so shareowners can pick and choose from among all nominees to form a board.

We explicitly include Item 6 to preclude frivolous challenges or lawsuits. For example, a company officer with a “golden parachute” might sue for a payout under that golden parachute in the event of a board election in which proxy access nominees won a majority of seats. Such a frivolous lawsuit could pose a risk, especially since the company’s officers might choose to mount only a half-hearted defense on behalf of the company. Requiring that, not only the company, but also its individual board members and officers, consider such an election to not be a change in control would complicate the efforts of such greedy individuals.

Model Proposal – Item 7

Each proxy statement or special meeting notice to elect board members shall include instructions for nominating under these provisions, fully explaining all legal requirements for nominators and nominees under federal law, state law and company bylaws.

One simple way to deny peoples’ rights is to not inform them of how they can exercise those rights. Item 7 requires full disclosure about how proxy access rights can be exercised. It is based on similar SEC requirements that companies disclose in their proxy materials how shareowners can submit proposals under Rule 14a-8.

We expect that companies will vet proxy access nominees, and reject some based on federal law, state law or company bylaws. To ensure fairness and transparency, Item 7 requires full disclosure of all applicable legal requirements.

Conclusion

This document presents a model shareowner proposal that can be submitted to corporations for a shareowner vote under SEC Rule 14a-8 to ensure that long-term shareowners have a reasonable, but not necessarily easy, means for including board nominations in the proxy materials those corporations distribute.

The USPX encourages shareowners to experiment with different approaches to proxy access so that, over time, we can see what approaches work best. Please submit the *Model Proposal* to corporations you think would benefit from it. We encourage shareowners to experiment with modifications to the *Model Proposal* or to submit entirely different proxy access proposals of their own design.

We welcome feedback, which we may incorporate into future versions of this *Model Proposal*. Please post comments at

<http://proxyexchange.org/2011/11/model-proxy-access-proposal/>

or e-mail Jim McRitchie at jm@corp.gov.net.

A drafting committee of USPX members organized by Jim McRitchie prepared this document. Other members of that committee were: Vincent Cirulli, Brett Davidson, Richard Foley, Glyn Holton and Steve Neiman.

SAMPLE

SAMPLE



Number 12-4
January 25, 2012

TO: ALL NYSE AND NYSE AMEX EQUITIES MEMBERS AND MEMBER ORGANIZATIONS

FROM: NYSE REGULATION

SUBJECT: APPLICATION OF RULE 452 TO CERTAIN TYPES OF CORPORATE GOVERNANCE PROXY PROPOSALS

I. Purpose

This Information Memo relates to the application of New York Stock Exchange LLC (“NYSE”) and NYSE Amex Equities LLC (“NYSE Amex Equities”) (collectively, the “Exchange”) Rule 452 to certain types of corporate governance proxy proposals.

Rule 452 governs when Exchange member organizations may vote customer shares without specific client instructions. In the past, the Exchange has ruled certain corporate governance proposals as “Broker May Vote” matters for uninstructed customer shares when the proposal in question is supported by company management.

More recently, the approach to broker voting of uninstructed shares has narrowed through changes in Exchange rules as well as through legislative action. For example, the Exchange amended Rule 452 in 2010 to prohibit brokers from voting uninstructed shares in the election of directors (other than directors of an investment company registered with the SEC under the Investment Company Act of 1940), and the Dodd-Frank Act codified this approach. In addition the Dodd-Frank Act specifically prohibited brokers from voting uninstructed shares on executive compensation.

In light of these and other recent congressional and public policy trends disfavoring broker voting of uninstructed shares, the Exchange has determined that it will no longer continue its previous approach under Rule 452 of allowing member organizations to vote on such proposals without specific client instructions. Accordingly, proposals that the Exchange previously ruled as “Broker May Vote” including, for example, proposals to de-stagger the board of directors, majority voting in the election of directors, eliminating supermajority voting requirements, providing for the use of consents, providing rights to call a special meeting, and certain types of anti-takeover provision overrides, that are included on proxy statements going forward will be treated as “Broker May Not Vote” matters.

As is always the case, listed companies are urged to consult with Exchange staff with any questions regarding particular proposals.

II. Staff Contact Information

Questions regarding this Information Memo should be directed to:

John Carey, Chief Counsel, NYSE Regulation, Inc., 212.656.5640; or

David De Gregorio, Chief Counsel, NYSE Regulation, Inc., 212.656.4166.

NYSE Regulation, Inc

SAMPLE