S7-14-03

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August 21,2003

Jonathan G. Katz
Secretary
Securities & Exchange Commission
450 Fifth Street N.W.
Washington, DC 20549-0609

Re: S7-14-03: Proposed Rule: Disclosure Renardinn Nominating Committee Functions and Communications between Security Holders and Boards of Directors

Dear Mr. Katz:

Since 1998, I have served as a director of five companies, four of them by virtue of winning a contested election and one as a result of being nominated by the board of directors in return for abandoning a proxy contest. I also asked the nominating committee of another company to nominate me to be a director which it refused to do. For the following reasons I oppose the proposed rule.

Why does the board's proxy card invariably exclude nominees submitted by shareholders?

The unstated premise behind the proposed rule is that investors do not know the answer to that question. Thus, according to the Commission, "[B]etter information about the way board nominees are identified, evaluated and selected is critical for shareholder understanding of the prosy process regarding nomination and election of directors." However, the Commission does not identify any shareholders who do not already understand the nomination process.[1] I think investors understand all too well that the unwritten policy of every board and nominating committee is to nominate the incumbent directors for re-election and that it is futile for a shareholder to submit an unsolicited nomination. Shareholders want empowerment, not "junk" disclosure.[2] **As** Eliza Doolittle sang to her talkative would-be lover **in** My Fair Lady

> Words! Words! Words!
> I'm so sick of words!
> I get words all day through;
> First from him, now from you!
> Is that all you blighters can do?

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[1] Interestingly, the Commission does not say whether **it** understands how the nomination process works. If it doesn't (which is doubtful), then it should ask a few registered companies to voluntarily submit the proposed disclosure to determine if investors would actually find it useful.

[2] Or does the Commission believe that the rule will result in candid disclosure, e.g., "The policy of the nominating committee is to give lip service to any unsolicited nominations from shareholders and then to reject them."

In short, the proposed rule insults the intelligence of investors who already understand how the nomination process operates and why shareholders are excluded from it. They want meaningful change, not meaningless words crafted by lawyers. Therefore, the proposed rule should not be adopted

Conflicts of interest are inherent in the nomination process.

I recall reading an article many years ago by Adam Clayton Powell, the flamboyant minister and long-term Congressman from Harlem in which he candidly proclaimed that a congressman's primary motive is to get re-elected. That is the case for anyone holding elected office, including a director of a corporation.[3] Yet, nowhere does the Commission explicitly acknowledge that a director faces an obvious conflict of interest when considering an unsolicited nomination from a shareholder.[4] Of course, a nominating committee or board would never admit that the real reason it routinely rejects any unsolicited nominations is that they pose a threat to the board's power. That would be tantamount to admitting a breach of fiduciary duty. Therefore, whatever rule the Commission adopts in likely to result in misleading "junk" disclosure.

Surely the Commission knows this. Why then would it propose a rule that it knows will result in false or misleading descriptions of the nominating process? As the great psychologist, Abraham Maslow observed, "If the only tool you have is a hammer, you tend to see every problem as a nail." Mandating disclosure is the Commission's preferred tool because it is safe, i.e., it is unlikely to generate controversy. In other words, it is a way to temporarily pacify shareholders by appearing to be doing something but without posing any real threat to entrenched management.

Opposing more disclosure is like opposing a lower speed limit near a school.[5] After all, who wants to defend putting children's safety in jeopardy or keeping shareholders in the dark? Even though directors would prefer to avoid drawing attention to their motives, they probably can't come up with a credible excuse to oppose the rule. They may also decide that their best strategy is allow the rule to be adopted, assign lawyers to create "junk" disclosure, assume that the Commission will not take any enforcement action and ask for "sufficient time for the rule to work" (maybe twenty years) before implementing more meaningful measures like access to the company's proxy card. Based on a reading of the publicly available comment letters from investors, they generally offer lukewarm support for the proposed rule (although they typically don't say what benefit it will bring) while also advocating stronger measures to remedy the exclusion of shareholders from the nomination process. Perhaps they think (wrongly in my opinion) that the rule will

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[3] ***See*** Melvin A. Eisenberg, "Access to the Corporate Proxy Machinery," 83 Harv. L. Rev. 1489 (1970) ("Toward the expiration of his term, an incumbent director assumes the capacity of office seeker as well as officeholder, thereby creating an irreconcilable conflict of interest.")

[4] In addition to a desire to retain his position, a director faces another conflict, i.e., resentment by his fellow directors who would view an endorsement of an unsolicited nomination submitted by a shareholder as a gesture of disloyalty.

[5] If one is only concerned about children's safety and ignores the cost, why not set the speed limit at 5 mph within a ½ mile radius of the school? The kids will be safe but it will take a lot longer for parents to pick them up after school.

prod boards into making the process more inclusive. Of course, corporate lawyers can be expected favor a rule mandating enhanced disclosure because they will be the ones that will be paid to comply with it.[6]

Why the Commission should not adopt the proposed rule.

The first law of economics is that there is no such thing as a free lunch. This is also known as the inevitability of opportunity costs or tradeoffs. Is the proposed rule an exception to TINSTAAFL? I doubt it. Here are some of the potential costs.

- The Commission will utilize resources to promulgate, administer and enforce the rule that could be used more effectively in other ways.
- Shareholders will bear the costs of preparing, printing and mailing the required disclosure. These costs could be material for small companies already burdened with the costs of complying with Sarbanes-Oxley.[7]
- Management may well attempt to exploit the rule by arguing that more meaningful reform should be delayed until the full impact of the enhanced disclosure is felt.
- "Junk" disclosure adversely affects the usefulness of the proxy statement by making it more cumbersome. Think of sifting through an email inbox to sort out a few important messages from a mountain of spam. Or consider those privacy policy statements issued by every financial institution. Congress thought mandating them was good for consumers. I toss them in the trash without reading them. What does Chairman Donaldson do with them?

If more disclosure is required, what would be useful?

Like Gore Vidal, "I am at heart, a tiresome nag complacently positive that there is no human problem which could not be solved if people would simply do as I advise." However, I am also a realist. Therefore, I do not expect the Commission to abandon its push for enhanced disclosure about the nomination process. **As** I said, calling for more disclosure is safe. And if we must have more disclosure, then I agree with the Commission that it should be meaningful. Therefore, I suggest that each company address this in its proxy statement: "Describe any conflicts of interest in cannection with the nomination process and discuss how they are resolved." That should present a pretty good creative challenge to the corporate bar!

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[6] ***See*** Douglas McCollam, "Legal Ease," Wall Street Journal, August 14, 2003, ("Perhaps no single act has done more for the bottom line of the legal profession than last year's passage of the Sarbanes-Oxley corporate reform act. In the year since the law **took** effect, every firm with a coffee maker and a receptionist in the lobby has created a Sarbanes practice group dedicated to scaring the bejeezus out of corporate clients about the dangers of noncompliance. A study conducted by the law firm of Foley & Lardner showed legal fees at public companies shot up 91% last year as executives coped with night sweats created by the new law. ")

[7] id.

Conclusion

Enhanced disclosure is a side show, a diversion from meaningful measures to improve shareholder democracy. Therefore, I urge the Commission to abandon the proposed rule and heed Eliza Doolittle's plea for action:

> Don't wait until wrinkles and lines
> Pop out all over my brow,
> Show me now!

Very truly yours,

Phillip Goldstein
President
Kimball & Winthrop, Inc.
General Partner

S7-14-03 #33

Rule-Comments

From: Phillip Goldstein [oplp@optonline.net]

Sent: Thursday, August 21,2003 10:38 PM

To: rule-comments@sec.gov

Subject: S7-14-03 Proposed Rule: Disclosure Regarding Nominating Committee Functions and Communications between Security Holders and Boards of Directors

The attached comment letter is in Word 2002.

Phillip Goldstein
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Killian Cummins