



CENTER FOR CAPITAL MARKETS

C O M P E T I T I V E N E S S

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The Honorable Mary Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chairman Schapiro:

The U.S. Chamber of Commerce, the world's largest business federation represents more than three million businesses and organization of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. To achieve this objective, it is an important priority of the CCMC to advance an effective and rational corporate governance structure. Accordingly, the CCMC is opposed to a federal shareholder access right for the following reasons:

- Substantive regulation of shareholder rights and director elections fall squarely within the purview of state corporation law and pre-empt action by the Securities and Exchange Commission ("SEC");
- Numerous reforms of recent years have provided shareholders with sufficient access to relevant information and to corporate decision-makers. Because of these reforms there is no compelling need for a federal access right; and
- The integrity of the voting system is a more urgent issue requiring the SEC's attention and should be addressed before putting further stress on the system with shareholder access.

Shareholder Access is a Matter of State Law

Director elections and shareholder rights have been under the purview of state law since the inception of the corporate structure in the 19th century. Because of this longstanding responsibility and the lack of authority by the SEC to act in

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this area of corporate governance, the CCMC urges the SEC to leave the rules and methods of electing directors, in the proper venue, the States.

Section 14 (a) of the Securities Exchange Act of 1934 lacks authority to regulate corporate governance and limits the SEC's rulemaking powers to the proxy solicitation process. Therefore, the SEC's authority is limited to the regulation of disclosures, made and the procedures followed, in connection with proxy solicitations. While the SEC lacks authority to regulate corporate governance, the United States Supreme Court has held that corporate governance is a matter of state law. In so ruling, the Supreme Court has stated "[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."¹

No compelling reason exists to overturn the long-standing state law role in controlling the substantive rules regarding director election and that role should in fact be preserved and protected. Experience shows that the state law route is more likely to preserve flexibility for companies and shareholders to define the right approach given the circumstances at hand. The CCMC believes the SEC can and should play a pivotal role by exercising its jurisdiction over disclosure to ensure that shareholders are fully informed about their rights and that there are transparent procedures for the exercise of such rights. Moreover, such a role is in accord with the SEC's limited authority under Section 14(a) of the Securities Exchange Act of 1934.

By way of example, the recent actions by Delaware should give pause to any federal action in the field of shareholder access. As the preeminent actor in corporate law in the United States, Delaware has enacted a new law to clarify company's ability to amend their bylaws to provide shareholder access to the company proxy materials for the purpose of nominating directors. The broad influence of Delaware on practices of publicly traded companies and on the corporate laws of other states can hardly be understated. Other states are expected to follow suit.

¹ *Santa Fe Industries v. Green* 430 U.S. 462, at 479.

The Delaware statute does not dictate the terms of such access, but rather leaves it to the corporation and its shareholders to resolve. This will ensure that management, directors and shareholders can shape a right to access that fits the size and character of a particular company. For example, the determination of which shareholders should have the right (i.e. the threshold ownership level), any time-based share holding requirements, the frequency with which such rights can be exercised, and the director qualifications required, can all be crafted to meet the unique situation at hand. The CCMC strongly believes that such an approach is practical and workable for individual companies, reflects the concerns of their constituents and is consistent with the long-term company growth.

The pursuit of a federal right to access will lead to a one size fits all rule. This results in unnecessary burdens for small and mid sized companies which cannot afford the distraction and expense of the process. It means that all companies will be viewed similarly in determining access design features. However, it is obvious that no one approach can respond to the diversity in business strategy, profit model, size, scope and ownership structure that characterizes corporate America.

If, in the alternative, states are allowed to exercise their rightful authority, companies will be able to work with shareholders to determine the features that are meaningful and workable for them. By preserving flexibility in design and implementation, the CCMC believes the competitiveness of American businesses will be enhanced. Currently, this is the model being used for majority voting of directors, staggered boards and the right of shareholders to call special meetings, among others. The CCMC believes that this flexibility has served American companies and shareholders well and that preserving and even fostering it should be the touchstone for corporate governance reform. Accordingly, the thousands of public companies, through management, directors and millions of shareholders will be allowed to foster a structure that best fits their needs.

Recent Reforms Have Expanded Shareholder Rights

In recent years, new and multiple rules have reformed corporate governance structures. These reforms include, but are not limited to, enhanced director independence, audit committee financial expertise, independent lead directors, majority voting for directors, decreased staggered boards, and enhanced disclosure of executive pay. In addition, companies have taken a variety of steps to enhance communication with shareholders.

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These steps include using web-based technology to communicate with shareholders, holding meetings with major holders and conducting shareholder surveys.

In light of these reforms the CCMC does not see a need for a broad, uniform shareholder access rule. In fact, shareholders have made very limited use of their right to recommend candidates for nomination, evidence that there is no compelling need for access.

Communication and Proxy Voting Improvements Should be Reviewed

Whereas the CCMC believes that shareholder access is outside of the scope of the SEC's authority, issues regarding the proxy system should be reviewed and action taken if warranted. As the marketplace has changed, issues have emerged that merit a review of proxy voting participation, including the lack of retail investor familiarity with the proxy solicitation process and the separation of voting and economic rights. For example, improvements to the Notice and Access framework are needed to increase retail investor participation and the appropriate disclosure of ownership interests may be needed. Additionally, new technologies can be introduced into the proxy voting system to better foster communications between investors and boards. Alternative voting processes also present opportunities to better balance the diverse voices of the investing community. The SEC should take a holistic view of all market participants in examining and improving broader proxy voting participation.

The CCMC respectfully requests the SEC to focus on ensuring adequate disclosure of access rights provided by state law and on considering appropriate changes in the shareholder communication and proxy voting participation, which clearly are within the SEC's authority.

Sincerely,



Richard Murray
Chairman
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

cc: The Honorable Luis Aguilar, Commissioner, U.S. Securities and Exchange
Commission
The Honorable Kathleen Casey, Commissioner, U.S. Securities and
Exchange Commission
The Honorable Troy Paredes, Commissioner, U.S. Securities and Exchange
Commission
The Honorable Elise Walter, Commissioner, U.S. Securities and Exchange
Commission