



THE VOICE OF THE SHAREHOLDER

November 25, 2003

Mr. Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street N.W.
Washington, D.C. 20549-0609
USA

Re: Request for Comments
Proposed Rule: Security Holder Director Nominations
Proposed Exchange Act Rule 14a-11
SEC Release No: 34-48626
File No. S7-19-03

Dear Mr. Katz,

The Canadian Coalition for Good Governance is submitting comments with respect to the proposed rule providing for shareholder¹ director nominees.

The Canadian Coalition for Good Governance is a group comprised of 30 large pension funds and money managers in Canada with total net assets under management of approximately CDN \$500 billion. All of us have global holdings that include significant investments in many U.S. companies. We therefore appreciate the opportunity of submitting our comments below.

We firmly believe that the rule you propose will facilitate the full and informed exercise of shareholder nomination and voting rights through the proxy process in two ways:

- by allowing shareholders to present their own candidates for inclusion on the slate of nominees of a board of directors when certain triggering events have occurred; and
- by requiring companies to include disclosure regarding shareholder nominees in company proxy materials.

We are very much in support of the proposed rule because we believe it will facilitate meaningful participation for shareholders in the proxy process in terms of the nomination and election of directors. We also hope that the implementation of this rule will result in corporate boards adopting a more responsive attitude towards shareholders and greater board accountability in general.

¹ We use the term "shareholder" to mean "security holder" which is the preferred term in the Release.

In Canada, our federal and provincial business corporation legislation provides shareholders with the ability to nominate directors through binding shareholder proposals² where the registered holder(s) of not less than five percent of the shares has held the shares for six months before the day on which the proposal is to be submitted. We believe that it is a fundamental right for shareholders to nominate and remove directors.

We believe shareholders should not be impeded in their right to make nominations to the boards of directors. Hence, while being in support of your proposals we would like you to consider further reforms.

1. The Problem with Plurality Voting: Why Can't Shareholders Rule Against a Director?

One of our strongest reasons for indicating support for your rule is the fact that plurality voting is the accepted standard in both Canada and the United State for the election of directors. Under plurality voting, every voter can exercise one vote for each candidate, and the candidate with the most votes wins regardless of whether that candidate obtains a majority of votes or not. In an election where there are the same number of nominees as there are board positions available, each nominee receiving even one vote will still be elected regardless of the number of "withhold" votes cast by disgruntled shareholders. Shareholders are left with the reality that a majority of "withhold" votes has no legal effect. As long as plurality voting remains the standard in corporate director elections in North America, director elections are meaningless. In reality boards can present slates of nominees and simply receive the "rubber stamp" they are seeking. A dissatisfied shareholder is faced with either liquidating the investment, which is not always feasible for large investors, or launching of a costly proxy contest. The latter is obviously a radical solution. For this reason, we feel your proposed rule strikes a fine balance between these two extremes.

However, we wonder why you have done nothing to prevent plurality voting for directors and offer an option for shareholders to simply vote "against" ineffective directors?

2. The Problem with Broker Votes: Why are Brokers Allowed to Cast Votes Without Clear Instructions?

Another problem with director elections is the ability of brokers to cast votes without clear instructions from beneficial owners. Such votes are predominantly with management and serve to disenfranchise shareholders that wish to participate meaningfully in the election of directors. Broker votes, combined with plurality voting, means that director elections are truly meaningless. While we agree with the rule you have proposed as an effort to give shareholders a voice in the proxy process, we believe brokers should not vote unless they have instructions from their clients.

3. The Problem with Limited Access Rights: Why Restrict the Application of this Instrument?

We understand this proposal to require companies to include shareholder nominees in the company's proxy materials represents a substantial change in the Commission's proxy rules. In cases where companies have been repeatedly unresponsive to shareholder proposal majority votes, we do not feel that this rule should be exempt if state legislation exists to limits its application.

² For companies that have been incorporated under the federal statute, see **Canada Business Corporations Act** R.S.C. 1985, c. C-44 (as amended) section 137(4). Provincial legislation is similar.

3. a) Insurmountable First Hurdle: State Enabling Legislation

We note that the first limitation on the application of this rule would be the proposed nomination process would only apply where the applicable state law currently provides for the nomination of candidates for election to the board of directors by shareholders. We understand the intentions behind the first aspect of this hurdle. We acknowledge that the regulation of the proxy solicitation process must occur in a delicate balance between federal and state law in the United States. However, we believe it to be entirely unfair to limit the application of this rule to the lucky shareholders that happen to reside in the states that happen to have enabling legislation. We are of the opinion that this is an unfair and unreasonable limitation of this rule especially since the proposed triggering thresholds are high.

b) Debilitating Second Hurdle: State Corporate Law

We also note with concern the second aspect of this first hurdle: even if the state of the company in which the shareholders reside has enabling legislation, if the state's corporate law provides that a corporation may forbid a shareholder nominating process in its articles of incorporation, the rule is also not available to shareholders. We hasten to indicate this second significant hurdle, if left untouched by federal legislation, will result in companies quickly enacting such provisions within weeks of this proposed rule becoming law. Perhaps they have begun the process now. We believe this second hurdle will have a profound effect and will virtually eliminate the usefulness of the rule to shareholders. We urge the Securities and Exchange Commission to consider forbidding the enactment of such clauses within the articles of incorporation or by-laws of corporations. We also believe that this rule should apply in all states of the United States because to allow otherwise is unfair and will surely weaken the application of the rule.

4. Two Proposed Nomination Procedure Triggering Events

a) Base 35% Director Nominee "Withhold" Votes on Votes Cast

You have asked for comment on whether the threshold should be 35% withhold votes of the votes cast at the meeting or 35% of the votes outstanding of the company. We believe that the threshold should be 35% of the votes cast at the meeting since 35% of the votes outstanding of the company would present too severe a limitation on the rule. Our Canadian statistics indicate that voting turnouts at shareholder elections is incredibly low. A recent study conducted by Fairvest ISS³ indicated that the average voter turnout for the companies comprising the TSX 300 Index was 63.3% for the 2001 annual meeting period in Canada. Average voter turnout for non-TSX 300 companies in Canada was an even more depressing 50.1%. We are not aware of any studies to this effect having been conducted in the United States but we suspect that the statistics are similarly disappointing.

b) Require Immediate Publication of Results of the Vote

One of the realities of life that would make this entire process so much easier for shareholders to monitor would be a rule mandating that companies must report the results of their elections as soon as possible on their websites or by press release. While it is possible to obtain this information by means of persistent appeals to the company, it seems unfair to mandate that

³ Fairvest – An ISS Company conducted the proxy voting study and it is published in **The Corporate Governance Review**, v.14, no. 1, December/January 2002.

registered management investment companies publish their votes on proxy voting issues⁴ while at the same time, allow listed companies to avoid this obligation to shareholders. We believe that the publication of shareholder voting results immediately after company meetings would result in greater participation at shareholder meetings and would obviously facilitate the application of the rule for this triggering event.

c) Keep Majority Vote Standard for Shareholder Proposal by 1% Group

The second triggering event that you have proposed is the case where a shareholder proposal is submitted that specifically provides for the company becoming subject to the shareholder nomination procedure as outlined in this rule. When such a proposal is submitted by a shareholder (or group of shareholders) holding more than 1% of the company's securities for more than one year and where it receives more than 50% of the votes cast at a meeting, the nomination procedure is triggered. We note your data indicates that a review of a sample of 237 shareholder proposals submitted in 2002 found that only three were submitted by an owner of more than 1% of the shares outstanding, and all three were submitted by a single shareholder. Of these three shareholder proposals, only one received in excess of 50% of the votes cast. Clearly, this is another significant threshold sufficient to limit the application of this rule without the need for state legislation to limit the application further. We believe that majority vote is appropriate for shareholder proposals and we do not think the standard should be any greater than (50% + 1) of the votes cast at the shareholder election.

5. Restrict Third Nomination Procedure Triggering Event to "Traditional Corporate Governance" Issues

You have specifically requested comment on the viability of a third nominations triggering event. This triggering event is described as a shareholder proposal submitted pursuant to Exchange Act 14a-8⁵ which receives more than 50% of the votes cast on the proposal and where the board of directors fails to implement the proposal by the 120th day prior to the date that the company mailed its proxy materials for the next annual meeting.

We feel this proposal has merit and we agree that where a majority of votes cast by shareholders favour a proposal and the board exercises its discretion and does not implement, then there may be an inference of ineffectiveness on the part of the board and dissatisfaction with the proxy process on the part of shareholders.

However, we are concerned that this proposal may open the floodgates because of the tremendous diversity of subjects that can possibly be addressed in a shareholder proposal. We believe that the proposal should be tempered by a caveat to the effect that only traditional corporate governance issues may be the subject matter of the shareholder proposal to qualify it as a third triggering event. It has been our experience in the past two years that it is only traditional corporate issues that have received enough votes to merit a board's attention, such as the declassification of the board, shareholder ratification of poison pills and shareholder ratification of golden parachutes. Without this "corporate governance" limitation, we believe this proposal could become a tool for special interest groups that do not have the best interests of the corporation in mind.

⁴ We refer here to **Final Rule: Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies**, Release No. 33-8188, 17 CFR Parts 239, 249, 270 and 274, effective date April 14, 2003

⁵ Other than a proposal submitted pursuant to this rule.

6. Set Eligibility Standards at 1% not 5% and Six Months Not Twenty-four Months

Once one of the triggering events have been effected, you propose that a director nominee may be submitted for candidacy in an upcoming election if the following conditions are met:

- the shareholder must own either individually or in the aggregate, more than 5% of the company's voting securities;
- the securities have to have been held for at least two years as of the date of nomination;
- the shareholder must declare that they will continue to own these securities through the date of the annual meeting;
- if the shareholder wants to act as a group, the shareholder must give notice to the company by filing a 13G form. If shareholders wish to seek a change of control of the company, they are not eligible to use this proposed rule.

You have requested comment on whether the “more than 5%” ownership threshold is appropriate as a prerequisite to the nomination of director candidates pursuant to this rule. We are of the opinion that “more than 5%” share ownership sets the threshold too high for the United States. We note that the proposal itself indicates that not quite half of the companies listed on the NYSE, AMEX or NASDAQ markets have a single shareholder that could satisfy this requirement. We recommend that the eligibility requirement be set at 1%, which is the same threshold for the submission of a direct access proposal. We note that 5% is the threshold for Canada as indicated earlier, however, in this country there is a relatively greater concentration of share ownership due to the smaller nature of our market.

We are also concerned with the fact that the second aspect of the eligibility requirement involves a two-year period for the holding of shares. We question why shareholders must put up with unresponsive boards for a period of two years? We would recommend a much shorter period – such as six months. We agree that while some commentators have worried that corporations may suffer undue hardships and disruption through shareholder access to proxy materials, we believe that the limitations previously discussed are already significantly high to ensure that the process will be closely monitored and rare to effect.

* * * * *

We thank you again for this opportunity to comment and participate in this process.

Sincerely,

David R. Beatty, O.B.E.
Managing Director
Canadian Coalition for Good Governance



THE VOICE OF THE SHAREHOLDER

CANADIAN COALITION FOR GOOD GOVERNANCE MEMBERS:

Acuity Investment Management Inc.
Alberta Teachers' Retirement Fund Board
AMI Partners Inc.
Aurion Capital Management Inc.
British Columbia Investment Management Corporation (BCIMC)
Burgundy Asset Management
Connor, Clark & Lunn Investment Management
CPP Investment Board
Franklin Templeton Investments
Greystone Managed Investments Inc.
Hospitals of Ontario Pension Plan (HOOPP)
International Finance Participation Trust (IFPT)
Jarislowsky Fraser Ltd.
J.P. Morgan Fleming
KBSH Capital Management Inc.
LaSalle Firefighters Pension Plan
Leith Wheeler Investment Counsel Ltd.
Legg Mason Canada Inc.
Mackenzie Financial Corporation
MFC Global Investment Management
Ontario Municipal Employee Retirement System (OMERS)
Ontario Teachers' Pension Plan
OPSEU Pension Trust
RBC Asset Management Inc.
Sionna Investment Managers Inc.
Standard Life Investments Inc.
Trustees of the I.U.O.E. Local 793 Pension Plan for Operating
Engineers in Ontario
UBS Global Asset Management