

140-2-14

ACTION MEMORANDUM

November 6, 1979

TO: The Commission

FROM: The Division of Corporation Finance

RE: Re-Examination of Rules Relating to Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally

RECOMMENDATION: That the Commission publish a release announcing the adoption of amendments to Regulation 14A and Schedule 14A which would:

Donald F. Greene
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- (a) Require that shareholders be provided with a form of proxy which (1) indicates whether the proxy is solicited on behalf of the issuer's board of directors, (2) permits shareholders to withhold authority to vote for each nominee for election as a director and (3) provides a means by which shareholders are afforded an opportunity to abstain from matters referred to in the proxy card as to which shareholders have an opportunity to vote, other than elections to office.
- (b) Exempt from the informational and filing requirements of the proxy rules the furnishing of proxy voting advice by financial advisors, under certain circumstances;
- (c) Subject non-issuer solicitations made to ten or fewer persons to Rule 14a-9; and
- (d) Require disclosure concerning (1) the votes cast for and votes withheld in the election of incumbent directors and (2) the date by which shareholder proposals must be received in order to be included in the issuer's next proxy statement.

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NOVEL, UNIQUE OR
COMPLEX ISSUES: None

ACTION REQUESTED BY: Week of November 12, 1979

PERSONS TO CONTACT: Michael J. Connell (22579)
Amy L. Goodman (23098)
G. Michael Stakias (22594)
Gregory H. Mathews (22644)

OTHER DIVISIONS
OR OFFICES CON-
SULTED: Division of Investment Management concurs.

Reference is made to the attached draft release which describes the rules recommended for adoption in greater detail and reflects the Division's rationale for recommending that they be adopted.

I. Background

In Securities Exchange Act Release No. 16104 (August 13, 1979), the Commission published for comment proposed amendments to Regulation 14A and Schedule 14A which were intended to provide greater opportunities for shareholders to obtain information and advice with respect to matters on which they vote. The proposals would have required that shareholders be provided with a proxy card which would (a) indicate whether the proxy is being solicited on behalf of the issuer's board of directors, (b) permit shareholders to vote for or against nominees for election as directors, individually, and (c) not confer discretionary

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authority to vote on matters referred to in the proxy card as which shareholders have an opportunity to vote and did not specify a choice, notwithstanding an indication that a signed proxy might be counted for purposes of a quorum. The release also requested comments on a proposed rule requiring that shareholders be provided, under certain circumstances, with information concerning the votes cast for and against incumbent directors. Other proposals would have exempted from the informational and filing requirements of the proxy rules the furnishing of proxy voting advice by financial advisors, under certain limited circumstances. Such activities, however, as well as non-issuer solicitations made to ten or fewer persons, would be subject to the proxy rule prohibition against false or misleading statements. Additionally, comment was requested on proposed rules requiring disclosure of the date by which shareholder proposals must be received in order to be included in the issuer's next proxy statement.

After careful analysis of the comments which have been submitted, the staff has concluded that the proposed rules, as revised, are conceptually sound, should provide useful information to shareholders and would foster their ability to participate in the voting process. We agree with commentators, however, that in some respects the proposals produced unintended difficulties requiring modification. The Division, therefore, has revised the proposals in several major respects, as discussed below, which are responsive to some of the concerns expres-

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sed by the commentators, and also has made some technical and drafting changes. The major revisions are described below.

I. Voting on Individual Nominees for Director - Proposed Rule 14a-4(b)(2)

Rule 14a-4(b)(2), as proposed, would have required that a form of proxy relating to the election of directors list the nominees and permit shareholders to vote for or against each nominee, individually, by marking a box or by similar means. However, the proxy card could also have furnished a means for shareholders to vote in favor of the entire slate of nominees by marking a single box, rather than by marking boxes for each of the nominees, provided that there were a similar means for the security holder to vote against the entire slate.

Almost all of the over six hundred commentators who responded to the Commission's request for comments provided an assessment of this proposed rule. 1/ The additional tabulating costs associated with proposed Rule 14a-4(b)(2) could be excessive for some companies and the goal of providing a means for shareholders to express a negative vote with respect to individual nominees also can be achieved by other methods presently in use which would involve only a moderate increase in

1/ Indeed, many commentators addressed only this issue. Because of the large number of letters received, and the repetitive nature of the views expressed, the staff employed a tallying approach in summarizing some of the comments. Detailed, multi-issue letters of comments were, however, fully analyzed.

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tabulating costs. The revised rule would give issuers a choice of providing boxes, a means to delete names, a write-in procedure, or other similar means. Revised Rule 14a-4(b)(2) would, however, require that the names of the nominees appear on the face of the proxy card but not necessarily "listed," as would have been required by the rule as proposed. This requirement would, we believe, facilitate the use by shareholders of whatever means the issuer selects.

We are also persuaded that by requiring that proxy cards permit the casting of "against" votes, in light of the effect of such votes under state law, the Commission will be subject to criticism which, though unfair, could be avoided by requiring that proxy cards permit shareholders to withhold their votes from nominees. On balance, the loss of a means to express one's opposition more clearly is probably not worth the damage to other parts of the Commission's corporate accountability program which such criticism could inflict. Similarly, revised item 5(c) reflects the elimination of the proposed requirement to disclose the effect of casting "against" votes.

The rule, as revised, eliminates that part of proposed Rule 14a-4(b)(2) which provided that if shareholders have cumulative voting rights the form of proxy may provide a means for shareholders to grant authority to have their shares cumulated and voted as they designate. As the commentators pointed out, this aspect of the rule

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was permissive in nature, and issuers presently can provide for such authority on the form of proxy if they desire to do so. The Commission could more appropriately encourage issuers to provide voluntarily for the exercise of cumulative voting on the proxy card by incorporating such a recommendation in the release.

II. Disclosure of Votes Cast For and Against Individual Directors - Item 6(g)

Proposed Item 6(g) which provides for the disclosure of voting results is unchanged except for word changes necessitated by elimination of "against" votes. In addition, a new instruction provides that such disclosure may be made in a post-meeting report rather than in the proxy statement relating to the next annual meeting of shareholders. Commentators, though generally against this proposal, were overwhelmingly in favor of the post-meeting report as an alternative to disclosure in the proxy statement.

III. Voting of Unmarked Proxies - Proposed Rule 14a-(b)(3)

Rule 14a-4(b)(3), as proposed, would have prohibited a form of proxy from conferring discretionary authority to vote with respect to any matter as to which the security holder is afforded an opportunity to specify a choice and no specification has been made. The proposed rule, however, did permit the form of proxy to provide a means

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for security holders to grant to the proxy discretionary authority to vote for any matter to which the security holder has been afforded an opportunity to specify a choice, other than elections to office.

This proposal generated widespread and hostile commentary. While we do not agree with the commentary which expressed doubt about the Commission's authority to adopt this rule, we are persuaded that if the rule were adopted, corporations and investment companies might experience severe difficulties in acting on certain corporate matters which must be put to shareholder vote. Revised Rule 14a-4(b)(4) permits the granting of authority to vote on proposals as to which no choice has been specified and revised Rule 14a-4(b)(2) provides for the granting of authority in the election of directors. As was suggested by a number of commentators, proposed Rule 14a-4(b)(1) has been revised to require that shareholders be provided with a means to abstain from voting on proposals.

IV. Identification of Persons on Whose Behalf Proxies are Solicited - Proposed Rule 14a-4(a)

No changes have been made. We will identify other references in the proxy rules to "management's proxy materials" and recommend that the Commission adopt technical amendments to change such references to read "issuer's proxy materials."

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V. Recommendation

The Division recommends that the Commission authorize the publication of the attached release, which announces adoption of the rules revised as described herein.

Attachment A - Summary of Comments