

July 22, 2010

## **SECURITIES AND EXCHANGE COMMISSION ISSUES CONCEPT RELEASE SEEKING PUBLIC COMMENT ON U.S. PROXY SYSTEM**

To Our Clients and Friends:

The principal mechanism for U.S. shareholder participation in corporate governance is being comprehensively scrutinized by the Securities and Exchange Commission (the "SEC") for the first time in almost thirty years. On July 14, 2010, the SEC issued a concept release seeking public comment on numerous fundamental aspects of the U.S. proxy system (the "Concept Release"). Noting concerns from both issuers and investors, the SEC proposes to examine the integrity and efficiency of the proxy system as a whole. Although it is not presented as a rulemaking proposal, the Concept Release will likely lead to significant SEC rulemaking in the coming years. Given the wide range of parties with vested interests in the proxy system, members of the corporate community should strongly consider participating in the dialogue related to this important area by submitting comments to the SEC, either individually or through collective means.

This alert provides an overview of the matters discussed in the Concept Release. In the near future we will issue a more detailed memorandum that identifies issues of particular concern. Comments -- on the specific issues raised in the Concept Release, or on the proxy system in general -- are due by October 20, 2010. The Concept Release addresses issues relating to three general topics: the accuracy, transparency, and efficiency of the voting process; shareholder communications and participation; and the relationship between voting power and economic interest.

### **A. The Accuracy, Transparency, and Efficiency of the Voting Process**

The SEC notes in the Concept Release that the wide array of third-party participants in the proxy system creates challenges for preserving the accuracy, transparency, and efficiency of the voting process. In light of the proxy system's complexity, the SEC solicits public comment on the following issues related to the proxy voting process:

#### **Over-Voting and Under-Voting of Shares**

In some cases, the number of shares that a broker-dealer or other securities intermediary is entitled to vote may not match the number of votes the intermediary actually casts. Discrepancies can occur, for example, if securities are loaned out and the broker-dealer solicits votes from both the beneficial owner and the borrower, or due to delivery failures in the clearance and settlement system. Securities intermediaries have implemented various methods of reconciling their records with the records of the vote tabulator and allocating the shares among their customers' accounts. The Concept Release asks for comment on whether over-voting or under-voting is occurring, whether it is in fact a problem, and whether the SEC should require securities intermediaries to either use a particular method of reconciliation and vote allocation, or require disclosure of the particular method the intermediary employs.

## **Vote Confirmation**

Investors are currently unable to confirm whether or not their votes are recorded correctly, largely because no single party -- broker-dealers, proxy service providers, transfer agents, or issuers -- has all of the information needed to provide confirmation. The Concept Release requests comment on the extent of the problem and whether participants in the voting chain should be required to share limited information to enable vote confirmation.

## **Proxy Voting by Institutional Securities Lenders**

Institutional securities lenders must recall any of their securities that are lent out prior to a voting record date in order to vote the shares. That can create a challenge for institutions as they may not learn of matters for which they want or need to cast votes in sufficient time to recall the securities. The Concept Release asks whether issuers should be required to publicly disclose descriptions of the matters to be voted on in advance of the record date. Additionally, the SEC solicits comment on whether mutual funds and other management investment companies should be required to disclose the number of shares voted as well as how they are voted (currently required).

## **Proxy Distribution Fees**

Currently, the fees that broker-dealers and their agents charge to issuers for distributing proxy materials are set by the New York Stock Exchange after SEC approval. The Concept Release seeks comment on whether the fee schedule should be revised or whether it should be eliminated to allow the marketplace to determine the amount of the fee. The Concept Release also solicits comment on alternatives to the current system, including creating a central data aggregator that would collect beneficial owner information and provide it to any agent designated by the issuer.

## **B. Shareholder Communication and Participation**

In addition, the Concept Release, recognizing the importance of shareholder voting, seeks public comment on ways to enhance shareholder communication and participation. Specifically, the Concept Release addresses the following issues:

### **The Ability of Issuers to Communicate with Beneficial Owners**

The large number of shares held in street name and recent corporate governance developments have led the SEC to question whether issuers are able to communicate effectively with the beneficial owners of their shares. The current system permits beneficial owners who hold shares in street name and object to the disclosure of their identities to issuers ("objecting beneficial owners" or "OBOs") to remain anonymous. As a result, issuers are forced to communicate with OBOs through securities intermediaries -- at greater cost and delay. The SEC seeks comment on whether it should preserve OBO status, or instead prohibit, limit, or discourage beneficial owners from objecting to the disclosure of their identities by intermediaries to issuers.

## **Retail Voting Participation**

The SEC is concerned about the relatively low level of voting participation by retail investors. The Concept Release solicits comment on strategies to increase voting participation, including investor education, accessing proxy information on broker websites, allowing advance voting instructions, enabling greater investor-to-investor communication, and improving the use of the internet for the delivery of proxy materials.

## **Data Tagging of Proxy-Related Information**

Recently adopted SEC rules require issuers to tag certain kinds of data, including financial statements and beneficial ownership of directors and officers that appear in their periodic reports on Form 10-Q and Form 10-K, using XBRL. The Concept Release solicits comment on whether to extend this requirement to certain types of information that appear in proxy statements, such as executive compensation and director qualifications.

## **C. The Relationship Between Voting Power and Economic Interest**

The Concept Release observes that confidence in the proxy system may be undermined if votes are cast by persons lacking an economic interest in the shares being voted. Accordingly, the SEC seeks comment on the following issues related to the relationship between voting power and economic interest:

### **The Role of Proxy Advisory Firms**

The Concept Release describes certain concerns that some issuers have, specifically that proxy advisory firms may be basing their voting recommendations on inaccurate or incomplete information and a "one size fits all" approach to corporate governance issues that does not take into account a company's size or other characteristics. The SEC also notes the concern of some commentators that proxy advisory firms might be subject to undisclosed conflicts of interest by providing consulting services to company clients and also proxy voting recommendations to investment advisors. The SEC requests comment on whether and how it should expand its regulatory oversight of proxy advisory firms.

### **Dual Record Dates**

Recent changes to Delaware law now permit issuers to set two record dates: one to give notice of the shareholder meeting and another date closer to the meeting date to determine who holds the voting rights. The Concept Release solicits input on whether the SEC should adapt its rules to facilitate dual record dates.

## Empty Voting

Finally, the Concept Release describes transactions -- including purchases of certain put options, sales of shares after a voting record date, and share lending -- that "decouple" the voting power of shares from the economic interest in the shares. Hedging strategies and derivatives can be used to create a negative economic interest in the issuer, and as a result, some shareholders might not employ the conventional approach of voting their shares in a manner that is designed to increase share price. The SEC seeks comment on whether to adopt rules requiring disclosure of empty voting or to permit only persons possessing pure long positions to vote by proxy.

The Concept Release will likely lead to significant changes to the proxy system in the years to come. Gibson Dunn attorneys are available to assist you in developing comment letters on the topics outlined in the release (available at <http://www.sec.gov/rules/concept/2010/34-62495.pdf>).



*If you have any questions regarding the current proxy voting process and how it may be impacted by the issues addressed in the Concept Release, you may contact the Gibson Dunn attorney with whom you work, or any of the following:*

### **Washington, D.C.**

*Howard Adler (202-955-8589, [hadler@gibsondunn.com](mailto:hadler@gibsondunn.com))  
Anne Lee Benedict (202-955-8654, [abenedict@gibsondunn.com](mailto:abenedict@gibsondunn.com))  
Amy L. Goodman (202-955-8653, [agoodman@gibsondunn.com](mailto:agoodman@gibsondunn.com))  
Stephen I. Glover (202-955-8593, [siglover@gibsondunn.com](mailto:siglover@gibsondunn.com))  
K. Susan Grafton (202-887-3554, [sgrafton@gibsondunn.com](mailto:sgrafton@gibsondunn.com))  
Elizabeth Ising (202-955-8287, [eising@gibsondunn.com](mailto:eising@gibsondunn.com))  
Brian J. Lane (202-887-3646, [blane@gibsondunn.com](mailto:blane@gibsondunn.com))  
Ronald O. Mueller (202-955-8671, [rmueller@gibsondunn.com](mailto:rmueller@gibsondunn.com))  
John F. Olson (202-955-8522, [jolson@gibsondunn.com](mailto:jolson@gibsondunn.com))*

### **New York**

*Barbara Becker (212-351-4062, [bbecker@gibsondunn.com](mailto:bbecker@gibsondunn.com))  
Andrew Fabens (212-351-4034, [afabens@gibsondunn.com](mailto:afabens@gibsondunn.com))  
Steven Finley (212-351-3920, [sfinley@gibsondunn.com](mailto:sfinley@gibsondunn.com))  
[Dennis Friedman](mailto:dfriedman@gibsondunn.com) (212-351-3900, [dfriedman@gibsondunn.com](mailto:dfriedman@gibsondunn.com))  
Eduardo Gallardo (212-351-3847, [egallardo@gibsondunn.com](mailto:egallardo@gibsondunn.com))  
Glenn Pollner (212-351-2333, [gpollner@gibsondunn.com](mailto:gpollner@gibsondunn.com))*

### **Los Angeles**

*Dhiya El-Saden (213-229-7196, [delsaden@gibsondunn.com](mailto:delsaden@gibsondunn.com))  
David M. Hernand (310-552-8559, [dhernand@gibsondunn.com](mailto:dhernand@gibsondunn.com))  
Ari B. Lanin (310-552-8581, [alanin@gibsondunn.com](mailto:alanin@gibsondunn.com))  
Jonathan K. Layne (310-552-8641, [jlayne@gibsondunn.com](mailto:jlayne@gibsondunn.com))*

# GIBSON DUNN

## **Orange County**

*James J. Moloney (949-451-4343, [jmoloney@gibsondunn.com](mailto:jmoloney@gibsondunn.com))*

*David C. Lee (949-451-4069, [dlee@gibsondunn.com](mailto:dlee@gibsondunn.com))*

## **San Francisco**

*Peter T. Heilmann (415-393-8236, [pheilmann@gibsondunn.com](mailto:pheilmann@gibsondunn.com))*

*Stewart McDowell (415-393-8322, [smcdowell@gibsondunn.com](mailto:smcdowell@gibsondunn.com))*

## **Denver**

*Richard M. Russo (303-298-5715, [rrusso@gibsondunn.com](mailto:rrusso@gibsondunn.com))*

*Robyn E. Zolman (303-298-5740, [rzolman@gibsondunn.com](mailto:rzolman@gibsondunn.com))*

© 2010 Gibson, Dunn & Crutcher LLP

*Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.*