Testimony to a Hearing of the United States Senate Committee on Banking, Housing & Urban Affairs

"Shareholder Rights and Proxy Access"
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1.1

The International Corporate Governance Network (ICGN) is a global membership organization of institutional and private investors, corporations and advisors. Our membership spans 40 countries and our investor members are responsible for global assets of US$15 trillion, US$4.5 trillion of which are invested in US markets.[1]

1.2

Capital is global, and it is also mobile. Competition among markets requires that policy makers pay attention to the concerns of shareholders in ensuring an effective and efficient regime for corporate governance. An element in considering the competitiveness of markets is undoubtedly the framework for shareholder rights. US provisions are increasingly judged by the standards in other markets. In many areas the US system is considered highly effective, but in the realm of shareholder rights it is viewed as relatively weak. The alternatives routes for investor protection, such as trading or litigation (the adage being "sue or sell" for investors with complaints) have been viewed as expensive, reactive and inefficient.

[1] As the Committee will know the ICGN Shareholder Rights Committee has submitted a comment letter to the SEC which sets out our concerns with the proposals as drafted regarding shareholders' access to the proxy. This written note should be viewed as supplemental to that letter, which is attached for convenience.

1.3

Overseas investors hold close to one in five shares in US public companies and this globalisation of capital markets has set the stage for investor concern with cross border standards of corporate governance. As a group with such significant shareholdings in the US, both from domestic and overseas sources, we welcome the opportunity to provide testimony to this Senate hearing on shareholder rights and access to the proxy. Please note that due to the short notice, this statement has been developed by the Secretariat and not been subject to consultation with our Board.

1.4

Shareholders have the right to appoint, dismiss and propose directors in other markets, and in ICGN's experience this contributes to investor confidence in the efficiency and effectiveness of the corporate governance regime. For example, our Members reported in a recent poll[2] that in the UK, Australia and other Common Law countries outside North America, shareholders may propose a director by ordinary resolution, and this requires that 100 shareholders or those representing 5% of the share capital put the resolution forward. A similar provision exists in major Civil Law countries, such as Japan or in Germany where a single shareholder may propose a director for election to the supervisory board, although to call a special meeting for this to take place requires 5% of shares. Each market has found the balance between ensuring a legitimate threshold and allowing shareholders to put forward proposals which their fellow shareholders can

[2] A poll of opinion on these issue was conducted in September 2007 of ICGN members by RD:IR the research firm.

consider on merit. We note in our SEC letter that in the US market due to its size that a 5% threshold is too high to allow for meaningful access, and should be tempered as in other markets, by a lower threshold or number of shareholders which is practical to attain.

1.5

We consider that US capital markets would be strengthened by shareholders being provided with the tools to both promote enterprise through ensuring accountability by the board. It is recognised that there are provisions via proxy contests for introducing new board members, but it was remarked in our poll of members that these are “complex and prohibitively expensive”. One ICGN member in our poll commented “New rules in the USA should be kept simple.”

1.6

We consider that shareholder rights in relation to the board of directors are the lynchpin of corporate governance. Shareholders have an economic interest which gives them a unique incentive to ensure boards fulfil their responsibilities to promote enterprise and ensure accountability. We are not persuaded that regulatory agencies and other bodies could or should attempt to substitute for this. Shareholders have a core of common interest with the business community in promoting wealth creation. Both sides need a corporate governance framework which is efficient and effective that promotes dialogue and allows flexibility in developing practical solutions. Law and regulation play an important role in setting the framework for rights and responsibilities but should not attempt to substitute for this direct contracting.

1.7

We are not convinced that the current SEC proposals as drafted meet the tests of efficiency and effectiveness. We also do not see consensus among the share owning community whose interests the SEC is mandated to protect. For that reason, we counsel a pause in proceedings. It is more important to make rule changes which command respect and reflect shareholders' concerns, than rush to implement in haste, what will surely be repented at leisure.

1.8

ICGN regards the right of shareholders to nominate directors to the board as fundamental. It is a right which has existed since the origins of company law in Europe over 150 years ago, and is a feature of major markets outside the USA to this day. The corporate governance paradigm is simple: shareholders provide capital to companies; boards are given the task of overseeing the deployment of that capital; shareholders ensure that their interests are protected through being able to hold the board to account. To ensure this, shareholders need the ability to appoint, remove and propose directors to the board. The mechanisms for this should be simple and practical. In a straw poll of the ICGN membership conducted recently, 82% stated that shareholders should have the right to propose directors for the board of the company. 76% thought the rules and requirements for proposing directors should be no different to that for introducing other resolutions to the agenda. One ICGN member respondent to our survey commented. "Shareholders

own the company and Boards and/or the SEC should not obstruct their access to this basic right. US directors are not sufficiently accountable to shareholders."

1.9

In our poll we also asked ICGN Members how often the provisions to propose directors were used in other markets, and in most cases, the answer was "rarely". This is because the "reserve power" acts as a powerful incentive for communication, consultation and the development of solutions between shareholders and companies. One ICGN Member commented from the UK "These provisions are rarely used, but the fact of their existence is a real spur to proper engagement by companies with their shareholders. And shareholders seem to be very thoughtful in their analysis of shareholder resolutions that do get on the agenda. I am not aware of very many shareholder resolutions having succeeded but I think that is because the engagement linked to the resolution (both by the proponents and others) has produced from the company commitments to improve practice." Another reflected that (having the ability to propose directors through a resolution "is why companies prefer to engage with real effort on issues that might become a shareholder resolution."

1.10

There has also been concern that allowing shareholders to put forward candidates to the board in the US via the proxy process would leave companies vulnerable to special interests. If nomination were the same as election, perhaps this would be a consideration. However, all resolutions must be passed by a majority of shareholders and all elected

directors would still have fiduciary duties to the company, not to any particular group. The majority of shareholders share the same interest as the company: the growth of long term value. As one respondent to the ICGN member poll commented "Shareholder proposals will only pass if at least 50% of shareholders share similar concerns. Directors who have their shareholders' confidence need not worry!". It is notable that some recent efforts by hedge funds and private equity groups to pressurise companies into new strategies have foundered as the shareholder majority has not provided support to the minority proposals. A healthy dialogue around those proposals has in fact strengthened communication between owners and boards, and improved understanding of strategy which is all to the companies' (and their owners, and it goes without saying, their stakeholders') long term gain.

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To sum up, ICGN considers that shareholders need the right to hold directors to account, and that the rights to appoint, remove and propose members to the board are an essential part of their corporate governance 'toolkit'. The US market will come under increasing pressure to compete, and shareholder rights are a vital element in capital market competitiveness. For that reason, we urge that the SEC proposals be put to one side, whilst a further round of consultation takes place to find solutions which are simple and practical. We do not see a disadvantage in postponing the decision. The current climate in our view is suitably stable to allow for this reflection. Shareholders may well make proposals, but only if they command majority support can they have real influence. That in itself is the inbuilt check and balance to the system.