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Shareholders Will Speak: Is Anyone Listening?

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Shareholders Will Speak: Is Anyone Listening?

What about Board — Investor Communications? Where Are We Headed?

BY LOIS YUROW

As we approach the 2008 proxy season, and continued debate about appropriate SEC rules for the annual proxy voting process, there has been increased discussion about the flow of communication between investors and boards of directors or individual directors. Here's an overview of where things stand at year-end.

Fact: The Securities and Exchange Commission received more than 30,000 letters commenting on pending rule amendments that generally would make it more difficult for shareholders to introduce proposals in company proxies. (See sidebar, SEC Votes on Two Shareholder Communication Rules, p. 9.) Even though the SEC voted to maintain the *status quo,* issuers should pay attention to the letters' common theme: shareholders want more ways to make their voices heard, not fewer.

Fact: In September, a PR firm released the results of a study showing that only 38 of the biggest 100 companies trading on NASDAQ "responded to a staged e-mailed investor inquiry with the appropriate answers." Many issuers did not respond at all.

Fact: According to a recent survey of high net-worth investors and professional financial advisors, investors harbor "a clear perception that the board [of directors] primarily serves [company] management, rather than shareholders."

What instruction can IROs take from these facts? Shareholders intend to speak, and if they get the sense that no one is listening, they will become resentful. Now that the SEC has decided the fate of the proposed proxy access amendments — at least for the upcoming proxy season — smart companies will not breathe a sigh of relief that the shareholder proposal process remains unchanged. Instead, they will consider ways to ensure that their own shareholders' communication needs are met and that shareholders are satisfied.

Current rules regarding shareholder communication

Receiving little attention in the ruckus over shareholder proposals is the fact that shareholders usually have another — albeit more limited — means for voicing their opinions. Specifically, all NYSE-listed companies are required to establish and publicize a system that enables shareholders and other interested parties "to communicate directly with the presiding director or with the non-management directors as a group." The SEC has not imposed such a requirement, but does require public companies to disclose:

- If they have a method for shareholders to communicate with board members;
- If so, what it is and how it works (what types of communication are accepted? who reviews correspondence received?); and
- If not, why the company decided it was not appropriate to have such a system.

Shareholder communication policies

Public companies respond to these requirements in a number of ways. A brief review of shareholder communications policies did not turn up any companies that *refuse* to accept correspondence for the board of directors, but many issuers impose restrictions and indicate that communications will not always reach their intended audience.

Generally, shareholder communication policies vary in three respects:

- **Who** vets shareholder correspondence
- **What** actually reaches the board
- **Who** can take advantage of a corporate communications policy.

In a 2004 paper entitled, "Framework and Tools for Improving Board-Shareowner Communications," the National Association of Corporate Directors (NACD) offered a set of best practices regarding these issues and more. Below are some highlights:

Who vets shareholder correspondence? Some companies will forward anything addressed to the board (or a particular director or committee) directly to the addressee. However, most assign an employee — generally the corporate secretary or someone in the general counsel's office or the IR department — to conduct an initial review of shareholder correspondence.

According to the NACD, it is fine for most correspondence to be funneled through a single office, but shareholders should at least have a way to contact board members directly (without going through management) to point out "company or management practices, policies, or activities that are possibly questionable, unethical, or illegal."

What actually reaches the board? Some companies use gatekeepers for administrative convenience only; their policies state that everything addressed to the board will be delivered once it is logged. More often, the gatekeeper has discretion to redirect (or weed out entirely) things like "mass mailings, job inquiries, surveys, business solicitations or advertisements, personal grievances . . . duplicative communications, or patently offensive or otherwise inappropriate material."

The NACD paper argues that everything addressed to a particular board member should get to that individual. At the very least, the gatekeeper should advise the board member of the communication and explain why it was routed elsewhere. The NACD suggests that boards pre-empt unsuitable correspondence by "detail[ing] which issues are appropriate for them to address and which are appropriate for management." Similarly, boards can preempt duplicative correspondence by posting FAQs on the company's Web site to answer common questions. Ensuring that all shareholders have access to the same information also minimizes potential Regulation FD concerns.

SEC VOTES ON TWO SHAREHOLDER COMMUNICATION RULES

As IR Update went to press, the SEC voted on two rules with significant bearing on shareholder communications. We provide a summary of both here, and will cover each in greater depth in future IR Update issues.

1. Proxy Access – The SEC voted 3-1 to amend its rules to clarify that companies may exclude from their proxy materials shareholder proposals to establish proxy access procedures. The amendment to Rule 14a-8(i)(8) provides that a company may omit from its proxy materials any proposal that "relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election." Chairman Cox indicated that this decision is a temporary solution in order to remove the uncertainty created by a 2006 U.S. Court of Appeals decision around what were longstanding proxy access procedures. Cox also reiterated that he favors shareholder access in the long term, and is working on an access proposal for the 2009 proxy season. The press release is available on the SEC Web site.

2. Electronic Shareholder Forums – The SEC also voted unanimously to adopt amendments to the proxy rules to facilitate the use of electronic shareholder forums. Under the amendments, participation in an electronic shareholder forum, which could potentially constitute a solicitation subject to the current proxy rules, would be exempt from most of the proxy rules if the conditions to the exemption are satisfied. See the SEC's press release for more information.

These rules will take effect 30 days after they are published in the Federal Register.

Who can take advantage of a corporate communications policy? Some companies view shareholder-board communication as akin to the shareholder proposal process. As a result, they require corresponding shareholders to identify themselves, state how many shares they own, and provide contact information. Many ask for disclosure about any "special interest" or conflict relating to the matter addressed, and a few even impose word limits.

The NACD indirectly discourages such procedural restrictions by pointing out that "one of the more tangible benefits of improved board-shareowner communication may be that investors' use of shareowner proposals . . . may decline." Improved communication with the board will not dissuade an investor who wants to gain the attention of fellow shareholders, but we can safely assume that many shareholders would be happier to get the attention of the board.

Do we *have to* respond?

Although some communication policies state that correspondence will be "acknowledged," a search did not turn up any that *promise* a response. The survey of NASDAQ companies described earlier demonstrates that reticence. Considering the common perception among shareholders that boards do not serve the investors, it seems that a company could stand out (favorably) simply by responding to shareholder inquiries — either directly or through publicly available FAQs.

As stated by the NACD, the board should "make a good-faith effort to respond to all direct communications from shareowners. There may well be times and issues when the most appropriate response is 'We cannot respond to your question or issue at this time…' However, a good-faith effort implies that the board will use this response only on an exceptional basis."

How to proceed

Based on the recent letters received by the SEC on the proxy access issue, shareholders are apparently quite frustrated that they cannot easily share their views with their elected representatives — the company's board. Smart, responsive companies can enhance their communications policies to ensure that they, the company, do not bear the brunt of that frustration. IRU

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A QUICK TIP

NEGOTIATING THE HOLIDAY SEASON

BY PAT REUSS

The observance of winter holidays often provokes anxiety — especially in the workplace. What kind of celebration is appropriate? What parties should I attend, and which are OK to avoid? What about gift giving? How can I be sure not to offend someone who celebrates in a different way from me? Use these ideas to guide your decisions and make your holiday season fun rather than frustrating.

- If your boss invites you, you must go! Party invitations from peers and those you supervise can be graciously declined, but unless you are out of town or so sick you can't stand up, treat an invitation from your boss as a command performance. The party will likely be a casual one, so you don't have to stay long, but you must attend. Address your boss the same way you do at work, and call family members by name whenever possible. Hidden trap: Don't assume everyone is from work — the person you make a sarcastic comment to about the fruitcake may be the boss's brother-in-law. Doing it right: Write a thank you note to your hosts — handwritten, not email. Most people won't, and this simple gesture will set you apart in a positive way.

- Keep your eyes open! Especially if this is your first holiday season with your employer, take your cues for celebration from your coworkers and your office culture. Some companies encourage holiday decorations; others do not. Some places have small gift exchanges within each department; others encourage community outreach instead. Hidden trap: Don't assume that everyone will celebrate in the same way. Doing it right: Volunteer to help coordinate whatever holiday celebration your company has. It's a good way to be visible.

- Stay sober! Many companies no longer sponsor holiday events where alcohol is served because of liability issues. But if your department goes out for a holiday lunch or dinner, make sure that you are sensible about drinking. Two glasses of wine in a one-hour period can be enough to lower your inhibitions and loosen your tongue. Hidden trap: Don't assume that your behavior at a holiday celebration won't affect your career. Many people have lived to regret their momentary, alcohol-fueled inappropriate behavior. Doing it right: Remember that every work-sponsored event, even a party, is work. Use the same skills that you've learned on your job to interact appropriately with everyone.

- Give down-line to individuals; give up-line as a group. Many organizational experts believe that any gift giving should be done between peers only. Others feel that department heads should give small, equally valuable gifts to those they supervise. If you do choose to give gifts to your employees, choose similar items or give gift cards of the same denomination to each employee. If you want to give a gift to your boss, suggest to your peers that you all go in together on a gift. Hidden trap: Avoid being ostentatious. Something that can be displayed at work or used at work is appropriate. Don't give an item (such as clothing) that is too personal. Doing it right: Emulate the manager who gave each person on her team a coffee mug with the person's name on it. Some people used them for beverages, others stored paperclips in them, but everyone found them useful and they were reminded of the manager's thoughtfulness frequently.

Most of all, remember that the holidays are a celebration of our connection to each other. Just relax, be sensible, and enjoy. IRU

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