Empowering Shareholders in Directors’ Elections: A Revolution in the Making

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A Ghost is Haunting Corporate America

1. Directors: By Grace of God, or by Will of the Shareholders? Why Shareholders are (were?) so Weak in Directors’ Elections;

2. The Evolution that lead to the New SEC Rules on Proxy Access;

3. New SEC Rule 14 a-11;

4. Is it enough?
   - Defenses against Proxy Access;
   - A (Truly) Revolutionary Proposal: Proportional Voting through “List Voting”
1. Traditional Obstacles to Shareholders in Directors’ Elections

- independent proxy solicitation
  - proxy access
    - exclusion
    - plurality vs. majority voting
      - NYSE Rule 452: brokers’ discretionary voting on uninstructed shares
        - new Rule 14a-11 + Dodd-Frank Act
        - “weak” voluntary majority voting
          - amended 2009
2. Recent State-law Evolution

• 2007: North Dakota Publicly Traded Corporations Act:
  – proxy access and reimbursement of proxy solicitation expenses;
  – majority voting

• 2009: Delaware “Mini-Reform”:
  – § 112 DGCL
  – § 113 DGCL
3. The SEC (and Congress) Enter the Scene

• Rule 14a-11
  – 3% for 3 years;
  – priority to largest shareholders, not first come, first served
4. Is it Enough?

• Defenses:
  – directors’ qualifications;
  – non-rescindable resignation conditioned on nominating committee’s approval;
  – withholding protections, e.g. § 102(b)(7);
  – contingent dividends based on presence in the board of directors approved by the board of directors

• Will these defenses Survive Judicial Scrutiny?
  – shareholders’ franchise (Blasius)?
  – takeover defenses standards?
  – pre-empted by Federal law?

• Is it enough?
  – how is proxy access affected by majority voting?
4. Is it Enough?

• A more Radical Proposal: Cumulative Voting and List Voting

coalition # votes x vacancies on the board = “pool” of votes to distribute among candidates

seat(s) on the board reserved for second ranking list