Date: April 15, 2008

To: Interested Persons

Re: 2008 Early Proxy Season Roundup

While the 2008 proxy season is just underway, several developments may foreshadow some interesting trends, although it will likely be a while before we are able to fully assess their impact. Here are some highlights of the early proxy season.

Activists can run an intense "vote no" campaign against a company's director nominees as an "exempt solicitation" without needing to undertake the expense and burden of a formal solicitation under the SEC's proxy solicitation rules.

In a different realm than hedge fund dissidents seeking board seats, we are increasingly seeing shareholder activists aggressively engage in "vote no" campaigns against incumbent board nominees, often including the CEO and Chair, through a so-called "exempt solicitation." Because they do not actually solicit votes through their own separate proxy cards against the directors, the shareholder can launch a relatively inexpensive PR campaign, including disseminating letters to shareholders via Broadridge (formerly ADP), without needing to incur the expense or burden of a formal proxy solicitation that complies with the SEC's proxy solicitation rules. In addition, because the item (election of directors) is already on the shareholder meeting agenda, and the activist is not proposing other nominees, the "vote no" campaign does not fall under the notice requirements in the company's bylaws.

Through an exempt solicitation, the campaigning shareholder can undertake a wide range of actions, including press interviews, newspaper ads, public speeches, and meeting with ISS and investors, all without any filing requirement (only formal letters to shareholders would need to be filed under a Notice of Exempt Solicitation). In contrast, the targeted company, which has a formal proxy solicitation underway, will likely need to file any materials it uses to counteract the campaign as additional solicitation materials under the proxy rules. Companies may be frustrated to discover that, except for the absence of their own competing proxy cards, the activists' efforts in a "vote no" campaign and the resulting media attention may have a similar effect as if the proponent had conducted a formal proxy contest.

Notwithstanding strong efforts and attention by activists, proposals seeking non-binding advisory votes on executive compensation (say-on-pay proposals) have so far received mixed support.

The majority votes received on several say-on-pay proposals last year were notable, especially given the relatively recent introduction of these proposals into the US proxy/governance landscape. Shareholder advisory votes on executive pay have been relatively common in countries such as the UK, the Netherlands and Australia. Shareholder activists, led by Walden Asset Management and the American Federation of State, County and Municipal Employees (AFSCME), are reported to have filed over 90 such proposals in the 2008 season, compared to approximately 50 last year. Initial expectations were that these proposals would fare well in the 2008 season, in light of the strong activist campaigns, ISS support and the momentum of the "wins" from last year.

Results so far have been mixed, with the proposal defeated at three major financial institutions–this notwithstanding the view of activists that the Wall Street firms were most vulnerable to say-on-pay proposals this year, given the widely publicized mortgage-related losses suffered. While at least five companies have adopted say-on-pay proposals as current or future ballot items, most notably Aflac as the first to do so for the 2008 season, it appears that at least some major institutional investors continue to believe that such a vote may not be the best way to communicate their views on the appropriateness of a company's executive compensation. Whether the lack of support at the few companies where the proposals have come to a vote so far represents a trend, or is more indicative of individualized factors such as the makeup of the shareholder base, is uncertain at this juncture.

The SEC staff is showing increasing willingness to grant no-action letter requests to exclude shareholder proposals from proxy statements under Rule 14a-8 than in past seasons.

According to RiskMetrics Group, the SEC Staff has increased dramatically the number of proposals permitted to be excluded from proxy statements through no-action letter requests since last year, from less than 50% to almost 70% of letters submitted. Even before realizing the increased level of support from the Staff, companies were emboldened this year to challenge proposals and sought exclusion in one in three cases, again according to RiskMetrics. Most often companies are challenging proposals under procedural grounds or the "ordinary business" basis for exclusion.

While many companies may be encouraged by these results and the number of submissions is likely to go up next year as a result, the process and outcome at the SEC continue to be difficult to anticipate.

Companies seem more willing to negotiate with shareholder activists for common middle ground on proposals, even on those likely to generate significantly less than majority support.

Companies continue to negotiate with shareholder proponents to find common ground and minimize the number of shareholder proposals on their meeting agendas. This trend continues from 2007, where the ISS PostSeason report highlighted the increased level of engagement between companies and shareholders, leading to more than half of all proposals being withdrawn. It has been reported that more than 100 proposals filed for the 2008 proxy season have already been withdrawn, often as a result of successful negotiation.

The interest by companies to negotiate may be surprising in one sense because the subjects are not limited to those proposals likely to engender a majority of supporting votes. Companies often seem just as interested in seeking the withdrawal of social responsibility proposals where supporting votes are more likely to be between 10% to 25%, or less. For example, it has been reported that more than half of the almost 30 proposals on health care principles have been withdrawn because the companies agreed to post policy statements supporting health care reform, even though the anticipated votes in support were nowhere near a majority.

Companies seem more willing to settle with hedge fund dissidents and agree on limited board representation, rather than engaging in protracted proxy contests.

A *Wall Street Journal* article recently focused on the actions by about 30 companies in the first quarter that settled with dissidents by agreeing on limited board representation, thereby avoiding divisive proxy fights or withhold campaigns. The background and motivation are likely different for each company involved but the well-publicized, negative and costly proxy fights in recent years between companies and dissidents, and the risk of a negative recommendation from shareholder advisory services such as ISS, may have been factors.

The anticipated tidal wave of binding by-law proposals has so far failed to materialize.

A few years ago, there was a concern that shareholder activists would increasingly submit binding by-law proposals rather than the more common non-binding, or precatory, proposals. However, in the 2007 season, binding by-laws only represented two percent of the shareholder proposals found on ballots, primarily limited to majority voting and restrictions on poison pills, and this year there have been only a few such proposals submitted in filed proxy statements so far. This trend may be due to companies being more willing to voluntarily adopt majority voting when confronted with such a proposal, coupled with decisions by shareholder activists to venture slowly in this area since during the proxy access debate the SEC Staff seemed to equate the ability to submit binding by-laws with a full-fledged proxy contest. Shareholder activists were already alarmed by suggestions that the SEC may restrict their ability to submit precatory proposals

(as evidenced by more than 10,000 letters submitted to the SEC defending this ability during the proxy access comment period).

The paperless benefits under E-proxy have so far not been widely adopted by companies, and the use of the rule has resulted in negative impact on retail shareholder votes.

According to Broadridge, by the end of February only about 100 companies have taken advantage of the E-proxy rules. The results so far indicate that less than one percent of shareholders requested paper copies after receiving a notice of internet availability of proxy materials. However, of some concern to companies and the SEC is an overwhelming decrease in the retail vote for companies using E-proxy, with retail accounts voting decreasing from about 19% to less than 5% and retail shares voting decreasing from about 30% to 23%.

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It becomes ever more challenging each proxy season for companies to anticipate and maintain an awareness and understanding of the current trends in shareholder activism, and their potential impact on corporate governance practices. Keeping an eye on the latest developments is an important step in staying prepared, since no company can assume that it is immune from being a target of activists.

We recommend that companies engage in an ongoing constructive dialogue with institutional investors, and shareholder advisory services such as ISS, on governance matters, so that these investors and shareholder advisers are well educated on the company's practices and viewpoints and the company, in turn, is apprised of shareholder concerns and reactions. It is likely to be less effective, and it may be too late, to start reaching out to investors and ISS during a crowded proxy season and only after the company is confronted with a challenging activist campaign.