

# SEC Roundtables & Non-Binding Proxy Resolutions

by  
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***Note:** In May, the Securities & Exchange Commission (SEC) held roundtables on its role in regulating proxy voting at publicly traded companies. In March, the Treasury Department held a [roundtable on 'principles-based' regulation](#). This post I adapted from a letter to Mark Regier of MMA Praxis who serves as chair of the Interfaith Center on Corporate Responsibility and from a post to the Social Investment Forum list serve.*

In our conversation, I suggested that the SEC's roundtables on proxy voting were a sure sign it intended to act on the 'problem' of what Delaware Vice Chancellor Leo E. Strine, Jr., characterizes as 'the costly precatory proposal process'.<sup>1</sup>

Their solution will be to end non-binding shareholder resolutions, the tool shareholder advocates have used so successfully since the early 1970s to force change at corporations on environmental, social and governance issues.

## ***Why the SEC will Act***

Why do I believe the SEC will act – and in short order?

**First**, in my experience administrative agencies use the roundtable tactic to give it a rationale for regulations it already intends to issue.

A roundtable is a means to appear disinterested and judicious when the agency already has defined the problem and its solution. It also lets the agency avoid identifying an outside impetus for regulations, as when the SEC adopted the mutual fund proxy voting regulations, it identified the SRI funds who had filed a petition for them.

**Second**, at the SEC's roundtables those defending proxy access were significantly out-gunned by their opponents. There was more of an appearance of balance than an actual one in the views expressed.

**Third**, there do not appear to be any significant obstacles within the

Commission's membership to eliminating proxy access for non-binding resolutions. Count the noses.

**Fourth**, since the Commission operates on a cycle counter to that of shareholder activists, the timing of the roundtables and the appearance of proposed regulations reduces the ability of the opponents to focus on them.

**Fifth**, given the impending presidential election, it will be difficult to gain much media attention to the new regulations or to the legal challenges to them.

**Sixth**, it seems likely that the new regulations will be pitched as part of the effort coordinated by the Treasury to introduce "principles-based" regulation, thus giving them a "good government/governance" cloak. Paulson used the same roundtable technique to roll out his concepts in March.

**Finally**, action on non-binding proxy proposals is only an early example of the sort of "beat the clock" actions we are likely to see from the Bush Administration over the next 18 months. All administrations that think themselves likely to be followed by one of a different party indulge in such behavior. This one will engage in it much more urgently than most.

In sum, the Commission will move very quickly to propose regulations and will fast track their adoption based in part on the record developed at the roundtables.

### ***'Grand Compromise' or Bad Deal?***

What will the regulations' substance be?

For about a year, a 'grand compromise' has floated about. Under it, shareholders would give up non-binding shareholder resolutions in exchange for periodic access to the board nomination process. My guess is that the SEC will move in precisely this direction.

***Hold the Line!*** So far as I know, no shareholder advocate has endorsed this 'compromise'. In fact, there is no room for compromise here. None. The 'grand compromise' should not even be given the courtesy of discussion.

We compromise our historic position on our right to access by giving the compromise the respect of discussion. We should be arguing for a guarantee of our

right to access for our resolutions -- not negotiating its termination or limitation.

***The Compromise's Elements.*** The 'Grand Compromise' (probably deliberately) conflates two distinct efforts: the push to influence corporations on environmental, social and governance issues and the drive to open the board nomination process. The first represents the interests of stakeholders, the second large institutional investors.

The 'Grand Compromise' would not assure shareholder advocates of the same access to decision-makers they now have. To the contrary, they would exchange that access for the chance to run a candidate for the board every few years.

In reality, the 'Grand Compromise' is an insult to our intelligence. It suggests we give up everything in exchange for nothing. Less than nothing, perhaps, as it is not at all clear that the DC Circuit and the Roberts Court would go along with the state law pre-emption required to enforce access to the nomination process.

***An Offer to Refuse.*** Put differently, the Compromise's proponents would get what they want in exchange for a promise to deliver something they may not – even if they act in complete good faith – be able to deliver. 'A pig in a poke', anyone?

In sum, the 'grand compromise' has all the attractions of the Godfather's 'offer you cannot refuse' – and much the same consequences for shareholder advocates whether taken or not.

### ***Organizing the Opposition***

In my view, SRI's traditional responses to regulatory proposals will not work here. By that I mean a gathering of the usual SRI and SRI-sympathetic groups in opposition.

***New Supporters Needed.*** What we need here – and I cannot emphasize this more strongly – is a mustering of money managers, investment bankers and the corporations themselves to oppose these regulations. The only way to defeat the coming regulations is to show strength among precisely the constituencies meant to benefit from the new regulations.

In practical terms, institutions must call on their service providers to lead the opposition to the coming proposed regulations. The companies that have said they are the better for engaging with shareholders on non-binding resolutions must say this – on the record – to the Commission and the public.

***Strategic Focus.*** If we lose this fight, we must retain the moral high ground from which to fight again when the SEC's composition changes. If we lose now in the closing months of the Bush II administration, we will be in a much better position to argue our position to new SEC commissioners if we are not bound by a bad 'compromise' we negotiated in 2007-08.

We should be urgently educating and mobilizing our constituencies. The time is short; the stakes are high. Very high.

## Endnotes

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1. Strine, Leo E., "Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance" . Journal of Corporation Law, Fall 2007. At p. 23. Available at SSRN: <http://ssrn.com/abstract=989624>