

Preliminary Review of Objectives for Investor Initiation of Issues

Foundation for improved access to decision-making information

Ability to define an issue

Challenges of practical support

Discussions during the past few weeks with representatives of a wide range of investor, corporate and professional perspectives suggest that almost everyone appreciates the benefits of making it practical for “mainstream” investors to initiate issues for consideration.¹ This enthusiasm was sensibly balanced, though, with concerns about fairness, integrity and order.

Following is a summary of the objectives and concerns that have been discussed so far, and of the further advice we need to provide the required support of investor interests.

Foundation for improved access to decision-making information

Several of you have noted that we had addressed these investor interests a few years ago in the Forum’s “E-Meetings” program, establishing consensus marketplace standards for more direct investor-corporate communication about decision-making issues.² That was intended to provide only a foundation for progress, though, and was recognized at the time as just a beginning. What we can observe now, unfortunately, is that this progress has included the development by some market participants of advantages over others.³

The need for more effective investor access has been illustrated on many levels in the attention-getting Pershing Square/Valeant bid for Allergan, including in the bidder’s plan for a self-managed “referendum” that stimulated our current interest. Essentially, each side is trying to control the definition of issues it wants investors to consider, and each side has claimed the support of the target’s shareholders for its version of issues. Presumably, some of Allergan’s shareholders would like to offer their own definitions of issues about which they should be informed, but do not want to assume the burdens of an “activist” function in public statements of their concerns. And many of the shareholders would probably also appreciate independent insights into the interests of other investors, but do not want to publicly state their own views or be exposed to communications that might be viewed as acting in concert.

We know that well-tested Forum processes can support these presumed investor interests very effectively. We have also determined how fairness is judged regarding an investor’s right to ask questions, either anonymously or identified, and get answers. Now we must figure out how to make those fair processes readily available.

¹ Guidance was invited in the [June 5, 2014 Forum Report: Support for Shareholder-Initiated Engagement](#), addressing concerns raised in the [May 21, 2014 Forum Report: Questions About Shareholder-Hosted Meetings of Shareholders](#).

² See [September 30, 2010 Forum Report: Standards for Fair Conduct of Shareholder Meetings Using Electronic Communications](#) and [October 18, 2010 FT Agenda: "Companies Prepare for New Investor Communication Demands."](#)

³ See [May 27, 2014 New York Times DealBook: "As Information Flows, S.E.C. Faces Difficulty Bottling It Up."](#)

Ability to define an issue

The essential purpose of enabling broader investor participation in the definition of issues is to improve the efficiency of decision-making, not only by investors but also by the corporate managers who are responsible for addressing their interests and by the policy makers who govern our capital markets. In that context, these are some of the key observations:

- ***Many investors want to be able to define issues themselves.*** If practical to do so, many fund managers would prefer to present their own definition of issues to be addressed rather than rely upon agents – whether proxy advisors or activist funds – to determine what investors should consider.
- ***Fund managers may consider it their responsibility to determine what is required for informed decisions.*** Based either on legal definitions of fiduciary duty or on client expectations of professional expertise, some fund managers feel obligated to exercise independent judgment about what is relevant in their investment decisions.
- ***Both investors and corporate managers should be able to understand the views of all significant investor constituencies.*** Aside from wanting to know who is winning a contest, anyone concerned with analyzing alternatives may benefit from learning the views of others with different perspectives.
- ***Corporate managers need to know what concerns long term investors.*** While the views of all shareholders should be considered, the interests of long term investors who rely upon the development of future enterprise value are likely to be most relevant to a company officer's or director's fiduciary responsibilities for the corporation and its stockholder interest.
- ***Issues defined by long term investors are important to the marketplace.*** The influence of investors concerned with long term enterprise development is essential to the viability of financial markets, and to their purpose of allocating capital productively.
- ***Investors must be able to choose between anonymous and attributed communication.*** Privacy rights and the sanctity of voting processes are of course important to all investors, but it is especially important for larger shareholders to be able to choose whether they want the benefits and burdens of leadership recognition or the ability to ask questions without being identified as the source.

Stated simply, most of us would benefit from investors being able to initiate and control their own definition of issues. It is not economically sound for managers of long term investment interests to rely upon the “free” agency of professional activists – or upon anyone else whose interests are clearly different and unshared – to determine what issues should be considered.

Challenges of practical support

The basic processes required for independent investor initiations of issues are well established, as noted above, and work well with evolving communication technologies. There are

significant challenges, though, in making the required services available more broadly than in the past Forum programs. These concerns can certainly be satisfactorily resolved, but will require careful thinking.

1. **Cost:** The most obvious obstacle to independent investor initiations of issues has been cost, since even relatively modest expenses incurred by one investor effectively impose a penalty on responsibility if the resulting benefits are distributed equally among all the other shareholders, including rival fund managers whose performance statistics have not been reduced by the burdens of leadership. What we need, then, is a very practical way to deliver the required services as a reasonably priced, value-justified alternative to a seemingly free activist service.

Current discussions are focused on the Forum's providing the required processes in relatively inexpensive steps, assuming that issues might be defined and addressed at early stages without any need for the initiators to fund full scale programs. We are also considering policies to accommodate multiple initiating investors for a subject company, although it is not yet clear whether this can be done in a practical process that avoids questions about the investors acting in concert.

2. **Qualification for investor initiation:** The theoretical ideal of completely open access to all investors must necessarily be balanced with the need for order. Qualification should be based on verified legitimacy of the investor, whether identified or anonymous, and of the issue to be initiated. The criteria for both investor and issue legitimacy must be strictly objective, and not based on popularity. Our objective is to assure that a Forum-supported investor initiation of an issue is responsibly presented and merits serious consideration.

Suggestions for qualifying issues have included variations of review panels and validating endorsements by other investors or organizations. Any solution will necessarily have to be simple and efficient, considering our objective of making support readily available as well as the need to minimize costs.

Please offer your thoughts on how to resolve these challenges, and on other challenges that should be addressed. We will be trying to develop a plan that can be tested in a real decision-making situation within a few weeks, and will welcome your advice to guide our progress.

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