No. 05-2825

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, EMPLOYEES PENSION PLAN,

Appellant,

-v.-

AMERICAN INTERNATIONAL GROUP, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLEE AMERICAN INTERNATIONAL GROUP, INC.'S RESPONSE TO APPELLANT'S REPLY TO THE RESPONSE TO INQUIRY OF THE COURT SUBMITTED BY THE SECURITIES AND EXCHANGE COMMISSION

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PRELIMINARY STATEMENT

The legal analysis of the SEC's Office of the General Counsel and Division of Corporation Finance of the Commission (the "Analysis"), submitted by the Commission in response to this Court's January 9, 2006 inquiry, shows clearly and unequivocally that Rule 14a-8(i)(8) (the "Rule") permits appellee American International Group, Inc. ("AIG") to exclude from its proxy the proposal at issue here. The Analysis demonstrates that this construction of the Rule is consistent with the longstanding position of the Division of Corporation Finance (the "Division"), with repeated public statements of the Commission, and with the structure and design of the proxy rules. Indeed, the Analysis makes clear that accepting the position advanced by appellant ("AFSCME") would fundamentally disrupt the system of proxy regulation established and administered by the Commission.

It is therefore not surprising that, as the Commission's letter to the Court emphasized, the Commission "has consistently let stand and declined to review the 'no action' positions of the Division taken in conformity with this legal interpretation of the Rule." Notably, the Commission has taken this posture despite AFSCME's repeated requests that it overrule the position of the staff.

As the Analysis concludes, "[t]he proper functioning of the election exclusion is critical to prevent the circumvention of other proxy rules that are carefully crafted to ensure investors receive adequate disclosure in election contests." (Analysis at 3.) AFSCME is free to continue its so far unsuccessful campaign to convince the Commission to endorse a fundamental change in the system of proxy regulation. Unless and until that occurs, however, there is no reason for this Court to upset the established – and completely correct – interpretation of the Rule explained in the Analysis, particularly where doing so would disrupt the integrated regulatory scheme established by the Commission and encourage evasion of the proxy disclosure rules.

In this memorandum, we briefly address certain matters raised in AFSCME's Reply to the SEC's Response (the "AFSCME Reply"). We do not repeat arguments made in AIG's opposition brief, to which we respectfully refer the Court for a more complete statement of our position.

1. The Analysis lays out the sensible judgments of the Division staff and the SEC's General Counsel, based on the text and the underlying policy goals of the Rule, as to what types of proposals are excludable under the Rule. As noted in the Analysis, it has been the "longstanding position" of the Division that the Rule permits "the exclusion

of shareholder proposals that would result in contested elections," including proposals used "either to campaign for or against a director nominee or to require a company to include shareholder-nominated candidates in the company's proxy materials." (Analysis at 2, 3.)

AFSCME tries to make it appear that the Division and the General Counsel's Office are renegades, somehow at odds with the Commission itself. But that position is belied, over and over again, by the record. In 1976, when the Rule was most recently revised, the Commission itself stated that "the principal purpose of [Rule 14a-8(i)(8)] is to make clear with respect to corporate elections, that Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature." Release No. 34-12598, 1976 WL 160410, at *9 (July 7, 1976). Since then, the Commission has made clear in three separate releases that it believes that allowing access to the proxy card for the purpose of nominations would require *amendment* of the Rule. *See* Release No. 34-48626, 2003 WL 22350515, at *81 n.74 (Oct. 14, 2003); Release No. 34-48301, 2003 WL 21852384, at *18 (Aug. 8, 2003); Release No. 34-31326, 1992 WL 301258, at *24 (Oct. 16, 1992); (Analysis at 14-16).

As the Analysis points out, referring to the August 2003 release, no amendment would be necessary if the SEC believed that the Rule

in its present form contemplated the inclusion of shareholder nominations in proxy statements:

> If proposals [such as AFSCME's] were not excludable under Rule 14a-8(i)(8), the Commission would have had no occasion to consider amending or reinterpreting the rule to allow them. The Commission's statement underscores its view that the Rule as written permits the exclusion of shareholder proposals that would require the inclusion of shareholder nominee's on a company's proxy card.

(Analysis at 14.)

Moreover, had the Commission disagreed with the position of the Division, it would never have allowed the staff to issue dozens of no-action letters holding that ballot access proposals are excludable under the Rule. Nor would it have decided to transmit to this Court the Analysis of the Division and the General Counsel, which emphatically rejects AFSCME's position.

AFSCME's interpretation of the Rule is not only inconsistent with the text, the Analysis and the authorities the Analysis cites, but would also create mischief, by allowing *evasion* of the protections of the proxy rules. As the Analysis explains, under AFSCME's interpretation of the Rule, "it would be possible for shareholders to wage election contests without conducting a separate proxy solicitation, and thus without providing

the disclosures required by the Commission's present rules governing such contests, and potentially without liability under Rule 14a-9 for misrepresentations made in proxy solicitations." (Analysis at 12.)

AFSCME's central argument is that only proposals that on their face pertain to a particular, specified election may be excluded. That is not, however, what the Rule says. AFSCME's construction would open a major breach in the system of proxy regulation, by allowing the submission of proposals that are designed to affect or stimulate election contests, without complying with the proxy disclosure rules. In the words of the Analysis: "If one looked only to what a proposal accomplished in the current year, and not to its effect in subsequent years, the purpose of the exclusion could be evaded easily." (Analysis at 4-5.) In this case, the trial court made an unchallenged factual finding that AFSCME's goal was in fact to trigger a process to displace AIG's Board. (*See* AIG Br. at 6, 19-20.)

AFSCME contends that this Court should disregard the serious concerns of the SEC's General Counsel and Division of Corporation Finance because three issuers identified in its opening brief (AFSCME Br. at 18) have adopted "policies of voluntarily publishing the names of shareholder-sponsored nominees" and no one has argued that these actions are "illegal." (AFSCME Reply at 12.) AFSCME does not advise the Court that the

procedures adopted by these three issuers are critically different from what is proposed here – those proposals appear to do little more than commit the company to work with large shareholders to agree on Board candidates.[1] (*See* Joint Appendix at A-605-A-620.) Moreover, the question of whether simply adopting such procedures is itself "illegal" is quite different from whether such a procedure will be *used* to subvert the proxy rules. Nor does the limited experience of three issuers signify anything meaningful about how a ballot access procedure would affect a system that regulates thousands of public companies.

AFSCME simply has no meaningful response to the important conclusion of the Analysis that "the Commission's detailed and carefully crafted regulatory regime governing contested elections... does not contemplate the presence of nominees from different vying factions in the

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[1] None of these three companies adopted proposals like AFSCME's. Ashland, Inc. merely "agreed to solicit from its major shareholders director candidates and to nominate a qualified candidate for election to the Board." (A-607.) Broadcom, Inc. adopted a procedure to permit shareholders holding greater than 1% but less than 20% of the company's stock to nominate candidates to a "Nominating Committee" of the Board, that would then consider the candidates and determine whether they should be nominated by the company and placed on the company's proxy statement. (A-613.) Hanover Compressor Company simply established a "process with shareholders holding more than 1% of its outstanding shares to nominate candidates for two new independent director positions to the board." (A-618.) Unlike the AFSCME proposal, none of these procedures are likely to stimulate contested elections.

same proxy materials." (Analysis at 11-12); *see* Citigroup No-Action Letter, Fed. Sec. L. Rep. (CCH) 0421200316, 2003 WL 19009802 (April 14, 2003) ("Any change in the Division's current interpretation would require other significant adjustments in the system of proxy statement regulation under Section 14(a) of the Securities Exchange Act of 1934.").

2. AFSCME argues that the Analysis, "like any 'no-action' letter, is entitled to no legal deference beyond its persuasive value." (AFSCME Reply at 1.) But the record here goes far beyond a no-action letter. The Division has issued more than *thirty* no-action letters, and, as noted above, three separate releases of the Commission powerfully support the Division's position.

Significantly, unlike a no-action letter, the Analysis is the product of a thorough evaluation of the issues, in response to this Court's inquiry, by the highest officials of the Division and the General Counsel's office. The Commission itself then decided to transmit the Analysis to the Court. In this context, we submit that the Analysis is entitled to substantial respect, where the underlying issue is the proper interpretation of the SEC's own rules. *See New York City Employees' Retirement System* v. *Dole Food Co., Inc.*, 969 F.2d 1430, 1435 (2d Cir. 1992) (Pollack, J. concurring) ("The

SEC's interpretation of its own administrative regulations is entitled to great weight.").

Contrast the Analysis with a typical Commission amicus brief. An amicus is signed by the General Counsel and submitted to the court after a decision by the Commission approving of the brief. (*See, e.g.*, Brief of the Securities and Exchange Commission, Amicus Curiae, *In re Worldcom, Inc. Sec. Litig.*, No. 03-9350 (2d Cir. Apr. 16, 2004).) Here, the Analysis is signed not only by the General Counsel, but also by the Division. In addition, it is accompanied by the statement of the Commission itself. It is, therefore, a stronger expression of the Commission's views than an amicus, and should be treated accordingly by this Court.

Bowen v. *Georgetown University Hospital*, 488 U.S. 204 (1988), which AFSCME cites (AFSCME Reply at 20) to support its argument that the Court should give no deference to the Analysis, is completely unlike this case. In *Bowen*, where the agency was itself a party to the case, the Court declined to adopt the interpretation of a regulation advanced by counsel for the Secretary of Health and Human Services, noting that the interpretation was *contrary* to the view the Secretary had advocated in the past. Therefore, the opinion was "[f]ar from being a reasoned and consistent view of the scope of [the regulation]." *Id.* at 212. The Court

stated that "[d]eference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate." *Id.* at 213. The Analysis can hardly be characterized as the SEC's "litigation position," nor is it inconsistent with the agency's historical interpretation of the Rule. It is, we submit, entitled to respect from this Court.

Conclusion

The SEC's Response to the Court's inquiry makes it even more plain that the Rule authorizes exclusion of AFSCME's proposal, and that endorsing AFSCME's position would risk chaos in the proxy regulation system. The District Court properly concluded that AFSCME's "proposal on its face 'relates to an election.' Indeed, it relates to nothing else." (Joint Appendix at A-5.) This Court should affirm that decision.

Dated: June 15, 2006

Respectfully submitted,

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