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November 24, 2014

Martha Carter, Global Head of Research
Institutional Shareholder Services, Inc.
1177 Avenue of Americas, 2nd Floor
New York, NY 10036

Dear Ms. Carter:

As institutional investors collectively representing nearly $2 trillion of assets under management, we write as follow-up from on conference call with Mr. Chris Cernich of Institutional Shareholders Services, Inc. ("ISS") on October 14. As you know, we are concerned with a recent trend among corporate directors to act unilaterally to impair the ability of shareholders to enforce their rights as owners of corporations through litigation. We respectfully urge you to promptly adopt a policy to oppose any effort by corporate directors to insulate themselves from accountability under the guise of bylaw or charter provisions that expose stockholders to personal liability for corporate expenses. Specifically, we urge you to make clear that ISS will recommend that stockholders exercise their voting rights to immediately remove any directors who adopt bylaws stripping investors of their rights.

As you may know, on May 8, 2014, the Delaware Supreme Court issued an opinion in *ATP Tour, Inc., et. al. v. Deutscher Tennis Bund*, that presents grave implications for investors in Delaware corporations. The Court held that corporate directors can, without stockholder approval, unilaterally adopt a bylaw requiring any stockholder who commences (or supports) litigation against a corporation or its directors, or derivatively on behalf of that corporation, to be personally liable for the legal expenses of the company and its officers and directors unless the stockholder "obtain[s] a judgment on the merits that substantially achieves, in substance and amount, the full remedy

sought" in the litigation.[1] The consequences of this ruling are so severe and detrimental to the integrity of the capital markets that decisive action is required. Indeed, since the decision, over 30 public companies have adopted provisions purporting to impose personal liability on shareholders for corporate debts.

First, the fee-shifting bylaw approved by the Supreme Court removes judicial oversight over corporate wrongdoing by effectively foreclosing stockholders' access to courts. The fundamental premise of corporate law is that while stockholders contribute capital and own the equity of a corporation, the directors and officers are responsible for managing the business affairs of the enterprise. The directors, thus, are charged with the corresponding fiduciary obligation to act in the best interests of the stockholders and the company. These statutory and fiduciary obligations are meaningful, however, only to the extent they can be enforced. Fee-shifting bylaws foreclose the filing of even the most meritorious of stockholder claims and effectively close the courthouse doors to investors, eliminating their ability to bring suit to prevent and remedy unlawful conduct among corporate fiduciaries.

Second, allowing directors to impose on stockholders personal liability for corporate expenses without the stockholders' express consent is the antithesis of the corporate form. Investors rely on the shield from corporate liability created by the corporate form, and corporations could not provide the products and services they provide without adequate access to investor capital. How could the stockholder-owners of corporations place trillions of dollars in the hands of fiduciaries who immunize themselves from legal challenge? Allowing directors to tear apart this corporate veil by imposing personal liability on stockholders who seek to protect their rights threatens the very underpinnings of our financial markets and upsets the balance between the interests of fiduciaries and the shareowners who they serve.

Finally, the failure to date of the judicial system, legislators, and regulators to protect stockholders from the opportunistic and self-interested adoption of bylaw provisions has opened the door to further and rapidly expanding abusive conduct, and calls for immediate intervention by ISS to provide much-needed market discipline. Now that the Delaware Supreme Court has opened the door to abusive fee-shifting bylaws, there is a significant risk that ever-increasing numbers of corporate boards will choose to exploit the current state of affairs to remove themselves from accountability through the court system. If corporations adopt fee-shifting bylaws in large numbers, the judiciary will be relegated to the sidelines.

In response to the *ATP* decision, in June 2014 the Delaware legislature was poised to pass legislation to make clear that corporate directors cannot use bylaws to require

[1] *ATP Tour, Inc., et. al. v. Deutscher Tennis Bund, et. al.*, ___ Del. ___,2014 WL 1847446 (Del. May 8, 2014).

shareholders to bear personal liability for corporate debts. However, on June 19, the U.S. Chamber of Commerce, through lobbyists and paid legal advisors, successfully fought to delay consideration of the legislation until the early 2015 session. The reason for the Chamber's delay tactics has now become clear: to allow companies the time to adopt these bylaws. In fact, in the short time since the Chamber persuaded the Delaware legislature to delay taking action, over 30 companies have adopted one form of fee shifting bylaw or another. Some of these companies, like Biolase Inc. and Echo Therapeutics, Inc., adopted these bylaws in the wake of or in anticipation of proxy solicitation efforts.[2]

In fact, if a unilaterally adopted bylaw can be used to target stockholder litigants, then there may be no distinction to prevent boards from using bylaws to impose fee shifting against stockholders who merely pursue proxy solicitations against the board. Allowing corporate directors to require stockholders to bear the expenses a corporation may incur in fighting stockholder litigation, even if the suit has merit, effectively eliminates the ability of stockholders to look to Delaware courts to protect their rights as the owners of corporations.

We believe that it would be appropriate for ISS to adopt a policy recommending that shareholders vote against the reelection of any director who uses bylaw amendments as a weapon to eliminate stockholder rights. We believe such a policy would serve as a strong deterrent to discourage corporate boards from using bylaw amendments to remove accountability over directors render their fiduciary obligations illusory.[3]

If you have any questions, please feel free to contact Jay Chaudhuri, General Counsel & Senior Policy Advisor at the North Carolina Department of State Treasurer, at (919) 508-1024 or jay.chaudhuri@nctreasurer.com.

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[2] To be sure, any public recommendation by ISS regarding contemplated or ongoing proxy solicitations involving companies who adopt fee shifting provisions should provide you a clear opportunity to take a decisive stance that directors who adopt such provisions will face a recommendation that stockholders support those directors' ouster at the next election.

[3] To be sure, while it is our intent to vote to remove such directors whether or not ISS announces the requested policy, we believe it critical that ISS in communicating unanimity on this issue. The Council of Institutional Investors already has stated that bylaws that limit accountability of corporate directors are not consistent with best governance practices.

Very truly yours,

/s/

Guus Warringa, Chief Counsel
APG Asset Management NV

/s/

Matthew Jacobs, General Counsel
California Public Employees' Retirement System

/s/

Brian Bartow, General Counsel
California State Teachers' Retirement System

/s/

Adam Franklin, General Counsel
Colorado Public Employees' Retirement Association

/s/

Catherine LeMarr, General Counsel
Office of Connecticut State Treasurer's Office

/s/

Michael McCauley, Senior Officer, Investment Programs & Governance
Florida State Board of Administration

/s/

Rhonda Smith, Executive Director
Houston Municipal Employees Pension System

/s/

Chris Supple, Executive Director and General Counsel
Pension Reserve Investment Management Board Commonwealth of Massachusetts

/s/

Thomas F. Gibson, Chairman
Middlesex County Retirement Board

/s/

Anatoli van der Krans, Senior Advisor Responsible Investment & Governance
MN Services

/s/

Board of Trustees
The New York City Employees' Retirement System

/s/

Board of Trustees
The New York City Police Pension Fund

/s/

Board of Trustees
The Board of Education Retirement System of the City of New York

/s/

Board of Trustees
The Teachers' Retirement System of the City of New York

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Board of Trustees
The New York City Fire Department Pension Fund

/s/

Board of Trustees
The Teachers' Retirement Systems' Variable A

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