UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

March 24, 2006

Roseann B. MacKechnie
Clerk
United States Court of Appeals
for the Second Circuit
1702 Thurgood Marshall
United States Courthouse
40 Centre Street
New York, NY 10007-1561

Re: *American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group*, No. 05-2825-cv

Dear Ms. MacKechnie:

Pursuant to the request of the Court in your letter dated January 9, 2006, concerning the above-referenced case, please find enclosed a Response to Inquiry of the Court, with an attached submission.

Enclosed are copies of this letter and the enclosure for distribution to the members of the panel. If you have any questions regarding this matter, please contact me at (202) 551-5100.

Sincerely,

Brian G. Cartwright

Brian G. Cartwright
General Counsel

Enclosure

cc: Michael A. Cardozo, Esq.
Lewis R. Clayton, Esq.
Jay W. Eisenhofer, Esq.
Cornish F. Hitchcock, Esq.
Carla A. Kerr, Esq.
Lowell Peterson, Esq.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

Response to Inquiry of the Court Concerning
American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group (2d Cir., No. 05-2825-cv)

By letter dated January 9, 2006, from Roseann B. MacKechnie, Clerk of the United States Court of Appeals for the Second Circuit, addressed to the General Counsel of the Securities and Exchange Commission, the Court sought the Commission's responses to a number of questions relating to Rule 14a-8(i)(8) promulgated by the Commission pursuant to the Securities Exchange Act of 1934 (the "Rule").

In response thereto, we transmit herewith the legal analysis of the Office of the General Counsel and the Division of Corporation Finance of the Commission. This analysis represents the view of both the General Counsel and the Division. In addition, 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.

Certain of the questions set forth in the letter of January 9 concern possible future rulemaking by the Commission, rather than the correct legal interpretation of the Rule. Modernization and improvement of the rules promulgated by the Commission governing the solicitation of proxies remains an area of interest to the Commission and its staff. In this regard, the Commission is currently exploring a variety of possibilities that would improve and invigorate shareholder democracy, including, for example, the use of the Internet and other recent technological advances in ways that would streamline the proxy process, enhance the ability of shareholders and registrants to communicate more freely, and reduce the cost to both shareholders and issuers of using the proxy system, while at the same time preserving the safeguards essential to assuring that shareholders receive full and fair disclosure whenever their proxies are solicited. The Commission may propose one or more future rules as a result of these efforts.

BY THE COMMISSION.

Nancy M. Morris
Secretary

March 24, 2006

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

March 24, 2006

Roseann B. MacKechnie
Clerk
United States Court of Appeals
for the Second Circuit
1702 Thurgood Marshall
United States Courthouse
40 Centre Street
New York, NY 10007-1561

Re: *American Federation of State, County & Municipal Employees, Employees Pension Plan v. American International Group,* No. 05-2825-cv

Dear Ms. MacKechnie:

We are pleased to make this submission upon the request of the Court dated January 9, and at the request of the Securities and Exchange Commission. The following sets forth the legal analysis of the Commission's Division of Corporation Finance and of the Commission's General Counsel.

According to your letter, the "ultimate issue" in this case is whether the Commission's rules permit a company to exclude from its proxy materials a shareholder proposal such as the one made to American International Group, Inc. ("AIG") by the American Federation of State, County, and Municipal Employees, Employees Pension Plan ("AFSCME"). As detailed below, the answer to this question is that Commission Rule 14a-8(i)(8) permits the exclusion of proposals such as this.

Introduction

AFSCME's proposal, if adopted, would amend AIG's bylaws to require the company to include in its proxy materials the names and optional statements of director candidates nominated by shareholders holding at least three percent of the company's stock. While Commission Rule 14a-8, 17 CFR 240.14a-8, gives shareholders a general right to have a proposal included in company proxy materials for a vote at a shareholder meeting, Rule 14a-8(i)(8) permits the exclusion from the company materials of a proposal that "relates to an election for membership on the company's board of directors or analogous governing body," and is known as the "election exclusion."[1] It has been the longstanding position of the Commission's Division of Corporation Finance that Rule 14a-8(i)(8) permits the exclusion of proposals such as AFSCME's, and the Division so concluded when AIG requested staff no-action relief. See AIG (Feb. 14, 2005).

The Division and the General Counsel interpret Rule 14a-8(i)(8) as permitting the exclusion of shareholder proposals that would result in contested elections. For purposes of Rule 14a-8, a proposal would result in a contested

---

[1] Until 1998, Rule 14a-8(i)(8) was numbered Rule 14a-8(c)(8). For purposes of consistency and ease of discussion, we refer to Rule 14a-8(i)(8) and its predecessor as "Rule 14a-8(i)(8)".

election if it is a means 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. Because AFSCME's proposal is a means to require AIG to include shareholder-nominated candidates in the company's proxy materials, it can be excluded.

The 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. Our interpretation is confirmed by (i) the express purpose of Rule 14a-8(i)(8), (ii) the structure of the Commission's detailed proxy rules, (iii) the purpose of Section 14(a) of the Securities Exchange Act of 1934, and (iv) other Commission statements.

Purpose of the Election Exclusion

When proposing amendments to Rule 14a-8 in 1976, the Commission 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 since other proxy rules, including Rule 14a-11, are applicable thereto."[2] See Release No. 34-

[2] The Commission's reference in its 1976 statement to "other proxy rules, including Rule 14a-11," reflects the fact that, in 1976, Rule 14a-11 was the

12598, 1976 WL 160410, at *9 (July 7, 1976) (emphasis added). Rule 14a-8 expressly was not intended to be a substitute, or additional, mechanism for conducting contested elections (the type of elections that would involve the "conducting [of] campaigns"), or for effecting reforms in contested elections (elections whose "nature" involves campaigns).

Thus, a proposal may be excluded pursuant to Rule 14a-8(i)(8) if it would result in an immediate election contest (e.g., by making a director nomination for a particular meeting) or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholder director nominees in the company's proxy materials for subsequent meetings.

As the Commission stated in 1976, the express purpose of the election exclusion is to make clear that Rule 14a-8 is not a proper "means" to achieve election contests, whether immediately or in subsequent years. 1976 WL 160410. If one looked only to what a proposal accomplished in the current year, and not to

---

Commission proxy rule governing election contests. As part of a reform in 1999, the Commission rescinded Rule 14a-11 and moved many of the requirements of prior Rule 14a-11 to the current Rule 14a-12. See Release No. 33-7760, 1999 WL 969596 (Oct. 22, 1999). Accordingly, the Commission's reference to Rule 14a-11 in 1976 was to the rules governing election contests, which now may be found generally elsewhere in the proxy rules and, in particular, in Rule 14a-12.

its effect in subsequent years, the purpose of the exclusion could be evaded easily. For these reasons, the phrase "relates to an election" in the election exclusion cannot be read so narrowly as to refer only to a proposal that "relates to the current election," but rather must be read to refer to a proposal that "relates to an election" in subsequent years as well.

The Division has taken care not to adopt an inappropriately broad reading of whether a proposal "relates to an election," as such a reading would permit the exclusion of all proposals regarding the qualifications of directors, the composition of the board, shareholder voting procedures, and board nomination procedures. Such a result would deny shareholder access to the company proxy materials under Rule 14a-8 with respect to a vast category of election matters of importance to shareholders that, unlike AFSCME's proposal, would not result in an election contest between company and non-company nominees, and that do not present significant conflicts with the Commission's other proxy rules. Our interpretation in this respect is consistent with the Commission's statement, when it adopted the current phrasing of Rule 14a-8(i)(8), that its scope was not intended "to cover proposals dealing with matters previously held not excludable by the Commission, such as cumulative voting rights [and] general qualifications for

directors ***." Release No. 34-12999, 1976 WL 160347, at *12 (Nov. 22, 1976).

In accordance with our interpretation of the election exclusion, the Division has drawn a distinction between (i) proposals that would result in multiple board candidates chosen by the company being placed on the company's proxy card, see General Electric Co. (Jan. 12, 2001), and (ii) proposals that would result in non-company board candidates being placed on the company's proxy card in opposition to company candidates, see Sears, Roebuck & Co. (Feb. 28, 2003). Though the former type, known as "double nominee" proposals, may superficially appear to result in a "contest" in one sense of the word (in that there would be more than one candidate for each board seat), all of the candidates in fact would be chosen by the company. For the purposes of Rule 14a-8(i)(8), such elections are not marked by the "campaigns" to which other proxy rules apply, as is the case where there are two or more opposing factions vying for election of their own nominees to the board. 1976 WL 160410. Accordingly, the Division's responses identified by the Court as "potentially inconsistent" illustrate not an inconsistency in its application of the election exclusion, but rather the consistent application to two different types of proposals of a distinction based on whether a shareholder proposal would result in a contested election as contemplated under

Rule 14a-8.[3]

Consistent with the reasoning discussed above, the Division has interpreted Rule 14a-8(i)(8) as requiring an extremely broad category of shareholder proposals to be included in company proxy materials, while remaining faithful to the intent of the exclusion. The Division has to date identified only four types of proposals that may be excluded, each of which would allow an end-run around the express purpose of Rule 14a-8(i)(8). An illustrative list of the numerous proposals the Division has found not to be excludable under Rule 14a-8(i)(8) and a list of the four types of proposals that may be excluded under Rule 14a-8(i)(8) are provided in Attachment A hereto.

---

[3] The Division's position in the double-nominee no-action letters and the Division's position regarding the instant proposal show a consistent application of a position first articulated by the staff in 1990. (See Amoco (Feb. 14, 1990) (permitting exclusion of a proposal because it "would establish a procedure that may result in contested elections to the board which is a matter more appropriately addressed under [Rule 14a-12]"). Although the Division in two no-action letters in 1993 and 1995 mistakenly took the view that companies should not exclude proposals similar to AFSCME's, Pinnacle West Capital Corp. (Mar. 26, 1993); Dravo Corp. (Feb. 21, 1995), the Division in numerous no-action letters prior to and after those letters has consistently found such proposals to be excludable. See AIG Br. at 7-10 n.2 (citing thirty-three such no-action letters); see also Thermo Electron (Mar. 22, 1990); Unocal Corp. (Feb. 6, 1990); Bank of Boston (Jan. 26, 1990).

Structure of the Proxy Rules

As the Commission indicated in its 1976 statement regarding Rule 14a-8(i)(8), "other proxy rules" are applicable to contested elections. Indeed, several separate and distinct rules, including the current Rule 14a-12, regulate proxy contests to ensure that investors receive adequate disclosure to enable them to make informed voting decisions in elections. Rule 14a-8 should not be read so as to render those other more specific proxy contest regulations superfluous, or even in conflict with Rule 14a-8.

The requirements to provide these disclosures are currently grounded in Rule 14a-3, which requires that any party conducting a proxy solicitation file with the Commission, and furnish to each person solicited, a proxy statement containing the information in Schedule 14A, found at 17 CFR 240.14a-101.[4] Items 4(b) and 5(b) of Schedule 14A require numerous specified disclosures if the solicitation is subject to Rule 14a-12(c). A solicitation is subject to Rule 14a-12(c) if it is made "for the purpose of opposing" a solicitation by any other person

[4] Rule 14a-3(a) provides, in pertinent part, that "[n]o solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a publicly-filed preliminary or definitive written proxy statement containing the information specified in Schedule 14A ***." 17 CFR 240.14a-3(a).

"with respect to the election or removal of directors ***." 17 CFR 240.14a-12(c). Thus, the result of Schedule 14A's cross-referencing of Rule 14a-12(c) is to trigger–when a solicitation with respect to the election of directors is conducted in opposition to another solicitation–a number of relevant disclosures.

The following is an illustrative list of the disclosures required by Items 4(b) and 5(b) of Schedule 14A:

(i) by whom the solicitation is made;

(ii) the methods to be employed to solicit;

(iii) total expenditures to date and anticipated in connection with the solicitation;

(iv) by whom the cost of the solicitation will be borne;

(v) any substantial interest of each participant in the solicitation;

(vi) the name, address, and principal occupation or principal business of each participant;

(vii) whether any participant has been convicted in a criminal proceeding within the past 10 years;

(viii) the amount of each class of securities of the company owned by the participant and the participant's associates;

(ix) information concerning purchases and sales of the company's securities by each participant within the past two years;

(x) whether any part of the purchase price or market value of such securities is represented by funds borrowed;

(xi) whether a participant is a party to any contract, arrangements or understandings with any person with respect to securities of the company;

(xii) certain related party transactions between the participant or its associates and the company;

(xiii) whether the participant or any of its associates have any arrangement or understanding with any person with respect to any future employment with the company or its affiliates, or with respect to any future transactions to which the company or its affiliates will or may be a party; and

(xiv) with respect to any person who is a party to an arrangement or understanding pursuant to which a nominee is proposed to be elected, any substantial interest that such person has in any matter to be acted upon at the meeting.

See 17 CFR 240.14a-101, Items 4(b) & 5(b). For purposes of Items 4 and 5, a "participant" in the solicitation includes (i) any person who solicits proxies; (ii) any director nominee for whose election proxies are being solicited; and (iii) any committee or group, any member of a committee or group, and other persons involved in specified ways in the financing of the solicitation. See id., Item 4, Instruction 3. Thus, for each of the numerous disclosures required as to a "participant," the information must be disclosed as to all of such persons. Moreover, Item 7 of Schedule 14A requires the furnishing of certain additional information as to nominees for director, including nominees of "persons other than the [company]" (i.e., shareholders). Id., Item 7. In addition, and of critical importance, all of these disclosures are covered by Rule 14a-9's prohibition on the making of a solicitation containing false or misleading statements or omissions. See 17 CFR 240.14a-9.

Because the board of directors of a company will include its own director nominees in its proxy materials, allowing shareholders to include their nominees in company proxy materials would create what is, in fact, a contested election of directors, without the shareholders conducting a separate proxy solicitation. The Commission's detailed and carefully crafted regulatory regime governing

contested elections, however, does not contemplate the presence of nominees from different vying factions in the same proxy materials.

As explained above, numerous protections of the Commission's rules are triggered only by the presence of a solicitation made in opposition to another solicitation. Accordingly, if proposals like AFSCME's were allowed, 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.

Although AFSCME's proposed bylaw includes certain safeguards and limitations (e.g., requiring nominators to provide some information to the company and requiring a three-percent stock ownership),[5] AFSCME's interpretation of the election exclusion does not require this. Thus, if AFSCME's interpretation of the election exclusion were to prevail, there would be no requirement that future proposals have any such safeguards at all. Moreover,

---

[5] AFSCME's proposal would not require a nominating shareholder to provide to the company all of the information that would be required to be disclosed by the Commission's rules, such as the significant amount of information required under Items 4(b) and 5(b) of Schedule 14A.

even if a future proposed bylaw required the nominating shareholder to provide the company with all of the information called for by the Commission's rules, that would not be sufficient. A bylaw provision is not an adequate substitute for having the nominating shareholder subject to the Commission's rules, which are enforceable by the Commission. See 15 U.S.C. 21(d)(1). The same flaw is present in proposed bylaw provisions like AFSCME's requiring the shareholder to execute a private "undertaking" assuming liability arising out of its communications with stockholders.

Purpose of Section 14(a)

By ensuring the applicability of the Commission's other proxy rules, Rule 14a-8(i)(8) furthers a central purpose of Exchange Act Section 14(a), "to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964) (emphasis added); see ICN Pharmaceuticals, Inc. v. Khan, 2 F.3d 484, 490 (2d Cir. 1993) (deeming "full disclosure" one of the "central themes of the federal securities laws concerning regulation of contests for corporate control").

Commission Statements Regarding the Rule

Finally, this understanding of the scope of Rule 14a-8(i)(8) is supported by statements of the Commission in addition to the 1976 statement discussed above. In a rulemaking proposal in August 2003 regarding communications between shareholders and boards of directors, the Commission explained that it had "considered a variety of reforms to achieve its regulatory objectives," Release No. 34-48301, 2003 WL 21852384, at *18 (Aug. 8, 2003), and explained specifically that it had considered and rejected the possible approach of "amending or reinterpreting Exchange Act Rule 14a-8(i)(8) to allow security holder proposals requesting access to the corporation's proxy card for the purpose of making nominations." Id. (footnote omitted; emphasis added).

If proposals such as the Commission described (of which AFSCME's in this case is an example) 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 nominees on a company's proxy card.

In October 2003, the Commission proposed a new procedure relating to

shareholder director nominations, designated Rule 14a-11 and commonly known as the "shareholder access" rule proposal.[6] The Commission proposed, among other things, an amendment to Rule 14a-8(i)(8) "that would, if adopted, make clear that a company may not rely on the [election exclusion] to exclude a proposal that the company become subject to the procedure" in proposed Rule 14a-11. Release No. 34-48626, 2003 WL 22350515, at *81 n.74 (Oct. 14, 2003).

The Commission stated that, although it was proposing a security holder director nomination procedure, it was not "reviewing or revising the position taken by the Division of Corporation Finance regarding the applicability of Exchange Act Rule 14a-8(i)(8) to security holder proposals that would have the effect of creating a security holder nomination procedure, other than" a proposal that the company become subject to the procedure in proposed Rule 14a-11. Id.

The Commission, again, explained that it considered and rejected the possible approach of "amending Exchange Act Rule 14a-8(i)(8) to allow security holder proposals requesting access to the corporation's proxy card for the purpose of making nominations." Id. at *52 (footnote omitted; emphasis added). See also Release No. 34-31326, 1992 WL 301258, at *24 (Oct. 16, 1992) (stating that "to

[6] No further action has been taken on this rule proposal.

require the company to include shareholder nominees in the company's proxy statement would represent a substantial change in the Commission's proxy rules"); Citigroup Inc., 2003 SEC No-Act. LEXIS 534, at *2 (April 14, 2003) (Commission stating, in determining "not to review the Division's no-action position under Rule 14a-8(i)(8)," that "[a]ny change in the Division's current interpretation [of Rule 14-a8(i)(8)] would require other significant adjustments in the system of proxy regulation under Section 14(a)"); Letter from Secretary of the Commission to Seymour Licht, dated April 6, 1998 ("The Commission has determined not to review the Division's no-action position.").

Conclusion

In sum, Rule 14a-8(i)(8) permits the exclusion of proposals, like AFSCME's, which would amend a company's bylaws to require the company to include in its proxy materials the names and optional statements of director candidates nominated by shareholders. This interpretation, which is supported by the purpose and structure of the Commission's proxy rules, is critical to prevent the circumvention of proxy rules that are designed to ensure investors receive adequate disclosure in election contests.

Respectfully yours,

Brian G. Cartwright
General Counsel

John W. White
Director
Division of Corporation Finance

ATTACHMENT A

Illustrative list of proposals found by the Division of Corporation Finance not to be excludable under Rule 14a-8(i)(8):

1. Proposals relating to the qualifications of directors (as long as the proposal will not remove current directors or disqualify current nominees), including:

    a. proposals to require that directors own a certain amount of stock (e.g., Storage Technology Corp. (Feb. 26, 1997));

    b. proposals to require that directors be independent (e.g., American International Group, Inc. (March 17, 2005));

    c. proposals to split the roles of Chairman and CEO (e.g., ExxonMobil Corp. (March 24, 2003));

    d. proposals to require that directors not sit on the boards of more than a specified number of companies (e.g., Duke Energy Corp. (Feb. 24, 2000));

    e. proposals to require that directors not be older than a certain age (e.g., Auto-Graphics, Inc. (Feb. 18, 2002));

    f. proposals to require that director nominees be diverse (e.g., Associates First Capital Corp. (Feb. 12, 1999));

    g. proposals to require that directors have specified industry expertise (e.g., Exxon Mobil Corp. (March 21, 2005));

    h. proposals to require that directors have specified personal experience or background (e.g., Raytheon Co. (Feb. 10, 2005));

2. Proposals to require a shareholder committee to review and evaluate the performance of the company's directors (e.g., Exxon Corp. (Feb. 28, 1992));

3. Proposals relating to board structure (as long as the proposal will not

remove current directors or disqualify current nominees), including:

a. proposals to require the annual election of directors (e.g., NiSource Inc. (March 9, 2005));

b. proposals to require independent nominating, compensation and audit committees (e.g., EMC Corp. (March 10, 2002));

c. proposals to increase the number of directors on the board (e.g., United Park City Mines Co. (June 30, 1983));

d. proposals to limit the number of terms that a director can serve (e.g., Minnesota Corn Processors, LLC (April 4, 2002));

4. Proposals relating to voting procedures, including:

a. proposals to require directors to be elected by majority vote (e.g., BEA Systems, Inc. (March 28, 2005));

b. proposals to require cumulative voting (e.g., Phoenix Gold International, Inc. (Nov. 21, 2000));

5. Proposals relating to board nomination procedures, including:

a. proposals to require each board nominee to make a statement in support of his nomination in the proxy statement (e.g., H.F. Ahmanson & Co. (Feb. 3, 1993));

b. proposals to require more detailed information about board nominees in the proxy statement (e.g., AT&T Corp. (Jan. 23, 1997));

c. proposals to require the board to nominate two people for each open board seat (e.g., General Electric Co. (Jan. 12, 2001)); and

d. proposals to require a detailed report to shareholders describing the company's procedures for selecting nominees (e.g., Texaco, Inc. (Feb. 2, 1998)).

6. Proposals to require reimbursement of shareholder expenses in contested elections (e.g., The Bank of New York Co. (Feb. 28, 2006)).

List of proposals found to date by the Division of Corporation Finance to be excludable under Rule 14a-8(i)(8):

1. Proposals that would disqualify board nominees who are standing for election (e.g., Peabody Energy Corp. (March 4, 2005));

2. Proposals that would remove a director from office before his or her term expired (e.g., Fresh Brands, Inc. (Jan. 7, 2004));

3. Proposals that question the competence or business judgment of directors (e.g., AT&T Corp. (Feb. 13, 2001)); and

4. Proposals that would require companies to include shareholder nominees for director in the companies' proxy materials (see AIG Br. 7-10 n.2 (citing no-action letters)).