



More regulation needed on shareholder voting

“Alcohol,” said Homer Simpson, standing atop a stack of kegs, “the cause of, and the solution to, all of life’s problems.” Homer had his “one thing,” to paraphrase Jack Palance’s character in *City Slickers*. To me, often it appears the “one thing” that is both a great challenge and a great comfort is human nature.

It’s sort of discouraging that when human nature is cited in addressing solutions to systemic challenges, less appealing elements are implied, such as procrastination, laziness, adherence to the familiar, self-indulgence, or worse. One of the comforting elements, actually, is human nature is a readily available crutch for the inability to address those challenges, because human nature doesn’t change. However, the more admirable elements of human nature, such as stubborn perseverance, ingenuity, and efficient competitiveness — though cited less often — are undeniably positive forces. My own human nature is such that it’s never immediately clear what I’m talking about; you have to bear with me: in this case what got me thinking is the perennial hot-button item of shareholder voting mechanics.

The issue of shareholder voting is massive. At its core is the seemingly impenetrable complexity of the system’s mechanics. The machinery that administers the exercise of voting rights, between the shareholders, who largely hold shares indirectly, and companies that issue those shares, is largely unregulated, complicated, and widely misunderstood, even by those in the business.

In an age of shareholder activism, that machinery is coming under increasing scrutiny. The recent evolution of corporate governance, such as “majority voting” of directors, depend on the integrity of the

voting system. For obvious reasons the exercise of shareholder voting power and influence depends on shareholders having information and time to make informed decisions, for their votes to be effectively recorded and counted, and for there to be confidence in the voting systems.

Increasing proxy contests for control of public companies also highlight the importance of shareholder voting. This is a clear example of an arena dependent on effective shareholder democracy: the efficiencies to be gained by such changes of control should not be frustrated by a voting system that cannot properly recognize a dissident’s voting power and influence. Further, the opaqueness of the voting system spawns, and frustrates, other issues, among them some recently popular concerns about “empty voting” (the separation of voting rights from economic interests) and compounds the awkwardness in the ongoing transition from a paper system to an electronic one.

This is where you come to the challenges of human nature. To begin with, the sheer size of the issue of voting mechanics, its intricacy, and number of parties are daunting, and the instinct not to tackle it in its entirety is powerful. Further, the system, with all of its subdermal warts, has well-entrenched actors who have inertia and, often, vested interests in maintaining the status quo. Another obstacle to progress is the fact the majority of shareholder meetings are uncontested and non-controversial, so if there are problems with the voting they are never discovered or largely un lamented. And then you come to the truly irreconcilable perspectives, like the head-on collision between the interest issuers naturally have in knowing the identities of their shareholders and the predictable desire of many shareholders for anonymity.

The natural temptation is to tackle

a monumental task in stages and there continue to be initiatives to improve elements of the system. Recently, for example, Canadian securities regulators adopted the “notice-and-access” system for shareholder meetings on or after March 1, 2013, which furthers the movement away from paper-based systems by permitting issuers to send a package to shareholders directing them to a web site to access the full proxy materials.

There is nothing wrong with a sequenced approach in principle. Human nature being what it is, achievement of success in stages might give encouragement, opportunity for trial, error, and correction, and a lesser sense of dread. The odds of these initiatives collectively addressing the core issues and yielding a voting system that is effective and transparent are, however, remote if there is no coherent framework to position and guide them.

The real challenge is the proxy voting system straddles the boundary of securities regulation, and in many of its core functions is entirely unregulated. Specifically, securities regulation addresses elements of distribution of proxy materials and voting instructions, but is largely silent on shareholder list preparation, reconciliation of those lists, and vote tabulation.

Most of the time, evolution of law in any field is an iterative process and usually works well. With shareholder voting, there are no easy answers, and a perfect solution is not possible. But there is a yawning need for comprehensive regulatory consideration of the issue. Meeting this kind of need with energy, creativity, and leadership will take the best elements of human nature. And maybe, if we involve Mr. Simpson, a wee bit of alcohol. ☐

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